

**DESIGN, BUILD AND OPERATE (DBO) AGREEMENT**

**BETWEEN**

**ISLAMORADA, VILLAGE OF ISLANDS**  
a Florida municipal corporation

**AND**

**REYNOLDS WATER ISLAMORADA, LLC**  
a Delaware Limited Liability Company

August \_\_, 2012

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## **DESIGN, BUILD AND OPERATE (DBO) AGREEMENT**

THIS DESIGN, BUILD AND OPERATE (DBO) AGREEMENT (this "Agreement") is made this \_\_\_\_ day of August, 2012 (the "Effective Date") between ISLAMORADA, VILLAGE OF ISLANDS, a Florida municipal corporation, with offices located at 86800 Overseas Highway, Islamorada, Florida 33036 ("Village"), and REYNOLDS WATER ISLAMORADA LLC, a Delaware Limited Liability Company ("Company"), with its principal place of business at 5634 West 5<sup>th</sup> Street, Jacksonville, Florida 32254.

### **RECITALS:**

A. The Village owns the North Plantation Key Wastewater Treatment Plant and Facilities located at 286 Gardenia Avenue, Islamorada, Florida 33070 in the Village (the "NPK Facilities"). The NPK Facilities are currently operated by U.S. Water Services Corporation under a contract with the Village dated June 1, 2011.

B. Legislation passed by the Florida Legislature (Chapter 99-395, Laws of Florida, and subsequent amendments thereto, and Chapter 2010-205, Laws of Florida) mandated higher wastewater treatment and disposal standards for the entirety of the Florida Keys (collectively, the "Legislation"). These regulations generally require that all wastewater treatment systems in the Florida Keys be upgraded and/or replaced to meet Advanced Wastewater Treatment (AWT) or Best Available Technology (BAT) capabilities. The Legislation has established a mandatory compliance date of December 31, 2015. In furtherance of the Legislation, the Florida Department of Community Affairs (DCA) has promulgated Administration Commission Rule 28-19.310 Comprehensive Plan (the "DCA Rule"), to the Village for the Work Program Administration containing specific dates and deadlines for implementation of the Village's wastewater system. As mandated by the State of Florida, the Village must meet certain milestones for the Project, and must complete construction with full operations of its wastewater collection and treatment system by December 31, 2015. The Company must complete the centralized wastewater system with full operations by the compliance date.

C. In furtherance of the Legislation and the DCA rule, the Village underwent a competitive selection and award process pursuant to Section 255.20 and Section 287.055, Florida Statutes, Florida Consultants' Competitive Negotiation Act (CCNA), and the Village's adopted Policy for Selection of Design-Build Firms. On December 14, 2010, as part of the first phase of the procurement process, the Village issued Request for Qualifications (RFQ) No. 10-12 soliciting Statement of Qualifications from experienced and qualified firms for the design, build, operate and finance of a new wastewater system for the Village. Pursuant to the initial RFQ process, the Village evaluated the qualifications of the respondents and selected five (5) firms deemed to be qualified to perform the Project and respond to the Requests for Proposals (RFP).

D. On June 29, 2011, the Village undertook the second phase of the competitive selection process and issued Request for Proposals (RFP) No. 11-06-29 to solicit proposals from pre-qualified firms for the design, build, operate and finance of its centralized wastewater system and operation and maintenance of the NPK Facilities. The RFP required that proposers

submit alternate proposals for wastewater treatment and disposal. Proposers were required to submit proposal for Alternative 1 providing for wastewater treatment and disposal by the Key Largo Wastewater Treatment District ("KLWTD"), and Alternative 2 providing for on-island wastewater treatment and disposal. Pursuant to the RFP, Proposals were received from two (2) pre-qualified proposers, evaluated and ranked for competitive selection based on the evaluation criteria set forth in the RFP, including Ability to Perform the Work and Qualifications, Technical Proposals, and Price Proposals and Financing Plan.

E. Reynolds Water Islamorada, LLC. submitted a proposal to the Village in response to the RFP, including a proposal for Alternative 1(b) for wastewater treatment and disposal by the KLWTD.

F. The Village has elected to publicly finance the Project in lieu of privately financing the Project, and will not require financing by the Company.

G. The Village has further elected to have all wastewater treated and disposed of off-island by the KLWTD (once the NPK Wastewater Treatment Plant is decommissioned) pursuant to an Agreement for Wastewater Services entered into by the Village and KLWTD, thereby eliminating the need for any on-island wastewater treatment facilities within the Village.

H. The Company is a special purpose entity and the sole point of contact and responsibility for the design, build and operate of the Project, with all wastewater treatment and disposal by the KLWTD, and the Company has agreed to provide operational services in compliance with certain terms and conditions of the Agreement for Wastewater Services between the Village and KLWTD.

I. The Company is in the business of designing, building, operating and managing Wastewater Facilities.

J. The Village desires to engage the Company, and Company desires to be engaged by the Village, in order to design and construct the Wastewater Facilities, and upon completion of construction of the Wastewater Facilities, the Village desires to retain the Company and Company desires to be retained by the Village to operate and maintain the Wastewater Facilities, including the operations of the NPK Facilities during the Interim Operations Period, for a term of twenty (20) years, all in accordance with the terms of this Agreement.

K. As a condition of the Village engaging the Company for the design, build and operate services, the Village requires that concurrently with this Agreement, Layne Christensen Company, a Delaware corporation (the "Guarantor"), enter into a Guaranty Agreement in favor of the Village guaranteeing payment and performance of all obligations of the Company under this Agreement in the form attached hereto as Appendix 14 (the "Guaranty").

L. The Village shall own all Wastewater Facilities built and operated by the Company.

M. The Company desires to (i) operate and maintain the NPK Facilities on an interim basis prior to the Commencement Date of Operations for Wastewater Facilities; (ii) provide services to the Village with respect to the designing, permitting and construction of the Wastewater Facilities; (iii) operate the Wastewater Facilities following the completion of construction and Acceptance of the Wastewater Facilities; and (iv) provide the other services enumerated in this Agreement, all in accordance with and pursuant to the terms, covenants, and conditions contained in this Agreement.

N. On \_\_\_\_\_, by Resolution No. \_\_\_\_\_, the Village Council authorized entering into this Agreement with the Company.

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

## **ARTICLE I - DEFINITIONS AND INTERPRETATIONS**

**1.1 DEFINITIONS.** As used in this Agreement, the following terms shall have the meanings set forth below.

**“Abnormal Substances”** means substances or materials that do not normally occur in domestic sewage and/or materially impact the influent parameters identified in the Influent Specifications and/or have a material impact on the operation of the Wastewater Facilities that: (i) contain solid or viscous pollutants in amounts which will cause significant obstruction to the flow in the Wastewater Facilities; (ii) are present in flow rates, concentrations or quantities which will cause Interference, overflows or exceed the applicable NPDES Permit requirements; (iii) are sufficiently high concentrations so as to interfere with the biological processes necessary for the removal of the organic and chemical constituents of the wastewater required to meet the discharge requirements of the applicable NPDES Permit, and/or (iii) will result in the presence of toxic gases, vapors or fumes within the Wastewater Facilities in a quantity that may cause acute worker health and safety problems. Abnormal Substances include, without limitation, heavy metals, phenols, cyanides, pesticides and herbicides. With respect to the Collection System, Abnormal Substances includes anything introduced into the Collection System that materially disrupts or inhibits flow of sewage through the Collection System.

**“Acceptance”** means demonstration by the Company that the Acceptance and Start Up Tests and Standards have been conducted and achieved and accepted by the Village.

**“Acceptance Date”** means the date following Substantial Completion on which the Company has successfully demonstrated and performed the Acceptance and Start Up Tests and Standards for the Village's Acceptance of the entire system or Wastewater Facilities in accordance with this Agreement and the Project Schedule, but shall be no later than December 1, 2015.

**“Acceptance and Start Up Tests and Standards”** means those tests and standards for the Wastewater Facilities, which the Company shall meet to achieve Acceptance of the Wastewater Facilities in accordance with Section 6.17 and Appendix 18, including start up tests and the usual and customary testing of any Equipment, system or component of the Wastewater Facilities performed either after construction or during installation for purposes of demonstrating that the Equipment, system or component operates and performs properly in accordance with the Contract Standards.

**“Acceptance and Start Up Test Reports”** means written reports of Acceptance and Start Up Tests for the Wastewater Facilities.

**“ACOE Funds”** means grant funds provided for the Project by the Department of the Army or Army Corps of Engineers pursuant to the Project Partnership Agreement and First Amendment thereto with Islamorada, Village of Islands, as attached to the RFP and incorporated herein by reference, together with any further amendments, for technical and financial assistance to carry out projects for the planning, design, and construction of wastewater treatment works to improve water quality in the Florida Keys through the Florida Keys Water Quality Improvement Program Regional Wastewater Treatment and Collection Facilities Project for the Village.

**“Affiliate”** means any person, corporation or entity directly or indirectly controlling, managing or owning the Company, including the managers and/or members of the Company. The manager and/or member of the Company shall be Layne Heavy Civil, Inc., an Indiana corporation, who possesses the technical and financial capability to perform the Work required in this Agreement.

**“Agreement”** means this "Design, Build and Operate (DBO) Agreement" between the Company and the Village, the Appendices, attachments, exhibits, the Design Documents and Construction Documents incorporated herein by reference, including Change Orders, and any other document or documents incorporated by reference, as the same may be amended or modified from time to time in accordance herewith.

**“Appendix”** means any of the Appendices included and made a part of this Agreement.

**“Applicable Law”** means (1) any federal, State or local law, code, rule, regulation, consent order or agreement, including the Village Charter and Code of Ordinances, and including the Legislation and the DCA Rule; (2) any formally adopted and generally applicable law, code, rule, regulation, requirement, determination, standard, practice, policy, implementation schedule or order of any Governmental Authority having appropriate jurisdiction; (3) any established interpretation of law or regulation utilized by an appropriate Governmental Authority if such interpretation is documented by such Governmental Authority and generally applicable; and (4) any Governmental Approval, in each case having the force of law and applicable from time to time to: (a) the siting, permitting, design, acquisition, construction, equipping, financing, ownership, possession, start-up, testing, operation, maintenance, repair, replacement or management of wastewater facilities or systems, including the Project; (b) the collection, conveyance or transmission, treatment, storage or supply of wastewater; (c) the air

emissions therefrom; (d) the transfer, handling, transportation or disposal of wastewater, sludge or by-products; and (e) any other transaction or matter contemplated hereby (including any of the foregoing which pertain to wastewater collection, transmission, treatment, wastewater disposal, health, safety, fire, environmental protection, labor relations, building codes, the payment of prevailing or minimum wages and non-discrimination).

**“Asset Management Plan”** means the plan and policies made a part of the Operations and Maintenance Plan set forth in Appendix 9 designed and implemented by the Company to manage the condition of the assets of the Wastewater Facilities, which utilizes a computerized maintenance management system and includes predictive, corrective and preventive maintenance, and periodic maintenance programs.

**“Build/Operate Facilities”** means the facilities described in Section 5.2 for which the Village has obtained design drawings and specifications which will require construction, operations and maintenance services from the Company.

**“Capital Modifications”** mean any material change to any part of the Wastewater Facilities occurring after the Acceptance Date, including the installation of new improvements, structures, equipment, systems or technology, authorized by the Village pursuant to Appendix 5.

**“Capital Modification Request”** means a request for approval of Capital Modifications prepared by the Company and forwarded to the Village for approval in accordance with Appendix 5.

**“Casualty”** shall have the meaning set forth in Section 16.1.

**“Change in Law”** means any of the occurrences set forth in Section 12.4 of this Agreement, which shall occur after the Contract Date.

**“Change in the Work” or “Change Order”** means a written instrument issued after the execution of this Agreement signed by the Village and Company stating a revision in the Design/Build Work and a related adjustment in the fixed Design/Build Price and/or Contract Time, if any.

**“Collection System”** means the wastewater collection systems and facilities, including pump stations and vacuum pump stations, as the same may be existing, acquired, installed, constructed, reconstructed, repaired and replaced from time to time to service the Village-wide need for wastewater collection.

**“Commencement Date of Construction of Build/Operate Facilities”** means the date which is thirty (30) days from the date of final permit approval for the Build/Operate Facilities, upon which date the Company shall commence construction of the Build/Operate Facilities described in Section 5.2 of this Agreement.

**“Commencement Date of Operations of Wastewater Facilities”** means the date on or prior to December 1, 2015, upon which date the Company has commenced performing operations and maintenance services on the Wastewater Facilities that are operating and properly collecting and transmitting wastewater.

**“Commencement Date of Operations for NPK”** means the date which is specified in the Notice to Proceed, upon which date the Company will commence performing interim operations and maintenance services on the existing NPK Facilities described in Section 5.1 of this Agreement.

**“Company”** means Reynolds Water Islamorada, LLC a Delaware Limited Liability Company, organized and existing under the laws of the State of Delaware, and authorized to transact business in the State of Florida. The Company is and shall at all times during the Term of this Agreement be owned, controlled and managed by Layne Heavy Civil Inc., an Indiana Corporation.

**“Company Fault”** means any breach (including the untruth or breach of any Company representation or warranty herein set forth), failure, non-performance or non-compliance by the Company with respect to its obligations and responsibilities under this Agreement to the extent not attributable to any Uncontrollable Circumstance, and which materially and adversely affects the Village's rights, obligations or ability or costs to perform under this Agreement.

**“Construction Documents”** means a set of complete drawings and specifications for the Wastewater Facilities that are consistent with and a logical evolution of the Design Documents approved by the Village and in accordance with the Contract Standards. The Construction Documents are intended to be the documents for which Governmental Authorities will issue permits for the Wastewater Facilities. The term "Construction Documents" includes Change Orders.

**“Consumer Price Index” or “CPI”** means the consumer price index as reported by the U.S. Department of Labor, Bureau of Labor Statistics, for all urban consumers, for the Miami-Dade/Ft. Lauderdale, Florida area. If the Consumer Price Index is discontinued, the term shall refer to comparable statistics on the effects of inflation published by the Bureau of Labor Statistics of the United States Department of Labor. If the Bureau of Labor Statistics no longer maintains statistics such as the Consumer Price Index, comparable statistics published by a responsible financial periodical or recognized authority agreed to by the parties shall be used for making the computation.

**“Contract Administrator”** shall mean the person listed in Section 3.2 authorized and specified in writing by the Village, as applicable, to represent it in connection with all purposes of this Agreement. The Village may change its Contract Administrator by written notice to the Company.

**“Contract Date”** means the effective date of this Agreement and the date upon which this Agreement has been approved by the Village Council and has been fully executed by all parties.

**“Contract Documents”** means this Agreement, the Construction Documents, any all permits issued for the Wastewater Facilities, and As-Built Drawings.

**“Contract Representative”** shall mean the persons listed in Section 3.2 authorized and specified in writing by the Company, as applicable, to represent it in connection with all purposes of this Agreement. The Company may change its Contract Representative by written notice to the Village and the approval of the Village.

**“Contract Services”** means the Design/Build Work, the O&M Services and all other services to be provided by the Company pursuant to this Agreement.

**“Contract Standards”** means the standards, terms, conditions, methods, techniques and practices required in connection with the Work, services and all obligations required in this Agreement by: (1) Applicable Law; (2) the Pre-Design Requirements, including the Design Criteria Package and the Design Standards Manual included in Appendix 8 hereto, the Technical Specifications, and the Design Documents; (3) the Performance Guarantees; (4) the Design Standard of Care; (5) Good Industry Practice; (6) the Design/Build Plan; (7) the Operation and Maintenance Plan; (8) the applicable Equipment manufacturers’ specifications; (9) all Insurance Requirements; (10) the requirements of the KLWTD Agreement, and (11) any other standard, term, condition or requirement specifically provided for or referenced in this Agreement.

**“Contract Time”** or the **“Design/Build Period”** means the duration for work associated with Design/Build Work for design and construction of the Wastewater Facilities either as a part of the total work thereof or the total time from Notice-to-Proceed to the Final Completion Date. Contract Time will be as identified in the Village approved Project Schedule.

**“Contract Year”** means the Village's fiscal year commencing on October 1 in any year and ending on September 30 of the following year; provided, however, that the first Contract Year of the Operations Period shall commence on the Acceptance Date and shall end on the following September 30, and the last Contract Year shall commence on October 1 prior to the date this Agreement expires or is terminated, whichever is appropriate, and shall end on the last day of the Term or the effective date of any termination, whichever is appropriate. Any computation made on the basis of a Contract Year shall be adjusted on a pro rata basis to take into account any Contract Year of less than 365 or 366 days, whichever is applicable.

**“CPI Adjustment Factor”** has the meaning specified in Section 9.6.2.

**“CPM”** means Critical Path Method.

**“CPM Schedule”** means the cost loaded, design and construction schedule for the Design/Build Work prepared by the Company and approved by Village using CPM.

**“Customer”** means the residential, commercial and other users, which discharge or cause to be discharged wastewater or Influent into the Collection System or Wastewater Facilities.



**“Design/Build/Operate Plan”** or “Design Build Operate Management Plan” means the Design/Build/Operate quality management plan to be developed by the Company in accordance with Appendix 17.

**“Design/Build Price”** means the fixed Design/Build Price, as shown in Appendix 6, which compensates the Company for the Design/Build Work.

**“Design/Build Work”** means everything required to be furnished and done for and relating to the design, permitting, construction and Acceptance of the Wastewater Facilities and Project by the Company pursuant to this Agreement during the Design/Build Period. Design/Build Work includes the employment and furnishing of all labor, materials, equipment, supplies, tools, scaffolding, transportation, Utilities, insurance, temporary facilities and other things and services of every kind whatsoever necessary for the full performance and completion of the Company's design, engineering, construction, Acceptance and Start Up Testing, obtaining and maintaining Governmental Approvals and related obligations with respect to the design and construction of the Wastewater Facilities and Project during the Design/Build Period, including the Build/Operate Facilities, all completed structures, assemblies, fabrications, acquisitions and installations, all commissioning and testing, and all of the Company's administrative, accounting, recordkeeping, notification and similar responsibilities of every kind whatsoever under this Agreement pertaining to such obligations. A reference to Design/Build Work shall mean any part and all of the Design/Build Work unless the context otherwise requires, and shall include all design and construction changes authorized by a Change Order.

**“Design Criteria Consultant”** means Wade Trim, Inc., who prepared the Design Criteria Package for the Project, as defined in Section 257.055, Florida Statutes.

**“Design Criteria Package”** means the Design Criteria Package dated June, 2011 prepared by Wade Trim, Inc. and included in the RFP, as modified in Appendix 8, containing the design/build specifications and criteria for the Project, as defined in Section 257.055, Florida Statutes, and included in Appendix 8 to this Agreement.

**“Design Documents”** means the Company's plans, technical specifications, drawings and other design and construction documents for the Design/Build Work that are consistent with and a logical evolution of the Pre-Design Requirements (Design Criteria Package and Design Standards Manual) attached hereto as Appendix 8 and including but not limited to the location, size and elevation of all structures, facilities, major equipment (including pipelines) and utilities, building sections or floor plans, roof plans, and descriptions of proposed landscaping, signage, entry ramps, lighting, parking, major exterior design features, and building materials.

**“Design Standard of Care”** means those methods, techniques, standards and practices, which at the time they are employed, and in light of the circumstances known or reasonably believed to exist at such time, are generally accepted as good and prudent design and engineering practices in the municipal wastewater industry, as the case may be, as practiced in the southeast region of the United States, including the Florida Keys and South Florida, and are consistent with the degree of skill and care ordinarily exercised by members of the relevant profession.

**“Design Standards Manual”** means the Design Standards Manual dated May, 2011 prepared by Wade Trim, Inc. and included in the RFP, as modified in Appendix 8, containing the technical requirements and minimum level of detail required to deliver the Project, and included in Appendix 8 to this Agreement.

**“Design Submission”** shall have the meaning set forth in Section 6.3.3.

**“Engineer of Record”** means the professional engineer licensed in the State of Florida and in good standing who is designated by the Company and acceptable to the Village, in its reasonable discretion, and is responsible for the preparation, signing, dating, sealing and issuing of the engineering documents relating to a portion of or all of the Design/Build Work.

**“Equipment”** means all manufactured equipment, property or assets, whether or not constituting personal property or fixtures, constituting part of the Project, including tanks (other than concrete tanks); basins (other than concrete basins); process and treatment, mechanical, piping (with an initial useful life of less than 20 years), electrical, instrumentation and controls, remote monitoring and communications, HVAC, chemical and other storage and feed systems, cranes and hoists, and any ancillary, appurtenant and support equipment and systems utilized in or at the Project. All manufactured equipment, property or assets shall be deemed "Project Equipment" once incorporated into the Project.

**“Event of Default”** shall have the meaning set forth in Article XIV.

**“Exit Tests and Standards”** means the test procedures and standards for the performance tests on the Wastewater Facilities to be conducted by the Company prior to termination or expiration of this Agreement, developed in accordance with Appendix 15.

**“Final Completion”** means the final completion of the Design/Build Work in compliance with the Design Documents, the Construction Documents, the Technical Specifications, and the applicable requirements of the Contract Standards and this Agreement, as more particularly described in Section 6.18.

**“Final Completion Date”** means the date on which Final Completion of the Wastewater Facilities occurs or is deemed to have occurred in accordance with Section 6.18, The required date for Final Completion of the Design/Build Work for the Wastewater Facilities shall be set forth in the Project Schedule, but shall not be later than December 1, 2015.

**“Final Completion Date of the Build/Operate Projects”** means the date upon which the Company shall achieve Final Completion of the Build/Operate Projects described in Section 5.2 of this Agreement. The required date for Final Completion of the Build/Operate Projects shall be set forth in the Project Schedule, but shall be no later than 270 days from the date of issuance of all final permits for the Build/Operate Facilities.

**“Float”** means the number of days by which an activity on the CPM schedule may be delayed from its earliest start date without necessarily extending the Contract Time.

**“Florida Department of Environmental Protection”** or **“FDEP”** means the State of Florida’s leading agency for environmental management and stewardship or any successor agency.

**“Good Industry Practice”** means those methods, techniques, standards and practices which at the time they are employed and in light of the circumstances known or reasonably believed to exist at such time, are generally recognized and accepted as good and prudent practices in the design, engineering, construction, installation, commissioning and testing, operation, maintenance, repair, replacement and management practices, as the case may be, for the municipal wastewater industry in the southeast region of the United States, including the Florida Keys and South Florida, and are consistent with the same degree of skill and care ordinarily exercised by members of the respective trade or profession.

**“Governmental Approvals”** means all orders of approval, permits, licenses, authorizations, consents, certifications, exemptions, rulings, entitlements and approvals issued by a Governmental Authority of whatever kind and however described which are required under Applicable Law to be obtained or maintained by any person with respect to the Wastewater Facilities, the Project and the Contract Services.

**“Governmental Authority”** means any federal, State, regional, the Village, municipal or local legislative, executive, judicial or other governmental board, agency, authority, commission, administration, court or other body, or any official thereof having jurisdiction over the Wastewater Facilities, the Project and Contract Services.

**“Guaranteed Maximum Annual Electricity Utilization”** means the Company's guaranteed maximum electricity usage expressed in kWh for the Wastewater Facilities during any given calendar quarter measured as 91.25 days as set forth in Appendix 7.

**“Guarantor”** means Layne Christensen Company, a Delaware corporation, authorized to transact business in the State of Florida.

**“Guaranty Agreement”** or **“Guaranty”** means the Guaranty Agreement entered into simultaneously with this Agreement executed by the Guarantor in favor of the Village in the form attached hereto as Appendix 14.

**“Influent”** means all water and wastewater flow entering the NPK Facilities during the Interim Operations Period and the Wastewater Facilities during the Operations Period.

**“Interference”** means the delivery of Influent which materially (i) inhibits or disrupts the collection processes or operations of the Wastewater Facilities, and/or (ii) causes a violation of the applicable NPDES Permit or other Applicable Law.

**“Interim Operations Period”** has the meaning specified in Section 5.1 with respect to the interim operations of the NPK Facilities.

**“Interim Operations Services”** means everything required to be furnished and done for and relating to the operations and maintenance of the NPK Facilities by the Company during the Interim Operations Period pursuant to this Agreement. Interim Operations Services include the employment and furnishing of all labor, materials, equipment, supplies, consumables, tools, supplies, storage, transportation, insurance, sales, delivery and other things and kinds of services whatsoever necessary for the full performance of the Company's operation, maintenance, repair, replacement, management, obtaining and maintaining Governmental Approvals and related obligations under this Agreement, and all of the Company's administrative, accounting, recordkeeping, reporting, notification and similar responsibilities of every kind whatsoever under this Agreement pertaining to such obligations.

**“Interim Service Fee(s) for NPK Facilities”** means the fees payable by the Village to the Company as compensation for the performance of the Interim Operations Services for the NPK Facilities, as set forth in Appendix 6.

**“Key Personnel”** means any individual or firm identified by the Company and approved by the Village as having a lead capacity or a high level of participation and authorization in the Work of Project in a supervisory capacity, including those individuals provided as part of the RFQ Statement of Qualifications and RFP Proposals and identified as such in Appendix 12.

**“Key Largo Wastewater Treatment District” or “KLWTD”** means the independent special district of the State of Florida located in Monroe County, Florida, that is organized and exists under Chapter 2002-337, Laws of Florida, as amended, who owns and operates a wastewater collection, treatment and disposal system, including a regional treatment plant located at Mile Marker 100.5 Overseas Highway, Key Largo, Florida, who will provide wastewater treatment and disposal services for Village-wide wastewater received from the Village pursuant to an Agreement for Wastewater Services entered into between the Village and KLWTD.

**“KLWTD Agreement”** means the Agreement for Wastewater Services entered into between the Village and KLWTD with an effective date of May 22, 2012, together with all Exhibits attached thereto, as may be amended from time to time, providing for wastewater treatment and disposal services for Village-wide wastewater transmitted to KLWTD.

**“Legal Proceeding”** means every action, suit, litigation, arbitration, administrative proceeding, and other legal or equitable proceeding having a material bearing upon this Agreement or the performances of the parties hereunder, and all appeals therefrom.

**“Maintenance and Repair”** means normal and ordinary maintenance, repair and replacement of the Wastewater Facilities required of the Company, for all subsurface or underground facilities and improvements, and above-ground Wastewater Facilities (including parts and equipment replacements with a cost of \$1,000.00 or less and all labor costs), predictive, corrective and preventive maintenance, of the machinery, Equipment, structures, improvements, facilities and all other property constituting the Project necessary to maximize the useful life of and keep the Wastewater Facilities in good working order, condition and repair and in a neat and orderly condition, in accordance with the Operations and Maintenance Plan and the Contract Standards.

**“Minimum Staffing Plan”** means the Operations & Maintenance Minimum Staffing Plan set forth in Appendix 10.

**“Non-Routine Services”** shall have the meaning provided in Section 9.8 of this Agreement.

**“Non-Specification Influent”** means any Influent received at the Wastewater Facilities that does not meet the Influent Specifications or that contains Abnormal Substances.

**“Notice to Proceed (NTP)”** means a written notice issued by the Village authorizing the Company to proceed with the Design/Build Work or some portion of the Work.

**“North Plantation Key Facilities” or “NPK Facilities”** means the existing North Plantation Key (NPK) Wastewater Treatment Plant, the Build/Operate Facilities described in Section 5.2 that the Company will construct (the NPK Vacuum Sewer Improvements, the Fontaine Road Collection System within NPK, and the MPK Collection System and Vacuum Pump Station Improvements), and the collection and conveyance system and disposal system for Islamorada, Village of Islands, including, but not limited to, all equipment, structures, reuse system, instrumentation, pumps, mains, lines, vacuum pumps, pump stations, parts, processes, buildings, fixtures, electrical panels, conduits, wells, tanks, treatment facilities, HVAC, disposal facilities, meters, computers, SCADA systems, communications systems, reclaimed water facilities, valves, generators and solids processing facilities.

**“North Plantation Key (NPK) Wastewater Treatment Plant”** means the existing treatment plant located within North Plantation Key (NPK), including, but not limited to, all equipment, structures, reuse water system, instrumentation, pumps, mains, lines, parts, processes, buildings, fixtures, electrical panels, conduits, wells, tanks, treatment facilities, HVAC, disposal facilities, meters, computers, SCADA systems, communications systems, reclaimed water facilities, valves, generators and solids processing facilities.

**“O&M Fee”** means the fixed operations and maintenance fee for the Wastewater Facilities, regardless of the flow entering the Wastewater Facilities or collected, transmitted or treated by KLWTD, stated annually, and as set forth in Section 9.6 and Appendix 6, which represents the maximum fee due the Company for all O&M Services required in this Agreement. The O&M Fee adjusts annually as set forth in Section 9.6.2.

**“O&M Plan” or “Operations and Maintenance Plan”** means the scope of work, performance standards and requirements for operating and maintaining the Wastewater Facilities as approved by the Village and set forth in this Agreement and Appendix 9.

**“O&M Plan for NPK Facilities” or “Operations and Maintenance Plan for NPK Facilities”** means the scope of work, performance standards and requirements for interim operations and maintenance of the NPK Facilities as approved by the Village and set forth in this Agreement and Appendix 9.

**“O&M Performance Standards”** means the scope of work, standards and requirements for operating and maintaining the Wastewater Facilities as approved by the Village and set forth in Articles VII and VIII of this Agreement.

**“O&M Services” or “Operations Services”** means everything required to be furnished and done for and relating to the operations and maintenance of the Wastewater Facilities, including the Interim Operations of the NPK Facilities, by the Company pursuant to this Agreement. O&M Services include the employment and furnishing of all labor, materials, equipment, supplies, consumables, tools, supplies, storage, transportation, insurance, sales, delivery and other things and kinds of services whatsoever necessary for the full performance of the Company's operation, maintenance, repair, replacement, management, obtaining and maintaining Governmental Approvals and related obligations under Section 7.13 of this Agreement, and all of the Company's administrative, accounting, recordkeeping, reporting, notification and similar responsibilities of every kind whatsoever under this Agreement pertaining to such obligations.

**“Operations and Maintenance Manual”** means the comprehensive plan and related computer programs prepared by the Company and approved by the Village containing detailed standard operating and maintenance procedures and other specific instructions, policies, directives, routines, schedules and other matters relating to the Operations Services, developed and maintained as required by Section 7.1 and Appendix 9 to this Agreement solely for the delivery of O&M Services pursuant to this Agreement.

**“Operations Period”** means the period from and including the Acceptance Date to and including the last day of the Term.

**“Operations Performance Bond”** means the performance bond to be provided by the Company, with the Village as Obligee, as of the Acceptance Date for the Operations Period in accordance with the terms and conditions set forth in this Agreement and in the form set forth in Appendix 4.

**“OSHA”** means the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 650 et seq., including the applicable regulations promulgated thereunder, each as amended or superseded from time to time.

**“Owner’s Representative”** means Wade Trim, Inc. who will provide oversight and coordination, design management and review, construction management and full-time resident inspection services and support to the Village throughout Project implementation and for the purposes of this Agreement.

**“Payment Bond”** means the labor and materials payment bond for the Design/Build Work to be provided by the Company, with the Village as Obligee, concurrently with the execution of this Agreement as described in and maintained pursuant to this Agreement, in the form set forth in Appendix 4.

**"Performance Bond"** means the performance bond for the Design/Build Work to be provided by the Company, with the Village as Obligee, concurrently with the execution of this Agreement as described in and maintained pursuant to this Agreement, in the form set forth in Appendix 4.

**"Pre-Design Requirements"** means the Design Criteria Package and Design Standards Manual included in the RFP, as amended, and attached as Appendix 8.

**"Project"** means the services and obligations described in this Agreement to be provided by the Company, as further detailed in Article III, including the Design/Build Work and the Operations Services.

**"Project Schedule"** means the CPM Schedule for the Project prepared by the Company and approved by the Village for the Wastewater Facilities pursuant to this Agreement.

**"Proposal"** means the proposal and documents submitted by the Company in response to the Village's RFP.

**"Punch List"** means a list of minor items to be completed or corrected as further set forth in Section 6.16. A Punch List shall be developed by the Company for the Village's approval when determining the status of completion of the Design/Build Work, or portion of the Design/Build Work, and shall be attached to a certificate of Substantial Completion or shall result from a Final Completion inspection.

**"Regulated Site Condition"** means, and is limited to, (1) surface and subsurface geotechnical conditions not normally or ordinarily found in the Florida Keys and South Florida (any amount, including excessive amounts, of excavated materials, coral rock, organic material, muck, or any mixture or combination thereof, shall be assumed to be normal and ordinary for the Florida Keys, not a Regulated Site Condition, and assumed by the Company); (2) surface or subsurface structures, materials or conditions having historical, archaeological or similar significance subject to the protection of Applicable Law; (3) any habitat of a rare or threatened species subject to the protections of Applicable Law; (4) the presence anywhere in, on or under the Project Sites on the Contract Date of wells or underground storage tanks for the storage of chemicals, petroleum products or Regulated Substances (in each of items (1), (2), (3) and (4), however, only to the extent not known or disclosed to the Company as of the Contract Date), and (5) the presence of Regulated Substances in environmental media anywhere in, on or under the Sites (including presence in surface water, groundwater, soils or subsurface strata).

**"Regulated Substance"** means (1) any oil, petroleum or petroleum product, (2) any substance, material, or waste which is or becomes regulated by any Applicable Law including, but not limited to, any material or substance which is (i) defined as a "hazardous waste," "extremely hazardous waste," "restricted hazardous waste," "hazardous material," "hazardous substance," or "hazardous waste" under Applicable Law or defined as such by the Florida Department of Environmental Protection, (ii) petroleum, (iii) friable asbestos, (iv) polychlorinated biphenyls, (v) designated as "hazardous substances" pursuant to Section 311 of the Clean Water Act (33 U.S.C. '1317), (v) defined as a "hazardous waste" pursuant to Section 1004 of the Resource

Conservation and Recovery Act, 42 U.S.C. '6901 et seq. (42 U.S.C. '6903), or (vi) defined as "hazardous substances" pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. '9601 et seq.

**“Release”** means any release, spill, emission, discharge, leaking, pumping, injection, deposit, disposal, dispersal, leaching, or migration of any Regulated Substance into the environment in violation of Applicable Law (including ambient air, surface or ground water, and surface or subsurface strata), including the movement of any Regulated Substance in or through the air, soil, surface or ground water, or property.

**“Renewal and Replacement”** means any renewal or replacement of the machinery, Equipment, structures, improvements or facilities constituting part of the Wastewater Facilities identified in the Renewal and Replacement Schedule, including all labor costs, that (i) is not Maintenance and Repair, (ii) replaces or extends the life of the asset, and (iii) having a cost greater than \$1,000.00.

**“Renewal and Replacement Fund” or “R&R Fund”** means the funds to be included by the Village in its annual fiscal year budget for the purpose of accruing funds for the Renewal and Replacement of major Equipment and components of the Wastewater Facilities. The Renewal and Replacement Fund shall be maintained by the Village in a separate or segregated account to be managed by the Village for the purpose of funding Renewal and Replacement of the Wastewater Facilities.

**“Renewal and Replacement Schedule”** means the Renewal and Replacement Schedule submitted with the Company’s Proposal to the RFP and included in Appendix 11 to this Agreement, identifying projected Renewals and Replacements of major Equipment and components of the Wastewater Facilities for the Term of this Agreement.

**"Renewal Term"** has the meaning specified in Article IV.

**"Required Design/Build Period Insurance"** has the meaning specified in Appendix 13.

**"Required Insurance"** means the Required Design/Build Period Insurance and the Required Operations Period Insurance, as set forth in Appendix 13.

**"Required Operations Period Insurance"** has the meaning specified in Appendix 13.

**“Request for Proposals” or “RFP”** means the documents issued by the Village soliciting proposals for the Project, entitled "Request for Proposal for Design, Build, Operate and Finance (DBOF) Wastewater System RFP No. 11-06-29, including supplemental addenda, documentation and attachments.

**“Reuse Water”** means former wastewater or greywater that has been treated at the Wastewater Facilities to remove solids and certain impurities to meet FDEP requirements to be established as reuse water, that is used in sustainable landscape irrigation or to recharge groundwater aquifers.



**“Service Fee(s)”** means the fees payable by the Village to the Company as compensation for the performance of the Operations Services, stated annually in Appendix 6, comprised of the O&M Fee.

**“Site(s)”** means the parcels of real property on which the Company will build and construct and operate the Wastewater Facilities, as more particularly described in Appendix 1.

**“Stakeholder Communication and Customer Service Plan”** means the scope of work, performance standards and requirements for communicating with Customers of the Wastewater Facilities during the performance and delivery of the Work, including the Design/Build Work and Operations Services, as approved by the Village and as set forth in Article V of this Agreement.

**"Subcontract"** means an agreement, contract or purchase order entered into between the Company and a Subcontractor for the Project.

**"Subcontractor"** means every person or entity (other than employees of the Company) employed or engaged by the Company or any person or entity directly or indirectly in privacy with the Company (including all Subcontractors and every sub-subcontractor of whatever tier) for any portion of the Contract Services, whether for the furnishing of labor, materials, Equipment, supplies, services or otherwise.

**“Substantial Completion”** has the meaning specified in Section 6.16.

**“Substantial Completion Date”** means the date on which Substantial Completion of the Project or the entirety of the Wastewater Facilities occurs or is deemed to have occurred under Section 6.16, but shall be no later than June 1, 2015.

**“Technical Specifications”** means the Technical Specifications set forth or referenced in the Design Standards Manual included in Appendix 8. Technical Specifications include Divisions 1 through 17 of the design deliverables describing the Project’s materials, Equipment, construction systems, standards and workmanship.

**“Term”** means the period of time designated in Article IV, including any and all Renewal Terms, during which the Company shall provide the Contract Services contemplated by this Agreement.

**"Termination Date"** means the last day of the Term resulting from either a termination or expiration under this Agreement.

**“Uncontrollable Circumstance”** means any act, event or condition that (1) is beyond the reasonable control of the party relying on it, and (2) materially expands the scope of, materially interferes with, materially delays, or materially increases the cost of, performing the party's obligations under this Agreement, but only to the extent that such act, event or condition is not the result of the negligent or intentional act, error or omission, failure to exercise

reasonable diligence, or breach of this Agreement on the part of the party claiming the occurrence of an Uncontrollable Circumstance.

(1) Inclusions. Subject to the foregoing, Uncontrollable Circumstances shall include the following:

(a) a Change in Law (as defined in Section 12.4);

(b) any injunction or similar order issued by a Governmental Authority, provided that such order is not the result of Company Fault and the Company is in compliance with the Contract Standards and this Agreement;

(c) the existence of a Regulated Site Condition to the extent provided in Section 6.8.3;

(d) contamination of the Site(s) from groundwater, soil or airborne Regulated Substances migrating from sources outside of the Site(s) and not caused by Company Fault;

(e) naturally occurring events (except weather conditions normal for the Site(s)) that constitute a natural disaster or other extreme weather condition such as landslides, underground movement, earthquakes, fires, tornadoes, hurricanes, named storms, severe tropical storms, floods, epidemics and other acts of God;

(f) explosion, terrorism, sabotage or similar occurrence, acts of a declared public enemy, extortion, war, blockade or insurrection, riot or civil disturbance;

(g) the failure of any Subcontractor (other than the Company or the Guarantor of either) to furnish services, materials, chemicals or Equipment on the dates agreed to, but only if such failure is the result of an event which would constitute an Uncontrollable Circumstance if it affected the Company directly, and the Company is not able after exercising all reasonable efforts to timely obtain substitutes;

(h) the failure of any appropriate Governmental Authority or private utility having operational jurisdiction in the area in which the Project is located to provide and maintain Utilities to the Project which are required for the performance of this Agreement, but, with respect to the electric power Utility during the Operations Period;

(i) the preemption, confiscation, diversion, destruction or other interference in possession or performance of materials or services by a Governmental Authority in connection with a public emergency or any condemnation or other taking by eminent domain of any material portion of the Project;

- (j) with respect to the Company, any Village Fault; or
- (k) with respect to the Village, any Company Fault.

(2) Exclusions. It is specifically understood that, without limitation, none of the following acts, events or circumstances shall constitute Uncontrollable Circumstances:

- (a) any act, event or circumstance that would not have occurred but for the affected party's failure to comply with its obligations hereunder;
- (b) changes in interest rates, inflation rates, wage rates, insurance premiums, commodity prices, currency values, exchange rates or any other economic conditions;
- (c) with respect to the Village, any changes in the financial condition of the Village, and with respect to the Company, any changes in the financial condition of the Company, the Guarantor or Subcontractors affecting the ability to perform their respective obligations;
- (d) the consequences of error, neglect, failure to exercise reasonable diligence, or non-performance of an obligation under this Agreement or breach of this Agreement, by the Company, the Guarantor, any Subcontractor, or any other person in the performance of the Contract Services;
- (e) union or labor work rules, requirements or demands which have the effect of increasing the number of employees employed at the Project or otherwise increasing the cost to the Company of performing the Contract Services;
- (f) any impact of prevailing wage or similar laws, customs or practices on the Company's costs;
- (g) weather conditions normal for the Project or Sites that do not constitute a natural disaster or other extreme weather condition;
- (h) any and all surface, subsurface and other conditions affecting the Sites, which may increase costs of performing or cause delay in the performance of the Design/Build Work, except those constituting Regulated Site Conditions;
- (i) any act, event, circumstance or Change in Law occurring outside of the United States;
- (j) mechanical failure of Equipment to the extent not resulting from a condition that is listed in the "Inclusions" section of this definition;
- (k) failure of the Company to secure any patent or other intellectual

property right which is or may be necessary for the performance of the Contract Services.

**“Utilities”** means any and all utility services and installations whatsoever (including gas, water, sewer, electricity, telephone, cable, fiber optics, oil, reuse water, and telecommunications), and all piping, wiring, conduit, and other fixtures of every kind whatsoever related thereto or used in connection therewith.

**“Village”** means Islamorada, Village of Islands, a Florida municipal corporation.

**“Village Fault”** means any breach, failure, non-performance or noncompliance by the Village with respect to its obligations and responsibilities under this Agreement to the extent not attributable to any Uncontrollable Circumstance, and which materially and adversely affects the Company's rights, obligations or ability or costs to perform under this Agreement.

**“Village Service Area”** means all territory Village-wide in which Customers shall be served by the Wastewater Facilities during the Term, excluding Tea Table Key.

**“Wastewater Facilities”** means all components of the wastewater system required to be furnished and completed for the Project, including the NPK Facilities, including Collection Systems, vacuum pump stations, lift stations, reuse water facilities, transmission force mains and pump stations, transmission lines and pipelines for the transmission of wastewater to KLWTD, all Sites, including, but not limited to, all buildings, structures, equipment, instrumentation, piping and related or required appurtenances for the Project that are to be designed and/or constructed and operated by Company, including any Capital Modifications thereto.

**“Wastewater Treatment Plant(s)” or “WTP”** means the wastewater treatment plant(s) and systems owned and operated by the KLWTD, as applicable, which will treat and dispose of Village wastewater, including buildings, structures, equipment, piping and related or required appurtenances including the facilities, pipes, connections and appurtenances used to pump and treat wastewater.

**“Work”** means the design and construction work (the “Design/Build Work”) and the operation and maintenance services (the “Operations Services”) and any and all other services required by this Agreement, wholly and severally, complete or incomplete, and includes all labor, materials, equipment and services provided or to be provided under this Agreement.

**1.2 INTERPRETATION.** In this Agreement, notwithstanding any other provision hereof:

(A) Recitals. The parties acknowledge and agree that the foregoing recitals are true and correct and hereby incorporated into this Agreement as if fully set forth herein.

(B) Defined Terms. The definitions set forth in Section 1.1 shall control in the event of any conflict with any definitions used in the recitals hereto.

(C) References Hereto. The terms "hereby," "hereof," "herein," "hereunder; and any similar terms refer to this Agreement.

(D) Persons. Words importing persons include firms, companies, associations, joint ventures, general partnerships, limited partnerships, limited liability corporations, trusts, business trusts, corporations and other legal entities, including public bodies, as well as individuals.

(E) Headings. The table of contents and any headings preceding the text of the Articles, Sections and subsections of this Agreement shall be solely for convenience of reference and shall not affect its meaning, construction or effect.

(F) Entire Agreement. This Agreement contains the entire agreement between the parties hereto with respect to the transactions contemplated by this Agreement. Without limiting the generality of the foregoing, this Agreement shall completely and fully supersede all other understandings and agreements among the parties with respect to such transactions, including those contained in the Village's Request for Qualifications (RFQ), the Statement of Qualifications of the Company submitted in response thereto, the RFP, the Proposal, and any amendments or supplements to any of the foregoing.

(G) Technical Specifications. Except for the Build/Operate Facilities, the Technical Specifications are intended to include the basic design and construction principles, concepts and requirements for the Design/Build Work but do not include the final, detailed design, plans or specifications or indicate or describe each and every item required for full performance of the Design/Build Work or for achieving Acceptance. The Company agrees to prepare all necessary and required, complete and detailed designs, plans, drawings and specifications and to furnish and perform, without additional compensation of any kind, all Design/Build Work in conformity with the Technical Specifications and the final designs, plans, drawings and specifications based thereon and approved by the Village. Except with respect to the Build/Operate Facilities designed by others, the Company further agrees that it shall not have the right to bring any claim whatsoever against the Village or any of its consultants or subcontractors, arising out of any design drawings, specifications or design requirements included in the RFQ or RFP or made available during the procurement process.

(H) Standards of Workmanship and Materials. Any reference in this Agreement to materials, Equipment, systems or supplies (whether such references are in lists, notes, specifications, schedules, or otherwise) shall be construed to require the Company to furnish the same in accordance with the grades and standards therefore indicated in the Pre-Design Requirements and this Agreement. Where this Agreement does not specify any explicit quality or standard for construction materials or workmanship, the Company shall use only workmanship and new materials of a quality consistent with that of construction workmanship and materials specified elsewhere in the Technical Specifications, and the requirements of the Technical Specifications are to be interpreted accordingly.

(I) Technical Standards and Codes. Consistent with the Design Standard of Care, references in this Agreement to all professional and technical standards, codes and

specifications are to the most recently published professional and technical standards, codes and specifications of the institute, organization, association, authority or society specified, all as in effect as of the Contract Date. Unless otherwise specified to the contrary, (1) all such professional and technical standards, codes and specifications shall apply as if incorporated in the Technical Specifications, and (2) if any material revision occurs, to the Company's knowledge, after the Contract Date, and prior to completion of the applicable Design/Build Work, the Company shall notify the Village. If so directed by the Village, the Company shall perform the applicable Design/Build Work in accordance with the revised professional and technical standard, code, or specification as long as the Village agrees to provide appropriate schedule relief and to adjust the fixed Design/Build Price on a lump sum or cost substantiated basis to the extent necessary to compensate the Company for any additional cost or expense attributable to any such revision.

(J) Liquidated Damages. This Agreement provides for the payment by the Company of liquidated damages in certain circumstances of nonperformance, breach or default. Each party agrees that the Village's actual damages in each such circumstance would be difficult or impossible to ascertain, and that the liquidated damages provided for herein with respect to each such circumstance are intended to place the Village in the same economic position as it would have been in had the circumstance not occurred. The payment of liquidated damages is not intended to limit any of the other remedies for breach specifically provided for in this Agreement. The parties acknowledge and agree that the additional remedies specifically provided for in this Agreement are intended to address harms and damages which are separate and distinct from those which the liquidated damages are meant to remedy. All liquidated damages provided for herein shall be at the discretion of the Village, which shall have the right to waive any Company obligation to pay liquidated damages hereunder with the approval of the Village Council.

(K) Causing Performance. A party shall itself perform, or shall cause to be performed, subject to any limitations specifically imposed hereby with respect to Subcontractors or otherwise, the obligations affirmatively undertaken by such party under this Agreement.

(L) Party Bearing Cost of Performance. All obligations undertaken by each party hereto shall be performed at the cost of the party undertaking the obligation or responsibility, unless the other party has explicitly agreed herein to bear all or a portion of the cost either directly, by reimbursement to the other party or through an adjustment to the Design/Build Price or the Service Fees.

(M) Assistance. The obligations of a party to cooperate with, to assist or to provide assistance to the other party hereunder shall be construed as an obligation to use the party's personnel resources to the extent reasonably available in the context of performance of their normal duties, and not to incur material additional overtime or third party expense unless requested and reimbursed by the assisted party.

(N) Good Industry Practice and Design Standard of Care. Good Industry Practice and Design Standard of Care shall be utilized hereunder, among other things, to implement

and in no event to displace or lessen the stringency of, the Contract Standards. In the event that, over the course of the Term, Good Industry Practice or Design Standard of Care evolves in a manner which in the aggregate materially and adversely affects the cost of compliance therewith by the Company, the Company shall be relieved of its obligation to comply with such evolved Good Industry Practice and Design Standard of Care (but not Good Industry Practice and Design Standard of Care as of the Contract Date) unless the Village so directs and agrees to adjust the fixed Design/Build Price or the Service Fee on a lump sum or cost-substantiated basis, as appropriate, to account for such additional costs. Except to the extent that the Company is relieved of its obligation to comply with such evolved Good Industry Practice or Design Standard of Care, as provided above, in no event shall any evolution of Good Industry Practice or Design Standard of Care, or any Village election to pay or not pay any such additional costs, relieve the Company of its obligations hereunder.

(O) Applicability, Stringency and Consistency of Contract Standards. The Company shall be obligated to comply only with those Contract Standards which are applicable in any particular case. Where more than one Contract Standard applies to any particular performance obligation of the Company hereunder, each such applicable Contract Standard shall be complied with. In the event there are different levels of stringency among such applicable Contract Standards, the most stringent of the applicable Contract Standards shall govern. In the event of any inconsistency or ambiguity among the Contract Standards, the Village's reasonable determination as to the applicable standard shall be binding.

(P) Delivery of Documents in Digital Format. In this Agreement, the Company is obligated to deliver reports, records, designs, plans, drawings, specifications, proposals and other documentary submittals in connection with the performance of its duties hereunder. The Company agrees that all such documents shall be submitted to the Village both in printed form (in the number of copies indicated) and in digital form. Digital copies shall consist of computer readable data submitted in any standard interchange format which the Village may reasonably request to facilitate the administration and enforcement of this Agreement. In the event that a conflict exists between the signed or the signed and stamped hard copy of any document and the digital copy thereof, the signed or the signed and stamped hard copy shall govern.

(Q) Severability. If any clause, provision, subsection, Section or Article of this Agreement shall be ruled invalid by any court of competent jurisdiction, then the parties shall: (1) promptly negotiate a substitute for such clause, provision, subsection, Section or Article which shall, to the greatest extent legally permissible, effect the intent of the parties in the invalid clause, provision, subsection, Section or Article; (2) if necessary or desirable to accomplish item (1) above, apply to the court having declared such invalidity for a judicial construction of the invalidated portion of this Agreement; and (3) negotiate such changes in substitution for or addition to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with items (1) and (2) above to effect the intent of the parties in the invalid provision. The invalidity of such clause, provision, subsection, Section or Article shall not affect any of the remaining provisions hereof, and this Agreement shall be construed and enforced as if such invalid portion did not exist.

(R) Drafting Responsibility. Neither party shall be held to a higher standard than the other party in the interpretation or enforcement of this Agreement as a whole or any portion hereof based on drafting responsibility.

(S) No Third-Party Rights. This Agreement is exclusively for the benefit of the Village and the Company and shall not provide any third parties with any remedy, claim, liability, reimbursement, cause of action or other rights.

(T) References to Days. All references to days herein are references to calendar days, unless otherwise indicated such as by reference to working days.

(U) References to Including. All references to "including" or "includes" herein shall be interpreted as meaning "including without limitation" or "includes without limitation."

(V) References to Knowledge. All references to "knowledge", "knowing", "know" or "knew" shall be interpreted as references to a party having actual knowledge.

(W) Counterparts. This Agreement may be executed in any number of original counterparts. All such counterparts shall constitute but one and the same Agreement.

(X) Governing Law. This Agreement shall be governed by and construed in accordance with the applicable laws of the State of Florida.

## **ARTICLE II REPRESENTATIONS AND WARRANTIES**

### **2.1 VILLAGE REPRESENTATIONS, WARRANTIES AND COVENANTS.**

The Village hereby represents, warrants and covenants to the Company as follows:

2.1.1 Existence and Powers. The Village is a municipal corporation duly created and existing pursuant to the laws of the State of Florida. The Village has the full legal right, power and authority to enter into this Agreement and to perform its duties and obligations hereunder.

2.1.2 Due Authorization and Binding Obligation. This Agreement has been duly authorized, executed and delivered by the Village and constitutes a legal, valid and binding obligation of the Village, enforceable against it in accordance with its terms, and the authorization, execution, delivery and performance of this Agreement by the Village does not violate any law, judgment, order, ruling or regulation applicable to the Village and does not constitute a breach of or default under any agreement or instrument by which the Village is bound.

2.1.3 The Village has or will have sufficient funding for this Project to meet the payment obligations for this Project.



## 2.2 Company Representations, Warranties, and Covenants

In addition to any other representations and warranties made by the Company in this Agreement, the Company represents, warrants and covenants to the Village as follows:

2.2.1 Existence and Powers. The Company is a Florida Limited Liability Company, validly organized, existing and in good standing under the laws of the State of Florida, and is duly qualified and authorized to do business in the State of Florida and in any other state in which it conducts its activities, with the full legal right, power and authority to enter into and perform its obligations under this Agreement.

2.2.2 Due Authorization and Binding Obligation. The Company has full power and authority to enter into this Agreement and to perform its duties and obligations hereunder. This Agreement has been duly authorized, executed and delivered by all necessary corporate action of the Company, and the authorization, execution, delivery and performance of this Agreement by the Company shall not violate any law, judgment, order, ruling or regulation applicable to the Company and constitutes a legal, valid and binding obligation of the Company, enforceable against it in accordance with its terms, and does not constitute a breach of or default under any agreement or instrument by which the Company is bound.

2.2.3 Permits and Approvals. The Company has or holds, or shall obtain in the course of performance, all licenses, certifications, permits and approvals required under Applicable Law, which the Company must obtain to perform the Work and provide all materials and services connected with this Agreement.

2.2.4 No Litigation. To the best of the Company's knowledge from the date of the Proposal submitted in response to the RFP and through the date of this Agreement, no Legal Proceeding, at law or in equity, action, suit, proceeding or official investigation has been threatened, publicly announced or commenced against the Company, the Affiliates or the Guarantor, by any federal, state or local Governmental Authority or agency, or in any federal, state or local court that seeks to enjoin, assess civil or criminal penalties against, assess civil damage against or obtain any judgment, order or consent decree binding the Company, the Affiliates or the Guarantor, on account of this Agreement or any actions contemplated to be taken by the Company hereunder. Neither the execution nor delivery by the Company of this Agreement nor the performance by the Company of its obligations in connection with the transactions contemplated hereby or the fulfillment by the Company, the Affiliates or the Guarantor, of the terms or conditions hereof (1) conflicts with, violates or results in a breach of any constitution, law, governmental regulation, bylaws or certificates of incorporation applicable to the Company, the Affiliates or the Guarantor, or (2) conflicts with, violates or results in a breach of any order, judgment or decree, or any contract, agreement or instrument to which the Company, the Affiliates or the Guarantor, are a party or by which the Company, the Affiliates or the Guarantor, or any of its properties or assets are bound, or constitutes a default under any of the foregoing.

2.2.5 Unlawful Activities. During the Village's negotiations with the Company, the Company, the Affiliates and the Guarantor, were informed and agreed not to participate in

any unlawful activity including, but not limited to, rebates, kickbacks, collusion or other unlawful acts or consideration.

2.2.6 No Approvals Required. No approval, authorization, order or consent of, or declaration, registration or filing with, any Governmental Authority is required for the valid execution and delivery of this Agreement by the Company, the Affiliates or the Guarantor, except as such have been duly obtained or made.

2.2.7 Claims and Demands. Except as disclosed in writing to the Village, there are no material and adverse claims and demands based in environmental, contract or tort law pending or, to the best of the Company's knowledge, threatened against the Company, the Affiliates or the Guarantor, with respect to any wastewater or water facility providing service to the general public designed, constructed, operated, maintained or managed by the Company.

2.2.8 Patents and Licenses. The Company owns, or is expressly authorized to use under patent rights, licenses, franchises, trademarks or copyrights, the technology necessary for the Project without any known material conflict with the rights of others. In the performance of the Work, the Company shall not specify or utilize any particular design, process or product that infringes upon any patent, license, trademark or copyright.

2.2.9 Guaranty. Simultaneously with the execution of this Agreement, and as further security for the performance of all obligations in this Agreement, Company has caused the Guarantor to execute and deliver to the Village the Guaranty Agreement in the form attached hereto as Appendix 14. The Company shall provide the Village with the Guaranty Agreement in order to secure the Company's performance under this Agreement, the completion of the design and construction of the Wastewater Facilities, and the operation and maintenance of the Wastewater Facilities. The Company shall provide the Village with the Guaranty Agreement in order to demonstrate that Company has the financial resources to design, build and operate the Wastewater Facilities from and after the date of this Agreement.

2.2.10 Required Design/Build Period Insurance. Simultaneously with the execution of this Agreement, the Company has provided the Village with certificates of insurance for all Required Design/Build Period Insurance as specified in Appendix 13. The Required Design/Build Period Insurance is in compliance with the requirements of Appendix 13.

2.2.11 Design/Build Firm. The Company qualifies and is expressly authorized as a "Design-Build Firm" within the meaning of Section 287.055(2)(h), Florida Statutes, and Applicable Law, and is certified to engage in the Design/Build Work and contract through a certified or registered general contractor or is certified to practice engineering, and shall comply with all Applicable Law in connection with the Design/Build Work.

2.2.12 Technical and Financial Capability. The Company and its Affiliates possess the technical and financial capability to perform the Work required in this Agreement, and guarantee the payment and performance obligations. The Company and its Affiliates are financially solvent and able to pay their debts, possess sufficient working capital to perform this Agreement, are able to furnish materials and services, are qualified, experienced and competent to perform

the Work required in this Agreement, and hold all required licenses, certifications, permits and other special licenses to perform the Work required in this Agreement, as required by Applicable Law.

2.2.13 Ownership and Control of Company. On the Contract Date and throughout the Term of this Agreement, the direct, indirect and beneficial ownership, membership, control and management of the Company shall be held by Layne Heavy Civil, Inc., an Indiana Corporation, and shall not be assigned or transferred without the prior written consent of the Village.

### **ARTICLE III PROJECT SUMMARY**

The following summary ("Project Summary") provides the pertinent facts and certain general terms with respect to the design, construction and operation of the Wastewater Facilities, which are the subject of this Agreement.

#### **3.1 Project Description.**

The Project consists of the design, construction and operation of Village-wide Wastewater Facilities for a centralized wastewater system to service all property or services areas within the Village. The Village has been mandated by the State of Florida, specifically by the Legislation and the DCA Rule, to meet certain milestones for the implementation of the Project and complete construction with full operations of the Wastewater Facilities by the compliance date of December 31, 2015. The State of Florida and the Legislation mandate the following milestone compliance dates for the Project, which the Company shall be required to achieve and meet and which compliance is a material inducement for this Agreement:

- |                                 |  |
|---------------------------------|--|
| On or before September 1, 2013: | The Company shall complete final design of the Project and Wastewater Facilities.  |
| On or before December 1, 2013:  | The Company shall commence construction of the Wastewater Facilities.  |
| On or before June 1, 2014:      | The Village shall have available to its Customers 25% of the Equivalent Dwelling Unit (EDU) connections or Service Availability for the Wastewater Facilities. |
| On or before December 1, 2014:  | The Village shall have available to its Customers 50% of the Equivalent Dwelling Unit (EDU) connections or Service Availability for the Wastewater Facilities. |
| On or before June 1, 2015:      | The Village shall have available to its Customers 75% of the Equivalent Dwelling Unit (EDU)  |

connections or Service Availability for the Wastewater Facilities.

On or before December 1, 2015: The Village shall have available to its Customers 100% of the Equivalent Dwelling Unit (EDU) connections or Service Availability for the Wastewater Facilities.

The Wastewater Facilities generally consist of Collection Systems, vacuum pump stations, lift stations, and transmission lines and facilities to transmit or deliver all wastewater to the KLWTD for treatment and disposal. Commencing thirty (30) days from Notice to Proceed, or such other date as may be directed by the Village, on an interim basis during design and construction of the Wastewater Facilities, the Company shall provide Interim Operations Services for the NPK Facilities and the Middle Plantation Key Collection System and other Collection Systems as completed and accepted by the Village and placed on line for treatment by the NPK Wastewater Treatment Plant. Upon completion of the Wastewater Facilities or portions thereof, all Village wastewater shall be transmitted to the KLWTD for treatment and disposal pursuant to the Agreement with KLWTD. The Company shall assume and perform all operational terms, conditions and requirements of the Village in the KLWTD Agreement, as set forth in Appendix 8 to this Agreement.

### 3.2 Project Representatives.

3.2.1 For purposes of the Project, the following shall serve as the Contract Representatives for the Company: Design/Build Work, Les Archer, P.E: Operations Services, Richard Gardner, P.E. The following shall serve as the Village's Representatives: Village Manager, Edward Koconis; Village Contract Administrator, Greg Tindle; Village's Owner's Representative, Thomas S. Brzezinski, Wade Trim, Inc.

3.2.2 Either party may in writing by notice to the other party in the manner provided for in Section 18.2, change its Project Representatives.

### 3.3 Work.

3.3.1 Design/Build Work. The Company shall complete the Design/Build Work for the design, permitting, construction and delivery of fully operational Wastewater Facilities in accordance with the Contract Standards and this Agreement.

3.3.2 Interim Operations Services for NPK Facilities. Commencing on the date specified in the Notice to Proceed, the Company shall perform Interim Operations Services for the NPK Facilities and Collection Systems, as constructed, in accordance with the Contract Standards and this Agreement.

3.3.3 Operations Services. From and after Acceptance of the Wastewater Facilities, the Company shall provide Operations Services for the Wastewater Facilities in accordance with the Contract Standards and this Agreement. The Company shall assume and perform the

operational terms, conditions and requirements of the Village in the KLWTD Agreement, as set forth in Appendix 8 to this Agreement.

### 3.4 Schedule for Performance.

3.4.1 Design/Build Work. The Company shall complete the Design/Build Work during the Design/Build Period pursuant to the Project Schedule approved by the Village. The Design/Build Period shall commence on the date indicated on the Notice to Proceed and all Design/Build Work shall achieve Final Completion and be fully operational no later than December 1, 2015. The Design/Build Work shall not commence and no expenses or obligations shall be incurred by the Company hereunder until the date specified in the Notice to Proceed. If the Village has not issued a Notice to Proceed on or before September 30, 2012, this shall be deemed an Uncontrollable Circumstance with the Company entitled to relief pursuant to Section 12.8 of this Agreement.

3.4.2 Operations Services. The Company shall perform the Interim Operations Services for the NPK Facilities as of the date specified in the Notice to Proceed, or such other date as may be directed by the Village, until such time as the wastewater within the NPK Service Area is transmitted to the KLWTD and/or the NPK Facilities are decommissioned. The Company shall perform the Operational Services for the Wastewater Facilities as of the Acceptance Date and throughout the Term of this Agreement in accordance with the Contract Standards and this Agreement. The Operational Services shall commence no later than December 1, 2015.

### 3.5 Compensation.

3.5.1 Design/Build Work. The Village shall pay the Company for the Company's performance of the Design/Build Work a fixed Design/Build Price as set forth in Appendix 6, subject only to approved additions and deductions by Change Order or as otherwise provided for in this Agreement. The fixed Design/Build Price for the Design/Build Work shall be Ninety Million, Nine Hundred Thousand and No/100 Dollars (\$90,900,000.00). Payment by the Village of the Design/Build Price shall be deemed full compensation to the Company for the Design/Build Work required by this Agreement.

3.5.2 Interim Operations Services; NPK Facilities. The Village shall pay the Company for the Interim Operations Services an annual Interim Service Fee in accordance with Appendix 6 attached hereto.

3.5.3 Operations Services; Wastewater Facilities. The Village shall pay the Company for the Operations Services an annual Service Fee comprised of a fixed O&M Fee as set forth in Appendix 6, subject to annual CPI adjustment as set forth in Section 9.6.2. The Village shall maintain the Renewal and Replacement Fund for the purpose of funding or paying for Renewals and Replacements.

## **ARTICLE IV TERM**

### **4.1     Effective Date; Design/Build Period.**

This Agreement shall become effective on the Contract Date, and the Design/Build Work shall be performed during the Design/Build Period. All rights, obligations and liabilities of the parties hereto shall commence on the Contract Date, subject to the terms and conditions hereof.

### **4.2     Operations Term.**

The Operations Period shall continue in effect for twenty (20) years, commencing on the final Acceptance Date for the entire wastewater system or all of the Wastewater Facilities and ending on the date that is twenty (20) years thereafter (the "Initial Term") or, if renewed at the option of the Village as provided in Section 4.3, this Agreement shall remain effective until the last day of the renewal term (the "Renewal Term") (the Initial Term and any Renewal Term being referred to herein as the "Term"). The Village and Company shall confirm the Acceptance Date of all Wastewater Facilities and the commencement date and expiration date of the Initial Term pursuant to a certificate substantially in the form attached hereto as Appendix 21 within ten (10) days following the final Acceptance Date, and such fully executed certificate shall become a part of this Agreement and be incorporated herein by reference. If this Agreement is terminated earlier pursuant to the termination provisions under Article XIV, however, the Term shall be deemed to have ended as of the date of such termination. At the end of the Term, all obligations of the parties hereunder shall terminate, except for any provisions which expressly survive the expiration or earlier termination of this Agreement.

### **4.3     Renewal Term.**

At the election of the Village, the Term may be renewed and extended for up to two (2) additional five (5) year terms (subject to convenience termination without cost to the Village at any time upon 90 days' written notice). The terms and conditions governing the Renewal Term(s) shall be the same terms and conditions governing the Initial Term. The Village shall provide written notice of its election to renew the Initial Term or the initial Renewal Term no later than six (6) months prior to such expiration ("Notice of Expiration of Term").

## **ARTICLE V SCOPE OF SERVICES/OBLIGATIONS**

### **5. 1     Operation and Maintenance of Existing NPK Facilities; Interim Service Fee**

5.1.1     Transition; Company Due Diligence.     On or before the date specified in the Notice to Proceed, the Company shall assume operation and maintenance of the NPK Facilities (the "Commencement Date of Operations for NPK Facilities"). Prior to the Commencement Date of Operations for NPK Facilities, the Company shall take any and all reasonable steps necessary

to ensure that a smooth transition of the responsibility occurs from the Village's existing operator, U.S. Water Services Corporation, to the Company. The Company shall provide all personnel, equipment and other resources necessary prior to the Commencement Date of Operations for NPK Facilities to inspect the physical condition of, perform due diligence and other investigations as the Company deems appropriate or necessary, and otherwise become familiar with the NPK Facilities and all Applicable Law relating thereto, and shall take all actions necessary to assume total responsibility for the operation, maintenance and management of the NPK Facilities on the Commencement Date of Operations for NPK Facilities.

5.1.2 NPK Facilities O&M. The Company shall provide interim Operations Services to the NPK Facilities, and all Collection Systems and facilities serviced by the NPK Wastewater Treatment Plant, from the Commencement Date of Operations for NPK Facilities in accordance with the O&M Performance Standards set forth in this Agreement and the Operations and Maintenance Plan for NPK set forth in Appendix 9.

5.1.3 Decommissioning of NPK Wastewater Treatment Plant; Pump Station and Administration Center. The Company shall maintain the NPK Wastewater Treatment Plant in operable condition for a minimum of ninety (90) days after flow begins to be transferred to KLWTD for treatment and disposal, and the Company shall thereafter decommission the NPK Wastewater Treatment Plant. On or before one hundred and twenty (120) days prior to the decommissioning of the NPK Wastewater Treatment Plant, the Company shall submit to the Village for approval a decommissioning plan prepared in accordance with FDEP requirements. On or before the date of decommissioning of the NPK Wastewater Treatment Plant, the Company shall design, permit and construct necessary repairs and improvements to the NPK Facilities in order to include a pump station and administration center for the Wastewater Facilities. The cost of decommissioning the NPK Wastewater Treatment Plant and all improvements to the pump station facility and administration center are a part of the Design/Build Work and are included in the Design/Build Price. The Company will utilize the NPK Facility as a central operations office during the Operations Period.

## 5.2 Build/Operate Services for the Build/Operate Facilities.

The Company shall provide construction and operations and maintenance services for the following Build/Operate Facilities:

A. NPK Vacuum Sewer Improvements. North Plantation Key (NPK) collection and vacuum system improvements and repairs within the NPK Facilities, in accordance with the design drawings and specifications prepared by CPH Engineers, Inc., and dated November, 2010 ("NPK Vacuum Sewer Improvements"), which are included in Appendix 2 to this Agreement. Using the NPK design drawings and specifications prepared by CPH Engineers, Inc., the Company shall construct the NPK Vacuum Sewer Improvements. The NPK Vacuum Sewer Improvements shall achieve Final Completion no later than 270 days calculated from the date of either the Notice to Proceed or the date of issuance of all required permits, whichever is later ("Final Completion of NPK Build/Operate Facilities").

B. Middle Plantation Key (MPK) Collection System and Vacuum Pump Station Improvements. The Middle Plantation Key (MPK) Collection System and Vacuum Pump Station Improvements, in accordance with the design drawings and specifications prepared by Wade Trim, Inc., and dated June, 2011, which are included in Appendix 2 to this Agreement. Using the MPK design drawings and specifications prepared by Wade Trim, Inc., the Company shall construct the MPK Collection System and Vacuum Pump Station Improvements. The Company shall incorporate the Village's forthcoming revisions to the MPK design to relocate the existing MPK vacuum pump station design to the Lysiloma Site as shown on Appendix 1. The MPK Collection System and Vacuum Pump Station Improvements shall achieve Final Completion no later than 330 days calculated from the date of either the Notice to Proceed or the date of issuance of all required permits, whichever is later ("Final Completion of MPK Build/Operate Facilities").the

C. Fontaine Road Collection System within NPK. Utilizing the Fontaine Road Collection System design drawings and specifications prepared by Wade Trim, Inc., which are included as Appendix 2 to this Agreement, the Company shall construct the Fontaine Road Collection System. The Fontaine Road Collection System within NPK shall achieve Final Completion no later than 270 days from Notice to Proceed ("Final Completion of NPK Build/Operate Facilities").

The Build/Operate Facilities to be constructed are part of and described in the Design/Build Work. All architectural, engineering, permitting and other design professional services shall be provided by the designer/engineer of the Build/Operate Facilities, with construction services to be provided by the Company. The Company shall provide Operations Services for the Build/Operate Facilities as set forth in the O&M Performance Standards and O&M Plan set forth in Appendix 9. In consideration of the discharge of the covenants and agreements contained in this Agreement that relate to the Design/Build Work for the Build/Operate Facilities, the Company shall receive the fixed Design/Build Price for the construction of the Build/Operate Facilities, as set forth in Appendix 6 to this Agreement.

### 5.3 Design/Build/Operate Services for the Wastewater Facilities.

The Village hereby retains Company, and Company hereby agrees to be retained by the Village to perform the Work for the Village, on the terms and conditions set forth in this Agreement, including the design and build of the Wastewater Facilities and the Operations Services to the Wastewater Facilities upon Acceptance of the Wastewater Facilities for the Term. The Company shall, in good faith, perform these services with prompt and commercial due diligence, and in accordance with the Contract Standards and the terms and conditions of this Agreement. The Company shall provide all design, engineering, construction, inspection, materials testing, labor, materials, tools and Acceptance and Start Up Testing necessary for the completion and full operations of the Wastewater Facilities. The Wastewater Facilities to be designed and constructed are generally described in the Design/Build Work. The Design/Build Work including, without limitation, all architectural, engineering and other design professional services shall be completed by the Company as required for the Company to perform its Operations Services in accordance with the O&M



Performance Standards and the O&M Plan included as Appendix 9 to this Agreement.

#### 5.4 General Management.

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

##### 5.4.1 Personnel.

The Company shall assign to the management of the Work and the Wastewater Facilities such of Company's executive and administrative Key Personnel, on a full or part-time basis, as reasonably appropriate, as may be required to provide proper supervision and management of the Wastewater Facilities, but in no event shall staffing be less than required by Applicable Law or the required Minimum Staffing Plan submitted as part of the Proposal and attached to this Agreement as Appendix 10. The Key Personnel as described in the organizational chart submitted as part of the Company's Proposal pursuant to the RFP, as modified and approved by the Village, and attached to this Agreement as Appendix 12, shall not be replaced or re-assigned without the prior written consent of the Village. The Company personnel proposed as replacements for Key Personnel shall be qualified for the position they are filling and have equal or greater qualifications than the individual being replaced. The Village shall approve all replacements of Key Personnel. No separate charge shall be made to the Village for any payroll benefits or other expense attributable to personnel. The Company shall supervise the work of, and hire and discharge, on-site employees of the Wastewater Facilities, using reasonable care in hiring and discharging such employees. Such employees shall include all employees reasonably necessary for the efficient and timely performance of the Work required in this Agreement. Unless otherwise required in writing by the Village, all employees of the Wastewater Facilities shall be the sole employees of the Company. The Village shall have no right to interfere with, supervise or otherwise direct such personnel, but may request that the Company discharge or remove from the Wastewater Facilities such personnel which the Village reasonably deems unsatisfactory. The Company shall execute and file when due all forms, reports and returns which are required by Applicable Law for the employment of such personnel.

##### 5.4.1.1 Village Rights with Respect to Key Personnel.

The Company acknowledges that the identity of the key management and supervisory personnel proposed by the Company and its Subcontractors in its Statement of Qualifications in response to the RFQ and its Proposal submitted in response to the RFP, as modified and approved by the Village, was a material factor in the selection of the Company to perform this Agreement. Such approved Key Personnel and their affiliations are set forth in Appendix 12. The Company shall utilize such Key Personnel to perform such services unless such personnel are unavailable for good cause shown. "Good cause shown" shall not include

performing services on other projects for the Company or any of its Affiliates, but shall include termination for cause, employee death, disability, retirement or resignation. In the event of any such permissible unavailability, the Company shall utilize replacement Key Personnel of equivalent skill, experience and reputation, and acceptable to the Village. Any on-site Key Personnel change and detailed justification supported by the qualifications of any proposed replacement shall be proposed to the Village for its review, determination and approval of compliance with this subsection with reasonable advance notice.

#### 5.4.2 Maintenance and Repairs.

The Company shall perform, or cause to be performed, such Maintenance and Repairs to the Wastewater Facilities as shall be required by: (a) the O& M Performance Standards; (b) the Operations and Maintenance Plan; (c) the Renewal and Replacement Schedule submitted with the Company's Proposal to the RFP and included as Appendix 11 to this Agreement; (d) Good Industry Practices to maintain the Wastewater Facilities; and (e) by any Applicable Law, In connection with such maintenance, the Company shall also cause to be provided, or contract to have provided, Utilities, telephone, rubbish hauling, cleaning, repairs, maintenance and similar services, to the extent such services are necessary for the proper maintenance of the Wastewater Facilities.

#### 5.4.3 Recommended Procedures.

The Company shall recommend from time to time to the Village, in writing, such procedures with respect to the Wastewater Facilities as the Company determines are advisable for the more efficient and economic management and operation thereof.

#### 5.4.4 Notice of Violation of Applicable Laws.

Upon obtaining knowledge thereof, the Company shall provide notification to the appropriate Governmental Authority as required by applicable permits and shall immediately notify the Village in writing of any violation of any Applicable Law and shall advise the Village as to any potential violation of any new Applicable Law, and, in either case, the Company shall advise the Village of the steps required to cure such violation or future violation, including whether or not such violation or such Applicable Law, or the application thereof to the Wastewater Facilities of the Village, should be contested. Unless the Village shall elect in writing to contest such violation or Applicable Law, the Company shall, at its sole cost and expense, take such steps as are necessary to promptly correct such violation or as are otherwise required to comply with Applicable Law. If an election is made to contest any Applicable Law or violation thereof, each party shall assist the other in such contest.

#### 5.5 Capital Modification Services.

The Company shall provide all design, engineering, construction, inspection, labor, materials, tools and testing equipment necessary for the execution and completion of such Capital Modifications as: (i) the parties may agree upon; (ii) as may be required by Applicable Law; or (iii) as may be required by the Village, in accordance with Appendix 5 in order to

expand or upgrade the Wastewater Facilities. All Capital Modifications shall be carried out in accordance with the terms of this Agreement and Appendix 5.

#### 5.6 Design/Build Compliance with KLWTD Agreement.

The Company shall comply with and perform the design and construction, and operations and maintenance requirements and standards in the KLWTD Agreement, including those set forth in Appendix 8 attached to this Agreement. The Company shall incorporate into the Design/Build Work the capital improvements and system upgrades to the Wastewater Facilities as required in the KLWTD Agreement and Appendix 8 to this Agreement, including: salinity meters and flow meters at each co-located vacuum pump station/master lift station complete with SCADA and telemetry to allow for monitoring by the Village and KLWTD, and tied to or connected to the KLWTD's existing SCADA system; and perform a hydraulic analysis of the Wastewater Facilities and KLWTD's System to ensure that pumping is not adversely impacted by the inclusion of the Village's Influent being discharged into the KLWTD's transmission system; and to coordinate with KLWTD in the design, construction and operation and maintenance of the Wastewater Facilities. If connecting into the KLWTD System adversely impacts the KLWTD System hydraulics, the Company shall find an alternative Point of Connection to the KLWTD System, acceptable to the Village and KLWTD. Any material changes to the Contract Standards or Construction Documents required by KLWTD which the Village directs the Company to perform, not specifically listed hereinabove or in Appendix 8 attached to this Agreement above, shall be considered a Change in the Work for which the Company may be entitled to an adjustment in the Fixed Design/Build Price and/or Contract Time in accordance with Article X.

#### 5.7 Stakeholder Communications and Customer Service Plan.

The Company shall establish and implement a Stakeholder Communication and Customer Service Plan to receive, log, address and respond to Customer service inquiries and complaints in a timely and professional manner, including telephone communication and email correspondence. Emergency situations shall be addressed immediately. All other Customer complaints and inquiries shall be addressed within five (5) days. Responsibilities in this plan shall include, but are not limited to, notifying property owners and residents of Project progress. Customer emails and telephone calls will be received by the Company on a 24-hour, 7-day per week basis, with at least 8 hours per day during normal business hours of emails and telephones being answered by the Company. Each email and telephone call shall be logged, the complaint or comment noted, the resolution to the complaint or comment, and the date and time the issue was resolved. This information shall be provided to the Village and the Owner's Representative on a timely basis, but not less frequency than monthly.

## **ARTICLE VI DESIGN/BUILD WORK**

### **6.1 Design/Build Work Generally.**

6.1.1 Commencement of Design/Build Work. The Company agrees and represents that it possesses the requisite skills and expertise to perform the Design/Build Work in a good and workmanlike manner, free from defects in materials, Equipment and workmanship, and that all materials and Equipment shall be new and approved or acceptable to the Village and in accordance with and for conformance with the Contract Standards. On the Contract Date, the Company shall promptly proceed to undertake, perform, and complete the Design/Build Work in accordance with the Contract Standards. The Company shall be paid the Design/Build Price pursuant to Article IX as its entitlements to portions of the Design/Build Price arise in accordance with that Article. Notwithstanding any provision to the contrary, except for an Uncontrollable Circumstance or Village Fault, the Village shall not be required to make payments or incur costs in excess of the Design/Build Price set forth in this Agreement and any Change Orders or amendments thereto approved by the Village executed by both parties. The Company shall complete the Design/Build Work no later than the Final Completion Date and in accordance with the terms and conditions of this Agreement including, without limitation, the Project Schedule. The Company shall perform the Design/Build Work in accordance with Applicable Law and shall provide all notices applicable to the Design/Build Work as required by Applicable Law. The Company shall remedy any Design/Build Work which is defective or fails to conform to the Contract Standards and shall be responsible for the cost therefore, and shall promptly correct any Design/Build Work which fails to meet these standards, at no cost to the Village.

6.1.2 Elements of Design/Build Work. In performing the Design/Build Work, the Company shall, in accordance with the Contract Standards and without limitation: (1) apply for, obtain and maintain all Governmental Approvals required for the completion of the Design/Build Work; (2) comply with all reporting obligations set forth herein; (3) prepare and excavate the Project and Sites; (4) remove from the Project and Sites and dispose of any demolition or construction debris resulting from the Design/Build Work and any unused soil excavated therefrom; (5) design and construct the Project, with supporting improvements, facilities and Equipment as described in the Contract Documents and this Agreement, and shall furnish and install all materials, equipment and services, except to the extent specifically indicated in the Contract Documents to be furnished or be the responsibility of others, as and when required for, in connection with, the design, construction, furnishing or equipping of the Project; (6) conduct the Acceptance and Start Up Tests and achieve Acceptance, (7) achieve Final Completion, all so that the Project is suitable and adequate for the purposes intended, and (8) provide for a system designed and constructed to minimize the level of inflow and infiltration into the Wastewater Facilities in accordance with the Contract Standards, including limiting the amount of gravity sewer lines within the Collection System. Staging areas for construction materials shall be located on locations approved by the Village and any other appropriate Governmental Authority and arranged and paid for by the Company.

6.1.3 Phasing and Staging of Design/Build Work. The Company shall not be limited in the phasing or staging of the Design/Build Work, except to the extent that the Contract Standards impose limitations. The Village understands and acknowledges that the Company intends to complete the Design/Build Work in phases or stages whereby particular segments of the Design/Build Work will be designed and built prior to the completion of the design and build of the Project as a whole. Although this Agreement does not require the Company to fully complete the entire design of the Project prior to proceeding with particular segments of the physical construction of the Project, the Company must comply with all requirements of Applicable Law in performing the Design/Build Work and must comply with the design submittal requirements set forth in Section 3.5.2 of the Design Criteria Package and Section 6.3.3.1 of this Agreement. The Company shall comply with the Contract Standards in all aspects of the performance of the Design/Build Work and shall coordinate and cooperate with any Village contractors performing work at or near the Project or Site(s) location.

6.1.4 Quality Assurance and Quality Control (QA/QC). The Company shall have full responsibility for quality assurance and quality control for the Design/Build Work, including compliance with the Design/Build/Operate Management Plan in accordance with Appendix 17. A QA/QC Manager shall be appointed by the Company. The Company will notify the Village, in writing, as to the name of the Company's QA/QC Manager for the Project. The QA/QC Manager, or his designee, shall be present on the Project and Sites with any necessary assistants on a fulltime basis when the Company or any Subcontractor is performing Design/Build Work to ensure compliance with the Design/Build/Operate Management Plan in accordance with Appendix 17. Within 60 days after Notice to Proceed, the Company shall submit to the Village for review and approval a copy of the Company's QA/QC Program, which the Company will follow when carrying out the Contract Services described in this Agreement.

6.1.5 Monthly Progress Reports.

The Company shall submit monthly progress reports to the Village regarding the Design/Build Work and compliance with the Final Design Completion Date and Project Schedule. The Company shall promptly notify the Village of potential changes in the Project Schedule. The monthly report shall include, but is not limited to a detailed description of progress performed including percent completed for each task; a schedule of values updated during construction itemizing material quantities stored and installed; a list of areas of concern and suggested mitigation measures; a list of activities and milestones to be completed during the next reporting period; an updated CPM schedule; a list of outstanding action items; status of submittals; a list of potential changes to the scope of work; and a report on Project safety, including a list of safety meetings held during the reporting period and an update on safety effort performance.

6.1.6 Monthly Progress Meetings.

The Company shall conduct monthly progress meetings with the Village and the Owner's Representative. The Village, or its duly appointed representatives, may inspect and/or monitor the Design/Build Work and review any documents relating to the Design/Build all for

the purpose of reviewing the Company's progress in the performance of its obligations regarding the Design/Build Work. Notwithstanding the Village's or its representative's attendance, inspection, monitoring, or review, or its failure to do so, the Company shall not be relieved of any of its obligations, responsibilities, or liabilities under this Agreement.

6.1.7 [Intentionally Deleted].

6.1.8 Payment and Performance Bonds. Prior to commencing the Design/Build Work, the Company shall obtain and provide the Village with the payment and performance bonds for the Design/Build Work in the forms attached hereto as Appendix 4, and shall certify that the Payment and Performance Bonds are in full force and effect for the duration of the Design/Build Period and in compliance with the requirements of Section 13.2.1.

6.1.9 Design/Build Period Insurance. Prior to commencing the Design/Build Work, the Company shall obtain and provide the Village with the Required Design/Build Insurance in accordance with Section 12.1 and Appendix 13, and acceptable to the Village, and shall certify that all such policies are in full force and effect for the duration of the Design/Build Period and in compliance with the requirements of Section 12.1 and Appendix 13.

6.1.10 Compliance with DBO Management Plan. The Design/Build Work shall comply with the DBO Management Plan set forth in Appendix 17 to this Agreement, including Quality Control Quality Assurance, Risk Management and Loss Prevention Program included therein.

6.1.11 Title and Risk of Loss. Title to the structures, improvements, fixtures, machinery, Equipment, and materials constituting the Project, or agreed upon portions or independent components thereof, shall pass to the Village, upon proper payment by the Village pursuant to this Agreement, on the Acceptance Date, free and clear of all liens and encumbrances, provided, however, that the vesting of such title shall not impose any obligations on the Village or relieve the Company from any of its obligations hereunder. The Company shall, however, bear all risk of loss concerning such facilities, structures, improvements, fixtures, machinery, Equipment and materials prior to and up to the Acceptance Date in accordance with the Contract Standards, regardless of the extent to which the loss was insured or the availability of insurance proceeds. Notwithstanding any of the foregoing, the Company shall bear all risk of loss concerning any facilities, structures, improvements, fixtures, machinery, Equipment, and materials stored at any location other than the Project or Sites, regardless of whether the Village has paid for any such structures, improvements, fixtures, machinery, Equipment or materials.

6.1.12 Damage or Destruction to Design/Build Work. In performing the Design/Build Work, the Company shall use care and diligence, and shall take all appropriate precautions to protect the Project from loss, damage or destruction. The Company shall report to the Village and the insurers, immediately upon obtaining knowledge thereof, any damage or destruction to the Project and as soon as practicable thereafter shall submit a full report to the Village. The Company shall also submit to the Village within 24 hours of

receipt, copies of all accident and other reports filed with, or given to the Company by, any insurance company, adjuster or Governmental Authority. Without limiting any of the rights or responsibilities of the Company, the parties shall cooperate so as to promptly have the Company, at its sole cost and expense, commence and proceed with due diligence to complete the repair, replacement and restoration of the Project to at least the character or condition thereof existing immediately prior to the loss, damage or destruction. The Village shall have the right to monitor, review and inspect the performance of any repair, replacement and restoration work by the Company.

6.1.13 Interfaces. The Company shall coordinate with the Village, KLWTD, and all applicable Utility providers for shutdowns required to complete all interfaces with other components of the Wastewater Facilities in performing the Design/Build Work.

6.1.14 Utilities. The Company shall make all arrangements necessary to secure the availability of all Utilities required to construct and operate the Project, including obtaining on behalf of the Village all required Utility Easements, whether on public right-of-way or private property or roads prior to the commencement of the Design/Build Work. In the event that Utility easements on the Project or Sites are required in connection with the Design/Build Work, the Company shall provide complete descriptions of all Utility connections necessary for such purposes.

6.1.15 No Liens; Encumbrances. The Company shall not directly or indirectly without the Village's consent, create or permit to be created or to remain, and shall promptly discharge or bond any encumbrance or lien arising on the Project, the Sites or the Design/Build Work arising out of the Company's Work. The Company acknowledges and agrees that the Project and Sites are public property or municipally owned by the Village and are therefore excluded from the definition of "real property" upon which liens may be placed as set forth in Section 713.01(24), Florida Statutes. The Company further acknowledges and agrees that the Design/Build Work to be performed pursuant to this Agreement is for the design and construction of public facilities and that the Company shall comply with the requirements of Section 255.05, Florida Statutes, including, but not limited to, the provision of bonds and payment of claims. The Company hereby waives, releases and relinquishes any right to claim or file a mechanic's or materialmen's lien against the Design/Build Work or any portion thereof, the Project or the Sites including, but not limited to, any rights the Company may have under Chapter 713, Florida Statutes. The Company shall include a provision substantially similar to this Section in each of its Subcontracts and purchase orders, requiring Subcontractors to waive any claim or entitlement to a mechanic's or materialmen's lien on the Project or the Sites and to look solely to the credit of the Company or its surety for payment of any sums due on the Project or the Design/Build Work.

If any such lien is at any time filed against the Project or the Sites or any part thereof, the Company, within thirty (30) days after notice of the filing, will cause such lien to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction, or otherwise. If the Company fails to cause such lien to be discharged within the thirty (30) day period, then, any amounts paid by the Village in obtaining the discharge or transfer of any lien, plus all of the Village's costs and expenses associated with any lien, including Attorneys' Fees, will constitute a

default payable by the Company under this Agreement, and such amounts will be paid by the Company to the Village on demand or deducted by the Village from the Design/Build Price.

All persons and entities contracting or otherwise dealing with the Company relative to the Project shall be placed on notice of the provisions of this Section. The Village and the Company further agree to execute, acknowledge and record in the Public Records of Monroe County, Florida, a Notice of No Lien pursuant to Chapter 713, Florida Statutes, and substantially in the form attached hereto as Appendix 22.

6.1.16 Payment of Design/Build Costs. The Company shall pay directly all costs and expenses of the Design/Build Work of any kind or nature whatsoever, including all costs of permitting (excluding permitting fees associated with Village-issued building permits); regulatory compliance and Legal Proceedings brought against the Company; obtaining and maintaining the Required Insurance and Bonds; payments due under the Subcontracts with Subcontractors or otherwise for all labor, materials and Equipment; legal, financial, engineering, architectural and other professional services of the Company; sales, use and similar taxes on Project supplies, materials and Equipment; Utilities required for the performance of the Design/Build Work; supervision by the Company of all Design/Build Work; Company preparation of schedules, budgets and reports, maintaining all design and construction accounts and cost records; and all other costs required to achieve Final Completion of the Project and all Wastewater Facilities.

6.1.17 Duty to Maintain Record Set of Drawings. The Company shall maintain a record set of drawings and Contract Documents in good order and marked current to record all changes made during construction and an accurate location of all portions of the Design/Build Work sufficient to prepare as-built drawings. Record Drawings shall be updated on a regular basis and made available to the Village and the Owner's Representative for review, as needed.

6.1.18 Flow Capacity Analysis. An initial flow capacity analysis was prepared by the Company and submitted with the Company's proposal and preliminary design report in response to the RFP. The initial flow analysis serves as the Company's basis of design for the Wastewater Facilities based on anticipated flows. After Acceptance, the Company shall assist the Village in completing an annual flow capacity analysis to determine current and future flows that will be experienced by the Wastewater Facilities and the KLWTD System to ensure proper collection and transmission by the Village and treatment by KLWTD. The flow capacity analysis will include a capacity analysis report prepared in accordance with Section 10 of the KLWTD Agreement. The flow capacity analysis shall be updated annually to identify areas ready for residential connections and Project areas to be connected in the future. The Company will not be providing engineering services for the capacity analysis report during the Operations Period as part of the annual Service Fee.

6.1.19 Site Acquisition; Rights-of-Way and Private Easements.

The Company is responsible for obtaining all Sites, right-of-way and easements and approvals for siting of the Wastewater Facilities, including the siting of Collection Systems on private roads and property, in accordance with the procedures set forth in Appendix 1. Such agencies and permits may include, but are not limited to, Florida Department of Transportation,



Monroe County Public Works Department, Islamorada, Village of Islands, and private property owners. Except as otherwise provided by the Village, the Company shall be responsible for identification and management of the acquisition of all Sites for the Wastewater Facilities, including Sites for pump stations and vacuum stations as identified in Appendix 1, and Collection Systems located within the Village, as well as any additional lands required for temporary construction or staging facilities, construction equipment or storage of materials and Equipment. The Company shall be responsible, at its sole cost and expense, to manage all land acquisition procedures in order for the Village to acquire the Sites listed in Appendix 1 for vacuum pump stations and lift stations, and shall be responsible for the costs and expenses for the due diligence testing and investigations of the Sites, including appraisals, surveys, geotechnical testing, soil testing, and Phase I environmental assessments. The Company shall establish the land acquisition costs (purchase price) for such Sites and present such to the Village for approval. The Village shall have the right, in its sole and absolute discretion, to approve all Sites to be acquired and land acquisition costs for the Sites listed in Appendix 1. The Village Council shall have final approval of the location of all Sites, and the design of all master lift/vacuum pump stations located thereon. The Village shall select the closing agent and directly pay for the following land acquisition costs in connection with the Sites described in Appendix 1 required for the Wastewater Facilities: purchase price of the Sites, recording fees and charges, and title searches and policies. In the event that the Sites listed in Appendix 1 are not acquired, are not feasible for the placement of the Wastewater Facilities, or do not receive final approval from the Village, the Company shall identify alternate Sites, and said alternate Sites shall be evaluated for any impact on the Design/Build Work, including the Design/Build Price and the Contract Time. To the extent that a change in the Sites listed in Appendix 1 impacts design and the Design/Build Work, the Company shall be entitled to a Change Order for equitable adjustment in the Design/Build Price and/or Contract Time. In the event that the pipeline or private road easement locations differ materially from the location shown on the Company's accepted 30% Design Drawings, an alternate selection may be made with the Village's approval or the Village may exercise its powers of eminent domain, and the Company shall be entitled to a Change Order for equitable adjustment in the Design/Build Price and/or Contract Time.

6.1.20 Fill. Should clean fill be available, the Village may, at its option, direct the Company to provide such fill to the Village at a location specified by the Village. Should clean fill be available for sale, any proceeds generated by the sale of fill shall be due to the Village through a deductive Change Order.

6.1.21 Complete Asphalt Overlay of Village Roads and Streets. The Village may require the Company to provide a complete asphalt overlay of the Village's roads and streets, in lieu of the asphalt patching required in the Pre Design Requirements. Within 30-days after Notice-to-Proceed, the Village and Company shall meet and discuss a preliminary scope of work to provide a complete asphalt overlay of the Village's roads and streets. Within 60-days after the meeting, the Company shall complete a Village-wide roads and streets survey and evaluation to determine the extent of the overlay requirements. The report shall address the current condition of each road and street, a recommended overlay procedure for each road including pavement preparation, and storm water. The report shall include preliminary overlay details, a scope of work, and a fixed lump sum price to complete the overlay work. The Company shall be compensated for the evaluation report and survey in accordance with Section 9.3.5 of this Agreement.

## 6.2 Project Schedule and Reporting.

The Company's planning, scheduling and execution of the Design/Build Work will be presented to the Village by submission of the progress schedule information and data identified herein.

6.2.1 The Design/Build Work under this Agreement will be planned, scheduled, executed, and reported by the Company in the form of the Project Schedule using a critical path method (CPM) based methodology in accordance with Section 01311 of the Project's Design Standards Manual. The Company will adhere to established technical standards for CPM using a computerized precedence diagram method.

6.2.2 The Company shall be responsible for the coordination and supervision of all Design/Build Work regardless of whether performed by its own employees or Subcontractors so as to ensure that the Design/Build Work is performed in an efficient, timely and economical manner. The Company shall also cooperate and coordinate with the Village's Design Criteria Consultant, Owner's Representative or other consultants retained by the Village for the Project.

6.2.3 The Company will provide the Village with three (3) hard copies and one (1) electronic copy of the draft Project Schedule within ninety (90) calendar days after the date of the Notice to Proceed. This draft Project Schedule will adhere to the Initial Project Schedule included in Appendix 16 and reflect the entire Design/Build Work. The Project Schedule will be prepared in accordance with Section 01311 of the Design Standards Manual and as required herein.

6.2.4 The Village will review and approve or comment upon the Project Schedule as submitted by the Company within fourteen (14) days after the Village's receipt of the draft Project Schedule. Once the Project Schedule is approved by the Village, it shall become the baseline schedule for the Design/Build Work, and is the basis for: (a) the monitoring of the Company's progress against Project milestones and Contract Time, and (b) the evaluation and reconciliation of extensions to the Final Completion Date, if and when an extension is needed and agreed to.

6.2.5 The Project Schedule will include procurement-related activities, which lead to the delivery of permanent materials to the Project. Procurement activities may include, but are not limited to, preparation of shop drawings, review/acceptance of shop drawings, materials fabrication, materials delivery, etc., as appropriate.

6.2.6 The Project Schedule will identify those requisite duties and responsibilities of the Village and others, including but not limited to, Governmental Authorities and applicable regulatory and review agencies. The Project Schedule will incorporate appropriate activities and sequences based on the information provided in the RFP as well as information provided by Governmental Authorities and regulatory and reviewing agencies with respect to the Project.

6.2.7 As required by Section 01311 of the Design Standards Manual, the Company will provide the Village with three (3) hard copies and one (1) electronic copy of the Project Schedule and progress reports.

6.2.8 The Company shall provide the Village with a monthly update to the Project Schedule. The Project Schedule shall include forecast and actual data. The forecast data shall show the Company's intended plan for the remainder of the Project. The actual data shall record when and how the Design/Build Work was performed. The Project Schedule update shall be in precedence diagram and/or bar chart format with appropriate logic ties between bars. Each update to the Project Schedule prepared by the Company shall include the current status of each activity, the remaining duration of each activity, the actual start and finish date for each activity in progress or completed, and the estimated start of activities, re-sequencing of work, or proposed changes in logic or duration for activities in the future. Except as permitted in this Agreement, in no event shall the Project Schedule be updated to move the Final Completion Date to a date after December 1, 2015 or the Commencement Date of Operations of Wastewater Facilities to a date after December 15, 2015. The Company agrees that the Company's submission of the monthly progress schedule and report (or any revised progress schedule and report) is for the Village's information only and shall not limit or otherwise affect the Company's obligations to achieve the milestone compliance dates set forth in Section 3.1 and this Agreement, including Substantial Completion by the Substantial Completion Date and Acceptance by the Acceptance Date. The Village's acceptance of the monthly progress schedule and report (or any revised progress schedule and report) shall not bind the Village in any manner. Thus, the Village's acceptance of the monthly progress schedule and report (or any revised monthly progress schedule and report) shall not imply Village approval or consent to any of the matters set forth therein. Notwithstanding any of the foregoing, the Company acknowledges and agrees that it has a material obligation to provide the Village with, and to update, maintain and revise, the CPM Schedule for the performance of the Design/Build Work throughout the Project.

### 6.3 Design Services.

6.3.1 Following Notice to Proceed, the Company shall provide the Design/Build Work, which shall include, but not limited to professional design services, Governmental Approvals, permits, labor, materials and Equipment required to undertake, complete, Start-Up and Acceptance Test the Project specified in the Design/Build Work. Notwithstanding any contracts or Subcontracts into which it may enter, the Company is and shall continue to be responsible to the Village under this Agreement for all matters related to the Wastewater Facilities, and the failure of any engineer, contractor or Subcontractor retained by the Company shall not relieve the Company of any of its obligations under this Agreement. The Company shall promptly inform the Village, in reasonable detail, of any default or anticipated default by the Project architect, engineer or any Subcontractors or other consultants under their respective contracts with the Company, or by the Company under any such agreement, as to which the Company has any knowledge or information. The Company shall promptly take, on behalf of the Village, all reasonable actions required to be taken, if any, to preserve the Village's remedies against such defaulting party or rights of the Village to remedy any such default.

6.3.2 Design Criteria Package and Design Standards Manual. The Company shall follow the Pre-Design Requirements detailed in the Village's Design Criteria Package and Design Standards Manual, unless otherwise specified within this Agreement.

6.3.3 Design Submissions. The Company shall prepare and submit to the Village and the Owner's Representative for review Design Development Drawings and Construction Documents (collectively "Design Submissions") for the Wastewater Facilities in accordance with the submittal requirements of Section 3.5.2 of the Design Criteria Package and this Section. At the Company's discretion, the Design Submissions may be in sequential or phased packages such that the Design/Build Work may be initiated in specific areas while design in other areas is ongoing. The Design Submissions shall be developed in accordance with the Project Schedule and the schedule of performance for milestone Design Submissions.

6.3.3.1 Progress Submittals. The Village's review of Design Submissions shall in no way relieve the Company of any responsibility for such design and construction hereunder. The Company shall submit 30%, 60% and 100% Design Submissions for review and comment by the Village in accordance and for conformance with the Contract Standards. The 30% Design Submission shall be completed using the preliminary design report as a basis submitted by the Company as part of its proposal in response to the RFP. Progress sets of 30%, 60% and 100% Design Submissions shall be submitted a minimum of fourteen (14) days prior to the milestone submittal due date. Additionally, the Company will provide the Village with the progress plans and/or prints anytime the Village requests such documents. Design Submissions shall consist of a minimum of three (3) full set drawing sets and three (3) of specifications. Upon written approval by the Village of the applicable Design Submission, the Company shall transmit a complete package, including plans, specifications, checklists and other requirements, as applicable.

6.3.3.2 Review Procedures. The following procedures shall be followed for the review of the Design Submissions, and any other design services submittals by the Company:

- a. The Company shall submit Design Submissions for review in accordance with the Project Schedule and the schedule of performance for milestone Design Submissions.
- b. The Village shall provide all review comments to the Company within fourteen (14) calendar days from receipt of the milestone submittal.
- c. The Company shall respond in writing to each Village review and comment and incorporate milestone review comments transmitted by the Village within seven (7) calendar days of receipt of the review comments. The Village and/or the Owner's Representative shall log, transmit and facilitate the exchange of review comments. The Company shall also maintain a similar log and make it available to the Village at all times.
- d. The Village and/or the Owner's Representative shall reply within seven (7) calendar days of receipt of any responses from the Company requiring

confirmation and will advise the Company of any further comments or if further reconciliation is required.

- e. If necessary, the Village or Company shall schedule a meeting between the Company and the Owner's Representative and Village to take place within seven (7) calendar days after review comments are issued to the Company, in order to resolve all issues between the parties. The Company and the Village will arrange for additional meetings or conference calls, if necessary, in order to expedite resolution and avoid impact to the Project Schedule.
- f. If any comments remain unsatisfied, additional backcheck submittals shall be required until all comments have been satisfied. Any costs associated with the Company's preparation of the backcheck Design Submissions shall be the Company's responsibility.
- g. Resolution of all review comments is a pre-requisite for completion of any phase of the Design Submissions.
- h. The Village shall complete its review of each Design Submission within the time identified in the applicable Project Schedule, or such longer period as the Parties may agree, and shall notify the Company of any concerns, problems or noncompliance of such Design Submissions with the Contract Standards within that time.
- i. If the Village does not respond within the required time, the Company shall provide the Village with written notice. If the Village does not respond within five (5) business days of the written notice, the Design Submissions shall be deemed to be reviewed by the Village.
- j. Upon completion of the review of the 100% Construction Documents, the Company shall proceed with mobilization and construction related to the portion of the Work identified in the Construction Documents.

#### 6.4 Subcontractors.

6.4.1 Village Review and Approval of Subcontractors. Subcontractors may be used to perform the Design/Build Work, subject to the Village's right of approval as set forth herein. The Village shall have the right, based on the criteria set forth below, to approve all Subcontractors, such approval not be unreasonably withheld, which the Company is permitted to engage for the Design/Build Work valued in excess of five percent (5%) of the Design/Build Price, which approval shall not be unreasonably withheld. Village approval of Subcontractors as provided in the preceding sentence shall not be required for: (1) Affiliates of the Company; and (2) Subcontractors submitted in the Company's proposal pursuant to the RFP and listed in Appendix 12D; (3) Vendors and material suppliers; and (4) Subcontractors hired by the Company for the purpose of remedying an emergency situation. The Company shall furnish the Village written

notice of its intention to engage or replace Subcontractors requiring Village approval under this Section, together with all information reasonably requested by the Village pertaining to the demonstrated responsibility of the proposed Subcontractor. The approval or withholding thereof by the Village of any proposed Subcontractor shall not create any liability of the Village to the Company, to third parties or otherwise. In no event shall any Subcontract be awarded to any person or firm debarred, suspended or disqualified from the State, County or Village from contracting for any services similar in scope to the Contract Services.

6.4.2 Subcontract Terms and Subcontractor Actions. The Company shall retain full responsibility to the Village under this Agreement for all matters related to the Design/Build Work and the Contract Services notwithstanding the execution or terms and conditions of any Subcontract. No failure of any Subcontractor used by the Company in connection with the Design/Build Work or the Contract Services shall relieve the Company from its obligations to perform pursuant to this Agreement. The Company shall be responsible for settling and resolving with all Subcontractors all claims arising out of payment, delay, disruption, interference, hindrance or schedule extension caused by the Company or inflicted on the Company or a Subcontractor by the actions of another Subcontractor. The Subcontract form shall provide that the Subcontractor shall perform its portion of the Design/Build Work in accordance with all applicable provisions of this Agreement and the Contract Standards, and shall further provide that in the event this Agreement is terminated for any reason, that the Subcontractor shall, at the Village's option, perform its Subcontract for the Village, or for a design/build firm designated by the Village, without additional or increased cost provided the Subcontractor is paid in accordance with its Subcontract.

6.4.3 Indemnity for Subcontractor Claims. The Company shall pay or cause to be paid to all Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have any right or claim for payment or lien against the Village for labor, services, materials or Equipment furnished for the Design/Build Work or the Contract Services. The Company acknowledges and agrees that its indemnity obligations under Section 12.2 shall cover and extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or Equipment in connection with the Design/Build Work or the Contract Services.

6.4.4 Assignability. All Subcontracts entered into by the Company with respect to the Project or the Wastewater Facilities, as applicable, shall be assignable to the Village, solely at the Village's election and without cost or penalty, upon the expiration or termination of this Agreement.

## 6.5 Village Review and Inspection of Design/Build Work.

6.5.1 The Village has engaged the Owner's Representative and may engage other qualified representatives to assist it in the review and inspection of the Design/Build Work, as the Village determines is in its best interest. The Owner's Representative and any other qualified representatives engaged by the Village shall review and inspect all Design/Build Work and the relevant Wastewater Facilities at any time during or after construction. The Company, and all personnel performing the Design/Build Work and construction services,

shall cooperate with the Village and its representatives in such review and inspection of the Project and Wastewater Facilities.

6.5.2 The Company acknowledges and agrees that the KLWTD, and the Army Corp of Engineers and the State of Florida, FDEP, and any other agency or entity providing financing or funding for the Project, may require review, comment and inspection of the Design/Build Work, including design review and construction inspection services. The Company agrees to cooperate with KLWTD and such agencies in any required review, testing and inspection of the Design/Build Work.

6.5.3 The Village's Owner's Representative will review and inspect all portions of the Design/Build Work. During the design phase of the Design/Build Work, the Owner's Representative will hold monthly design review meetings to ensure that the Design Standards and Contract Standards of the Design/Build Work are being met in the Company's design of the Wastewater Facilities. The Company will participate in these meetings and respond to questions and comments provided by the Owner's Representative and the Village. During the Construction Phase of the Design/Build Work, the Owner's Representative will provide full-time resident inspection and construction administration services. The Company will allow access to the Design/Build Work by the Owner's Representative and Village, and cooperate with the Owner's Representative and the Village, so they can inspect and verify that the Design/Build Work is being constructed in accordance with the Company's designs and the Contract Standards. Monthly progress meetings will be held by the Owner's Representative. The Company will participate in these meetings and respond to questions and comments provided by the Owner's Representative and the Village.

6.5.4 The Owner's Representative will also provide for the delivery of documents and communications to the KLWTD. The Company shall work with the Owner's Representative to develop a KLWTD Communications Plan acceptable to the Village. The intent being that the Company will not directly communicate with KLWTD and that the Company will be required to produce only one set of reports and communications, as required under this Agreement.

## 6.6 Safety.

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

6.6.1 No later than 60-days after Notice To Proceed, the Company shall submit to the Village the Company's Safety Program for ensuring the safety of the workers, the Work, and the public while completing the Work.

6.6.2 The Company shall comply with the Safety Program and planning and safety measures submitted by the Company to the Village.

6.6.3 The Company assumes responsibility for establishing and monitoring the Safety Program and all safety programs related to the performance of the Work. The Company shall, prior to commencing construction, designate a safety representative with the necessary qualifications and experience to monitor the Safety Program and all safety programs related to the Work. Unless otherwise required by this Agreement, the Company's safety representative shall be an individual assigned to the Project who may have responsibilities for the Work in addition to safety. The Company and its Subcontractors shall comply with all Applicable Law relating to safety. The Company shall immediately report in writing any safety-related injury, loss, damage or accident arising from the Work to the Village and, to the extent mandated by OSHA, to all Governmental Authorities and/or regulatory authorities having jurisdiction over safety related matters involving the Work.

6.6.4 The Company's responsibility for safety under this Section is not intended in any way to relieve Subcontractors, employees and agents of any contractual or legal obligations or responsibility. The Company shall cause all Subcontractors, employees and agents to comply with Applicable Law. These obligations and responsibilities include, but are not limited to, compliance with all Legal Requirements, including those related to health and safety matters as required by the Occupational Safety and Health Administration (OSHA), and taking all necessary measures to implement and monitor all safety programs to guard against injury, losses, damages or accidents resulting from their performance of the Work.

#### 6.7 Access and Suitability of Project and Sites.

6.7.1 Familiarity with the Project and Sites. The Company acknowledges and agrees that its agents and representatives have visited, inspected and are familiar with the Project and Sites, including the NPK Facilities, including surface, subsurface and physical conditions relevant to the obligations of the Company pursuant to this Agreement, roads, Utilities and topographical conditions; that the Company is familiar with all local and other conditions which may be material to the Company's performance of its obligations under this Agreement, including subsurface conditions, transportation, climate, access, availability, disposal, handling and storage of materials and Equipment, and availability and quality of labor and Utilities; and has received and reviewed all information regarding the Project and the Sites provided to it as part of the RFP; and that based on the foregoing, the Project and Sites constitute an acceptable and suitable site for the construction of the Project and Wastewater Facilities in accordance with this Agreement, and the Project can be constructed on the Project and Sites within the Design/Build Price and by the Acceptance Date. The Company has prepared preliminary design drawings dated October 28, 2011, submitted in response to the RFP which depicts the general, proposed location of the Wastewater Facilities. The Company acknowledges and agrees that the proposed location or siting of these Wastewater Facilities may change to avoid existing Utilities, requirements from permitting agencies or Governmental Authorities, or to better fit into existing available right-of-ways or existing easements, or other instances beyond the control of the Village or the Company. Such relocations of the Company's proposed location or siting of the Wastewater Facilities will not constitute a Change in Work except to the extent that there is a material impact on the design of the Wastewater Facilities, and the Design/Build Price and Contract Time.



6.7.2 Site Investigations. Within ninety (90) days of Notice to Proceed, the Company, at its sole cost and expense, shall make all further soil test borings, surveys, geotechnical tests, Phase I environmental assessments, conduct analyses of subsurface conditions, and survey and locate subsurface Utilities on the Project and Sites, in each case as necessary under Good Industry Practice, to prepare for design and construction hereunder in accordance with Applicable Law and to obtain all required Governmental Approvals. Not later than thirty (30) days before such further investigations of conditions are initiated, a plan shall be submitted to the Village for review. Within thirty (30) days following the completion of the Sites Investigation, the Company shall furnish the Village with a certified written report prepared by a professional engineer licensed in the State of Florida, describing and certifying the tests, investigations and surveys conducted, the results of each, and the level of satisfaction of the tests relating thereto and all other requirements specified herein (the "Site Investigation Report").

6.7.3 Project and Site Access. The execution of this Agreement shall be deemed to constitute the granting of a license to the Company to access the Sites owned or controlled by the Village for the purposes of performing such engineering and analysis, including such additional subsurface and geotechnical studies or tests as deemed necessary by the Company for the performance of the Design/Build Work prior to commencement of construction. Except to the extent provided in Section 6.8 with respect to Regulated Site Conditions, the Company shall assume all risks associated with such activities and shall indemnify, defend and hold harmless the Village in accordance with and to the extent provided in Section 12.2 from and against all losses or expenses resulting therefrom. Following commencement of construction, the Company shall have all Project and Sites access rights as are necessary for the performance of the Contract Services during the Term and such access rights shall not be subject to prior Village approval.

## 6.8 Surface and Subsurface Site Conditions.

6.8.1 General. The only relief to which the Company shall be entitled hereunder due to any surface or subsurface condition encountered in the performance of the Contract Services shall be relief based on the discovery of a Regulated Site Condition.

6.8.2 Regulated Site Condition; Subsurface Conditions. The Company is aware of the surface and subsurface geotechnical conditions found in Islamorada and throughout the Florida Keys and that there can be excessive amounts of excavated material, coral rock, organic material, muck, or a combination or mixture thereof, and that these conditions are normal and ordinary for the Florida Keys and shall not constitute a Regulated Site Condition. The Company is aware that the proposed location or siting of the Wastewater Facilities presented in the Company's preliminary design report submitted in response to the RFP are preliminary in nature and may need to be relocated into pavement, or other locations requiring restoration. The Company represents and warrants that, as of the Contract Date, it has no knowledge of any surface or subsurface geotechnical conditions that would constitute a Regulated Site Condition hereunder. In the event that the Company encounters a subsurface condition that constitutes a Regulated Site Condition in the performance of the Design/Build Work, the Company shall provide prompt written notice to the Village of such condition, which notice shall not be later than five (5) days after such condition is first known to the Company. The Company shall, to the extent reasonably possible, provide such notice before the Regulated

Site Condition has been disturbed or altered and shall notify the Village of its intended course of action. The Village shall then promptly investigate or cause to be investigated the alleged Regulated Site Condition set out in the Company's notice. The Company shall be entitled to Uncontrollable Circumstance relief as and to the extent provided in Section 12.8 in the event that it encounters a Regulated Site Condition.

6.8.3 Company Obligations with Respect to Regulated Site Conditions. The Company represents and warrants that, as of the Contract Date, it has no knowledge of any Regulated Site Conditions. In performing the Design/Build Work during the Term, the Company shall exercise due care, in light of all relevant facts and circumstances, to avoid exacerbating any Regulated Site Condition after the location and existence of such Regulated Site Condition has been disclosed to the Company, or becomes actually known to the Company through physical observation (including any such observation made during excavations). Except for the Company's failure to exercise due care with respect to such disclosed or known Regulated Site Condition, the Company shall be entitled to Uncontrollable Circumstance relief in connection therewith in accordance with and to the extent provided in this Section and in this Agreement. The parties acknowledge and agree, however, that Regulated Site Conditions shall not include any condition involving Regulated Substances used, stored or otherwise brought to the Project or Sites by the Company or any Subcontractor. The Company shall comply, and shall cause all Subcontractors to comply, with Applicable Law and the Contract Standards in using or storing any Regulated Substances on the Project or Sites and shall assume all risks associated with such activities and indemnify, defend and hold harmless the Village in accordance with and to the extent provided in Section 12.2 from and against all losses and expenses resulting therefrom.

6.8.4 Village's Obligations with Respect to Regulated Site Conditions. If at any time a Regulated Site Condition is determined to exist which (1) reasonably requires a Response Action or other action in order to comply with Applicable Law, (2) materially interferes with and adversely affects the performance of the Design/Build Work, or (3) materially increases the cost to the Company of performing the Design/Build Work, then the Village shall promptly after written notice from any Governmental Authority or the Company of the presence or existence thereof, commence and diligently prosecute Response Actions or other actions as may be necessary under Applicable Law and Good Industry Practice to dispose of, remediate or otherwise correct the Regulated Site Condition or otherwise make the Regulated Site Condition comply with Applicable Law. The Village shall have the right to contest any determination of a Regulated Site Condition and shall not be required to take any action under this subsection so long as: (i) the Village is contesting any determination of a Regulated Site Condition in good faith by appropriate proceedings conducted with due diligence; (ii) Applicable Law permits continued design or construction of the Project pending resolution of the contest, and (iii) the Company's Safety Policies and Procedures permit continued construction of the Project, so that the Company shall have no liability or responsibility as a result of the failure of the Village to dispose of, remediate or otherwise correct such Regulated Site Condition during the period of contest.

## 6.9 Design/Build Work Permitting Requirements.

6.9.1 Generally. Except as otherwise expressly provided in this Agreement, the Company shall be responsible, at its sole cost and expense, for obtaining all Governmental Approvals and permits for the Design/Build Work required under this Agreement, including those listed in Appendix 16. The Company shall prepare and make all filings, applications and reports and take all other action necessary to obtain and maintain all Governmental Approvals necessary to commence, continue and complete the Design/Build Work and achieve Acceptance. The Company shall bear the risk and responsibility of obtaining and maintaining such Governmental Approvals in accordance with this Section and Appendix 16. With respect to any Governmental Approvals that the Village or designer/engineer has obtained prior to the Contract Date including for the Build/Operate Facilities, the Company shall be responsible for obtaining any modifications necessary for the performance of the Design/Build Work in accordance with Applicable Law and shall bear the risk with respect thereto to the extent provided in this Section. Where required under Applicable Law or requested by the Village, in its sole discretion, Governmental Approvals shall be obtained in the name of the Village, name the Village as co-permittee or recognize the Village as beneficiary of the Governmental Approval, and in connection therewith, the Company shall: (1) prepare the application and develop and furnish all necessary supporting materials; (2) supply all data and information which may be required; (3) familiarize itself with the terms and conditions thereof; (4) attend all required meetings and hearings and, at the request of the Village, assume the lead role in handling any such meetings and hearings; and (5) take all other action necessary to obtain, maintain, renew, extend and comply with the terms thereof. All permit and filing fees required in order to obtain and maintain the Governmental Approvals (other than the Village issued building permit fees) shall be paid by the Company, regardless of the identity of the applicant or permittee, and are included in the Design/Build Price. The Company shall not disadvantage the Village in any application, data submittal or other communication with any Governmental Authority regarding any Governmental Approval. The Village shall have the right to attend any proceedings associated with a Governmental Approval. The final terms and conditions of any Governmental Approval to be obtained and maintained by the Company shall be subject to the Village's approval, which approval shall not be unreasonably withheld or delayed.

6.9.2 Data and Information. All data, information and action required to be supplied or taken by the Company in connection with the Governmental Approvals shall be supplied and taken on a timely basis considering the requirements of Applicable Law and the responsibilities of the Village as the legal and beneficial owner of the Project. The data and information supplied by the Company to the Village and all Governmental Authorities shall be correct and complete in all material respects, and shall be submitted in draft form to the Village at least five (5) working days prior to submitting such data and information to the applicable Governmental Authority to allow full and meaningful review and comment by the Village. The Company shall be responsible for any schedule or cost consequences that may result from the submission of materially incorrect or incomplete information.

6.9.3 Non-Compliance and Enforcement. The Company shall report to the Village and, as appropriate, other Governmental Authorities, immediately upon obtaining knowledge thereof, all violations of the terms and conditions of any Governmental Approval or Applicable

Law pertaining to the Project. The Village shall have the right to independently enforce compliance with this Agreement regarding the requirements of any Governmental Approval regardless of whether a concurrent or different regulatory enforcement action has been undertaken by any other Governmental Authority.

6.9.4 Reports to Governmental Authorities. The Company shall prepare all reports, make all information submittals and provide all notices to all Governmental Authorities required by all Governmental Approvals and under Applicable Law with respect to the Design/Build Work. Such reports shall contain all information required by the Governmental Authority. The Company shall first provide the Village with copies of such regulatory reports for review, comment and signature, as applicable, at least five (5) working days before their filing with the Governmental Authority; provided, however, that in the event that Applicable Law requires immediate filing with the Governmental Authority, the Company shall provide such copies to the Village concurrently with the filing with the Governmental Authority. The Company shall certify the accuracy and completeness of all reports, submittals, data and other information proposed for filing.

6.9.5 Potential Regulatory Change. The Company shall keep the Village regularly advised as to potential changes in regulatory requirements affecting the Design/Build Work of which the Company has knowledge, and shall provide recommended responses to such potential changes so as to mitigate any possible adverse economic impact on the Village or the Project should a Change in law actually occur.

6.9.6 Village-Issued Building Permits and Limited Permitting Assistance by Village. While the Company shall be responsible for obtaining Village issued Building Permits in accordance with this Section, the Village shall waive the permitting fees associated with the Village Building Permits. For the purposes of this Section, "Village Building Permits" shall be limited to building, electrical and plumbing permits, and impact fees directly related to the implementation of the Project. The Village shall not be responsible for any other Company costs associated with the Village Building Permits or other permitting fees. The Village shall provide reasonable assistance to the Company, as requested, in connection with the Company's obligation to obtain and maintain the Governmental Approvals required to be obtained by the Company, including signing permit applications, attending public hearings and meetings of the Governmental Authorities charged with issuing the Governmental Approvals, and providing the Company with existing relevant data and documents that are within the Village's custody or control or are reasonably obtainable by the Village and which are reasonably required for such purpose; provided, however, that the Village's obligation to provide such reasonable assistance shall be limited, in light of the Company's primary role in the permitting and development of the Project, only to those actions which are legally required to be taken by the Village as permittee or co-permittee or which involve providing information which is in the possession of or reasonably obtainable by the Village.

6.9.7 Company Assumption of Permitting Risk. The Company explicitly assumes the risk of obtaining the Governmental Approvals required to be obtained by the Company pursuant to this Section, including the risk of delay, non-issuance or the imposition of any term or condition in connection therewith by a Governmental Authority; provided, however, that the

Company may be afforded relief from the assumption of such risk in the event of a Change in Law described in Section 12.4.1 and to the extent provided under this Section 6.9. The Company acknowledges that a Governmental Authority, in issuing any Governmental Approval, may impose terms and conditions which require the Company to make changes or additions to the Design/Build Work which may increase the costs, time or risk to the Company of performing the Design/Build Work or the Contract Services, all of which costs, delays or risks shall be for the account of and borne by the Company (except as otherwise specifically provided for in this Section 6.9).

6.9.8 Assumed Approval Issuance Dates. The Company shall submit completed applications for each of the Governmental Approvals listed below by the applicable “Governmental Approval Application Date,” as indicated in the initial Project Schedule set forth in Appendix 16. The Governmental Approval Application Dates are estimated in the Company’s initial schedule and shall be finalized in the approved Project Schedule prepared in accordance with Appendix 16. The “Assumed Approval Issuance Date” is the date by which the applicable Governmental Approval is expected to be obtained, as set forth in the Project Schedule and Appendix 16, assuming completed application submittals in accordance with Applicable Law and the adopted administrative practice of the applicable Governmental Authority by the applicable Governmental Approval Application Date.

6.9.9 Uncontrollable Circumstance Relief Associated with Permitting Obligations. The Company shall be entitled to seek equitable Uncontrollable Circumstance relief in accordance with and to the extent provided herein in the event that: (1) the Company is delayed in the performance of the Design/Build Work due to a third party challenge to an “agency action”, as defined in Chapter 120 of Title X of the Florida Statutes, in connection with any Governmental Approval; (2) a Governmental Authority fails to comply with Applicable Law in connection with a Governmental Approval application; (3) the imposition of arbitrary and capricious terms and conditions in connection with a Governmental Approval; or (4) (i) the Company has complied with the requirements of this Agreement, (ii) the Company has timely submitted all applications, data, studies, reports, responses and other information required under Applicable Law and the adopted administrative practice of the Governmental Authority, or requested by the Governmental Authority, in order to obtain the Governmental Approval, (iii) the Company has in all respects used its best efforts to obtain the Governmental Approvals, (iv) the Company has consistently maintained a fully responsive and engaged professional relationship with the staff and management of the Governmental Authority in a manner that, while not expressly required by Applicable Law, is generally recognized among regular practitioners in the permitting field as necessary on a practical level to secure similar permits in a timely manner in light of the discretion afforded Governmental Authorities, and (v) there has been a failure to issue a Governmental Approval by the Assumed Approval Issuance Date set forth in the approved Project Schedule and in section 6.9.8. Any price relief associated with a Governmental Authority delay under this subsection shall be limited to the Company’s reasonable daily general conditions costs, subject to Cost Substantiation by the Company, for the number of days of delay caused by the applicable Governmental Authority but only to the extent any such Governmental Authority delay actually causes a material delay in the Company’s CPM Schedule after the exercise of all commercially reasonable mitigation efforts by the Company.

6.10 Compliance with Applicable Law.

6.10.1 Compliance with Applicable Law. In designing, constructing, commissioning, start up and testing of the Project, the Company shall comply with Applicable Law, shall construct and operate all Equipment and systems comprising the Project, as applicable, in accordance with the Contract Standards, and shall observe all safety standards as required by this Agreement and Applicable Law.

6.10.2 Registration, Licensing and Certification Requirements. The Company shall ensure that the Company is a Design/Build Firm under Section 287.055, Florida Statutes, and all persons performing the Design/Build Work, including all Subcontractors, comply with all registration, licensing and certification requirements imposed by any Governmental Authority and Applicable Law.

6.10.3 Compliance with Conditions in Governmental Approvals. The Company shall comply with all conditions and requirements of all Governmental Approvals required to be made, obtained or maintained under Applicable Law in connection with the continuance of the Design/Build Work.

6.10.4 Governmental Approvals Necessary for Continued Construction. The Company shall make all necessary filings, applications and reports necessary to obtain and maintain all Governmental Approvals, including all renewals and extensions, required to be made, obtained, maintained, renewed or extended under Applicable Law in connection with the continuance of the Design/Build Work once commenced. The Village shall cooperate with the Company in connection with the foregoing obligation.

6.10.5 Violations; Fines, Penalties and Remediation. The Company shall provide to the Village, immediately following the receipt thereof, copies of any notice of default, breach or non-compliance received under or in connection with Governmental Approval, Subcontract or other agreement pertaining to the Design/Build Work. In the event that the Company or any Subcontractor fails at any time to comply with Applicable Law with respect to the Design/Build Work, the Company shall: (1) promptly respond to any notice of non-compliance, warning letter, notice of violation or other enforcement and seek resolution of the issues; (2) promptly correct such failure and resume compliance with Applicable Law; (3) pay any resulting fines, assessments, levies, impositions, penalties or other charges; (4) indemnify, defend and hold harmless the Village in accordance with Section 12.2 from any losses and expenses resulting therefrom, and the Company shall be responsible for any costs and expenses incurred by the Village in connection with remedying or contesting any violation, including but not limited to, costs of consultants, legal fees and costs, and other direct expenses incurred by the Village; (5) make all changes in performing the Design/Build Work that are necessary to assure that the failure of compliance with Applicable Law will not recur; and (6) comply with any corrective action plan filed with or mandated by any Governmental Authority in order to remedy a failure of the Company to comply with Applicable Law.

## 6.11 Construction Practice.

6.11.1 Temporary Construction Staging Area. Temporary construction staging area(s) are to be provided by the Company, at its sole cost and expense, in locations that meet the requirements of the Village Code of Ordinances and local regulations and are subject to the approval of the Village thirty (30) days prior to the scheduled start of construction. Temporary construction staging areas shall include temporary offices and construction trailers, areas to store materials and Equipment, weather protection, parking for workers and management, safety and first aid equipment, aggregate and fill material processing equipment and operations, and materials purchased by the Village under any implemented Owner Direct Purchase Program. The Company shall provide a secured fence around the perimeter of the Staging Area and keep the area locked and secure. Security shall also be provided at the Staging Area. The Company shall maintain a clean, organized Staging Area providing for safe vehicular and pedestrian traffic movements, on-going dust control, and housekeeping. Utilities services such as potable water, sanitary sewer, electricity, telephone, etc. shall also be provided at the Staging Area.

6.11.2 Traffic Plan. During the course of the Design/Build Work, the Company shall provide, operate, and maintain equipment, services and personnel for traffic control and protective device, as required to expedite safe vehicular and pedestrian traffic flow in accordance with Section 01570 of the Design Standards Manual.

## 6.12 Engagement of Owner's Representative and Village Engineer.

6.12.1 Duties. The Company shall fully cooperate with the Owner's Representative in connection with the administration of this Agreement and the performance of the duties of the Owner's Representative hereunder. In the performance of such services, the Company agrees that the Owner's Representative, without limiting other possible services to the Village, shall: review and monitor design review and construction progress; coordinate and facilitate design review and construction progress with KLWTD; payments and procedures; determine the completion of specified portions of the Design/Build Work; review proposed changes to the Design/Build Work and proposed variations in the Pre-Design Requirements; review plans, drawings and specifications of the Project for compliance with the Technical Specifications; monitor the Acceptance and Start Up Tests undertaken by the Company and review the Company's certified Acceptance Test Reports to determine whether the Project Acceptance criteria have been satisfied pursuant to Section 6.17; review the validity of the Company's written notice that an Uncontrollable Circumstance has occurred; review the Company's submissions with respect to Capital Modifications pursuant to Appendix 5; and provide certificates and perform such other duties as may be specifically conferred on the Owner's Representative by the Village or hereunder. It is understood that the services intended to be provided by the Owner's Representative shall be of an observational and review nature only, and that the Owner's Representative shall not have authority to interfere with, halt or delay in any way the construction of the Project or to require or approve changes to the Technical Specifications or the Company's plans and specifications made in accordance therewith.

6.12.2 Fees. The fees of the Owner's Representative shall be paid by the Village, except that the Company shall reimburse the Village, on a cost substantiated basis, for any services performed by the Owner's Representative in connection with each repetition of all or any portion of the Acceptance and Start Up Tests performed after the Substantial Completion Date, unless and to the extent any such additional Acceptance and Start Up Tests occur during an agreed to time extension period or are required as a result of an Uncontrollable Circumstances. The parties acknowledge and agree that the liquidated damages provided for in Section 6.16.3 are intended, in part, to reimburse the Village for the expenses reasonably anticipated to be incurred by the Village as a result of a delay by the Company in achieving Substantial Completion, Acceptance and Final Completion, including the costs associated with any services to be performed by the Owner's Representative during the delay. Notwithstanding the preceding, should the Company be required to pay liquidated damages in accordance with and to the extent provided in Section 6.16.3, the Company shall not be required to reimburse the Village for the actual costs of the Owner's Representative incurred during the delay.

#### 6.13 Construction Monitoring and Testing.

6.13.1 Materials and Equipment/Systems Testing. The Company shall conduct all tests of the Design/Build Work (including shop tests, materials testing, etc.) and inspections required by the Contract Standards and this Agreement. The Company shall hire the services of independent testing laboratories, at the Company's sole cost. Materials testing and quality control services will be provided by the Company in accordance with the requirements set forth in Sections 01400 and 01410 of the Design Standards Manual. The Company shall give the Village and Owner's Representative reasonable advanced notice (at least 5 working days) of tests or inspections prior to the conduct thereof; provided, however, that in no event shall the inability, failure, or refusal of the Village or the Owner's Representative to attend or be present at or during any such test or inspection delay the conduct of such test or inspection or the performance of the Design/Build Work. The Company's Engineer-of-Record, or his designated representative, at its sole cost and expense, shall conduct or witness any such tests or inspections. All analyses of test samples shall be conducted by persons authorized to perform such tests by the State of Florida or federal agency having jurisdiction and shall be subject to the approval of the Village, which approval will not be unreasonably withheld. In addition to the foregoing, Acceptance and Start Up Tests of the performance of the completed Project shall be conducted in accordance with Section 6.17.

#### 6.14 Correction of Design/Build Work.

6.14.1 Correction of Non-Conforming Design-Build Work. Throughout the Design/Build Period, the Company shall, at its sole cost and expense, complete, repair, replace, restore, re-perform, rebuild and correct promptly any Design/Build Work that does not conform with the Contract Standards, and any other provisions of this Agreement or Applicable Law.

6.14.2 Election to Accept Non-Conforming Design/Build Work. The Village may, in its discretion, elect by Change Order, at the Company's request, to accept non-conforming Design/Build Work and charge the Company (through a Design-Build Price Adjustment, adjustment to the Service Fee, or both, as appropriate) for the amount agreed upon by the parties



by which the value of the Company's services or Design/Build Work has been reduced. The Village shall have no obligation to accept non-conforming Design/Build Work pursuant to this subsection.

6.14.3 Relation to Other Obligations. The obligations specified in this Section establish only the Company's specific obligation to correct the Design/Build Work and shall not be construed to establish any limitation with respect to any other obligations or liabilities of the Company under this Agreement. This Section is intended to supplement (and not to limit) the Company's obligations under and with respect to the Project, the Contract Standards and any other provisions of this Agreement or Applicable Law.

#### 6.15 Key Personnel.

6.15.1 Personnel Performance. The Company shall enforce discipline and good order at all times among the Company's employees and all Subcontractors. All persons engaged by the Company for Design/Build Work shall have requisite skills for the tasks assigned. The Company shall employ or engage and compensate engineers and other consultants to perform all engineering and other services required for the Design/Build Work. All firms and personnel performing Design/Build Work, including Subcontractor firms and personnel, shall meet the licensing and certification requirements imposed by Applicable Law.

6.15.2 Village Rights with Respect to Key Design/Build Work Personnel. The Company acknowledges that the identity of the key Design/Build Work management and supervisory personnel proposed by the Company and its Subcontractors in its Proposal submitted in response to the RFP was a material factor in the selection of the Company to perform this Agreement. Such personnel and their affiliations are set forth in Appendix 19. The Company shall utilize such personnel to perform such services unless such personnel are unavailable for good cause shown. "Good cause shown" shall not include performing services on other projects for the Company or any of its Affiliates, but shall include termination for cause, employee death, disability, retirement or resignation. In the event of any such permissible unavailability, the Company shall utilize replacement key management and supervisory personnel of equivalent skill, experience and reputation. Any on-site personnel change shall be proposed to the Village for its review, consideration and determination of compliance with this subsection with reasonable advance notice. The Village shall approve any proposed replacements of Key Personnel.

6.15.3 Labor Disputes. The Company shall furnish labor that can work in harmony with all other elements of labor employed for the performance of the Design/Build Work. The Company shall have exclusive responsibility for disputes or jurisdictional issues among unions or trade organizations representing employees of the Company or its Subcontractors, whether pertaining to organization of the Design/Build Work, arrangement or subdivision of the Technical Specifications, employee hiring, or any other matters. The Village shall have no responsibility whatsoever for any such disputes or issues and the Company shall indemnify, defend and hold harmless the Village in accordance with Section 12.2 from any and all losses and expenses resulting from any such labor dispute.

6.16 Substantial Completion.

6.16.1 Conditions to Substantial Completion. Substantial Completion shall occur only when all of the following conditions have been satisfied, unless waived by the Village in writing:

(i) the Company has submitted and the Village has approved in writing, written notification by the Company that construction of the Project, or any agreed upon portion or component thereof, is physically complete and all Design/Build Work pertaining to the Project, or any agreed upon portion or component thereof, is complete and operational in all respects in compliance with this Agreement, except the items on the Punch List, so that the Wastewater Facilities, or any agreed upon portion or component thereof, can be occupied, used and lawfully operated for their intended purposes;

(ii) a preliminary or temporary certificate of occupancy has been issued for the Project or Sites, or any agreed upon portion or component thereof, if required by Applicable Law;

(iii) all Utilities specified or required under this Agreement to be arranged for by the Company are connected and functioning properly;

(iv) the Company and the Village have agreed in writing upon the Punch List in accordance with Section 6.16.4 (or, if they are unable to agree, the Village shall have prepared and issued the Punch List to the Company within 20 days of the Company having submitted its proposed Punch List to the Village);

(v) the Company has delivered to the Village written certification from the Equipment manufacturers (including manufacturers of information technology systems and instrumentation and controls) that all major items of machinery and Equipment included in the Project, or any agreed upon portion or component thereof, have been properly installed and tested in accordance with the manufacturers' recommendations and requirements;

(vi) the Company has delivered to the Village the final Operating Protocol and the Operation and Maintenance Manual;

(vii) the Company has been authorized by all appropriate Governmental Authorities to perform the procedures necessary and has achieved Acceptance and conducted the Acceptance and Start Up Tests and Standards required by this Agreement and Applicable Law, and such authorization has not been withdrawn, revoked, suspended, superseded, or materially impaired or amended;

(viii) the Company has submitted DEP Form 62-620.910(12) to the Florida Department of Environmental Protection;

(ix) All necessary approvals, permits and licenses have been issued by Governmental Authorities for the operation of the Wastewater Facilities, or any agreed upon portion or component thereof;

(x) the Company has successfully completed Acceptance and Start-Up Tests and Standards as described in Section 6.17 of this Agreement for the Wastewater Facilities, or any agreed upon portion or component thereof, and such are operational and can be used for their intended purposes and capacity as specified in this Agreement;

(xi) the Company has submitted written certification that all of the foregoing conditions have been satisfied and the Village has approved the Company's certification, which approval shall be effective as of the date of the Company's certification;

(xii) the Company has videotaped all Collection Systems to be placed into service and provided the Village with a copy of the videotape to show that all Collection Systems are free of debris, rocks, soil, etc., and are in an acceptable condition; and

(xiii) the Village has provided the Company with a Certificate of Substantial Completion for the Wastewater Facilities, or any agreed upon portion or component thereof.

6.16.2 Notice of Substantial Completion. The Company shall give the Village's Representative at least 30 days' prior written notice of the expected date of Substantial Completion.

6.16.3 Substantial Completion Date; Delay Liquidated Damages.

6.16.3.1 Schedule for Achieving Substantial Completion. Notwithstanding the Company's achievement of Substantial Completion for agreed upon portions or components of the Wastewater Facilities, the Company shall achieve Substantial Completion of all Wastewater Facilities and the entire system by the Substantial Completion Date. In the event of one or more delays in the Design/Build Work caused by an Uncontrollable Circumstance occurring during the Design/Build Period, the scheduled Substantial Completion Date shall be the date determined by adding to the Substantial Completion Date the aggregate number of days of delay in the performance of the Design/Build Work caused by such Uncontrollable Circumstance and approved in a Change Order, subject to the requirements and limitations set forth in this Agreement. In the event of any such adjustment or delay, liquidated damages payable by the Company under this Section, if any, shall be payable from the adjusted Substantial Completion Date.

6.16.3.2 Substantial Completion Subsequent to Scheduled Substantial Completion Date; Delay Liquidated Damages. In the event that Substantial Completion

occurs subsequent to the scheduled Substantial Completion Date, the Company shall be liable for and shall pay to the Village, or cause the Company's surety to pay the Village, daily delay liquidated damages as herein stipulated for each and every calendar day that the Company shall have failed to achieve Substantial Completion after the scheduled Substantial Completion Date.

6.16.3.3. The amount of daily delay liquidated damages payable by the Company and herein stipulated pursuant to this Section shall be \$5,000.00 for each and every calendar day of delay in achieving the Substantial Completion Date. The amount may be retained by the Village from current progress payments or from retainage, but if the amount owing and/or retainage is insufficient to fully pay the Village said liquidated damages, the Company agrees to pay, or cause the Company's surety to pay, said insufficiency to the Village.

6.16.4 Punch List. The Company shall submit a proposed Punch List to the Village and the Owner's Representative when the Company believes that the Design/Build Work, or any agreed upon portion or component thereof, has been substantially completed in compliance with this Agreement. The "Punch List" shall be a statement of repairs, corrections and adjustments to the Design/Build Work, and incomplete aspects of the Design/Build Work, which in the Company's opinion:

- (i) the Company can complete before the Final Completion Date, and with minimal interference to the occupancy, use and lawful operation of the Project; and
- (ii) would represent, to perform or complete, a total cost of not more than 2.0% of the portion of the fixed Design/Build Price applicable to the construction of the Project (unless the Village determines that a higher percentage is acceptable).

In no event shall the Punch List contain any incomplete items necessary for full operations of the Project, or any agreed upon portion or component thereof. The Village shall have the right to approve the Punch List. Completion of the Punch List and Design/Build Work shall be verified by a final walk-through of the Project conducted by the Village and the Owner's Representative with the Company and the Design/Build Manager.

6.16.5 Substantial Completion of Portions or Independent Components of Wastewater Facilities. The Company and the Village agree that phased completion of certain agreed upon portions or independent components of the Wastewater Facilities would be desirable. Accordingly, the Company will endeavor, but shall not be required to, complete the Design/Build Work to allow phased Substantial Completion, prior to the scheduled Substantial Completion Date for the entire Wastewater Facilities, for the following agreed upon portions or independent components, of the Design/Build Work:

- (i) Middle Plantation Key Collection System, Vacuum Pump Station and associated force main to permit wastewater to be sent to NPK Wastewater Treatment Plant;
- (ii) South Plantation Key Collection System, Vacuum Pump Station and force main connection and associated US-1 force main to KLWTD;

- (iii) Upper Matecumbe Collection System, Vacuum Pump Station and force main connection and associated US-1 force main to KLWTD, including Whale Harbor crossing;
- (iv) US-1 Transmission and Pipeline, NPK Pump Station and connection to permit wastewater to be diverted from NPK to KLWTD, including Tavernier Creek crossing;
- (v) Windley Key US-1 force main and collection system, including Snake Creek Bridge Crossing;
- (vi) Lower Matecumbe Collection System, vacuum pump station and associated connection to US-1 transmission main from Lower Matecumbe vacuum station to Lignumvitae crossing;
- (vii) Lower Matecumbe US-1 transmission main to Upper Matecumbe, including Tea Table relief, Indian Key and Lignumvitae crossings.

#### 6.17 Acceptance and Start-Up and Performance Testing.

6.17.1 Notification. When the Design/Build Work or any agreed upon portion or independent component have achieved Substantial Completion and may be placed in service and operation, the Company shall promptly notify the Village in writing of such and that the Company is prepared to perform Acceptance and Start Up Tests and Standards in accordance with Appendix 18.

6.17.2 Testing. After the Company notification of Substantial Completion has been submitted to the Village, the Company shall afford the Village an opportunity to make final inspections and the Company shall then conduct the applicable Acceptance and Start Up Tests and Standards required in the Design Standards Manual, Design Criteria Package, by each Equipment manufacturer and by the Engineer of Record under the Village's observation at a time set by the Village, which shall be within five (5) days after the notification.

6.17.3 Acceptance and Start-Up Testing Period. The Acceptance and Start-Up Tests shall be successfully run without any major Equipment failures for an entire 30-day period. If during the 30-day testing period any major Equipment failures occur, the Company shall have 24-hours to repair or correct the cause of the failure. If any major Equipment failures prevent the Company from successfully operating the Acceptance and Start-Up Tests for an entire 30-day period without interruption in excess of a 24-hour period, then the Acceptance and Start-Up Tests will be deemed a failure and the Company will have to re-start the Acceptance and Start-Up Tests for another uninterrupted 30-day period until it is successfully run without any major Equipment failures.

6.17.4 Acceptance/Rejection. Upon successful completion of the Acceptance and Start Up Tests Reports, the Village shall within ten (10) days issue notification of final acceptance or rejection of the Wastewater Facilities or any agreed upon portion or independent component thereof. Any final Acceptance shall not be deemed to waive the Village's rights regarding claims for insurance, Company guarantees, indemnification, warranties and guarantees, and recovery for damages resulting from the Design/Build Work, which fails to satisfy the requirements of this Agreement.

6.17.5 Corrections. Any rejection by the Village of the Wastewater Facilities, or any agreed upon portion or independent component thereof, shall describe the reasons for the rejection. The Company shall diligently correct the matters requiring correction and then diligently conduct any applicable Acceptance and Start-Up Tests and submit appropriate Acceptance and Start-Up Test Reports for the matters corrected. The procedures shall then be repeated until the Village issues notification of final Acceptance; however, nothing in this Section shall extend the Substantial Completion Date, the Final Completion Date or the Commencement Date of Operations of Wastewater Facilities for performance by the Company.

#### 6.18 Final Completion.

6.18.1 Requirements of Final Completion. The Company shall achieve Final Completion on or before December 1, 2015. "Final Completion" shall occur when all of the following conditions have been satisfied:

- (i) a Certificate of Completion or Certificate of Occupancy has been issued for the Project, Wastewater Facilities and Sites, or any component thereof, as required by Applicable Law;
- (ii) all Design/Build Work, including items on any Punch List prepared as a result of final inspections, and clean up and removal of construction materials and debris, has been completed in accordance with this Agreement, the Construction Documents and Applicable Law, and the Village has received an unqualified written certification to that effect from the Company;
- (iii) the Company shall have delivered to the Village a final and complete set of construction record drawings, record drawings, As-Built Drawings and all other deliverables required by this Agreement;
- (iv) the Company shall be in possession of, and shall have delivered to the Village copies of, the warranties of machinery, Equipment and fixtures constituting a part of the Project, together with all related operating manuals supplied by the applicable supplier or manufacturer. Warranties shall be submitted to the Village in an indexed folder that includes the original warranty for each piece of Equipment that requires a warranty;
- (v) the Company has delivered and stored spare parts, tools, records, software, and all other items required under this Agreement;
- (vi) the Company has delivered to the Village the final Operating Protocol, Operation and Maintenance Manuals, and all O&M Performance Standards;

- (vii) the Company has submitted DEP Form 62-620.910(13) to the Florida Department of Environmental Protection;
- (viii) the Company has submitted written certification that all of the foregoing conditions have been satisfied and the Village has approved the Company's certification, which approval shall be effective as of the date of the Company's certification; and
- (ix) the Village has provided the Company with a Certificate of Final Completion.

6.18.2 Schedule for Achieving Final Completion. Notwithstanding the Company's achievement of Final Completion for agreed upon portions or components of the Wastewater Facilities, the Company shall achieve Final Completion of all Wastewater Facilities and the entire system by the Final Completion Date. In the event of one or more delays in the Design/Build Work caused by an Uncontrollable Circumstance occurring during the Design/Build Period, the scheduled Final Completion Date shall be the date determined by adding to the Final Completion Date the aggregate number of days of delay in the performance of the Design/Build Work caused by such Uncontrollable Circumstance and approved in a Change Order, subject to the requirements and limitations set forth in this Agreement. In the event of any such adjustment or delay, liquidated damages payable by the Company under this Section, if any, shall be payable from the adjusted Final Completion Date.

6.18.3 Failure to Achieve Final Completion. In the event that Final Completion occurs subsequent to the scheduled Final Completion Date, the Company shall be liable for and shall pay to the Village, or cause the Company's surety to pay the Village, daily delay liquidated damages as herein stipulated for each and every calendar day that the Company shall have failed to achieve Final Completion after the scheduled Final Completion Date. The amount of daily delay liquidated damages payable by the Company pursuant to this Section shall be \$5,000.00 for each and every calendar day of delay in achieving the Final Completion Date. The amount may be retained by the Village from current progress payments or from retainage, but if the amount owing and/or retainage is insufficient to fully pay the Village said liquidated damages, the Company agrees to pay, or cause the Company's surety to pay, said insufficiency to the Village.

## **ARTICLE VII**

### **OPERATION & MAINTENANCE OF WASTEWATER FACILITIES**

#### **7.1 General**

7.1.1 Following Notice to Proceed, the Village and the Company shall meet in order to review the written policies and procedures that will define the reporting, notification, and general operational interface requirements for the operation and maintenance of the Wastewater Facilities by the Company. These policies and procedures shall be incorporated into the Operation & Maintenance Plan for the Wastewater Facilities provided by

the Company and included in Appendix 9. The Operation and Maintenance Plan shall include, at a minimum, an Emergency Action Plan, Site Specific Safety Plan, and a general Safety Policies and Procedures Manual. The Operation and Maintenance Plan shall include the Operations and Maintenance Plan for the NPK Facilities until they are decommissioned, and for the Wastewater Facilities included in the Design/Build Work. The Company shall submit the Operation and Maintenance Plan to the Village for review and approval in accordance with Appendix 9. The Company shall maintain and keep current the Operation and Maintenance Plan on-site available for the Village's review during the Term of this Agreement, and will formally submit a list of annual updates to the Village for review and comment on the anniversary date of the Project's Notice To Proceed. The Parties agree to cooperate and coordinate their schedules and activities throughout the Term of the Agreement. The Company's Operation & Maintenance Plan shall also include the Operations Protocol that will be followed while delivering the O&M Services during the Operations Term of this Agreement. The Operations Protocol within the Operation & Maintenance Plan shall include any requirements and standards necessary to meet Governmental Authority regulations and Applicable Law.

7.1.2 Operational Requirements of the KLWTD Agreement. The Company acknowledges and agrees that the Village has entered into the KLWTD Agreement, which is incorporated and made part of this Agreement. The Company shall operate and maintain the Wastewater Facilities in accordance with the terms, conditions and requirements of the KLWTD Agreement, including those set forth in Appendix 8 attached to this Agreement.

## 7.2 Company Responsibilities.

7.2.1 Commencing on the Commencement Date of Operation of Wastewater Facilities, or such other date mutually agreed to in writing by the Company and the Village, the Company will provide continuous Operation Services of the Wastewater Facilities on a twenty-four (24) hour, seven (7) day per week basis, in accordance with the Operation & Maintenance Plan attached to this Agreement as Appendix 9, the and the Operation and Maintenance Staffing Plan set forth in Appendix 10.

7.2.2 The Company, shall implement standard operating procedures and place into service an Asset Management Plan complete with a computerized preventive maintenance program and process control programs. Records from these programs shall be available for inspection by the Village at all reasonable times.

## 7.3 NPK Wastewater Treatment Plant.

7.3.1 Within the design capacity and capabilities of the NPK Wastewater Treatment Plant described in detail in the "NPK Wastewater Treatment Plant NPDES Permit" set forth in Appendix 23, during the Interim Operations Period, the Company shall manage, operate and maintain the NPK Wastewater Treatment Plant so that effluent discharged from the NPK Wastewater Treatment Plant meets the requirements specified in the "NPK Wastewater Treatment Plant NPDES Permit." The Company shall monitor all wastewater entering the NPK



Wastewater Treatment Plant and treat all such wastewater in accordance with the terms of this Agreement and Applicable Law.

#### 7.4 Wastewater Collection System.

7.4.1 The Company shall maintain and repair the Collection System. The Company's responsibility for the Collection System shall end at the Customer's property line or at the easement boundary.

7.4.2 Maintenance and Repair. All Maintenance and Repair costs associated with the vacuum lines, valve pits, and appurtenances thereof of the Collection System shall be borne by the Company.

7.4.3 Sewer Back-Up Procedure. From and after the inception of the Term of this Agreement, the Company shall establish (i) a routine, normal sewer line preventative maintenance program, and (ii) corrective procedures to be implemented in the event of any personal injury or property damage resulting from a sewer back-up, which shall consist of the following:

7.4.3.1 Upon receipt of Customer notice or Village notice, the Company will promptly determine whether the cause of the sewer back-up is an obstruction in the Village's lateral line or the Customer's line within the Customer's property;

7.4.3.2 If the obstruction is in the Village's lateral line, the Company will (i) within 24 hours remove the cause of the sewer line obstruction or back-up by implementation of its corrective procedures; (ii) document the approximate date and time of the obstruction or back-up; (iii) determine the extent of personal injury or property damage caused by the obstruction or back-up, if any; (iv) contact a predetermined remediation company to clean up and/or remediate the sewer back-up and to minimize any damage; and (v) provide a report to the Village indicating the cause of the obstruction or back-up and the steps taken to remedy the problem. All costs including pump out, transportation, disposal, permitting, labor, and overtime shall be borne by the Company. If the obstruction is demonstrated to be caused by the Customer, the Village will reimburse the Company for those costs incurred and substantiated by the Company.

7.4.3.3 If the sewer line back-up is within the Customer's property or outside the easement boundary, the Company will advise the Customer to contact a remediation service company and the Customer's insurance carrier, as applicable; and

7.4.3.4 If the Customer files a claim with the Company, the Company will promptly notify the Village and the Company's insurance carrier.

#### 7.5 General Operation and Maintenance/Staffing.

7.5.1 The Company shall maintain, manage, operate and repair the Wastewater Facilities so that wastewater is collected from the Village Customers and transmitted to KLWTD for treatment and disposal in accordance with the requirements of the KLWTD

Agreement, including those set forth in Appendix 8 attached to this Agreement, and assumed by the Company, all Governmental Approvals issued by Governmental Authorities and Applicable Law.

7.5.2 With regard to Interim Operations of the NPK Plant, the Company shall provide an Operations Manager or lead operator with at least the minimum required licensure level on the Project for at least the minimum times as required by the all Governmental Approvals issued by Governmental Authorities and by Applicable Law. An operator meeting the lead operator classification level of the Wastewater Treatment Plant(s) shall be available to be contacted as needed to initiate appropriate action in a timely manner, 24 hours per day. With regard to the operation of the Wastewater Facilities during the Operations Period, the Company shall provide a maintenance supervisor.

7.5.3 The Company shall provide smooth and uninterrupted transition of Operations and Maintenance between the Company and the existing operator of the NPK Facilities engaged by the Village.

7.5.4 The Company shall provide all Equipment, tools and supplies for the Operations Services and Maintenance and Repair of the Wastewater Facilities.

7.5.5 The Company shall assume full responsibility for the continuous operation of the Wastewater Facilities and shall operate, manage, maintain, repair and monitor the Wastewater Facilities in accordance with the requirements established by the KLWTD Agreement, including those as set forth in Appendix 8 attached to this Agreement, Applicable Law and Governmental Approvals. The Company shall be fully responsible for meeting or exceeding the general performance requirements of all Governmental Approvals subject to the design limits and capabilities of the Wastewater Facilities and Uncontrollable Circumstances.

7.5.6 The Company shall calibrate meters used to measure flow, at least annually and more frequently as recommended by the manufacturer or required by the KLWTD Agreement and maintain calibration records. Copies of the annual calibration reports shall be provided to the Village.

7.5.7 The Company shall provide all personnel and associated wages, salaries, benefits; all services; all tools, supplies, spare parts, vehicles and materials, including fuel, oil, lubricants, filters, spark plugs, gaskets, and other consumables including chemicals, utilities (excluding electricity), telephone, water, necessary to operate the Wastewater Facilities in accordance with this Agreement, the terms and conditions of the KLWTD Agreement, including those set forth in Appendix 8, and Applicable Law. The Wastewater Facilities shall be operated in a manner to ensure that the Wastewater Facilities satisfy all requirements of this Agreement, the KLWTD Agreement and Applicable Law. A Predictive Maintenance Program shall be developed by the Company and provided to the Village for review and approval in accordance with Appendix 9. This Predictive Maintenance Program shall be utilized by the Company for Maintenance and Repair of the Wastewater Facilities. The Company shall maintain responsibility for ordering, receipt, storage and safekeeping of any consumables

purchased by the Company in connection with Operation Services for the Wastewater Facilities.

7.5.8 The Company shall meet with representatives of the Village, as needed and/or as requested by the Village, or at minimum at least monthly, to review operations, reports and costs. The Company shall attend a weekly staff meeting and shall attend regularly scheduled monthly Village Council meetings, as requested by the Village. The Company shall maintain a professional, responsible and responsive working relationship with representatives of the Village, Governmental Authorities and regulatory authorities, suppliers of materials, Utilities and services, and the public.

7.5.9 While performing Operations Services pursuant to this Agreement, all personnel shall wear a uniform shirt with the logo of the Company and shall wear a Village identification tag, shall be equipped with communication equipment, including but not limited to, cellular telephones. A list of all cellular telephone numbers of such personnel shall be submitted to the Village at the time of Notice to Proceed and such list shall be updated and provided to the Village on a regular basis.

7.5.10 The Company shall maintain inventory of all consumable materials, supplies and spare parts required for operation of the Wastewater Facilities.

#### 7.6 Maintenance and Repair.

7.6.1 The Company shall perform all Maintenance and Repair on the Wastewater Facilities in accordance with the Operations and Maintenance Plan attached hereto as Appendix 9, Applicable Law and this Agreement, including activities associated with usual, routine, and customary repairs, and to and perform emergency repairs on components of the Wastewater Facilities. The Company shall install new vacuum valves and appurtenances into vacuum pits installed by others as required and incorporate new vacuum pits into the Wastewater Facilities.

7.6.2 The Company shall develop and implement a Preventive Maintenance Program for the Wastewater Facilities, which shall be delivered to the Village for review and approval in accordance with Appendix 9. Such program shall include all lubrications, adjustments, inspections, monitoring and repairs as necessary to operate and maintain the Wastewater Facilities throughout the Term of this Agreement.

7.6.3 The Company shall perform all Maintenance and Repairs on the Wastewater Facilities, including, without limitation, the NPK Wastewater Treatment Plant, Collection System and sewer force mains, vacuum pumps stations, interim pump stations and transmission mains and pipes.

7.6.4 The Company shall supply and utilize computerized programs for Maintenance and Repair, process control, cost accounting, and laboratory QA/QC.

7.6.5 The Company shall implement sampling as required to comply with the Governmental Approvals, the KLWTD Agreement, including those set forth in Appendix 8, and all other regulatory requirements of Governmental Authorities.

7.6.6 The Company shall collect and input Wastewater Facilities data into the Asset Management Plan. The data shall include, but is not limited to, equipment name plate data, Maintenance and Repair procedures and schedules, inventories of critical spare parts and supplies and records of labor associated with Maintenance and Repair procedures performed.

7.6.7 The Company shall make all necessary repairs required to correct any deficiency in original Equipment which prevents the Wastewater Facilities from consistently meeting the requirements of this Agreement.

7.6.8 All costs incurred by the Company for Maintenance and Repairs shall be the responsibility of the Company. Any and all costs including labor, overtime, equipment, tools, materials, vehicles, coordination with regulatory agencies and Governmental Authorities, etc. associated with the Maintenance and Repair, including activities associated with usual, routine, and customary, and emergency repairs of the Wastewater Facilities, shall be the responsibility of the Company. Maintenance and Repair shall include parts and equipment with a cost of \$1,000.00 or less. Any Maintenance and Repair activity where parts and equipment costs exceed \$1,000.00 shall be considered Renewal and Replacement. The Company will rebuild and refurbish removed parts and equipment whenever possible to be used for Maintenance and Repair or placed into inventory as future spare parts. The Company may use the spare parts inventory discussed in Section 7.7.3 to perform the Maintenance and Repair on the Wastewater Facilities. The Company shall monitor and report monthly on the status of the spare parts inventory to the Village. The Village will consider replenishing the spare parts inventory, as advised by the Company.

7.6.9 The \$1,000.00 allowance for parts and equipment set forth in Section 7.6.8 hereinabove shall be adjusted annually based on the CPI Adjustment Factor in the manner set forth in Section 9.6.2 (Annual Fee Adjustments to the Service Fee), with such adjustments commencing one (1) year after the Commencement Date of Operations of the Wastewater Facilities.

## 7.7 Renewal and Replacement.

7.7.1 Duties. The Company shall perform all Renewal and Replacement of the machinery, Equipment, structures, improvements and all other property constituting the Sites and Wastewater Facilities during the Term of this Agreement as required under the Contract Standards. Reimbursable costs for Renewal and Replacement includes equipment and parts costing more than \$1,000.00 that are not currently in inventory as spare parts, rental costs for specialized equipment, specialized restoration (including street paving, FDOT requirements for work along US-1, etc.) and specialized labor not currently on-hand. Labor, overtime labor, tools, materials on-hand, vehicles, equipment, fuel, normal restoration (including driveway repair, roadway/street shoulder work, roadway patching, etc.) shall not be reimbursable and shall not be considered when determining the cost of the Renewal and Replacement. Should the parts and

equipment for the Renewal and Replacement activity exceed \$1,000.00, the Company shall request in writing from the Village approval to complete the Renewal and Replacement activity. The request shall include a summary of the work, a detailed list of required materials and equipment, and a schedule for the work to be completed. The Village's approval for Renewal and Replacement shall be required for disbursements from the Renewal and Replacement Fund. The Village shall not unreasonably withhold its approval of disbursements from the Renewal and Replacement Fund provided the Company demonstrates that the Renewal and Replacement is reasonably necessary to preserve the overall maintenance and repair and the reliability, useful life, durability and efficiency of the Wastewater Facilities. The obligations of the Company under this Section are intended to assure that the Wastewater Facilities and Sites are properly and regularly maintained, repaired and replaced in order to preserve their long-term reliability, useful life, durability and efficiency, and that at the end of the Term the Wastewater Facilities are returned to the Village in a condition required by Appendix 15 and which does not require the Village to undertake a significant overhaul or immediate replacements in order to continue to provide reasonably priced and efficient wastewater services. Nothing in this Section shall limit the Company's obligations with respect to the required condition of the Wastewater Facilities at the end of the Term under Appendix 15. The Renewal and Replacement Fund includes the amounts budgeted by the Village to fund the Renewal and Replacement of the Wastewater Facilities. All Renewal and Replacement activities shall be funded first from the Renewal and Replacement Fund and second by the Village in the event that additional funds are required to pay for Renewal and Replacements in excess of the Renewal and Replacement Fund. The Village shall not unreasonably refuse to fund the Renewal and Replacement activities when reasonably requested by the Company and provided the Company demonstrates that the Renewal and Replacement is reasonably necessary to preserve the overall maintenance and repair and the reliability, useful life, durability and efficiency of the Wastewater Facilities. Any loss, damage, or injury to the Wastewater Facilities to the extent caused by the Village's failure to fund the Renewal and Replacement activities when reasonably requested and demonstrated by the Company shall be the sole responsibility of the Village.

**7.7.2 Renewal and Replacement Schedule.** The Renewal and Replacement Schedule set forth in Appendix 11 provides a detailed schedule of Renewal and Replacements which are to be performed by the Company and funded by the Village over the Operations Period in order to achieve the standard of overall maintenance and repair of the Wastewater Facilities deemed essential for the proper operability, durability and reliability of the Wastewater Facilities over their expected useful life. Without limiting any of the Company's obligations under this Section, and provided that the Village funds the Renewal and Replacement activities from the Renewal and Replacement Fund, the Company shall make and complete all Renewal and Replacements which are necessary to achieve such standard of repair and replacement in accordance with the Renewal and Replacement Schedule, as such schedule may be altered or amended pursuant to this Section. The parties acknowledge that, in light of the long-term nature of Operations Period of this Agreement and the practical limitations on predicting with specificity the useful life of any particular asset, it may be appropriate from time to time to alter the Renewal and Replacement Schedule. Accordingly, the Village shall fund the Renewal and Replacement as it deems appropriate. The Company shall have the right to request Village approval of alterations to the Renewal and Replacement Schedule at any time during the Operations Period, provided that no such alterations shall be made unless the Company demonstrates to the satisfaction of the

Village that the sum of all Renewal and Replacements performed to date by the Company, and all Renewal and Replacements to be performed under any such alterations, shall result in a standard of overall Wastewater Facilities' maintenance, repair and replacement which is equal to or better than the standard represented by the activities to be performed under the Renewal and Replacement Schedule. Any alterations to the Renewal and Replacement Schedule, approved by the Village, shall be reflected in an updated Renewal and Replacement Schedule. The Company shall cooperate with the Village in identifying any such alterations which may be desirable in order to anticipate or address the technical obsolescence of any component, system or process of the Wastewater Facilities, and in proposing such alterations for the Village's approval. In no event shall any such alteration of the Renewal and Replacement Schedule result in an increase in the amount to be funded or otherwise paid by the Village into the Renewal and Replacement Fund for any particular Contract Year.

7.7.3 Spare Parts Inventory. The Company shall provide spare parts in accordance with the Pre-Design Requirements. Spare parts shall be stored on-site and located within the Wastewater Facilities' vacuum pump stations. Prior to Substantial Completion, the Company shall provide and store the spare parts. For subsurface and underground facilities, the Company shall provide and store no less than 1% of the installed number of parts for spare parts, including but not limited to valve pit packages, valve boxes, controller boxes, breather boxes, pressure gages, etc. The Company may use spare parts with a cost of \$1,000.00 or more as a Renewal and Replacement, upon written approval by the Village. The Company will monitor and report monthly on the status of the spare parts inventory to the Village using the Asset Management Plan or program. The Village reserves the right to require the Company to purchase additional spare parts or to re-stock the spare parts inventory.

#### 7.8 NPK Wastewater Treatment Plant Collection and Disposal.

7.8.1 The Company shall properly dispose of screenings generated at the NPK Wastewater Treatment Plant.

7.8.2 The Company shall provide for the collection, removal, transport and disposal of Sludge and process solids for disposal directly at an approved facility for such purposes. The Village shall directly pay for all costs for the transport and disposal of Sludge.

7.8.3 The Company shall maintain all manifests or other documentation required for disposal of Sludge and process solids, and such documentation shall be signed by Company in the name of the Village and a copy provided to the Village.

#### 7.9 Testing and Laboratory Analysis.

7.9.1 The Company shall perform all laboratory testing and sampling required by Governmental Authorities, the KLWTD Agreement, Governmental Approvals, the Clean Water Act, the Safe Drinking Water Act, and/or any federal, State or local rules and regulations, statutes or ordinances, or license requirements or judicial and regulatory orders, agreements and decrees. The Company shall deliver and certify such results to the Village and submit the results to the FDEP and other Governmental Authorities, as required.

7.9.2 The Company's failure to meet or exceed the applicable performance or requirements of any Governmental Approvals will only be excused in those instances where the failure was caused by an Uncontrollable Circumstance or as provided in Section 7.22. In the event that Uncontrollable Circumstance prohibits the Company from meeting the applicable performance requirements, the Company shall immediately take all reasonable steps to stop the discharge of the non-compliant Influent and to bring the Wastewater Facilities into compliance with the performance requirements.

7.9.3 All laboratory tests required by Governmental Approvals shall be performed by a laboratory that has been certified by the Department of Health for any specific method or analysis combination that is used to comply with the Governmental Approvals. The on-site test procedures for the NPK Plant shall be performed by a laboratory certified test for those parameters under the direction of an operator certified under Chapter 62-602, F.A.C. and using the applicable procedures described in DEP-SOP-001/01 (January 2002), as may be amended.

7.9.4 The Company shall conduct analysis of any repeated or persistent non-compliance issues, and recommend remedial measures to the Village for system modifications, if appropriate.

7.9.5 The Company shall conduct any and all process control testing required for the NPK Plant required by the NPDES Permit and the Company's internal process control management plan to ensure proper and compliant operation of the Wastewater Facilities. The Company shall maintain all process control testing equipment, including on-line instrumentation, in good working order and shall perform laboratory quality assurance and quality control checks as are standard for the industry.

#### 7.10 Odor and Noise Control.

7.10.1 The Company shall operate the Wastewater Facilities using methods that will minimize odor and noise within the limits and capabilities of the Wastewater Facilities. Operations of the Wastewater Facilities shall provide zero detectable odors from the Wastewater Facilities at the fence line of the Sites of each vacuum pump station or lift station.

7.10.2 The Company shall report to the Village within 24 hours all odor complaints received from Customers or the KLWTD, and respond within 24 hours to all Customer or KLWTD service complaints. Complaints shall contain the name, address, phone number, date and time of said complaint and the Customer contact person. Odor complaints shall specify the nature of odor, probable origin of the odor and the action the Company will implement or has implemented to remedy and/or mitigate said odor. Odor complaints shall be addressed and resolved by the Company immediately, but in no event later than seven (7) days from the receipt of the complaint.

#### 7.11 Training and Personnel.

7.11.1 The Company shall provide ongoing training and education for appropriate

personnel in all necessary and appropriate areas of modern process control, Operations Services, industrial pretreatment, reclaimed water, laboratory, energy management, Customer service, Maintenance and Repair, safety, supervisory skills and emergency operations.

7.11.2 The Company shall develop and implement an organized in-house safety program that will include regularly scheduled safety training sessions for all Operations Services' personnel; standard operating procedures for chemical handling, confined space entry, lock-out/tag-out, and emergency response; and the care and use of the proper safety equipment to perform these procedures.

7.11.3 The Company shall staff the Wastewater Facilities with employees who have met appropriate licensing and certification requirements of the State of Florida and meet the requirements of Governmental Approvals or Governmental Authorities.

#### 7.12 Records and Reports.

7.12.1 The Company shall prepare and process comprehensive monthly reporting to the Village of the Wastewater Facilities operating parameters, laboratory, Maintenance and Repair plans and activities, improvement activities, treatment results, Equipment and parts and inventories and other relevant information in accordance with all Applicable Laws. The Company shall prepare and maintain measurement and monitoring logs required by Governmental Approvals and Applicable Law.

7.12.2 The Company shall prepare and submit to the Village all reports and all other information required by, and in accordance with the Governmental Approvals and manufacturers' warranties, as well as monitoring and measurement logs on bound 8 inch by 14 inch record books with pre-printed schedules. Reports include, but are not limited to, Discharge Monitoring Reports, Annual Reuse Reports and other reports required by and in accordance with FDEP Permits and requirements, and Applicable Law.

7.12.3 Once each year, at a time to be determined in advance by the Village, the Company shall submit reports that record significant events of the past year, describe the status of the Wastewater Facilities and compare the status of planned activities.

7.12.4. The Company shall maintain safety records in connection with its operation of the Wastewater Facilities and performance of the Operations Services under this Agreement. The Company must record the relevant details regarding any accidents or injuries occurring at the Wastewater Facilities. The Company shall include in the monthly report for the Village details of its safety record from the time of the last report.

7.12.5 The Company shall prepare State and federal permit plant performance reports and submit them to Village for signature and transmittal to appropriate Governmental Authorities, as required by the Governmental Approvals and all Applicable Law.



7.12.6 The Company shall prepare and maintain accurate reports of incidents of loss, theft or vandalism and shall provide these reports to the Village in a timely manner.

7.12.7 The Company shall assist the Village in the preparation of capacity analysis reports in accordance with the Governmental Approvals, the requirements of the KLWTD Agreement and Applicable Law.

7.12.8 The Company shall provide all documents in draft form to the Village for review prior to submittal to any Governmental Authority or the KLWTD, or other regulatory agency or manufacturer, as requested. Final copies of all reports shall be provided to the Village.

7.12.9 The Company shall update and maintain accurate records and redline drawings of repairs and upgrades made to the Wastewater Facilities. Copies of the record drawings will be maintained at the Wastewater Facilities office and provided to the Village upon termination of this Agreement.

7.12.10 All Wastewater Facilities' records, data, software, and information, including, but not limited to, operation reports and laboratory data, shall be owned by the Village. All operating procedure guidelines, preventive maintenance and safety programs, and Wastewater Facilities' evaluation reports shall, upon termination of this Agreement, remain the property of the Village and shall be assigned to the Village promptly upon termination of this Agreement.

### 7.13 Governmental Approvals and Permits.

7.13.1 The Company shall prepare and submit Governmental Approvals and Permit renewal applications required by Applicable Law for the Wastewater Facilities, including necessary backup and detailed operation and maintenance performance reports, no later than 180 days prior to the expiration of the current Governmental Approval or Permit.

7.13.2 The Company shall use its best efforts to ensure that the Governmental Approval or Permit is processed and renewed by the FDEP and respond to all additional requests by FDEP in support of obtaining such Governmental Approval or Permit renewal; provided, however, (i) the Company shall not be required to provide engineering services and/or to certify permit applications; and (ii) the Company shall not be responsible for unreasonable or arbitrary delays or additional permit requirements imposed or caused by the Governmental Authority.

7.13.3 The Company shall assume responsibility for the payment of any fines and penalties arising out of, related to or resulting from the Company's violation of any Applicable Law or Governmental Approval or Permit to the extent caused by the negligence or willful misconduct of the Company.

7.13.4 The Company shall conduct analysis of any repeated or persistent non-compliance issues, and recommend remedial measures to the Village for system or Wastewater Facilities' modifications, if appropriate.

7.13.5 The Company shall not be responsible for testing, certification or engineering services for NPDES permits or renewals, but shall provide data and support the Village in obtaining any required NPDES permit applications or renewals.

#### 7.14 Manufacturers' Warranties.

7.14.1 The Company shall be responsible for installing the Equipment and conducting all Operations Services necessary or required to maintain the Equipment and existing warranties and maintain all manufacturers' warranties on Equipment and shall assist the Village in enforcing manufacturers' warranties and guarantees. After the expiration of the above warranties on Equipment, the Company will continue to perform Maintenance and Repair and any Renewal and Replacement of Equipment will be performed by the Company subject to the Village's funding of such Renewal and Replacement activities from the Renewal and Replacement Fund as provided herein.

7.14.2 The Company shall provide the Village with full documentation indicating that preventive Maintenance and Repair is being performed on all Equipment and Wastewater Facilities in accordance with manufacturers' recommendations at intervals and in sufficient detail as may be determined by the Village.

7.14.3 The Company shall be responsible for notifying the Village of any required modifications to the Wastewater Facilities or treatment processes in accordance with all warranties and Applicable Law.

7.14.4 The Maintenance and Repair of the Wastewater Facilities must include documentation of corrective and preventive Maintenance and Repair and a critical spare parts inventory.

#### 7.15 Construction and Inspection Processes.

7.15.1 Commencing with the one (1) year anniversary of the commencement of the Operations Period and every year thereafter, the Company shall conduct an annual comprehensive Wastewater Facilities inspection with representatives of the Village to evaluate and document the condition of the Wastewater Facilities, safety issues or other concerns. The Company shall inspect the Wastewater Facilities and notify the Village of specific capital expenditures needed or required annually. Upon completion of the annual comprehensive Wastewater Facilities inspection, the Company shall submit a Condition Assessment Report of the Wastewater Facilities to the Village. The Condition Assessment Report will summarize the findings made during the annual comprehensive Wastewater Facilities inspection, report on the overall condition of the Wastewater Facilities, estimate the remaining useful life of each piece of Equipment with a replacement cost exceeding \$1,000.00, and provide a five (5) year annual

projection of the expected expenditures of the Renewal and Replacement Fund for budgetary planning purposes for use by the Village.

7.15.2 The Company shall provide, as a representative of the Village, inspection of all new sewer connections within 48 hours (two (2) working days) upon receipt of notice. The Company shall inspect and formally record and document each sewer connection to assure the new connection was completed within the standards required in the KLWTD Agreement and the Village's standards with respect to the Wastewater Facilities that are provided to the Company; provided, however, any plumbing or engineering certifications shall be performed or paid for by the Village.

7.15.3 The Company shall work with the Village to maintain access and minimize disruption and outages to the existing Equipment and components during a construction phase or other modification of any part of the Wastewater Facilities; provided, however, that any plumbing or engineering certifications required shall be not be paid for by the Company.

7.15.4 The Company shall use all best and reasonable efforts to locate all sewer lines, manholes, reclaimed water lines, valves, valve pits and other appurtenances of the Collection System within 48 hours upon receipt of written request. The Company will manage the Village's Sunshine State One Call of Florida (SSOCOF) account and provide all required labor and documentation needed under the SSOCOF protocol.

7.15.5 During any Village-approved construction or modification of the Wastewater Facilities by the Company, the Company shall obtain all necessary Governmental Approvals and Bonds and comply with all Applicable Law and regulations relating to the safety of persons or property, or to the protection of persons or property from damage, injury, or loss, and shall develop and maintain all necessary safeguards and precautions for such safety and protection.

#### 7.16 Cross Connection Control and Inspection.

7.16.1 The Company shall be responsible for coordinating cross-connection control and inspection efforts with the Florida Keys Aqueduct Authority (FKAA) and/or such other agency with jurisdiction over water facilities, as needed. Until the Village adopts a cross-connection control and inspection program, the Company shall use the most recent version of the FKAA Manual of Cross Connection Control and AWWA Manual M14 ("Recommended Practice for Backflow Prevention and Cross-Connection Control") as guidance. The Company shall apprise the Village of any cross-connection issues and recommend to the Village any required improvements or changes.

7.16.2 The Company shall ensure cross-connection control compliance for the Village, which shall include identification and inspection of any potential cross-connection health hazards between FKAA potable water distribution system and the Wastewater Facilities reclaimed water transmission system and other Village non-potable liquid conveyance systems.

7.16.3 The Company shall verify appropriate protection devices and the proper installation of Equipment, and operating as designed.

7.16.4 The Company shall ensure that all backflow prevention devices that are components of the Village's Collection System, and treatment and disposal systems, are inspected and serviced annually as required, at no additional cost to the Village.

#### 7.17 Security and Village Access.

7.17.1 The Company shall maintain the security features at all Wastewater Facilities on a 24-hour, seven (7) days per week basis, in accordance with the capabilities of the installed security items. Security shall include perimeter fencing, signage and automated alarm monitoring, where applicable.

7.17.2 The Company shall provide 24-hour per day access to the Wastewater Facilities for authorized Village personnel so designated by the Village. The Company shall provide master keys for the Wastewater Facilities to the Village.

7.17.3 The Company shall ensure that all visitors to the Wastewater Facilities shall comply with the Company's operating and safety procedures.

#### 7.18 Customer Service.

7.18.1 For all emergency calls and Customer complaints, the Company shall make initial response within 30 minutes. Initial response may be limited to acknowledgment of the emergency condition, including return calls to Customers, acknowledgement of alarms, and notification of the emergency to the Village or other appropriate initial response as outlined in the approved Emergency Preparedness Plan. Follow-up actions for emergency situations shall be implemented in the timeframe and manner outlined in the approved Emergency Preparedness Plan.

7.18.2 For all non-emergency situations, the Company shall provide resolution to Customer complaints within two (2) working days from the time a complaint is submitted to the Company by Customer or the Village, or provide a schedule for resolution that is acceptable to the Village. The Village shall be advised of all complaints received by the Company and the Company's response to said Customer complaint concerning service. Complaints shall contain the name, address, phone number, date and time of said complaint and Customer contact person.

#### 7.19 Emergency Preparedness.

In accordance with Appendix 9, and at a minimum annually thereafter, the Company shall prepare and revise as necessary an Emergency Preparedness Plan, satisfactory to the Village, for coordination with the Village and other Governmental Authorities. The Emergency Preparedness Plan shall be approved in the Village's sole, but reasonable

discretion. The Company shall comply with the Emergency Preparedness Plan for the Term of this Agreement.

7.20 Engineering and Technical Services During Operation and Maintenance.

7.20.1 At no additional cost or expense to the Village, the Company shall provide technical services required to identify, evaluate, and prepare preliminary recommendations necessary to ensure the proper operation and maintenance of the Wastewater Facilities including, without limitation, recommendations for Capital Modifications.

7.20.2 The Company shall provide additional engineering and technical services, which are in addition to the Contract Services under this Agreement, as and when requested by the Village. The Company shall be compensated for such additional engineering and technical Services in a manner provided by the terms of this Agreement. A detailed Scope of Work and cost estimate for such additional engineering and technical services will be provided to the Village by the Company, and written authorization to proceed from Village shall be required before such services are initiated.

7.21 Inflow and Infiltration.

7.21.1 The Company acknowledges that the Village has entered into the KLWTD Agreement for the treatment and disposal of the Village's wastewater, which Agreement contains certain standards and requirements for all Influent entering the Wastewater Facilities and the KLWTD System. The Company further acknowledges that the infiltration of material amounts of fresh or saltwater into the Wastewater Facilities and the KLWTD System may cause the capacity of the KLWTD Wastewater Treatment Plant to treat Wastewater to be diminished and may adversely impact KLWTD's ability to treat and dispose of Wastewater.

7.21.2 The Company shall monitor and record the Influent salinity level in the Wastewater Facilities in accordance with the guidelines of Appendix 9, The Company shall provide and install appropriate sampling locations for KLWTD to sample the Village's Wastewater to verify the Village's compliance with the salinity levels set forth in the KLWTD Agreement and this Agreement.

7.21.3 As stated elsewhere in the Agreement, the Company agrees to keep the Wastewater Facilities in such repair or condition so that material infiltration and inflow will be controlled. The Company is not responsible for infiltration and inflow and salinity levels caused by Uncontrollable Circumstances or Non-Specification Influent entering the Wastewater Facilities from Customers or Customer sites.

7.21.4 It is not abnormal to have readings over 1.0 parts per thousand (ppt) during high tide. When salinity reaches 2.0 ppt, the Company will monitor the Collection System for possible salinity sources. The Company will check salinities at the vacuum pump stations and lift stations to determine the general area of the problem. From there, the Company will check each of the branches until the source of the salinity infiltration is found. When the source of the salinity infiltration is located within the Wastewater Facilities, the Company will correct the problem through Maintenance and Repair. If the source of the salinity is coming from Customers or

Customer sites or otherwise constitutes an Uncontrollable Circumstance, the Company will notify the Village and the Village will require the Customer(s) to immediately correct the salinity infiltration and/or the Village and the Company will together decide how the Uncontrollable Circumstances will be addressed by the parties under this Agreement.

7.21.5 The Company is allowed up to thirty (30) days of salinity in excess of 4 parts per thousand in a rolling 12-month period for Influent prior to application of surcharges by the KLWTD. The Company shall be liable to the Village for such surcharges if the thirty (30) days of salinity in excess of 4 parts per thousand in a rolling 12-month period is predominantly caused by the Collection System designed and constructed by the Company hereunder and is not caused substantially in whole or in part by Customers or Customer sites and/or Uncontrollable Circumstances.

7.21.6 In addition, in the event that the Village's Wastewater salinity levels exceed 3.0 parts per thousand for more than one hundred twenty (120) days during any rolling twelve (12) consecutive month period, the Company shall be liable to the Village for any resulting surcharges assessed by KLWTD if the excess salinity is predominantly caused by the Collection System designed and constructed by the Company hereunder and is not substantially caused in whole or in part by Customers or Customer sites and/or Uncontrollable Circumstances. In no event shall the Company be charged for a surcharge for a day or days on which the source of the excess salinity is caused in whole or in part by Customers or Customer sites and/or Uncontrollable Circumstances.

7.21.7 In the event that salinity levels exceed 3.0 parts per thousand for more than one hundred twenty (120) days during any rolling twelve (12) consecutive month period and the excess salinity is predominantly caused by the Collection System designed and constructed by the Company hereunder and is not caused substantially in whole or in part by Customers or Customer sites and/or Uncontrollable Circumstances, and the Company fails to reduce the salinity levels to below 3.0 parts per thousand after the one hundred twenty (120) day time period, the Village may take such actions as necessary, at the Company's expense, to reduce salinity levels of the Village's flows within its Wastewater Facilities; provided, however, the Village shall pay for such surcharge if the excess salinity is caused by Uncontrollable Circumstances and/or Non-Specification Influent originating from Customers or Customer sites.

7.21.8 The Company shall provide and install appropriate sampling locations for KLWTD to sample the Village's Wastewater to verify the Village's compliance with the salinity levels set forth in the KLWTD Agreement and this Agreement. The Company further agrees to keep the Wastewater Facilities in such repair or condition so that material infiltration and inflow will be controlled. The Company shall identify and address excess inflow and infiltration in its general maintenance, operation, and management program for the Wastewater Facilities.

7.22 Intentionally Deleted.

7.23 Changes in Scope for Operations Services.

7.23.1 A Change in Scope of services shall occur when and as the Company's costs of

providing Operations Services under this Agreement change as a result of:

7.23.1.1 any change in Project operations, personnel qualifications or staffing or other cost which is a result of an Uncontrollable Circumstance, Village Fault or KLWTD directed changes under the KLWTD Agreement; or

7.23.1.2 the Village's request of the Company and the Company's consent to provide additional services.

7.23.2 For Changes in Scope described above, the Village and the Company will negotiate an adjustment in the Service Fee compensation resulting from the Change in Scope.

## **ARTICLE VIII PERFORMANCE STANDARDS**

### **8.1     Design and Performance Standards.**

The Company represents and warrants that the Design/Build Work and the Capital Modifications designed and constructed by the Company will meet the performance criteria set forth in the Contract Standards and this Agreement. All design and engineering professional services performed to execute the Design/Build Work shall conform to the Contract Standards, the Pre-Design Requirements, the Design Documents, the Design Standard of Care, and Good Industry Practice.

### **8.2     Project Warranties.**

Except with respect to materials and Equipment, which are warranted under standard manufacturer's warranties, the Company warrants to the Village that all Design/Build Work shall be of good quality, for its intended use, and free from defects in materials and workmanship and in conformity with the Contract Standards and this Agreement, for a period of one (1) year from the Acceptance Date of the entirety of the Project and Wastewater Facilities, or one (1) year from the date of Final Completion for any work performed between the Acceptance Date and Final Completion, or such longer period of time as may be required by Applicable Law (the "Warranty Period"). This warranty shall apply to all Design/Build Work performed, regardless of whether the Design/Build Work was furnished or performed by the Company or any of its Subcontractors. Nothing contained herein shall be construed to establish a period of limitation with respect to any other obligation which the Company or Surety on Bonds might have under the Contract Standards, Contract Documents or Payment and Performance Bonds, and any claim for latent defects under Applicable Law. That portion of the Design/Build Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective by the Village and shall promptly be repaired and/or replaced by the Company on demand from the Village. The Company's warranty shall exclude normal wear and tear under normal usage.

The Company shall, for the protection of the Village, obtain from all Subcontractors, vendors, suppliers and other persons from which the Company procures structures, improvements, fixtures, machinery, Equipment, facilities and materials to be incorporated in the Project and the Wastewater Facilities such warranties and guarantees as are standard and customarily provided with respect thereto and as are specifically required in the Contract Standards, each of which shall be assigned to the Village to the full extent of the terms thereof. No such warranty shall relieve the Company of any obligation hereunder, and no failure of any warranted or guaranteed structures, improvements, fixtures, machinery, Equipment, facility or material shall be the cause for any increase in the Design/Build Price or the Service Fee or excuse any nonperformance of the Design/Build Work unless such failure is itself attributable to an Uncontrollable Circumstance. The Company makes no warranties as to the NPK Facilities that are existing at the time of this Agreement, and not designed or constructed by the Company as part of the Design/Build Work.

### 8.3 Material Warranties.

The Company represents and warrants to the Village that materials and Equipment furnished for the Project any and all Wastewater Facilities and Capital Modifications shall be of new and good quality and that the Design/Build Work shall conform to the Contract Standards and this Agreement. The Village shall be provided with the standard manufacturer's warranties on all materials and Equipment (which shall in no event be less than one (1) year)), with all such warranties commencing on the Acceptance Date of said materials or Equipment by the Village, or such longer period of time as may be required by the terms of the Contract Standards or Applicable Law. If required by the Village, the Company shall furnish satisfactory evidence as to the kind and quality of materials and Equipment used or installed. Selection and incorporation of the Equipment and materials into the Design/Build Work shall be in conformance with the Contract Standards, unless otherwise specifically agreed to by the parties.

Any such warranties which may be held by the Company shall be automatically, and without further action by the parties, deemed transferred to the Village upon termination or expiration of this Agreement. However, the Company shall, upon written request by the Village, execute written assignments of any and all such warranties. The Company shall satisfy all requirements, including but not limited to maintenance obligations, of said warranties so that they remain in full force and effect for the maximum duration of the warranty.

### 8.4 Enforcement.

During the progress of the Design/Build Work and the Warranty Period or thereafter as may be applicable, the Company shall, at its sole cost and expense, promptly make any and all repairs or replacements resulting from defects in design, construction, materials or workmanship in the Design/Build Work pursuant to Section 8.2, and remedy or correct defective or non-conforming Design/Build Work. The Company shall make repairs and replacements, and remedy or correct defective or non-conforming Design/Build Work, promptly upon receipt of written notification from the Village. If the Company fails to make the repairs and replacements promptly, the Village may repair or replace the defective element



of the Design/Build Work and the Company shall be liable to the Village for the cost thereof, together with an administrative fee of fifteen percent (15%) of the cost of the repairs or replacement work. The cost to the Company of performing any of its warranty obligations under this Article VIII shall be at the Company's sole cost and expense, and within the fixed Design/Build Price. The Company's obligations to make repairs, replacements and to remedy and correct defective or non-conforming Design/Build Work under this Article VIII shall be in addition to the Company's obligations to the Village for any other remedies or damages of any kind for which the Company would be responsible for under this Agreement and Applicable Law, including damages suffered by the Village as a result of the defective or non-conforming Design/Build Work.

## **ARTICLE IX COMPENSATION**

### **9.1     Compensation for Services**

For the Contract Services provided pursuant to this Agreement, the Village shall pay the Company the Design/Build Price for the Design/Build Work and the Service Fees for the Operations Services, as set forth herein and in Appendix 6 attached to this Agreement. For the Interim Operations Services for NPK Facilities, the Village shall pay the Company the Interim Service Fees for the NPK Facilities, as set forth in Appendix 6 to this Agreement.

### **9.2     NPK Facilities; Interim Service Fee.**

The Company shall operate and maintain the NPK Facilities from the Commencement Date of Operations for NPK Facilities in accordance with the requirements set forth in this Agreement. The Company agrees that the Interim Service Fee set forth in Appendix 6 to this Agreement shall be the compensation and reimbursement due and payable to the Company for the Interim Operation Services for the NPK Facilities.

### **9.3     Design/Build Price.**

9.3.1 Design/Build Price Generally. The Village shall pay the Company the fixed Design/Build Price for the Design/Build Work in accordance with the terms of this Section and Appendix 6 to this Agreement. The fixed Design/Build Price, as may be adjusted by any Design/Build Price Adjustment as set forth in subsection 9.3.3 of this Section and Article X, shall be the Company's entire compensation and reimbursement for the performance of the Design/Build Work and the design and construction capital costs including, but not limited to: the costs of design and engineering, Governmental Approvals and permitting, insurance, bonding, construction of the Wastewater Facilities, obtaining all Utilities that the Company will require to perform the Design/Build Work, commissioning and Acceptance and Start Up Testing of the Wastewater Facilities, correcting all non-conforming Design/Build Work, operating the Wastewater Facilities during the Acceptance and Start Up Tests and prior to the Acceptance Date.

9.3.2 Fixed Design/Build Price. The fixed Design/Build Price is Ninety Million, Nine Hundred Thousand and No/100 Dollars (\$90,900,000.00). Except as provided in subsection 9.33 below, the fixed Design/Build Price shall not be subject to adjustment in any manner whatsoever. The fixed Design/Build Price is inclusive of all taxes payable in connection with the performance of the Design/Build Work, including all sales taxes and business taxes.

9.3.3 Design/Build Price Adjustments. Each adjustment to the fixed Design/Build Price provided in this subsection shall be deemed a “Design/Build Price Adjustment” and shall be reflected in a Change Order approved by the Village. The fixed Design/Build Price shall be adjusted only for the following:

9.3.3.1 Adjustment for Change Orders. The fixed Design/Build Price shall be adjusted to account for the cost (increase or decrease) of any Change Order issued by the Village with respect to the Design/Build Work pursuant to Article X.

9.3.3.2 Adjustment for Uncontrollable Circumstances. The fixed Design/Build Price shall be equitably adjusted to account for costs resulting from Uncontrollable Circumstances not reflected in Subsection 9.3.3.1 above. In the event either party is rendered unable, wholly or in part, to carry out its respective obligations under this Agreement or is delayed due to an Uncontrollable Circumstance, except for any obligations to make payment or continue performance of obligations not affected by the Uncontrollable Circumstance, then the affected obligations of such party shall be suspended during the period of the Uncontrollable Circumstance. Every reasonable effort shall be made by the parties to avoid delay and limit any period during which such affected obligations might be suspended. In the event of an Uncontrollable Circumstance, the Company shall be entitled to an equitable adjustment in the Design/Build Price and/or in the Project Schedule by Change Order.

9.3.4 No Service Fee Payment Prior to Acceptance. Prior to the Acceptance Date, the Company shall not be entitled to payment of the Service Fees for the Operations Services, except for the Interim Service Fees with respect to the Interim Operations of the NPK Facilities. All costs for design, construction through Final Completion, permitting, commissioning, Acceptance and Start Up Testing, and operation of the Wastewater Facilities through the Acceptance Date, including costs for labor, materials, chemicals and Utilities, shall be borne by the Company and have been priced into the fixed Design/Build Price, which shall be payable to the Company in accordance with this Section.

9.3.5 Provisionary Allowance for Complete Asphalt Overlay of Village Roads and Streets. The Village may allocate an amount over and above the Design Build Price in a fixed sum for the Village’s Provisionary Allowance for Complete Asphalt Overlay of Village Roads and Streets in an amount designated in Appendix 6. This sum shall be for the Village’s use to pay the Company for the costs to complete the pavement survey, evaluation, and asphalt overlay as described herein under Section 6.1.21. Should the Village and the Company negotiate an acceptable scope and fee to complete this complete asphalt overlay of Village roads and streets, the Company shall receive a Change Order in accordance with Article X.

#### 9.4 Payment Procedure.

9.4.1 Progress Payments. The Design/Build Price shall be payable to the Company on a monthly basis and in accordance with the process set forth in this Section. The Company shall prepare Progress Payment Requests, which shall consist of an updated Project Schedule, an update of the approved Schedule of Values attached hereto in Appendix 6 indicating the work progressed through the reporting period, and payment request forms in accordance with Section 01152 of the Design Standards Manual. The Owner's Representative shall use the prices contained in the approved Schedule of Values as a basis for confirming the Progress Payment Request. If any such prices or progress do not, in the judgment of the Owner's Representative or Village, represent the actual relative costs of the different parts of the work performed and completed to date, the Owner's Representative or Village will require the Company to revise the Progress Payment Request accordingly until it is acceptable to the Owner's Representative and the Village.

9.4.2 Construction Disbursement; Progress Payment Requests. Following Notice to Proceed with the Design/Build Work, the Company shall be entitled to submit Progress Payment Requests on a monthly basis and receive from the Village partial payments of the Design/Build Price which: (i) shall be made only upon completion of a milestone, or completion of demonstrated progress in the work against the final Schedule of Values (such Schedule of Values to be provided to the Village for approval no later than sixty (60) days after the Contract Date and incorporated into this Agreement as Appendix 6) required to be completed as the basis for payment as set forth in Appendix 6 attached hereto; and (ii) shall be subject to the conditions to payment and information required to support each Progress Payment Request as set forth in this Section. The Company shall submit each Progress Payment Request to the Village, with copies to the Owner's Representative and Contract Administrator, with the following information required to support each Progress Payment Request:

- (i) a verified statement setting forth the information required under Applicable Law pertaining to prevailing wages; and
- (ii) a detailed description of all Design/Build Work completed through the date of the Progress Payment Request or to date;
- (iii) revisions to the progress schedule (or a revised progress schedule) which shall reflect changes in the Company's construction schedule since the date of the last Progress Payment Request;
- (iv) revisions to the cost-loaded CPM or Project Schedule, which shall reflect changes in the CPM or Project Schedule since the date of the last Progress Payment Request;
- (v) construction progress photographs;
- (vi) a signed and sealed certificate of the Company certifying: (a) the portion of the Design/Build Price which is payable to the Company; (b) that the Company is neither in default under this Agreement nor in breach of any material provisions of this Agreement such that the breach would, with the giving of notice or passage of time, constitute an Event of Default; and (c) that all items applicable to the Design/Build Work entitling the

Company to the requested payment under the Schedule of Values in Appendix 6 have been completed in accordance herewith and the Contract Standards;

- (vii) notice of any encumbrance or lien which may have been filed, together with evidence that the Company has discharged or bonded against such encumbrance or lien;
- (viii) satisfactory evidence that all labor and materials furnished through the date of the preceding Progress Payment Request have been fully paid, including the following: (a) partial waivers or releases of lien upon the Progress Payment executed in the form acceptable to the Village, from all first tier Subcontractors, for payment immediately through the preceding Progress Payment Request in the amount of the requested payment, plus all amounts of the Design/Build Price paid to the Company to the date of the Progress Payment Request, or if any Subcontractor refuses or fails to furnish such waiver or release, a bond or other security acceptable to the Village to indemnify the Village against any payment claim, (b) Company's Progress Payment Request Affidavit and Partial Release of Lien executed in the form acceptable to the Village from the Company; and
- (ix) any other documents or information relating to the Design/Build Work reasonably requested by the Village, the Contract Administrator or the Owner's Representative or as may be required by Applicable Law or this Agreement.

**9.4.3 Review and Payment of Progress Payment Requests.** The Village, Contract Administrator and the Owner's Representative shall review the Company's certified Progress Payment Request to the Village for each Design/Build Price payment and within five (5) days of receipt of the Company's Progress Payment Request delivered pursuant to this Section shall verify or dispute in writing the Company's certification that the Company has achieved the level of progress in the work or milestone indicated and is entitled to payment. If the Contract Administrator and Owner's Representative determine that the work has progressed as indicated in the Company's certified Progress Payment Request and the Contract Administrator and the Owner's Representative provide written notice thereof to the Company and the Village, the Village shall pay the Company within twenty one (21) days following such determination, subject to the Village's right to dispute payment in accordance with this Agreement and Applicable Law. Disputes regarding payments of the Design/Build Price shall be resolved in accordance with Section 9.4.4 herein below.

**9.4.4 Disbursement Dispute Procedures.** If the Contract Administrator and Owner's Representative determine, pursuant to subsection 9.4.3 of this Section, that the work required for any payment has not progressed as indicated by the Company or otherwise disputes any Progress Payment Request, the Contract Administrator and Owner's Representative shall provide within five (5) days written notice to the Company and the Village as to the Contract Administrator's and Owner's Representative's reasons, in reasonable detail, for such determination or the basis for such dispute. After receiving such determination notice, the Company may make the necessary corrections and resubmit a certified Progress Payment Request to the Contract

Administrator and Owner's Representative, or the Contract Administrator and Owner's Representative may agree on a revised amount, Progress Payment Request or estimate, as applicable, in which case the Company shall promptly notify the Village of such agreement. If the Company is unable to reach agreement with the Contract Administrator and Owner's Representative as to the progress of work or other dispute, the Company may exercise its right to contest the Contract Administrator's and Owner's Representative's determination in accordance with the dispute resolution procedures set forth in Article XIV. Any proceedings undertaken to resolve a dispute arising under this subsection shall immediately terminate if: (i) the Company demonstrates to the Contract Administrator and the Owner's Representative that the work has proceeded to the percentage completion or milestone indicated in the certified Progress Payment Request giving rise to the dispute or that any disputed certified Progress Payment Request is correct, and (ii) the Contract Administrator and Owner's Representative concur with such demonstration. The Company shall not be entitled to payment of the amount so requested and disputed except upon resolution of the dispute in accordance with this subsection.

9.4.5 Retainage. Each partial payment will be subject to a ten percent (10%) retainage holdback until certification by the Engineer of Record and Design/Build Manager and confirmation by the Contract Administrator and Owner's Representative that construction of the Project has reached fifty percent (50%) completion. For purposes of this Section, "fifty percent (50%) completion" shall mean the point at which (i) the Village has expended fifty percent (50%) of the total costs of the Design/Build Price, and (ii) main line vacuum piping have been installed in front of fifty percent (50%) of the Village Service Area included in the Design/Build Work being installed by the Company. After fifty percent (50%) completion, each partial payment will be subject to a five percent (5%) retainage holdback. The Company may include an amount up to fifty percent (50%) of the amount of retainage withheld from all prior partial payments in its Progress Payment Request to the Village following certification by the Engineer-of-Record and Design/Build Manager and confirmation by the Contract Administrator and Owner's Representative that construction of the Project is fifty percent (50%) complete. The Village shall pay the Company up to fifty percent (50%) of such retainage held as part of the Progress Payment Request in accordance with this Section, provided, however, that the Village shall not be required to pay any retained amount that is the subject of a good faith dispute, the subject of a claim brought pursuant to Section 255.05, Florida Statutes, or otherwise the subject of a claim or demand by the Village or the Company.

The Village shall release to the Company the accumulated funds retained from all prior partial payments (excluding interest earned or accrued) upon receipt of certification from the Engineer-of-Record and the Design/Build Manager and confirmation by the Contract Administrator and Owner's Representative that Acceptance has occurred pursuant to Article VI; provided, however, that to the extent items are contained on the Final Punch List, the Village, the Contract Administrator and the Owner's Representative shall reasonably estimate the cost to make each correction or to complete each such item and the Village shall be entitled to withhold from payment of the retained funds an amount equal to 150% of the aggregate value of such items, in addition to the amount of unresolved or unbonded claims by third parties or encumbrances or liens in connection with the Design/Build Work. Upon certification by the Contract Administrator and Owner's Representative that Final Completion has occurred and so long as authority contained in the Governmental Approvals to operate the Wastewater Facilities

remains unimpaired, the Village shall release to the Company all remaining retained funds, excluding any interest accrued on the amount of the retained funds which interest shall be for the account of the Village.

9.4.6 Permissible Withholdings. The Village may disapprove and withhold and retain all or any portion of any payment requested in any Progress Payment Request in an amount equal to the sum of:

- (i) any amounts which are permitted under this Section to be withheld from any payment requested in any Progress Payment Request;
- (ii) any amounts which the Company is required to reimburse the Village pursuant to this Agreement;
- (iii) any delay liquidated damages which are payable to the Village pursuant to this Agreement;
- (iv) any indemnification or other amounts which are due and owing to the Village pursuant to this Agreement;
- (v) any other deductions which are required by Applicable Law;
- (vi) any payments with respect to which documents to be delivered in connection therewith are not correct and complete;
- (vii) any amount equal to the cost to the Village of performing any work in the event of a failure by the Company to timely perform its obligations pursuant to this Agreement;
- (viii) any payments with respect to which the Design/Build Work covered by such Progress Payment Request (or any previous Progress Payment Request) does not comply with this Agreement;
- (ix) any payments with respect to which any person has asserted a lien resulting from the acts or omissions of the Company in performing the Design/Build Work and such lien remains unreleased or unbonded;
- (x) all requisitioned payments, if an Event of Default of the Company has occurred under Article XIV of this Agreement; and
- (xi) in the event the Company fails to pay any taxes, assessments, penalties or fees imposed by any Governmental Authority, then the Company authorizes the Village to deduct and withhold or pay over to the appropriate Governmental Authority those unpaid amounts upon demand by the Governmental Authority; and

9.4.7 Final Payment Request and Payment.

9.4.7.1 Final Payment Request. Upon achieving Final Completion in accordance with Section 6.18, the Company shall prepare and submit to the Village a final Progress Payment Request. The final Progress Payment Request shall include:

- (i) AIA Document G707 (Consent of Surety Company to Final Payment) certifying the surety agrees that final payment of the Design/Build Price shall not relieve the Surety of any of its obligations under the Performance Bond or the Payment Bond;

(ii) a signed and sealed certificate of the Engineer of Record certifying: (a) that the Design/Build Work has achieved Final Completion in accordance with Section 6.18 and that the portion or balance of the Design/Build Price is payable to the Company; (b) that the Company is neither in default under this Agreement nor in breach of any material provisions of this Agreement such that the breach would, with the giving of notice or passage of time, constitute an Event of Default; and (c) that all items applicable to the Design/Build Work entitling the Company to the requested final payment under the Schedule of Values in Appendix 6 have been completed in accordance herewith and the Contract Standards;

(iii) notice of any encumbrance or lien which may have been filed, together with evidence that the Company has discharged or bonded against such encumbrance or lien;

(iv) satisfactory evidence that all labor and materials furnished through the date of the preceding Progress Payment Request have been fully paid, including the following: (a) final waivers or releases of lien for the Design/Build Work upon the final payment in the full amount of Design/Build Price executed in the form acceptable to the Village, from all first tier Subcontractors, for all payments immediately through the preceding final Payment Request in the amount of the requested payment, plus all amounts of the Design/Build Price paid to the Company to the date of the final Payment Request, or if any such Subcontractor refuses or fails to furnish such waiver or release, a bond or other security acceptable to the Village to indemnify the Village against any payment claim, (b) Company's Final Payment Affidavit and Release of Lien executed in the form acceptable to the Village;

(v) a list of any and all pending property damage and personal injury or death insurance claims arising out of or resulting from the Design/Build Work, identifying the claimant and the nature of the claim; and

(vi) any other documents or information relating to the Design/Build Work reasonably requested by the Village, the Contract Administrator or the Owner's Representative or as may be required by Applicable Law or this Agreement.

9.4.7.2 Final Payment. If based on the Contract Administrator's and Owner's Representative's (i) observation of the Design/Build Work, (ii) final inspection, and (iii) review of the final Progress Payment Request and other documents required by subsection 9.4.7.1 of this Section, the Contract Administrator and Owner's Representative are satisfied that conditions for Final Completion have been satisfied, the Contract Administrator and Owner's Representative shall, within fifteen (15) days after receipt of the final Progress Payment Request, furnish to the Village and the Company the Contract Administrator's and Owner's Representative's recommendation of final payment and Final Completion. If the Contract Administrator and Owner's Representative are not satisfied, the Contract Administrator and Owner's Representative shall return the final Progress Payment Request to the Company, indicating in writing the

reasons for not recommending final payment, in which case the Company shall make the necessary corrections and resubmit the final Progress Payment Request.

(i) Village Concurrence. If the Village concurs with the Contract Administrator's and Owner's Representative's recommendation of final payment, the Village shall, within thirty (30) days, file a written notice of Final Completion and notify the Company and the Contract Administrator and Owner's Representative of such acceptance. As soon as reasonably practicable (but in no event later than forty-five (45) days after the Village's original receipt of the Company's final Progress Payment Request, subject to the Village's right to dispute payment in accordance with this Agreement and Applicable Law) after filing such notice, the Village shall pay to the Company the balance of the Design/Build Price, subject to any withholdings and any other provisions governing final payment specified herein.

(ii) Village Non-Concurrence. If the Village does not concur with the Contract Administrator's and Owner's Representative's determination, the Village shall return the Progress Payment Request to the Company, through the Contract Administrator and Owner's Representative, indicating in writing its reasons for refusing final payment and Final Completion. The Company shall promptly make the necessary corrections and resubmit the Progress payment Request to the Contract Administrator and Owner's Representative. The Village's written determination shall bind the Company, unless the Company delivers to the Village, through the Contract Administrator and Owner's Representative, written notice of a claim within thirty (30) days after receipt of that determination.

Final payment does not constitute a waiver by the Village of any rights relating to the Company's obligations under this Agreement. Final payment constitutes a waiver of all claims by the Company against the Village relating to the Design/Build Work, the payment of the Design/Build Price or otherwise in connection with the Design/Build Period other than those previously filed in writing with the Village on a timely basis and still unsettled.

## 9.5 Audit Books and Records.

9.5.1 Audit. All payments by the Village to the Company and all Work of the Company shall be subject to audit at any time by the Village.

9.5.2 Books and Records. The Company shall prepare and maintain proper, accurate and complete books and records regarding the Work and all other transactions related to the design, permitting, construction, and testing of the Work, including all books of accounts, bills, vouchers, invoices, personnel rate sheets, cost estimates and bid computations and analyses, Subcontracts, purchase orders, time books, reports, correspondence, and any other documents showing all acts and transactions in connection with or relating to or arising by reason of the Work, this Agreement, any Subcontract or any operations or transactions in which the Village has or may have a financial or other material interest hereunder. All financial records of the Company and its Subcontractors shall be maintained in accordance with generally accepted



accounting principles and auditing standards for municipal and governmental institutions. The Company and Subcontractors shall comply with the State of Florida audit requirements and federal audit requirements in connection with any State of federal funding or grants received by the Village for the Project. Except as otherwise required by Applicable Law, the Company shall produce such books and records (except financial ledgers and statements) for examination and copying. The Company shall keep and maintain all such books and records separate from other records and accounts, and shall maintain such books and records for at least five (5) years after Acceptance by the Village, or such longer period of time during which any legal proceeding with respect to the Work may be pending.

#### 9.6 Service Fees.

During the Interim Operations Period for the NPK Facilities, the Village will pay the Company on a monthly basis the Interim Service Fee for NPK Facilities, as set forth in Appendix 6 (prorated for the number of remaining days in the month in which the Interim Operations Services occur) until such time as the NPK Wastewater Treatment Plant is decommissioned.

Beginning upon the Commencement Date of Operations of Wastewater Facilities, the Village will pay the Company on a monthly basis the Service Fee described in Appendix 6 (prorated for the number of remaining days in the month in which the Commencement Date of Operations of Wastewater Facilities occurs). The Service Fee for the Project is allocated by operational components and is comprised of the following:

9.6.1 Fixed O&M Fee. The Fixed O&M Fee represents the Company's maximum and fixed operations and maintenance fee for the Wastewater Facilities, stated annually, as set forth in Appendix 6 attached to this Agreement. The Fixed O&M Fee shall include the fixed operations and Maintenance and Repair costs of the Wastewater Facilities, regardless of actual wastewater flowing through the Wastewater Facilities or transmitted for treatment to the KLWTD. The Fixed O&M Fee shall be exclusive of electricity and customer billing costs, and shall include the fixed portion of the Maintenance and Repair of the Wastewater Facilities for the Operations Term of this Agreement. The Fixed O&M Fee shall be prorated in the month of the Commencement Date of Operations of Wastewater Facilities.

#### 9.6.2. Annual Fee Adjustment of Service Fee.

The Service Fee identified in Appendix 6 shall be adjusted effective the first day of each Contract Year based on the following formula:

$$\text{Adjusted Annual Fee} = \text{Current Period Annual Fee} \times [1 + \% \text{ CPI Increase}/95\%], \text{ with a floor of zero (0) and a cap of five percent (5\%)}$$

Where,

CPI = The final non-seasonally adjusted Consumer Price Index, for All Items, All Urban Consumers for Miami-Ft. Lauderdale, FL as reported by the U.S. Department of Labor, Bureau of Labor Statistics.

%CPI Increase = The change in the CPI for the most recent June period prior to the Annual Fee Adjustment compared to the previous June CPI as expressed as a percentage (e.g. 3.0%).

The initial Annual Fee Adjustment shall not apply prior to or during the Contract Year in which the Commencement Date of Operations of Wastewater Facilities occurs. The Annual Fee Adjustment shall not apply to the Interim Service Fee for the NPK Facilities. If the final value of the CPI Index is not available for the applicable period when required hereunder, the amount of the adjustment to be made shall be estimated by using the preliminary value of the CPI Index for the applicable period or the final value of the CPI Index for the latest available period. All calculations and payments based on such estimate shall be adjusted as soon as reasonably practicable after the final value of the CPI Index for the applicable period is published. If the CPI Index is no longer published at the time that adjustment is to be calculated, or if the base or method of calculation used for the CPI Index is altered, the calculation shall be made using a comparable similar index or method mutually agreed upon by the Company and the Village.

9.6.3 Renewal and Replacement Fund. The Renewal and Replacement Fund represents the annual funds budgeted by the Village in a separate and segregated account for the purpose of accruing funds for the Renewal and Replacement of major Equipment and components of the Wastewater Facilities. The detailed annual Renewal and Replacement Schedule attached to this Agreement as Appendix 11 identifies the replacement cost and year for each major Equipment and component of the Wastewater Facilities, including Equipment, systems, and structures during the Term of the Agreement. The Renewal and Replacement Fund is intended to accrue reserves dedicated to fund the Renewal and Replacement Schedule included as Appendix 11.

#### 9.7 Guaranteed Maximum Electricity Utilization.

All electricity costs for the operation of the Wastewater Facilities shall be paid directly by the Village; however, the Company shall guarantee that the electricity usage of the Wastewater Facilities shall not exceed the Guaranteed Maximum Electricity Usage as set forth in Appendix 7 to this Agreement. In the event the actual electricity usage of the Wastewater Facilities in any calendar quarter exceeds the Guaranteed Maximum Electricity Usage, the Company shall be responsible for one hundred percent (100%) of the excess usage (based on the average rate per kilowatt-hour paid by the Village during any applicable calendar quarter), and such amount shall be an offset to the Service Fee payable in the month following the calculation of such overage, if any. The review and calculation of any excessive electricity usage shall be completed by the Village after the conclusion of each Contract Year, with a separate calculation for each of the four (4) quarterly periods within such Contract Year

(i.e. January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through December 31).

9.8 Other Expenses.

Costs for Non-Routine Services and Additional Engineering and Technical Services provided by the Company shall be paid by the Village to the Company separately on a time and expense basis, if previously approved by the Village in writing, including overtime. Materials will be paid by the Village to the Company at cost plus 10% on the actual cost of materials to reimburse the Company for administrative expenses. The Company shall not purchase any such supplies or services from any person, firm, corporation or entity related or affiliated with the Company unless (i) the prior written approval thereof by the Village is obtained (following a complete disclosure of all material information by the Company), and (ii) the compensation, price or fee paid to such person, firm, corporation or entity for the merchandise, services or other property purchased is comparable and competitive with the compensation, price or fee which would be chargeable in a bona fide, arm's-length transaction by an unaffiliated person rendering comparable services or selling or leasing comparable goods to entities conducting a business similar to that conducted by the Company.

9.9 Payment.

The Company shall provide invoices to the Village by the tenth day of the month for the monthly installments of the Service Fees and such other expenses as are incurred for the previous month. Payment shall be made by the Village in accordance with the Florida Prompt Payment Act. In the event that any portion of the Company invoice is disputed by the Village, the Village shall pay that portion of the invoice which is not disputed and promptly proceed with dispute resolution as provided in this Agreement. If any payment required to be made by either party hereunder is not paid when due, such payment may bear interest thereon from the date such payment was due to the date of receipt of payment by the party owed.

9.10 Change Orders.

All Changes in the Work authorized by applicable Change Order shall be performed in accordance with the general requirements for the Design/Build Work set forth in this Agreement and in accordance with Article X. The Village and the Company shall negotiate appropriate adjustments for changes in good faith and as expeditiously as possible.

9.11 Minor Changes in the Scope of Work.

The Company may make minor changes in the Design/Build Work consistent with the Contract Standards and intent of this Agreement, upon approval of the Village and the Owner's Representative, in writing, of any such changes and the Company shall record such changes on the As-Built documents maintained by the Company. Minor changes in the Design/Build Work do not involve an adjustment in the Design/Build Price and/or Contract Time and do not materially or adversely affect the Design/Build Work, including the design,

quality, performance and workmanship required by the Contract Standards and this Agreement.

9.12 Emergencies.

In any emergency affecting the safety of persons and/or property, or the safety and proper operation of the Wastewater Facilities, the Company shall act, in its reasonable discretion, to prevent threatened damage, injury or loss to persons or property. The parties shall negotiate in good faith an equitable Change Order to the Design/Build Price, Operations Fee and/or Contract Time, as appropriate, to reimburse the Company for the emergency work.

**ARTICLE X  
CHANGES IN THE DESIGN/BUILD WORK**

10.1 Changes in the Work.

10.1.1 The Village may, at any time, by written order designated or indicated to be a Change Order, make any change or modification in the Design/Build Work or add to the Design/Build Work within the general scope of this Agreement, including, but not limited to changes:

- (i) in the Specifications or Drawings;
- (ii) in the sequence, method or manner of performance of the Design/Build Work;
- (iii) in any Village-furnished facilities, equipment, materials, services or Sites;
- (iv) directing acceleration in the performance of the Design/Build Work;
- (v) in the Design/Build Work or Operations Services which is a result of a material change caused by an Uncontrollable Circumstance or Change in Law.

10.2 Changes in the Design/Build Work.

10.2.1 Village Directed Changes Requiring An Increase In Design/Build Price.

No change in the Design/Build Price or Contract Time may be made except by a duly authorized and executed written Change Order. The Village may request and negotiate changes in the Design/Build Work by delivering to the Company a Request For Quotation describing the change being considered and requesting the Company to submit a proposal for an adjustment in the Design/Build Price and/or Contract Time. The Company's response to the Request For Quotation shall be submitted to the Village within ten (10) days, or other reasonable period as mutually agreed, of the Company's receipt of the Village's request. If the Change in the Work, or addition to the Design/Build Work, will result in an increase in the

Design/Build Price, the Village shall have the right to require the performance thereof on a lump sum basis, a time and material basis, or all as hereinafter more particularly described (the right of the Village as aforesaid shall apply with respect to each such Change in the Work).

10.2.2 Lump Sum Changes. If the Village elects to have the Change in the Work performed on a lump sum basis, its election shall be based on a lump sum proposal submitted by the Company to the Village. The Company's proposal shall be itemized and segregated by labor and materials for the various components of the Change in the Work (no aggregate labor total will be acceptable) and shall be accompanied by signed proposals of any Subcontractors who will perform any portion of the Change in the Work and of any persons who will furnish materials or equipment for incorporation therein. The proposal shall also include the Company's estimate of the time required to perform said changes or additional work.

10.2.3 Time and Materials Changes. If the Village elects to have the Change in the Work performed on a time and materials basis, the same shall be performed, whether by the Company's forces or the forces of any of its Subcontractors, at actual costs to the entity performing the Change in the Work, plus the following markups for overhead and profit:

10.2.3.1 The portion of the proposal relating to construction labor, whether by the Company's forces or the forces of any of its Subcontractors, may include reasonably anticipated payroll costs of job site labor, including foremen, who will be directly involved in the Change in the Work (for such time as they will be so involved). Payroll costs shall include salaries and wages, plus the costs of fringe benefits which shall include social security contributions, unemployment, excise and payroll taxes, workers' compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. The expenses of performing work after regular working hours shall be included in the above to the extent authorized by the Village, and up to fifteen percent (15%) of such anticipated gross wages, but not payroll costs, as overhead and profit for the Company or any such Subcontractor, as applicable (said overhead and profit to include all supervision except foremen).

10.2.3.2 The portion of the proposal relating to design professional services may include the actual direct salary of those directly involved in the Change in the Work times a direct salary multiplier of 3.0.

10.2.3.3 The portion of the proposal relating to materials may include the reasonably anticipated direct costs to the Company or to any of its Subcontractor of materials and equipment to be purchased for incorporation in the Change in the Work, plus transportation and applicable sales and use taxes and up to fifteen percent (15%) of said direct material costs as overhead and profit for the Company or any such Subcontractor (said overhead and profit to include all small tools), and may further include the Company's and any of its Subcontractor's reasonably anticipated rental costs in connection with the Change in the Work (either actual or discounted local published rates), plus up to fifteen percent (15%) thereof as overhead and profit for the Company or any such Subcontractors, as applicable.

10.2.3.4 Where one or more tiers of Subcontracts are on the basis of the Change, the intent of this Section is that the Subcontractor who actually performs or furnishes the work, at whatever tier, will be paid a fee of fifteen percent (15%) of the costs incurred by such Subcontractor and that any higher tier Subcontractor and the Company will each be paid a fee of ten percent (10%) of the amount paid to the next lower tier Subcontractor.

10.2.3.5 The Company shall submit to the Village daily time and material tickets, to include the identification number assigned to the Change in the Work, the location and description of the Change in the Work, the classification of labor employed (and names), the materials used, the equipment rented (not tools) and such other evidence of cost as the Village may require. The Village may require authentication of all time and material tickets and invoices by persons designated by the Village for such purpose. The failure of the Company to secure any required authentication shall, if the Village elects to treat it as such, constitute a waiver by the Company of any claim for the cost of that portion of the Change in the Work covered by a non-authenticated ticket or invoice; provided, however, that the authentication of any such ticket or invoice by the Village shall not constitute an acknowledgment by the Village that the items thereon were reasonably required for the Change in the Work.

10.2.4 In the event the Company fails to submit its proposal within the designated period, the Village may order the Company to proceed with the Change in the Work and the Company shall so proceed. The Village shall unilaterally determine the reasonable cost and time to perform the Design/Build Work in question, which determination shall be final and binding upon the Company in accordance with Section 10.2.6.

10.2.5 No overhead and profit will be paid by the Village on account of a Change in the Work except as specifically provided in this Agreement. Overhead and profit shall be deemed to include all costs and expenses which the Company or any of its Subcontractor's may incur in the performance of a Change in the Work, including administration, project management staff, general office overhead, tools and equipment, and which are not otherwise specifically recoverable.

10.2.6 Unilateral Changes. If in negotiations, the Village and Company are unable to agree on the adjustment in the Design/Build Price and/or Contract Time corresponding to any change in the Design/Build Work, the Village may issue a unilateral Change Order. Upon receiving such unilateral Change Order, the Company shall promptly proceed or continue with the Design/Build Work involved as required by the unilateral Change Order and the Design/Build Work will be performed on a time and materials basis in accordance with Section 10.2.3.

### 10.3 Company Notice of Change.

10.3.1 If the Company asserts that an Uncontrollable Circumstance has caused a Change in the Work, or addition to the Design/Build Work, which change causes a material increase or decrease in the Company's cost or the Contract Time required for the performance of any part of the Design/Build Work under this Agreement, the Company shall, within ten (10) days after becoming aware of such event, give the Village written notice as herein required.

Said notice shall include the instructions or circumstances that are the basis of the claim and the Company's best estimate of the cost impact on the Design/Build Price and the Contract Time involved.

10.3.2 If the Company intends to assert a claim under this Section, it must, within ten (10) days after receipt of a written Change Order under Subsection 10.2 above or the furnishing of a written notice under Subsection 10.3.1, submit to the Village a written statement setting forth the specific nature and cost of such claim, unless this period is extended by the Village. The statement of claim hereunder may be included in the notice under Subsection 10.3.1 above. The statement of claim shall include all direct impact costs associated with the Change in the Work, as well as the Company's estimate of the Project Schedule impact of the Change in the Work, if any.

#### 10.4 General Provisions Related To Changes in the Work.

10.4.1 Changes Requiring a Decrease in Design/Build Price. If the Change in the Design/Build Work will result in a decrease in the fixed Design/Build Price, the Village may request a quotation by the Company of the amount of such decrease for use in preparing a Change Order. The Company's quotation shall be forwarded to the Village within five (5) days of the Village's request, or other reasonable period as mutually agreed upon by the parties, and, if acceptable to the Village, shall be incorporated in the Change Order. If not acceptable, the parties shall make every reasonable effort to agree as to the amount of such decrease, which may be based on a lump sum properly itemized, on unit prices stated in the Agreement and/or on such other basis as the parties may mutually determine.

10.4.2 No claim by the Company for a Change in the Work hereunder shall be allowed if asserted after Final Completion and final payment of the Design/Build Price to the Company under this Agreement. Except as otherwise indicated in a Change Order, no claim relating to or flowing from a particular Change in the Work shall be allowed after execution of the Change Order relating to that Change in the Work.

#### 10.5 Regulated Site Conditions.

10.5.1 Should the Company encounter a Regulated Site Condition, the Company shall promptly give notice to the Village of such conditions before they are disturbed and proceed in the manner set forth in Section 12.8. The Village shall thereupon promptly investigate the conditions and, if they find that the conditions materially differ from those shown in this Agreement and constitute a Regulated Site Condition, the Village shall prepare and process a Change Order. Any material increase or decrease of costs in the Design/Build Price resulting from such Regulated Site Condition shall be adjusted in the manner provided herein for adjustments as to extra and/or additional work and Changes in the Work.

#### 10.6 Emergencies.

10.6.1 In any emergency affecting the safety of persons, property and/or the Wastewater Facilities, the Company shall act, in its reasonable discretion, to prevent threatened damage, injury or loss to persons or property. The parties shall negotiate in good faith an

equitable Change Order for the Design/Build Price and/or Contract Time, as appropriate, to reimburse the Company for the emergency work resulting in a material increase to the Design/Build Price.

#### 10.7 Changes in Contract Time.

The Company's time of performance shall be adjusted in accordance with the following Sections:

10.7.1 Excusable Delay. If an Uncontrollable Circumstance causes a material delay in the progress of the Design/Build Work by (a) adversely impacting the critical path of the Project Schedule for the Design/Build Work, or (b) delaying the Contract Time, then the time for performance of the Design/Build Work shall be equitably adjusted by Change Order, as appropriate. The Company shall give the Village prompt written notice of delays within ten (10) days of the time the Company becomes aware of such delay.

10.7.2 Reduction of Contract Time. If changes in the Design/Build Work, scope of Work or circumstances arise that warrant a reduction in the Contract Time, the parties shall enter into a Change Order mutually agreeing to an equitable reduction in the Contract Time.

10.8 Value Engineering. The Company is encouraged to develop, prepare, and submit to the Village value engineering change proposals (VECP's) voluntarily. The Company shall share in any savings realized from accepted VECP's, in accordance with the provisions herein.

10.8.1 A Value engineering change proposal (VECP) is a proposal that:

10.8.1.1 requires a Change Order to this Agreement (and any corresponding Change in Scope to the Operations Services) to implement; and

10.8.1.2 results in reducing the Design/Build Price (and any corresponding change or reduction in the Service Fee) without impairing essential functions or characteristics of the Project.

10.8.2 The Company shall include in each VECP the information described below:

10.8.2.1 A description of the difference between the Agreement requirement and the proposed requirement, the advantages and disadvantages of each VECP, including a justification when an item's function or characteristic is being altered and the effect of the change on performance, including any pertinent objective test data;

10.8.2.2 A list and analysis of the Agreement requirements that must be changed if the VECP is accepted, including suggested revisions;

10.8.2.3 Identification of the part of the Project to which the VECP applies;

10.8.2.4 A detailed cost estimate for the affected portions of the Agreement



requirement and the VECP. The cost reduction associated with the VECP shall take into account the Company's costs involved, including any amount attributable to Subcontractors;

10.8.2.5 A description and estimate of costs the Village would incur in implementing the VECP, such as testing and evaluation;

10.8.2.6 A prediction of any effects the proposed change would have on costs to the Village beyond the Contract Time or effects on the Operations Period, if any; and

10.8.2.7 A statement of the time by which the VECP must be accepted by Village in order to achieve the maximum cost reduction, noting any effect on the Contract Time and Schedule of Values.

10.8.3 The Village will notify the Company of the status of the VECP within twenty-one (21) days from the date of receipt. If additional time or information is required, the Village will notify the Company within such time and provide the revised expected date of the decision.

10.8.4 If a VECP is accepted, the Village will issue a deductive Change Order and the Change Order shall reflect that the Company shall receive fifty percent (50%) percent of the net savings to the Village.

10.8.5 The Company shall include an appropriate value engineering clause in all Subcontracts with Subcontractors.

10.8.6 The Village and the Company have agreed that certain opt out or vacant lots or parcels, at the Village's election, may not receive a valve pit or service connection, and such change shall not constitute a VECP.

## **ARTICLE XI RESPONSIBILITIES**

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

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

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

Each party shall provide timely reviews and approvals of all submissions consistent with the turnaround times set forth in the Project Schedule and this Agreement.

### **11.3 Site Agreements.**

The Village shall promptly approve the location of all Sites for the Wastewater

Facilities, including master lift stations or vacuum pump stations, transmission lines and Collection Systems. The Sites upon which the Wastewater Facilities will be located or installed are identified in Appendix 1 attached to this Agreement and have been pre-approved by the Village. The cost of all acquisition purchase price for land or property acquisition and closing costs (recording fees and title searches and policies) for the Sites identified in Appendix 1 shall be paid for by the Village with fee simple title and ownership to be vested in the Village. All due diligence incurred in connection with the acquisition of the Sites and design and construction of the Wastewater facilities thereon shall be paid for by the Company and are included in the Design/Build Price, including appraisals, surveys, Phase I environmental assessments, soil and geotechnical tests and borings.

The Company shall manage the process, on behalf of the Village, for the acquisition and attainment of all easements and rights-of-way in favor of the Village in the manner set forth in Appendix 1 necessary to place or install the Wastewater Facilities, including the attainment of utility easements on private roads or private property, and any lands required for temporary construction facilities or storage of materials and equipment. The process and the Company's responsibilities for the attainment of easements and rights-of-way on private roads and property are identified in Appendix 1. Should the parties fail to obtain easements on private roads or property in the manner described in Appendix 1 due to the unwillingness of the private property owner to grant an easement or similar right in favor of the Village, the Village shall initiate eminent domain or similar legal process to obtain such easement.

#### 11.4 Government Approvals and Permits.

The Village shall provide reasonable assistance to the Company in obtaining Governmental Approvals, permits, approvals and licenses that are the Company's responsibility for the Work under this Agreement and Applicable Law. However, the Village shall not be obligated to incur any third party costs or expenses with regard to the same.

#### 11.5 Compliance with Federal and State Laws and Village Policies.

The Company agrees to comply with all Applicable Law in the performance of this Agreement and in connection with the Project.

##### 11.5.1 Federal and State Laws.

The Village shall pay for or finance all or a portion of the Project with federal and/or State public funding sources, including SRF Loans provided through the FDEP, and ACOE Funds. Accordingly, the Company acknowledges and agrees to comply with all applicable requirements imposed by State and Federal requirements for design and construction contracts as provided in this Agreement and Applicable Law. The Village makes no representations that the RFP contained or this Agreement contains all of the applicable State and Federal requirements or provisions as required for funding of the Project. To the extent applicable to the Project and this Agreement for the design, construction and operation of the Wastewater Facilities, the Company shall comply with all applicable State and federal requirements and provisions, including but not limited to the following:

11.5.1.1 Federal and State Labor Standards Provisions; Prevailing Wages. In connection with any assistance or funding for the Project by the United States of America, including but not limited to SRF Loans or ACOE Funds, the Company shall comply with all applicable Federal and State Labor and Wage Laws for the construction of the Project, and applicable Federal Labor Standards Provisions (Davis-Bacon Act, Copeland Act, and Contract Work Hours and Safety Standards Act), including as set forth in the FDEP Supplementary Conditions (Construction) included as Appendix 19 to this Agreement. The Company acknowledges and agrees that the Project constitutes a public work of the Village for which prevailing wages for the construction of the Project shall be due and shall pay its workers prevailing wages. It shall be the Company's obligation to interpret and implement any prevailing wage requirements for the Project. Prevailing wages shall not apply to Operations Services, unless required by Applicable Law.

11.5.1.2 FDEP Supplementary Conditions (Construction). As may be required for SRF Loans and ACOE Funds, and other State and Federally assisted funding for the Project, the Company shall comply with the FDEP Supplementary Conditions (as applicable to Design/Build Projects and this Agreement), as set forth in Appendix 19 attached to this Agreement, including but not limited to compliance with the following:

- Minority Business Enterprises (MBE) and Women Business Enterprises (WBE) participation in the Project;
- Section 306 of the Clean Air Act (42 U.S.C., 1857(h)); Section 508 of the Clean Water Act (33 U.S.C. 1368); Executive Order 11738 (Administration of the Clean Air Act with respect to Federal contracts, grants on loans); and 40 CFR Part 15 prohibiting the use of facilities included in the U.S. Environmental Protection Agency's List of Violating Facilities;
- Debarment and Suspension (Executive Order 12549);
- Affirmative Action and Equal Employment Opportunity (Executive Order 11246; the Civil Rights Act of 1964; Department of Defense Directive 5500.11 issued pursuant thereto). The Company shall comply with all applicable State and federal laws pertaining to nondiscrimination which prohibit discrimination based on race, color, age, or national origin;
- Immigration Reform and Control Act of 1986 (State of Florida Executive Order 11-02);
- Army Regulation 600-7, entitled "Non discrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army."
- Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. 9601 et. seq., as amended (CERCLA);

- Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq., as amended (RCRA); and
- Americans with Disabilities Act of 1990, as amended.
- Occupational Safety and Health Act (OSHA);
- Trench Safety Act, Sections 553.60 through 553.64, Florida Statutes.

11.5.1.3 ACOE Funds. As applicable to any ACOE Funds received by the Village for the Project, the Company shall comply with all requirements and provisions contained in the ACOE Project Partnership Agreement between the Department of the Army and Islamorada for Technical and Financial Assistance for the Florida Keys Water Quality Improvement Program Regional Wastewater Treatment and Collection Facilities dated August 17, 2008, together with Amendment No. 1 thereto dated February 5, 2010, and attached to the RFP, and any further amendments as may be entered into from time to time between the Village and ACOE for grant funding of the Project. The Company acknowledges and agrees that the Project Partnership Agreements with ACOE require design and construction review and oversight of the Project by ACOE, and the Company shall comply with such requirements and cooperate with the Village and ACOE in such compliance. It is anticipated that the Project Partnership Agreements with ACOE will be modified to reflect the “Project” as defined therein consistent with the scope of Work or Project set forth in this Agreement.

11.5.1.4 Federal Aid Construction Contract Provisions (FHWA-1273). To the extent applicable to the Project, the Company shall comply with the Contract Provisions Federal-Aid Construction Contracts (FHWA - 1273) included in this Agreement as Appendix 20.

11.5.1.5 Compliance with Non-Discrimination Policy. In performance of this Agreement and during the Term, the Company agrees as follows:

(i). The Company will not discriminate against any employee, applicant for employment, Subcontractor, guest, visitor or invitee, because of race, religion, creed, color, sex, marital status, sexual orientation, political ideology, ancestry, national origin, or the presence of any sensory, mental or physical disability, unless allowed by Applicable Law as a bona fide occupational qualification. The Company shall post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

(ii). Subsection (i) above shall be interpreted in a manner that is consistent with the United States Constitution, the State Constitution and applicable State and federal statutes governing workplace discrimination. The terms used in this Section shall have the same meaning as defined in State statutes governing the same subject matter.

(iii). Nothing in this subsection shall be interpreted as prohibiting bona fide occupational qualifications consistent with applicable State and federal law and

reasonably necessary to the normal operation of Village employment or contracting. Nothing in this subsection shall be interpreted as prohibiting regulations and policies to prevent nepotism or conflicts of interest.

(iv). Nothing in this subsection shall be interpreted as prohibiting action taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the Village.

11.5.1.6 Prohibition against Contingent Fees. Pursuant to Section 287.055(6), Florida Statutes, this Agreement contains the following prohibition on contingent fees: “The architect (or registered surveyor and mapper or professional engineer, as applicable) warrants that he or she has not employed or retained any company or person, other than a bona fide employee working solely for the architect (or registered surveyor and mapper, or professional engineer, as applicable) to solicit or secure the RFP or this Agreement and that he or she has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for the architect (or registered surveyor and mapper or professional engineer, as applicable) any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of the RFP and this Agreement.” For the breach or violation of this provision, the Village shall have the right to terminate this Agreement without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.

#### 11.5.2 Trench Safety Act.

The Company shall comply with the Trench Safety Act set forth in Sections 553.60 and 553.64, inclusive, Florida Statutes, and OSHA Standard 29 C.F.R. section 1926.650, subpart P. In order to evidence the Company’s compliance with the foregoing, upon execution of this Agreement, the Company shall also execute and deliver to the Village a Trench Safety Compliance Statement in the form attached hereto as Appendix 24 and by this reference made a part of this Agreement. Without limiting the foregoing, at all times during the performance of the Work required in this Agreement, under no circumstances shall any trench remain open overnight.

#### 11.5.3 Village Laws and Policies.

The Company shall comply with the Village Charter and Code of Ordinances, as well any and all adopted Village Policies and regulations pertaining to this Agreement and the Project.

#### 11.6 Parties Duties and Responsibilities

11.6.1 The Village shall keep in force all Project warranties, guarantees, easements and licenses that have been granted or assigned to the Village and are not transferred to the Company or to be performed by the Company under this Agreement.

11.6.2 The Company shall pay all sales, excise, license fees, royalties, ad valorem, property, franchise, occupational and disposal taxes, or other taxes associated with the Project and the Wastewater Facilities. In the event the Company is required to pay any sales tax or use taxes on the value of the services provided by Company hereunder or the services provided by any Subcontractor of Company, the Company shall pay such taxes and provide the Village with proof of payment.

11.6.3 Owner Direct Purchase Program. The Village may exercise its right to implement an owner direct purchase program whereby the Village will directly purchase equipment or materials for the Design/Build Work. Under an owner direct purchase program, the Company shall work with the Owner's Representative and the Village to identify materials and equipment for purchase by the Village. The Company shall negotiate pricing and terms and conditions, and prepare draft purchase orders for the identified equipment or materials to be purchased by the Village under this program, and work with the Village in establishing delivery and payment schedules to the equipment and material vendors. The Company will receive, unload, properly store, and provide insurance consistent with the requirements of this Agreement and Applicable Law for all equipment and materials purchased under this owner direct purchase program. The Company shall work with the Village and the Owner's Representative to establish a protocol and procedure to implement an Owner Direct Purchase Program within ninety (90) days after Notice to Proceed. The fixed Design/Build Price shall be reduced by the value of the purchase orders, plus the applicable sales tax, issued by the Village under the owner direct purchase program.

11.6.4 The Company shall provide the Project with appropriate security personnel and/or devices to protect against any losses resulting from the theft, damage, or unauthorized use of property owned by the Village and shall accept liability for such losses except to the extent such losses are directly caused by the negligent acts or omissions of the Village.

11.6.5 The Village shall continue to be responsible and pay for the general administration and enforcement of (i) the Wastewater Facilities and Collection System, (ii) the Village's Utility Policy, (iii) long-term System and Service Area planning; (iv) the enforcement of any Village orders, ordinances or Applicable Law; and (v) the collection of any fees, rates, charges or assessments from Customers due the Village in connection with the Wastewater Facilities.

11.6.6 Except to the extent that insurance is required of the Company for Operations Services during the Operations Period as set forth in Appendix 13, upon Acceptance of each phase or agreed upon component of the Wastewater Facilities in accordance with the phasing schedule set forth in Section 6.16.5 of this Agreement, the Village will adequately insure the Sites and Wastewater Facilities against peril and liability and will assume financial responsibility for any failure to insure the Sites and Wastewater Facilities.

**ARTICLE XII**  
**INSURANCE, INDEMNIFICATION, LIABILITY AND**  
**UNCONTROLLABLE CIRCUMSTANCE RELIEF**

12.1 Company Insurance.

At all times during the Term, the Company shall obtain and maintain the Required Insurance in accordance with Appendix 13 to cover losses and liabilities caused by the Work or Operations Services performed by or on behalf of the Company, and shall pay all premiums with respect thereto as the same become due and payable. Except for Builders Risk, the Required Design/Build Period Insurance shall be provided within ten (10) business days of the execution and delivery of this Agreement for the Village's review and approval (Builders Risk Insurance shall be provided at least 30 days prior to the commencement of any Design/Build Work) and shall remain in effect for the periods specified in Appendix 13 in annual (or other) renewable periods. The Required Operation Period Insurance shall be provided as a condition precedent to Acceptance and shall remain in effect for the Operations Period in annual (or other) renewable periods. The Company shall file with the Village certificates of insurance with original endorsements evidencing coverage in compliance with Appendix 13 and this Agreement in a form acceptable to Village.

12.1.1 Insurers, Deductibles and Village Rights. All Required Insurance shall be obtained and maintained from financially sound and generally recognized responsible insurance companies meeting the qualifications set forth in Appendix 13. The insurers issuing policies of Required Insurance shall be authorized to write such insurance in the State of Florida. The insurance coverage may be written with deductible or self-insured retention amounts within the limits provided in Appendix 13, and the Company shall be responsible for any deductible or self-insured retention amounts. The Company shall also be responsible for any excluded losses if such losses are within the liability of the Company hereunder. All policies evidencing such insurance shall provide for: (1) payment of the losses to the Village and to the Company as their respective interests may appear and in accordance with the terms and conditions allowed by the applicable coverage; and (2) prior written notice of the cancellation or non-renewal thereof to the Company and the Village in accordance with Appendix 13. All policies of insurance required by this Section shall be primary insurance to the extent loss or liability is caused by Work or Operations Services performed by or on behalf of the Company.

12.1.2 Certificates, Policies and Notice. The Required Insurance, including any renewals thereof, shall be evidenced by certificates of insurance as provided herein and in Appendix 13. No later than the 30 days prior to the issuance date of each policy of Required Insurance, including any renewals thereof, the Company shall provide the Village with a draft certificate of insurance for review and approval, and shall deliver the final, approved certificate of insurance to the Village promptly following its issuance. Not later than 60 days prior to the beginning of each Contract Year throughout the Term, the Company shall furnish certificates of insurance to the Village to confirm the continued effectiveness of the Required Insurance. Whenever a Subcontractor is utilized, the Company shall either obtain and maintain or require the Subcontractor to obtain and maintain insurance in accordance with the applicable

requirements of Appendix 13. The Company shall maintain current certificates of all Required Insurance at the Project and Sites at all times throughout the Term.

12.1.3 Maintenance of Insurance Coverage. If the Company fails to pay any premium for Required Insurance, or if any insurer cancels or fails to renew any Required Insurance policy and the Company fails to obtain replacement coverage so that the Required Insurance is maintained on a continuous basis, then, at the Village's election (but without any obligation to do so), the Village may pay such premium or procure similar insurance coverage from another company or companies at the Company's cost and upon such payment by the Village the amount thereof shall be immediately reimbursable to the Village by the Company (plus an administration fee of 15%). The Company shall not perform Design/Build Work during any period when any policy of Required Design/Build Period Insurance is not in effect. The Company shall comply with all applicable Required Insurance and take all steps necessary to assure that the Project and the Wastewater Facilities, as applicable, remain continuously insured in accordance with the requirements of this Agreement during the Term hereof and Applicable Law. The failure of the Company to obtain and maintain any Required Insurance shall not relieve the Company of its liability for any losses intended to be insured thereby. Should any failure to provide continuous insurance coverage occur, the Company shall indemnify, defend and hold harmless the Village in the manner provided in this Agreement, from and against any and all losses and expenses arising out of such failure. The purchase of the Required Insurance to satisfy the Company's obligations under this Section shall not be a satisfaction of any Company liability under this Agreement or in any way limit, modify or satisfy the Company's indemnity obligations hereunder.

12.1.4 All insurance coverage's shall be provided as set forth in Appendix 13 by insurers with a rating of A XIII, or better, in the most recent edition of Best's Key Rating Guide, Property-Casualty Edition, and who are either (i) authorized by a subsisting certificate of authority issued by the State of Florida to transact business in the State of Florida, or (ii) except with respect to coverage for the liability imposed by the Florida Workers Compensation Act, an eligible surplus lines insurer under Florida Law.

12.1.5. Each insurance policy shall be endorsed to state that coverage shall not be canceled, non-renewed and shall not be reduced in coverage or limits except in the manner set forth in Appendix 13.

12.1.6. All liability coverage's shall name the Village, its Council and every officer, agent and employee of the Village as additional insured with respect to Work under this Agreement, in the manner set forth in Appendix 13 to this Agreement.

12.1.7. The Company's insurance and any insurance provided in compliance with these specifications and Appendix 13 shall apply only on a primary basis to the Village, and shall not require contribution from any other insurance or self-insurance maintained by Village, to the extent loss or liability is caused by Work or Operations Services performed by or on behalf of the Company.



12.1.8. The Village and the Company agree and shall cause their insurers to waive all rights of subrogation against the other party and its representatives, officers, agents and employees.

12.1.9 The obligations of the Company under this Section shall survive the termination or expiration of this Agreement and shall continue until such time as Company shall have completed and discharged its obligations under this Agreement.

## 12.2 Indemnity.

12.2.1 The Company hereby covenants and agrees to indemnify, defend and hold harmless, the Village, and its Council members, officers, attorneys, employees, representatives, agents and contractors, to the fullest extent permitted by law, from and against all claims (including workers' compensation and wage claims), demands, suits, actions, liabilities, losses, expenses, damages, penalties, fines, judgments, and costs and expenses, including without limitation the reasonable costs and expenses of attorneys' fees and costs and litigation, asserted by third parties to the extent caused by the negligent acts, errors or omissions, reckless, intentional or willful misconduct of the Company, or any of its employees, consultants, contractors, Subcontractors, or agents, or persons employed or utilized by the Company, regardless of whether or not they are caused in part by a party indemnified hereunder. The Company's indemnity obligations hereunder shall not be limited by any coverage exclusions or other provisions in any insurance policy maintained by the Company which is intended to respond to such events. The Company shall not, however, be required to indemnify or defend the Village for any claims, losses (including workers' compensation and wage claims), liabilities, actual expenses, damages, penalties, judgments, and costs and expenses, including without limitation the reasonable costs and expenses of attorneys' fees and costs and litigation, to the extent caused by the negligence or intentional misconduct of the Village, and its Council members, officers, attorneys, employees, representatives, agents and contractors.

12.2.2 The indemnification obligations under this Section shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the Company and/or any Subcontractor under worker's compensation acts, disability benefit acts, or other employee benefit acts.

12.2.3 In the event that any claims are brought or actions are filed against the Village with respect to the indemnities contained herein, the Company agrees to defend against any such claims or actions regardless of whether such claims or actions are rightfully or wrongfully brought or filed. The Company and the Village agree to mutually select the attorneys to appear and defend such claims or actions on behalf of the Village. The Company further agrees to pay at the Company's expense the attorneys' fees and costs incurred by those attorneys approved by the Village to appear and defend such claims or actions on behalf of the Village at both the trial and appellate levels.

12.2.4 To the extent this indemnification clause or any other indemnification clause in this Agreement does not comply with Chapter 725, Florida Statutes, as may be amended, this provision and all aspects of the Contract Documents shall hereby be interpreted as the parties'

intention for the indemnification clauses and Contract Documents to comply with Chapter 725, Florida Statutes, as may be amended.

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

12.3. Limitation on Extent of Damages.

12.3.1 Any damages that arise out of the performance of this Agreement shall be limited to the actual loss to the other party and that, except as otherwise specifically stated in this Agreement, damages shall not include lost profits, loss of business opportunity, good will or reputation. In the absence of gross negligence, reckless, intentional or willful misconduct, it is the intent of the parties hereto that punitive damages shall not be sought or awarded; however, notwithstanding, the foregoing shall not limit the obligation of the Company under any indemnification provision or otherwise for a violation of any Governmental Approval or Applicable Law, nor shall it limit the Company's responsibility for any penalty or other monetary payment, fine or assessment required due to a violation of any Governmental Approval or Applicable Law.

12.3.2 No Damages for Delay. Notwithstanding any other provisions in this Agreement to the contrary, the Company shall not be entitled to and hereby waives any damages which it may have suffer by reason of delay, including delay due to Uncontrollable Circumstances, and waives all damages it may suffer by reason of such delay, including lost profits, overhead and supervision. Apart from an adjustment to the Contract Time, no payment of claim for damages shall be made to the Company as compensation for damages for any delays or hindrances, from any cause whatsoever in the progress of the Work, whether such delay be avoidable or unavoidable, except to the extent that such delay is caused by the active interference by the Village or Village Fault, and not otherwise compensated for under an agreed Change Order.

12.4 Changes in Law.

12.4.1 A Change in Law means any of the following acts, events or circumstances to the extent that compliance with the change materially expands the scope, interferes with, delays or increases the cost of the Work or the performance of the obligations of this Agreement by either party, that occur after the Contract Date of this Agreement and that could not have been reasonably anticipated or known by the Company prior to or as of the Contract Date:

12.4.1.1. Except as provided for in (ii), (iii) and (iv) below, the enactment, adoption, promulgation, modification, repeal, or change of any Applicable Law (excluding Federal or State income, sales or tax laws) after the Contract Date, unless such Applicable Law was on or prior to the Contract Date duly enacted, adopted, promulgated, modified, repealed or changed, in each case in final form, to become effective without any further action of the Governmental Authorities; and

12.4.1.2. Except as provided in (i), (ii), (iii) and (iv) below, the order or judgment of any Governmental Authority issued after the Contract Date enforcing any Change in Law described in subsection 12.4.1.1 of this definition to the extent such order or judgment is not the result of the negligent, reckless or intentional action, error or omission or lack of reasonable diligence of the Company or of the Village, whichever is asserting the occurrence of a Change in Law; provided, however, that the contesting in good faith or the failure in good faith to contest any such order or judgment shall not constitute or be construed as such a negligent, reckless or intentional action, error or omission or lack of reasonable diligence; or

It is specifically understood, however, that none of the following shall constitute a “Change in Law”:

(i) acts, events and circumstances with respect to the Governmental Approvals to the extent that the Company has expressly assumed the permitting risk under Article VI of this Agreement;

(ii) a change in the nature or severity of the actions typically taken by a Governmental Authority to enforce compliance with Applicable Law which was in effect as of the Contract Date;

(iii) any increase in any fines or penalties provided for under Applicable Law in effect as of Contract Date; and

(iv) any act, event or circumstance that would otherwise constitute a Change in Law but that does not change the requirements imposed on the Company by this Agreement or the Contract Standards in effect as of the Contract Date

12.4.2 For each Change in Law, the Company shall immediately, but no later than ten (10) days after becoming aware of such change, prepare a notice to the Village that documents the Company's reason for believing a Change in Law has occurred. If agreed to by the Village, the Company shall then prepare a report describing all actions and changes proposed by the Company to address the Change in Law, including an assessment of alternatives, and all associated projected Capital Modifications or increases/decreases in operations, maintenance, capital and other costs, and the matter shall be addressed as a Change Order under Article X.

## 12.5 Special, Consequential and Punitive Damages.

Except to the extent specifically excluded by this Agreement herein below, in no event shall either party hereto be liable to the other or obligated in any manner to pay to the other any special, consequential or punitive damages based upon claims arising out of or in connection with the performance or non-performance of its obligations or otherwise under this Agreement. The waiver of the foregoing damages under this Section is intended to apply to only disputes and claims as between the Village and the Company, and specifically shall not apply and is not intended to apply to or limit the Company's agreement to indemnify the Village for third party claims pursuant to Section 12.2 of this Agreement.

Notwithstanding the foregoing limitation, the Company shall be liable and responsible for the following damages or costs, whether or not such are deemed special, consequential or punitive damages: (i) any and all fines, assessments, and penalties imposed by Governmental Authorities arising from non-compliance with the Legislation and DCA Rules for Project progress milestone and final completion and operations compliance dates for the Wastewater Facilities, including the progress milestone dates set forth in Section 3.2, the Substantial Completion Date and the Final Completion Date for the Wastewater Facilities; (ii) violations of any Governmental Approvals and Permits and Applicable Law, and any fines, assessments, and penalties imposed by Governmental Authorities or other regulatory or enforcement agencies in connection with this Project, to the extent caused by the negligent acts, errors or omissions, reckless, intentional or willful misconduct of the Company, or any of its employees consultants contractors, Subcontractors, or agents, or persons employed or utilized by the Company; and (iii) to the extent that such special, consequential or punitive damages are covered by Required Insurance in accordance with Appendix 13 and this Agreement, to the extent caused by the negligent acts, errors or omissions, reckless, intentional or willful misconduct of the Company, or any of its employees consultants contractors, Subcontractors, or agents, or persons employed or utilized by the Company. With the Village's prior written approval, the Company may contest any such fines in administrative proceedings and/or in court, provided that the Company first pays such fines, assessments or penalties, as may be required. The Company shall pay all costs and expenses in connection with any such contest or challenge, and shall indemnify the Village for any and all costs and expenses incurred by the Village in connection with such contest.

12.6 Intentionally Deleted.

12.7 Intentionally Deleted.

12.8 Uncontrollable Circumstances.

12.8.1 Uncontrollable Circumstance Relief. Except as expressly provided under the terms of this Agreement, neither party to this Agreement shall be liable to the other for any loss, damage, delay, default or failure to perform any obligation to the extent it results from an Uncontrollable Circumstance. The occurrence of an Uncontrollable Circumstance shall not excuse or delay the performance of a party's obligation to pay monies previously accrued and owing under this Agreement, or to perform any obligation hereunder not affected by the occurrence of the Uncontrollable Circumstance. The Village shall pay the Design/Build Price or the Service Fee during the continuance of any Uncontrollable Circumstance, adjusted to account for any cost reductions achieved through Company mitigation measures required by subsection 12.8.2 of this Section, as well as for any cost increases to which the Company is entitled under subsection 12.8.3 of this Section.

12.8.2 Notice and Mitigation. The party that asserts the occurrence of an Uncontrollable Circumstance shall notify the other party in writing within five (5) days after the date the party experiencing such Uncontrollable Circumstance first knew of the occurrence thereof, with a written description of: (1) the Uncontrollable Circumstance and the cause thereof (to the extent known); and (2) the date the Uncontrollable Circumstance began, its estimated

duration, the estimated time during which the performance of such party's obligations hereunder shall be delayed, or otherwise affected. As soon as practicable after the occurrence of an Uncontrollable Circumstance, the affected party shall also provide the other party with a description of: (i) the amount, if any, by which the Design/Build Price or the Service Fee is proposed to be adjusted as a result of such Uncontrollable Circumstance; (ii) any areas where costs might be reduced and the approximate amount of such cost reductions; and (iii) its estimated impact on the other obligations of such party under this Agreement. The affected party shall also provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever such act, event or condition shall occur, the party claiming to be adversely affected thereby shall, as promptly as practicable, use all reasonable efforts to eliminate the cause therefor, reduce costs and resume performance under this Agreement. While the Uncontrollable Circumstance continues, the affected party shall give notice to the other party, before the first day of each succeeding month, updating the information previously submitted. The party claiming to be adversely affected by an Uncontrollable Circumstance shall bear the burden of proof, and shall furnish promptly any additional documents or other information relating to the Uncontrollable Circumstance reasonably requested by the other party.

12.8.3 Conditions to Performance, Schedule and Design/Build Price or Service Fee Relief. In the event of an Uncontrollable Circumstance, the Company may, subject to the limitations specifically provided for in this Agreement, be entitled to relief from the performance of its obligations hereunder, an extension of the Project schedule or an increase in the Design/Build Price or the Service Fee, or any combination thereof, which properly reflects the interference with performance, the time lost or the amount of the increased cost (including Cost Substantiated costs associated with the mitigating measures undertaken by the Company pursuant to subsection 12.8.2 of this Section), in each case as a result thereof, but only to the minimum extent reasonably forced on the Company by the event, and the Company shall perform all other Contract Services. Price relief associated with an Uncontrollable Circumstance shall not include profit to the Company. Any cost reduction achieved through the mitigating measures undertaken by the Company pursuant to subsection 12.8.2 of this Section upon the occurrence of an Uncontrollable Circumstance shall be reflected in a reduction of the amount by which the Design/Build Price or the Service Fee would have otherwise been increased or shall serve to reduce the Design/Build Price or the Service Fee to reflect such mitigating measures, as applicable. In the event that the Company believes it is entitled to any relief on account of an Uncontrollable Circumstance, it shall furnish the Village written notice of the specific relief requested and detailing the event giving rise to the claim within thirty (30) days after the giving of notice delivered pursuant to subsection 12.8.2 of this Section, or if the specific relief cannot reasonably be ascertained and such event detailed within such thirty (30) day period, then within such longer period within which it is reasonably possible to detail the event and ascertain such relief. Within thirty (30) days after receipt of such a timely submission from the Company, the Village shall issue a written determination as to the extent, if any, it concurs with the Company claim for performance, price or schedule relief, and the reasons therefor. The Company

acknowledges that its failure to mitigate, or to give timely notice pertaining to, an Uncontrollable Circumstance as required under this Section may adversely affect the Village. To the extent the Village asserts that any such adverse effect has occurred and that the relief to the Company or the additional cost to be borne by the Village under this subsection should be reduced to account for such adverse effect, the Company shall have the affirmative burden of refuting the Village's assertion concerning lack of timely notice and the Village shall have the affirmative burden of proving its assertion of the Company's failure to mitigate. The agreement of the parties as to the specific relief to be given the Company hereunder on account of an Uncontrollable Circumstance shall be evidenced by a Change Order.

12.8.4 Schedule Relief during the Design/Build Period. In Order to be entitled to an adjustment to the Scheduled Substantial Completion Date, the Scheduled Acceptance Date, or to the number of days allowed for the achievement of Final Completion, the Company must demonstrate the impact of the Uncontrollable Circumstance on the Company's CPM schedule, as updated, maintained and revised by the Company in accordance with this Agreement. In no event shall the Company be entitled to relief pursuant to this Section for delays caused by Company Fault or otherwise not attributable to an Uncontrollable Circumstance materially impacting the Company's CPM Project completion schedule.

12.8.5 Capital Modifications. Before proposing any adjustment to the Service Fee in its notice of requested relief under this Section, the Company shall determine whether any increased costs of operation and maintenance of the Wastewater Facilities resulting from an Uncontrollable Circumstance can reasonably and prudently be reduced by the undertaking of a Capital Modification. In the event that the Company makes such a determination, the Company shall so advise the Village in writing in accordance with Section 5.5. The Village shall thereupon determine, in its sole discretion, whether such a Capital Modification shall be undertaken and shall so advise the Company within sixty (60) days of receipt of such notice by the Company. In no event shall the Company undertake such Capital Modification except at the express written direction of the Village.

12.8.6 Acceptance of Relief Constitutes Release. The Company's acceptance of any performance, price or schedule adjustment under this Section shall be construed as a release of the Village by the Company (and all persons claiming by, through, or under the Company) from any and all losses or expenses resulting from, or otherwise attributable to, the Uncontrollable Circumstance giving rise to the adjustment claimed.

## **ARTICLE XIII**

### **SECURITY FOR PERFORMANCE**

#### 13.1. Company and Guarantor.

13.1.1. Guaranty Agreement. The Company, concurrently with the execution and

delivery of this Agreement, has caused the Guaranty Agreement to be provided by the Guarantor in the form attached hereto in Appendix 14.

13.1.2. Material Adverse Change to the Financial Condition of the Guarantor. For purposes of this Section, a "Material Adverse Change" shall be any change to the financial condition of the Guarantor that actually has, or is reasonably likely to have, a significant adverse effect on the Guarantor's ability to perform its obligations under this Agreement and the Guaranty Agreement, including any change that results in a 20% decline in the Guarantor's net worth. For purposes of this Section, "net worth" shall mean stockholder or shareholder equity, as reported on the Guarantor's balance sheet. Notwithstanding any of the foregoing, no Material Adverse Change shall be deemed to have occurred under this Section to the extent that the Guarantor, at its sole cost and expense, is able to obtain and maintain either a shadow or actual investment grade credit rating for the Guarantor on its senior debt from one or more of the Rating Agencies. Any credit rating analysis by any of the Rating Agencies pursuant to this Section shall assume a hypothetical borrowing by the Guarantor of an amount at least equal to the Design/Build Price of Ninety Million, Nine Hundred Thousand and No/100 Dollars (\$90,900,000.00). For purposes of this subsection "investment grade" means a rating of at least BBB- from S&P or Fitch and a rating of at least Baa3 from Moodys. The Company and Guarantor shall immediately notify the Village of any Material Adverse Change.

13.1.3. Credit Enhancement Upon a Material Adverse Change. If a Material Adverse Change occurs, the Company and the Guarantor shall, at its sole cost and expense, cause to be provided credit enhancement of its obligations hereunder within 30 days after such occurrence. Such credit enhancement shall be in the form either of (1) an unconditional guarantee of all of the Company's obligations hereunder provided by a corporation or financial institution meeting the minimum financial requirements set forth in subsection 13.1.2 of this Section and otherwise acceptable to the Village, or (2) subject to the approval of the Village in its sole and absolute discretion, a substitute instrument providing security for the performance of the Company's obligations hereunder in a form and manner acceptable to the Village. In the event that the Company or Guarantor provides credit enhancement in the form of a replacement guarantor pursuant to this subsection, the replacement guarantor shall become a Guarantor for purposes of this Agreement and the provisions of this Section shall apply equally to such replacement Guarantor. The Village shall have the right but not the obligation, exercisable in its sole and absolute discretion, to waive, modify, alter or replace the foregoing requirement from time to time as and to the extent the Village deems necessary to protect the public interest and to secure the performance by the Company of its obligations hereunder and by the Guarantor of their obligations under the Guaranty Agreement in light of the nature, extent and potential duration of the Material Adverse Change.

13.1.4. Company and Guarantor Annual Reports. The Company shall annually furnish the Village, within ninety (90) days after the end of the Company's and Guarantor's fiscal year, consolidated balance sheets and income statements for the Company and Guarantor attached to the audited year-end financial statements reported upon by the Company's and Guarantor's independent public accountant. If applicable, the Company shall also furnish the Village with copies of the quarterly and annual reports and other filings of the Guarantor

filed with the Securities and Exchange Commission or comparable foreign regulatory body, as applicable.

### 13.2. Bonds.

13.2.1. Performance and Payment Bonds. The Company shall provide the Performance Bond and the Payment Bond with the Village as Obligees concurrently with the execution of this Agreement, and all the obligations under the Bonds shall be solely related to the payment and performance of the Design/Build Work required in this Agreement. The Performance Bond and the Payment Bond shall be in the forms attached hereto as Appendix 4 and acceptable to the Village, and shall comply with the provisions of Section 255.05, Florida Statutes. Each of the Payment Bond and the Performance Bond shall be in an amount equal to 100% of the Design/Build Price and shall be recorded in the public records of Monroe County. The Performance Bond and the Payment Bond shall be issued by a surety company, and any and all renewals, extensions or replacements thereafter: (1) approved by the Village and having a rating of "A" in the latest revision of the A.M. Best Company's Insurance Report; (2) listed in the United States Treasury Department's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsurance Companies"; and (3) holding a valid certificate of authority to transact surety business in the State of Florida. The Performance Bond shall remain open in an amount equal to 100% of the Design/Build Price, including any Design/Build Price adjustments, until Final Completion. The Payment Bond shall remain open in an amount equal to 100% of the Design/Build Price, including any fixed Design/Build Price adjustments, until Final Completion. Prior to the Company's undertaking any Capital Modification under this Agreement, if applicable and agreed to by the parties, the Company shall provide a performance bond and a payment bond, each in an amount equal to the costs of such Capital Modification, and such bonds shall otherwise comply with the requirements of Applicable Law and this Section. Should the performance and payment bonds required by this Section be provided by more than one surety company, the following requirements shall apply: (i) at least one of the co-surety companies shall meet all of the requirements of this Section 13.2.1 for the full amount of the bond, and (ii) each surety shall be jointly and severally liable for the full amount of the bond required. Notwithstanding anything to the contrary in the Performance Bond or the Contract Documents, the Performance Bond will not cover any obligations of the Guarantor arising under the Guaranty Agreement and no claim or cause of action will arise under the Performance Bond relating to any Event of Default by the Guarantor arising under Sections 14.2.5, 14.2.6, 14.2.7 or 13.1.3 of this Agreement.

13.2.2. Operations Performance Bond. The Company shall provide the Operations Performance Bond as of the Acceptance Date in the form attached hereto as Appendix 4, with the Village as Obligees, and all obligations under the Operations Performance Bond shall be solely related to the Operations Services required in this Agreement. The Operations Performance Bond shall serve as security for the performance of the Operation Services by the Company, and shall be in the initial stated amount equal to the annual Service Fee, shall be for a term of one (1) year, and shall be continuously renewed, extended or replaced so that it remains in effect for the entire Term; provided, however, that the stated amount of the Operations Performance Bond shall be adjusted each year to conform to any increase in the



Service Fee during the Operations Period. The Operations Performance Bond shall be issued by a surety company: (1) approved by the Village and having a rating of "A" in the latest revision of the A.M. Best Company's Insurance Report; (2) listed in the United States Treasury Department's Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsurance Companies"; and (3) holding a valid certificate of authority to transact surety business in the State of Florida. If the Operations Performance Bond expires or is terminated prior to the expiration of this Agreement, prior to such expiration or termination, the Company shall provide a substitute Operations Performance Bond in the amount and in accordance with the provisions of this subsection such that there is no gap in coverage. In no event shall the Operations Performance Bond serve as a limitation on the liability of the Company under this Agreement.

13.2.3. Monitoring of Sureties. The Company shall be responsible throughout this Agreement for monitoring the financial condition of any surety company issuing bonds under this Agreement and for making inquiries no less often than annually to confirm that each such surety company maintains at least the minimum rating level specified in this Section. In the event the rating of any issuing surety company falls below such minimum level, the Company shall promptly notify the Village of such event and shall promptly furnish or arrange for the furnishing of a substitute or an additional bond of a surety company whose rating and other qualifications satisfy all above requirements, unless the Village agrees to accept the surety company or agrees to an alternative method of assurance. Upon such notice by the Company of such an event, the Village shall not unreasonably withhold its approval of such assurance.

### 13.3. Costs of Providing Security for Performance.

13.3.1. Generally. The cost and expense of obtaining and maintaining the Security Instruments required under this Article as security for the performance of the Company's obligations hereunder is included in the fixed Design/Build Price or Service Fee, as applicable, and shall be borne by the Company without further reimbursement from the Village.

## **ARTICLE XIV TERMINATION, DEFAULT AND REMEDIES**

### 14.1 Village Termination for Convenience.

14.1.1 Early Termination for Convenience. This Agreement may be terminated by the Village at any time for convenience before a Notice to Proceed is issued by the Village and such termination shall be effective immediately upon notice being provided by the Village to the Company. Additionally and notwithstanding any other provision in this Agreement, in the event that after the Contract Date and prior to the Notice to Proceed, this Agreement is deemed or ruled void or unenforceable by a court of competent jurisdiction, then this Agreement shall be terminated effective immediately, and the Village shall not be responsible or liable to the Company for any costs or expenses or for damages, including anticipated lost profits, resulting from such termination. In the event of termination pursuant to this subsection, neither party hereto shall have any further rights, obligations nor liabilities hereunder except to the extent

that any right, obligation or liability set forth herein expressly survives termination of this Agreement. If such termination occurs after a Notice to Proceed is issued by the Village, the Village shall pay the Company for the Design/Build Work completed in the manner set forth in Section 14.1.2 herein below.

14.1.2. Termination for Convenience. The Village shall have the right to terminate this Agreement, in whole or in part, at any time, for its convenience and without cause, upon ninety (90) days prior written notice to the Company. Upon such termination pursuant to this Section prior to or during performance of the Design/Build Work and prior to the Acceptance Date, the Village shall pay the Company for the Design/Build Work completed in accordance with the requirements of this Agreement up to the date of termination the price or compensation under the Agreement corresponding to the Design/Build Work completed, plus (i) reasonable administrative costs of settling and paying claims arising out of the termination of Design/Build Work under purchase orders or Subcontracts; (ii) reasonable costs incurred in demobilization and the disposition of residual materials and equipment; and (iii) 15% to cover reasonable overhead and profit on items (i) and (ii) of this clause. Upon the Village's termination pursuant to this Section during the Operations Period, the Village shall pay the Company all Service Fees due up to the date of termination. Notwithstanding the foregoing, the Village shall not have the right to terminate this Agreement for convenience during the Operations Period until after one (1) year from the Acceptance Date of the Wastewater Facilities.

#### 14.2 Termination for Cause by the Village.

Upon the occurrence of an "Event of Default" by the Company that the Village has provided written notice to the Company and the Company has not cured as provided below, the Village shall have the right to terminate this Agreement, in whole or in part, or pursue any legal rights it may have against the Company under this Agreement and Applicable Law to recover damages or to secure specific performance, including the enforcement of all Payment and Performance Bonds required in this Agreement. Each of the following shall constitute an Event of Default by the Company:

14.2.1. The failure of the Company to perform or observe any of its covenants, agreements, obligations or duties under this Agreement that cannot be cured by the payment of money, including, but not limited to, the following:

(A) Failure of the Company to commence the Design/Build Work in accordance with the Project Schedule

(B) Failure of the Company to perform the Work, including the Operations Services, or portions thereof to completion or otherwise in a diligent, efficient, workmanlike manner, and in accordance with the Contract Standards and this Agreement;

(C) Failure of the Company to use an adequate quantity or quality of personnel, workers, equipment or materials to prosecute and complete the Work within the Contract Time and in accordance with the terms of this Agreement;

(D) Except to the extent excused due to the occurrence of an Uncontrollable Circumstance or Casualty, the failure of the Company to achieve Substantial Completion by the Scheduled Substantial Completion Date of Wastewater Facilities;

(E) Except to the extent excused due to the occurrence of an Uncontrollable Circumstance or Casualty, the failure of the Company to achieve Final Completion by the Scheduled Final Completion Date of Wastewater Facilities;

(F) Except to the extent excused due to the occurrence of an Uncontrollable Circumstance or Casualty, the failure of the Company to achieve operations of the Wastewater Facilities by the Commencement Date of Operations of the Wastewater Facilities; and

(G) Except to the extent excused due to the occurrence of an Uncontrollable Circumstance or Casualty, the abandonment or failure to operate all or a portion of the Wastewater Facilities for two (2) or more consecutive days in any Contract Year; and

(H) The failure of the Company to comply with the terms, conditions and requirements of the KLWTD Agreement, including those set forth in Appendix 8.

14.2.2. The failure by the Company, to make any payment required under this Agreement;

14.2.3 The failure of the Company to make prompt payment to any Subcontractor materialmen or supplier;

14.2.4 The material inaccuracy of any representation or warranty made by the Company or the Guarantor, including pursuant to the RFQ and RFP processes, or pursuant to this Agreement;

14.2.5 The commencement of any bankruptcy, insolvency, liquidation or similar proceeding by or against the Company or the Guarantor which materially and adversely affects the Company's or Guarantor's ability to perform its duties or obligations under this Agreement or the Guarantor's ability to perform its obligations under the Guaranty Agreements; the consent by the Company or the Guarantor to the appointment of, or taking possession by a receiver, liquidator, trustee in bankruptcy or custodian of the Company or the Guarantor or any substantial part of its assets; any assignment of all or substantially all of the assets of the Company or the Guarantor for the benefit of creditors; or the failure by the Company or the Guarantor to pay debts as they become due;

14.2.6 A default by the Guarantor under the Guaranty Agreement or the failure of the Guarantor to make any payment or perform any other obligation under the Guaranty in a timely manner; and

14.2.7 The failure of the Company or the Guarantor to provide credit enhancement when and as required in Section 13.1;

Upon the occurrence of an Event of Default described above, the Village shall provide written notice of the event to the Company. Upon the occurrence of an Event of Default described in Sections 14.2.4, 14.2.5, 14.2.6 and 14.2.7, the Village shall provide written notice of the event to both the Company and the Guarantor. The Company and/or the Guarantors, as applicable, shall have fifteen (15) days after such written notice is given to cure an Event of Default. However, if the cure of an Event of Default cannot reasonably be completed within the fifteen (15) days, an Event of Default shall not occur if within said fifteen (15) days the Company shall have commenced to cure and shall thereafter diligently prosecute within thirty (30) days of the notice. Upon the occurrence of an Event of Default by the Company, and failure to cure within the time provided above, the Village may terminate or suspend the Agreement in whole or in part, by providing written notice thereof to the Company and pursue all appropriate legal remedies as provided in this Agreement and by Applicable Law.

#### 14.3 Other Remedies Upon Company Event of Default.

The right of termination provided under this Section upon an Event of Default by the Company is not exclusive. If this Agreement is terminated by the Village for an Event of Default by the Company, the Village shall have the right to pursue a cause of action for damages, specific performance and equitable remedies, and to exercise all other remedies which are available to it under this Agreement, the Guaranty Agreement, the Bonds and under Applicable Law.

#### 14.4 Relationship to Liquidated Damages.

Any liquidated damages payable by the Company under this Agreement shall cease to accrue on the Termination Date. The Company shall be liable for all liquidated damages that have accrued up to the Termination Date, subject to the limitations stated herein.. The parties acknowledge and agree that such liquidated damages are intended solely to compensate the Village for costs and expenses associated with the specific circumstances identified in the specific provisions providing for such liquidated damages and are not intended to liquidate all damages that the Village is likely to suffer in the event of a Company Event of Default under this Article. Accordingly, except as specifically provided in this Agreement, and except with respect to damages relating solely to the specific circumstances for which liquidated damages are provided under this Agreement, the payment of any such liquidated damages by the Company shall not serve to limit or otherwise affect the Village's right to pursue and recover damages under this Section.

#### 14.5 Termination for Cause by the Company; Payment Due Company.

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

14.5.1 The unexcused failure of the Village to perform or observe any of its material covenants, agreements, obligations or duties created by this Agreement with the result that the Company is precluded thereby from performing any one or more of its obligations under the Agreement;

14.5.2 The failure of the Village to make any uncontested payment due and payable under this Agreement;

14.5.3 The material inaccuracy of any representation or warranty made by the Village if the legality of this Agreement or the ability of the Company to carry out its duties and obligations under this Agreement is thereby materially adversely affected;

14.5.4 The commencement of any bankruptcy, insolvency, liquidation or similar proceeding against the Village; the consent by the Village to the appointment of or taking possession by a receiver, liquidator, assignee, trustee or custodian of the Village or any substantial part of its assets, of any assignment for the benefit of creditors, or the failure by the Village to pay its debts as they come due; provided that in the case of commencement of an involuntary petition or proceeding or entry of a judgment or judicial order that includes or seeks to cause any of the above events, such petition, proceeding, judgment or order shall remain undischarged or undismissed for one hundred and twenty (120) days; and provided further that the appointment of a financial control or oversight board by the State of Florida shall not, in and of itself, constitute any such event. The rights and remedies identified herein shall not limit the ability of the Company to seek any other rights and remedies provided by Applicable Law, including the Company's ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of the Company to stop work under any applicable provisions of the Agreement.

Upon the happening of any Event of Default described above, the Company shall send written notice to the Village setting forth in detail the alleged failure or deficiency of the Village. The Village shall have thirty (30) days after receipt of such written notice from the Company to cure such failure or deficiency. If the failure or deficiency is subject to cure, but such cure cannot reasonably be completed within thirty (30) days, an Event of Default by the Village shall not occur if within the thirty (30) days the Village shall have commenced to cure and shall thereafter diligently pursue such cure to completion.

In the event that the Village does not cure such failure or deficiency within said thirty (30) day period or commence cure (or any extension as provided above), the Company may terminate the Agreement, in whole or in part, or suspend performance until the cure is completed or perfected, upon ninety (90) days prior written notice to the Village. Notwithstanding the foregoing, the Village shall make payments to the Company pursuant to Applicable Law, including the Prompt Payment Act.

If the Company should elect to terminate this Agreement for an uncured default by the Village prior to the Commencement Date of Operations of Wastewater Facilities, the Village shall pay the Company for the Design/Build Work completed in accordance with the requirements of this Agreement up to the date of termination the price or compensation under

the Agreement corresponding to the Design/Build Work completed, plus (i) reasonable administrative costs of settling and paying claims arising out of the termination of Design/Build Work under purchase orders or Subcontracts; (ii) reasonable costs incurred in demobilization and the disposition of residual materials and equipment; and (iii) 15% to cover reasonable overhead and profit on items (i) and (ii) of this clause.

#### 14.6 Obligations of the Company Upon Termination or Expiration.

14.6.1 Company Obligations. Upon any termination of the Company's right to perform this Agreement, or upon the expiration of this Agreement, provided the Village has made all undisputed payments required hereunder, the Company shall, as applicable:

(1) Stop the Contract Services on the termination date and to the extent specified by the Village;

(2) Promptly deliver to the Village all Design Documents and construction record and As-Built drawings prepared by the Company in carrying out the Design/Build Work which have not previously been delivered to the Village, and all supporting design notebooks, calculations, record files, design meeting memoranda, and construction meeting memoranda;

(3) Promptly take all action as necessary to protect and preserve all materials, Equipment, tools, facilities and other property including all of the items described in item (8) below;

(4) Promptly remove from the Project all equipment, implements, machinery, tools, temporary facilities of any kind and other property owned or leased by the Company (including temporary sheds, trailers, workshops and toilets), and repair any damage caused by such removal;

(5) Clean the Project, including the Sites, and leave it in a neat and orderly condition;

(6) Subject to this Section, promptly remove all employees of the Company and any Subcontractors and vacate the Project and Sites;

(7) Promptly deliver to the Village a list of all supplies, materials, machinery, Equipment, property and special order items previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Project;

(8) Provide the Village with a 30-day supply of chemicals and other consumables and a reasonable supply of spare parts in light of the nature and condition of the Project as of the Termination Date;

(9) Deliver to the Village the Operation and Maintenance Manual and all computer programs used at the Project in the performance of the Contract Services, including all revisions and updates thereto;

(10) Provide the Village with a list of all files relevant to the Project and access and security codes with instructions and demonstrations which show how to open and change such codes;

(11) Deliver to the Village a copy of all books and records in its possession relating to the performance of the Contract Services;

(12) Advise the Village promptly of any special circumstances which might limit or prohibit cancellation of any Subcontract;

(13) Promptly deliver to the Village copies of all Subcontracts, together with a statement of:

- (a) the items ordered and not yet delivered pursuant to each agreement;
- (b) the expected delivery date of all such items;
- (c) the total cost of each agreement and the terms of payment;  
and
- (d) the estimated cost of canceling each agreement;

(14) Assign to the Village any Subcontract that the Village elects in writing, at its sole election and without obligation, to have assigned to it. The Village shall assume, and the Company shall be relieved of its obligations under, any Subcontract so assigned;

(15) Unless the Village directs otherwise, terminate all Subcontracts and make no additional agreements with Subcontractors;

(16) Provide the Village with a list of all Project Equipment subject to patents, licenses, franchises, trademarks or copyrights and the associated royalties and license fees associated therewith which the Village will be responsible for paying on or after the Termination Date;

(17) As directed by the Village, transfer to the Village by appropriate instruments of title, and deliver to the Project, as applicable, (or such other place as the Village may specify), all special order items pursuant to this Agreement for which the Village has made or is obligated to make payments;

(18) Promptly transfer to the Village any and all warranties given by any manufacturer or Subcontractor with respect to particular components of the Design/Build Work or the Operation Services;

(19) Notify the Village promptly in writing of any Legal Proceedings against the Company by any Subcontractor or other third parties relating to the termination of the Design/Build Work or the Operation Services (or any Subcontracts);

(20) Give written notice of termination, effective as of date of termination of this Agreement, promptly under each policy of Required Insurance (with a copy of each such notice to the Village), but permit the Village to continue such policies thereafter at its own expense, if possible;

(21) Take such other actions, and execute such other documents as may be necessary to effectuate and confirm the foregoing matters, or as may be otherwise necessary or desirable to minimize the Village's costs, and take no action which shall increase any amount payable by the Village under this Agreement.

14.6.2 Continuity of Service and Technical Support. Upon any termination of the Company's right to perform this Agreement, or upon the expiration of this Agreement, the Company, at the request and direction of the Village, shall provide for an effective continuity of service and the smooth and orderly transition of management to the Village or any replacement operator designated by the Village. Such service shall be for a period of up to 180 days and shall include providing technological and design advice and support and delivering any plans, drawings, renderings, blueprints, operating manuals, computer programs, spare parts or other information useful or necessary for the Village or any replacement operator designated by the Village to carry out and complete the Design/Build Work and to perform the Operation Services. In addition, the Company shall provide the Village and any replacement operator with a one-time training program relating to the operation and maintenance of the Project, including any Capital Modifications thereto. The Company shall be paid for such services consistent with the payment structure set forth in this Agreement.

14.6.3 Transfer of Project and Wastewater Facilities. Upon termination of this Agreement before the expiration of the Term, the Company shall execute such documents and instruments as are reasonably requested by the Village or necessary to transfer the Project and Wastewater Facilities to the Village in good and working condition, less normal wear and tear, in good operating order, maintained in accordance with Good Industry Practices, and in accordance with the Exit Standards and Conditions and the requirements of this Agreement, with operating and maintenance records, and with a level of parts inventory consistent with the O&M Scope of Work without cost to the Village.

14.6.4 Delivery of Books, Records & Agreements.

Within forty five (5) days after the expiration or earlier termination of this Agreement, the Company shall deliver to the Village, the originals, to the extent in the possession of the Company, and copies (as hereinafter described), of the following ("Books and Records"): (i) all



books and records prepared and/or maintained by the Company during the Term required for the operation and maintenance of the Wastewater Facilities; (ii) all permits, plans, purchase and sale agreements, licenses, warranties, contracts, security documents and loan documents pertaining to the Project and the Wastewater Facilities and in the possession of the Company, (iii) all bills of sale evidencing title or rights of the Village; and (iv) any other records or documents pertaining to the Project and the Wastewater Facilities and in the possession of the Company which are required or reasonably appropriate for the ownership, possession, development, construction, sale and management of the Project and the Wastewater Facilities. Furthermore, all original documents delivered by the Company to the Village pursuant to this Section shall be made available to the Company as may be reasonably necessary in connection with any actual or threatened litigation which relates to the Project or the Wastewater Facilities and to which the Company is a party. In addition to the foregoing, the Company shall, immediately upon the termination of this Agreement, identify all contracts relating to the operation and maintenance of the Project and the Wastewater Facilities and assign to the Village or its designee such existing contracts, if any, relating to the operation and maintenance of the Project and the Wastewater Facilities as the Village shall reasonably direct.

#### 14.7. Final Accounting.

Within ninety (90) days after the expiration of the Term or earlier termination of this Agreement (the "Post Termination Period"), the Company shall be obligated to deliver to the Village a final accounting, which shall cover the period from the Contract Date of this Agreement to the termination or expiration date and which shall specifically identify any and all expenses which have been incurred in connection with the Project and the Wastewater Facilities as of the date thereof but which have yet to be paid; provided, however, that if such expiration or termination date shall be a date other than the last day of a calendar month, the final accounting shall be prepared as of the last day of the month in which such expiration or termination occurs.

14.7.1 General Cooperation and Assistance. During the Post Termination Period, the Company shall cooperate and assist the Village and any other party or person designated by the Village in any manner which the Village shall reasonably require to become familiar with the Project and the Wastewater Facilities, its operation and maintenance, and ensure a smooth transition of services, and all matters relating thereto consistent with this Section.

14.7.2 Company Payment of Certain Costs. If termination is pursuant to Section 14.2 (Termination for Cause by the Village), the Company shall be obligated to pay the costs and expenses of undertaking its obligations under this Section. If the Company fails to comply with any obligation under this Section, the Village may perform such obligation and the Company shall pay on demand all reasonable costs thereof subject to cost substantiation.

14.7.3 Village Payment of Certain Costs. If termination is for the convenience of the Village under Section 14.1, or due to a Village Event of Default pursuant to Section 14.5, or upon the expiration of this Agreement, the Village shall pay to the Company within 30 days of the date of the Company's invoice supported by cost substantiation all reasonable costs and expenses incurred by the Company in satisfying its obligations under this subsection 14.7.

14.7.4 Exit Standards and Conditions.

In connection with any termination pursuant to this Article XIV, the Company shall comply with the Exit Tests and Standards set forth in Appendix 15.

14.7.5 Survival of Certain Provisions Upon Termination.

All representations and warranties of the parties contained in Article II hereof and the rights and obligations of the parties stated to survive termination of this Agreement shall survive the expiration or earlier termination of this Agreement.

**ARTICLE XV  
DISPUTE RESOLUTION**

15.1. No Waivers.

No action of the Village or Company pursuant to this Agreement (including any investigation or payment), and no failure to act, shall constitute a waiver by either party of the other party's compliance with any term or provision of this Agreement. No course of dealing or delay by the Village or Company in exercising any right, power or remedy under this Agreement shall operate as a waiver thereof or otherwise prejudice such party's rights, powers and remedies. No single or partial exercise of (or failure to exercise) any right, power or remedy of the Village or the Company under this Agreement shall preclude any other or further exercise thereof or the exercise of any other right, power or remedy.

15.2. Forum For Dispute Resolution.

It is the express intention of the parties that all Legal Proceedings related to this Agreement or to the Project or to any rights or any relationship between the parties arising therefrom shall be solely and exclusively initiated and maintained in State court Monroe County, Upper Keys Division, or federal courts located in the Southern District of Florida. The Company and the Village each irrevocably consents to the jurisdiction of such courts in any such Legal Proceeding and waives any objection it may have to the laying of the jurisdiction of any such Legal Proceeding.

15.3 Non-Binding Mediation.

15.3.1 Rights to Request and Decline. Either party may request Non-Binding Mediation of any dispute arising under this Agreement, whether technical or otherwise. The non-requesting party may decline the request in its sole discretion. If there is concurrence that any particular matter shall be mediated, the provisions of this Section shall apply. The costs of such Non-Binding Mediation shall be divided equally between the Village and the Company.

15.3.2 Procedure. The Mediator shall be a professional engineer, attorney or other professional mutually acceptable to the parties who has no current or on-going relationship to either party. The Mediator shall have full discretion as to the conduct of the mediation. Each party shall participate in the Mediator's program to resolve the dispute until and unless the parties reach agreement with respect to the disputed matter or one party determines in its sole discretion that its interests are not being served by the mediation.

15.3.3 Non-Binding Effect. Mediation is intended to assist the parties in resolving disputes over the correct interpretation of this Agreement. No Mediator shall be empowered to render a binding decision.

15.3.4 Relation to Judicial Legal Proceedings. Nothing in this Section shall operate to limit, interfere with or delay the right of either party under this Article to seek all legal remedies and commence judicial Legal Proceedings upon a breach of this Agreement by the other party, whether in lieu of, concurrently with, or at the conclusion of any Non- Binding Mediation.

15.4 Duty to Continue Work. In the event of an Event of Default or dispute, the Company covenants and agrees that the Company will diligently proceed and continue to provide the Work and services and performance specified in this Agreement, except as may be provided otherwise in this Agreement, regardless of any pending mediation or other action.

## **ARTICLE XVI DAMAGE AND DESTRUCTION**

### **16.1 Repair of Damage by the Company.**

The Company shall use the care and diligence reasonably expected by a similarly situated entity performing Work as required under this Agreement, and shall take all reasonable and appropriate precautions within the Company's control, to protect the Project and Wastewater Facilities from loss, damage or destruction. The Company agrees to notify the Village and insurers in writing, as soon as practical and upon obtaining knowledge thereof, of any damage to the Project, Sites or Wastewater Facilities resulting from fire, hurricane, storm, earthquake, or any other identifiable event of a sudden, unexpected, or unusual nature ("Casualty") and as soon as practicable thereafter shall submit a report to the Village summarizing the Casualty and survey of any such loss, damage or destruction to the Project, the Sites or the Wastewater Facilities. The Company shall also submit to the Village within 24 hours of receipt copies of all accident and other reports filed with, or given to the Company by, Governmental Authorities. If the Wastewater Facilities are damaged by a Casualty and the Company and/or the Village and/or the Company's and/or Village's insurance carriers, as applicable, agree to pay the Company to perform such Work, the Company shall restore the Wastewater Facilities to substantially the same condition as existed before the Casualty, if commercially possible, and except to the extent modifications to the Wastewater Facilities are required by Applicable Law or Governmental Authority. Such restoration shall commence as soon as commercially practicable following the Casualty and with the express consent of

any insurance company, adjuster or Governmental Authority. If the Village requests that the Company make modifications to the Wastewater Facilities in connection with the rebuilding, the Company may condition its consent to those modifications on confirmation that the modifications shall not increase the time and expense necessary to restore the Wastewater Facilities to the same operating condition that the Wastewater Facilities operated prior to the Casualty. The Village shall have the right to monitor, review and inspect the performance of any repair, replacement and restoration work by the Company as if such work constituted Work hereunder.

#### 16.2 Repair Period Notice.

The Company shall, within a commercially practical period after the date of the Casualty and the Company and/or Village and/or the Company and/or Village insurance carrier giving Company the notice to proceed, provide written notice to the Village indicating the anticipated commencement date and period for restoring, repairing or replacing the Wastewater Facilities ("Repair Period Notice"). The Repair Period Notice shall be accompanied by a certified statement executed by the contractor retained by the Company to complete the repairs. If the Company has not retained a contractor, if requested by the Village, a licensed contractor not affiliated with the Company and approved by the Village, shall certify the Company's opinion about the anticipated period for repairing the Wastewater Facilities.

#### 16.3 Village's Option To Terminate.

If the Repair Period Notice provided by the Company indicates that the anticipated period for restoring, repairing or replacing the Wastewater Facilities exceeds two-hundred and seventy (270) days or such other period of time acceptable to the Village, the Village may elect to: (i) terminate this Agreement for convenience consistent with Article XIV after receiving the Repair Period Notice; or (ii) negotiate with the Company in order to otherwise repair the Casualty.

### **ARTICLE XVII ASSIGNMENT AND DELEGATION**

#### 17.1 Assignment by Company.

The Company shall not assign, transfer, sell, convey, lease, sublease, encumber or otherwise dispose of this Agreement, its right to execute the same, or its right, title or interest in all or any part of the Project, the Sites, the Wastewater Facilities, this Agreement or any monies due hereunder whatsoever prior to their payment to the Company, whether legally or equitably, by power of attorney or otherwise, without the prior written consent of the Village, in its sole and absolute discretion. Any such approval given in one instance shall not relieve the Company of its obligation to obtain the prior written approval of the Village to any further assignment. Any such assignment of this Agreement which is approved by the Village in writing, shall require the assignee of the Company to assume the performance of and observe all obligations, representations and warranties of the Company under this Agreement,

and no such assignment shall relieve the Guarantor of any of its obligations under the Guaranty Agreement, which shall remain in full force and effect during the Term hereof. The approval of any assignment, transfer or conveyance shall not operate to release the Company in any way from any of its obligations under this Agreement unless such approval specifically provides otherwise.

Notwithstanding the foregoing, the Company shall have the right to assign this Agreement to Layne Heavy Civil, Inc., as a “Permitted Assignee”, subject to the following: (i) the Company shall deliver to the Village the proposed assignment agreement, at least sixty (60) days prior to the effective date of the assignment, for the Village’s review and approval; (ii) the Permitted Assignee shall expressly assume and agree to be fully bound by the terms and conditions of this Agreement and assume the performance of all obligations, representations and warranties of the Company under this Agreement; and (iii) no such assignment shall relieve the Guarantor of the performance of any of its obligations under this Agreement or the Guaranty Agreement, which shall remain in full force and effect during the Term hereof; and (iv) the Company and the Guarantor shall execute such other instruments or agreements, as may be reasonably requested or required by the Village to effectuate the assignment.

17.2 By the Village.

The Village may not assign its rights or obligations under this Agreement without the prior written consent of the Company, except that the Village may transfer its rights under and its interest in this Agreement to another Governmental Body, any entity or special district created by or for the Village to build, manage, operate or finance the Wastewater Facilities, if such assignee assumes the duties and obligations of the Village hereunder.

17.3 Subcontract.

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

## **ARTICLE XVIII CONTRACT ADMINISTRATION**

18.1 Agreement Documents.

This Agreement and all documents and instruments referenced herein shall permit the parties to complete the Design/Build Work within the Contract Time for the Design/Build Price specified. The Contract Documents of this Agreement are intended to be complementary and interpreted in harmony so as to avoid conflict, and interpreted in a manner consistent with construction and design industry standards. In the event of any inconsistency, conflict or ambiguity between or among this Agreement, the Appendices and other documents referenced in this Agreement, the instruments are prioritized as follows:

18.1.1 All written modifications, amendments and Change Orders to this Agreement issued in accordance with the terms of this Agreement;

18.1.2 This Agreement;

18.1.3 The Appendices to this Agreement;

18.1.4 Any other documents described or referred to in this Agreement.

18.2 Notices.

All notices, consents, approvals or written communications given pursuant to the terms of this Agreement shall be: (1) in writing and delivered in person; (2) transmitted by certified mail, return receipt requested, postage prepaid or by overnight courier utilizing the services of a nationally-recognized overnight courier service with signed verification of delivery; or (3) given by facsimile transmission or electronic mail, if a signed original is deposited in the United States Mail within two (2) days after transmission. Notices shall be deemed given only when actually received at the address first given below with respect to each party. Either party may, by like notice, designate further or different addresses to which subsequent notices shall be sent.

Village Notice Address. Notices required to be given to the Village shall be addressed as follows:

Islamorada, Village of Islands  
Attn: Village Manager  
86800 Overseas Highway  
Islamorada, Florida 33036  
Facsimile No.: (305) 305 664-6464  
Email Address: [edward.koconis@islamorada.fl.us](mailto:edward.koconis@islamorada.fl.us)

With a copy to:

Village Attorney  
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L  
2525 Ponce de Leon Blvd., Suite 700  
Coral Gables, Florida 33134  
Attn: Nina L. Boniske, Esq.  
Facsimile No.: (305) 854-2323  
Email Address: [nboniske@wsh-law.com](mailto:nboniske@wsh-law.com)

Contract Administrator Notice Address. Notices required to be given to the Contract Administrator shall be addressed as follows:

Greg Tindle  
Wastewater Program Manager  
Islamorada, Village of Islands  
86800 Overseas Highway  
Islamorada, Florida 33036  
Facsimile No.: (305) 305 664-6464  
Email Address: [greg.tindle@islamorada.fl.us](mailto:greg.tindle@islamorada.fl.us)

with a copy to the Village at the address provided above.

Owner's Representative Notice Address. Notices required to be given to the Village's Owner's Representative shall be addressed as follows:

Thomas S. Brzezinski, Executive Vice President  
Wade Trim, Inc.  
Renaissance 5  
8745 Henderson Rd, Ste 220  
Tampa, Florida 33634  
Facsimile No.: (813) 884.5990  
Email Address: [tbrzezinski@wadetrim.com](mailto:tbrzezinski@wadetrim.com)

with a copy to the Village at the address provided above.

Company Notice Address. Notices required to be given to the Company shall be addressed as follows:

Reynolds Water Islamorada, LLC  
Attn: Mark Accetturo, President  
300 East Broad Street  
Fairburn, Georgia 30213  
Facsimile No.: (770) 969-4363  
Email Address:  
[mark.accetturo@layne.com](mailto:mark.accetturo@layne.com)

with a copy to:  
Layne Christensen Company  
Attn: Steve F. Crooke, Senior Vice President and General Counsel  
1900 Shawnee Mission Parkway  
Mission Woods, Kansas 66205  
Facsimile No.: (913) 362-0133  
Email Address: [steve.crooke@layne.com](mailto:steve.crooke@layne.com)

**ARTICLE XIX**  
**REQUIREMENTS OF LEGISLATION AND DCA ADMINISTRATION RULES**

19.1 General.

19.1.1 The Company shall cooperate with the Village to ensure that the Village is in full compliance with the Legislation and DCA Rules, the FDEP Permits and any Applicable Law. The Company hereby undertakes to complete its obligations pursuant to this Agreement in compliance with the Legislation and DCA Rules, the FDEP Permits and any Applicable Law. Accordingly, the Company's covenants of obligations shall include, but shall not be limited to, timely compliance with operating criteria, preparation of notices and reports (including technical monitoring reports and capacity reports), maintenance of records of monitoring information, the establishment of an appropriate cost accounting system and the assembly and delivery of the necessary operating and cost information which the Village may reasonably request or require to comply with the Legislation, the DCA Administration Rule, the FDEP Permits and Applicable Law.

19.1.2 Any notices and reports proposed or required under Applicable Law shall be submitted to the Village for approval before delivery to any Governmental Authority or other third party.

19.1.3 The Company acknowledges and agrees to the Legislation and DCA Rule, the FDEP Permits and any applicable Project deadlines and Project milestone compliance dates, and is familiar with their terms and requirements.

**ARTICLE XX**  
**MISCELLANEOUS PROVISIONS**

20.1 Compliance with Law.

The Company agrees to comply with all Applicable Law in the performance of this Agreement and in connection with the Project and Wastewater Facilities.

20.2 Application of Taxes & Assessments.

The Wastewater Facilities, and the modifications and improvements to the Wastewater Facilities to be constructed, shall be owned by the Village during the Term of this Agreement. It is the intent of the parties that the Project shall be municipally owned property and not subject to real property or possessory interest taxation. The parties agree to work cooperatively to minimize the property taxes, assessments and any other taxes that may apply to the Wastewater Facilities, in view of their exclusive purpose to provide wastewater collection and treatment services to the Village and its Customers. In this regard, the parties may establish an Owner Direct Purchase Program pursuant to Section 11.6.3 to minimize the sales tax payable by the Village.



In its performance of the Contract Services, the Company acknowledges that construction materials and supplies initially acquired by the Company or any Subcontractor in connection with the Design/Build Work or any Capital Modification, and operating supplies relating to the performance of the Operation Services, are subject to State and local sales tax. The Company further acknowledges that these taxes have been priced into the Fixed Design/Build Price and the Service Fee, and agrees to pay all such taxes without reimbursement from the Village.

### 20.3 Relationship Between Parties.

The relationship of the Company to the Village is that of independent contractor and not one of employment. None of the employees, agents or Subcontractors of the Company shall be considered employees of the Village. Nothing in this Agreement shall be deemed to constitute either party a partner, agent or legal representative of the other party. No liability or benefits, such as workers compensation, pension rights or liabilities, or other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to any party's agent or employee as a result of this Agreement or the performance thereof. For the purposes of all Applicable Law, and all federal, state and local laws and regulations, the Company shall exercise primary management and operational decision making authority.

### 20.4 Governing Law.

This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of Florida. Any action filed to enforce the terms of this Agreement shall be filed in Monroe County, Florida.

### 20.5 Waiver.

The failure on the part of any party to enforce any provision of this Agreement shall not be construed as a waiver of its right to enforce such provision in the future. A waiver of any term of this Agreement on the part of any party in one case shall not be construed as a waiver in any other case and shall not affect any other term of this Agreement.

### 20.6 Ownership of Documents.

All deliverables produced pursuant to this Agreement shall be the property of the Village, upon payment by the Village. All information acquired from the Village, or from others at the expense of the Village, in the performance of this Agreement shall be and remain the property of the Village. This includes but is not limited to all records, data, files, computer records, work sheets, deliverable products (complete and incomplete) and all other types of information or writings, whether electronic, digital, graphic matter or other medium upon which intelligence or information may be recorded or retrieved prepared or acquired by the Company in the performance of this Agreement. This excludes documents identifying the salary and benefits of specific employees of the Company as well as other proprietary information related to the business operations of the Company. The Company shall have a right

to retain a copy of all documents it produces under this Agreement. However, such documents are not intended or represented to be suitable for reuse by the Village or others on any other project and the Village shall have no right to use the design documents or construction drawings or specifications for any purpose other than that intended under this Agreement. Any reuse without written verification or adaptation by the Company for the specific purpose intended will be at Village's sole risk and without liability or legal exposure to the Company.

20.7 Ownership of Project; Title to Sites and Wastewater Facilities.

The Project and Wastewater Facilities shall be owned by the Village at all times. The Company shall perform the Design/Build Work and Operation Services provided for herein as an independent contractor and shall not have any legal, equitable, tax, beneficial or other ownership or leasehold interest in the Project or the Wastewater Facilities. During the Term, ownership and title to the Sites and Wastewater Facilities and any modifications or improvements thereto (excluding trade fixtures of the Company that are installed in the Sites) shall be and remain exclusively in the Village.

20.8 Successors and Assigns.

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

20.9 Third Party Beneficiaries.

Except as may be specifically stated in this Agreement, this Agreement shall not create any rights or benefits to parties other than the Village and the Company.

20.10 Copies.

This Agreement shall not be executed in counterparts. Two (2) fully executed copies of the Agreement shall be provided, one for the Village and one for the Company.

20.11 Entire Agreement, Modifications, Headings and Severability.

The parties acknowledge that this Agreement constitutes the entire Agreement between the parties and supersedes all prior representations, warranties, agreements, and understandings oral or written between the parties with respect to its subject matter. Unless stated otherwise in this Agreement, this Agreement may not be modified except in writing signed by both parties. The headings to this Agreement are for convenience and reference purposes only and shall not constitute a part of the Agreement.

20.12 Severability.

If any element of this Agreement is later held to violate the law or a regulation, it shall be deemed void, and all remaining provisions shall continue in force.

20.13 Time of Essence.

Time is of the essence with respect to each provision of this Agreement and the Project milestone dates and compliance dates mandated by the State of Florida, the Legislation and the DCA Rule.

20.14 No Waiver of Governmental Authority.

The consents, approvals and disapprovals given or to be given by the Village under this Agreement are given in the Village's proprietary capacity as a party to this Agreement. Nothing in this Agreement shall be construed as a waiver of, or limitation upon, the authority, powers or actions of the Village acting in its municipal or governmental capacity. Nothing in this Agreement shall be interpreted as limiting the rights and obligations of the Village under Applicable Law in its governmental capacity (including police power actions to protect health, safety and welfare or to protect the environment), or as limiting the right of the Company to bring any action against the Village, not based on this Agreement, arising out of any act or omission of the Village in its governmental capacity.

20.15 Authority of Village Manager.

The Village Manager shall have the authority to execute all documents necessary to implement this Agreement, provided, however, that the Village Manager shall not execute a Change Order that increases the cost to the Village by more than \$25,000 nor shall the Village Manager alter the Final Completion Date or the Commencement Date of Operations of Wastewater Facilities.

20.16 No Liability for Exercise of Police Power.

Notwithstanding and prevailing over any contrary provision in this Agreement, any Village covenant or obligation that may be contained in this Agreement, including the following:

- (i) To cooperate with, or provide good faith, diligent, reasonable or other similar efforts to assist, the Company, regardless of the purpose required for such cooperation;
- (ii) To execute documents or give approvals, regardless of the purpose required for such execution or approvals;
- (iii) To apply for or assist the Company in applying for any County, Village or third party permit or needed Governmental Approval; or

(iv) To contest, defend against, or assist the Company in contesting or defending against any challenge of any nature;

Nothing in this Agreement shall bind the Village, the Planning and Development Services Department, or any other County, Village, federal or State department or authority, committee or agency to grant or leave in effect any zoning changes, variances, permits, waivers, contract amendments, or any other approvals that may be granted, withheld or revoked in the discretion of the Village or other applicable Governmental Authority in the exercise of its police power.

20.17 Notice of Litigation.

In the event the Company or Village receives notice of or undertakes the defense or the prosecution of any Legal Proceedings, claims, or investigations in connection with the Project, the party receiving such notice or undertaking such defense or prosecution shall give the other party timely notice of such proceedings and shall inform the other party in advance of all hearings regarding such proceedings. For purposes of this Section only, "timely notice" shall be deemed given if the receiving party has a reasonable opportunity to provide objections or comments or to proffer to assume the defense or prosecution of the matter in question, given the deadlines for response established by the relevant rules of procedure.

20.18 Further Assurances.

The Village and Company each agree to execute and deliver such further instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Agreement. The Village and the Company, in order to carry out this Agreement, each shall use all commercially reasonable efforts to provide such information, execute such further instruments and documents and take such actions as may be reasonably requested by the other and not inconsistent with the provisions of this Agreement and not involving the assumption of obligations or liabilities different from or in excess of or in addition to those expressly provided for herein.

20.19 Limited Recourse to Village.

No recourse shall be had to the general fund or general credit of the Village for the payment of any amount due the Company hereunder, whether on account of the Design/Build Price or Service Fees, or for any payment or claim of any nature arising from the performance or non-performance of the Village's obligations hereunder. The Village has the authority to impose utility rates, charges and assessments in an amount sufficient to protect the revenue streams under this Agreement. The Village covenants and agrees to dedicate that portion of wastewater fee revenues necessary to make payments under this Agreement.

20.20 Prevailing Party. If any litigation is necessary to enforce the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees which are directly attributed to such litigation in addition to any other relief to which it may be entitled.

20.21 Waiver of Jury Trial. THE COMPANY AND VILLAGE, BY ACCEPTANCE OF THIS AGREEMENT, HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT THAT EACH MAY HAVE TO A TRIAL BY JURY WITH RESPECT TO ANY LITIGATION BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PARTY TO THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THIS AGREEMENT.

IN WITNESS WHEREOF, the parties have executed this Agreement and acknowledged all Appendices attached hereto as of the date first written above.

**VILLAGE:**

ISLAMORADA, VILLAGE OF ISLANDS, a  
Florida municipal corporation

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Michael Reckwerdt, Mayor

**ATTEST:**

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Village Clerk

**APPROVED AS TO FORM AND  
LEGAL SUFFICIENCY AS TO THE  
VILLAGE ONLY:**

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Village Attorney

IN WITNESS WHEREOF, the parties have executed this Agreement and acknowledged all Appendices attached hereto as of the date first written above.

**COMPANY:**

REYNOLDS WATER ISLAMORADA, LLC a  
Delaware limited liability company

By: \_\_\_\_\_  
Mark Accetturo, President and Managing  
Member

## **APPENDICES**

### **(Attached to the Design, Build and Operate (DBO) Agreement between Islamorada, Village of islands, and Reynolds Water Islamorada, LLC**

1. Project Sites
2. Design Drawings for Build/Operate Projects
3. Intentionally Deleted
4. Forms of Payment/Performance Bonds
5. Capital Modifications
6. Design/Build Price and Service Fee Schedule
7. Guaranteed Maximum Electricity Usage
8. Pre-Design Requirements (Design Criteria Package and Design Standards Manual)
9. Operations & Maintenance Plan
10. Operations & Maintenance Minimum Staffing Plan
11. Renewal & Replacement Schedule
12. Key Personnel
13. Insurance Requirements
14. Form of Guaranty Agreement
15. Exit Tests and Standards
16. Initial Project Schedule
17. DBO Management Plan
18. Acceptance and Start Up Tests and Standards
19. FDEP Supplementary Conditions (Construction)
20. Federal Aid Construction Contract Provisions (FHWA-1273)
21. Acceptance Date Certificate
22. Notice of No Lien
23. NPDES Permit (NPK Facilities)
24. Trench Safety Compliance Statement