

June 13, 2018

MEMO TO: IEM-63 File

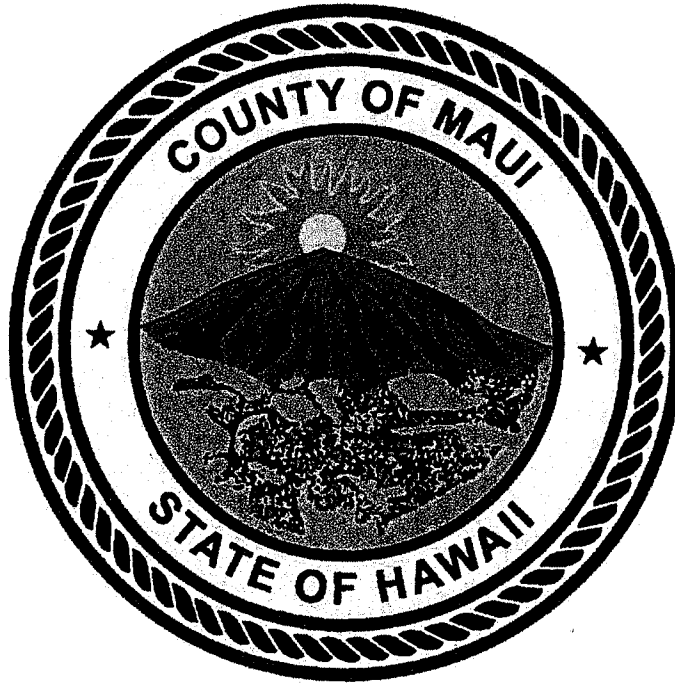
F R O M: Elle Cochran, Chair   
Infrastructure and Environmental Management Committee

SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO  
STATUS UPDATE ON ANAERGIA SERVICES LLC PROJECTS**  
(IEM-63)

The attached informational document pertains to Item 63 on the Committee's agenda.

iem:misc:063transinfo01

Attachment



M1016

**MAUI COUNTY INTEGRATED WASTE CONVERSION AND ENERGY PROJECT  
SERVICES AGREEMENT**

**MAUI COUNTY INTEGRATED WASTE CONVERSION AND ENERGY PROJECT  
SERVICES AGREEMENT**

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**MAUI COUNTY INTEGRATED WASTE CONVERSION AND ENERGY PROJECT  
SERVICES AGREEMENT**

This Integrated Waste Conversion and Energy Project Services Agreement ("Agreement") is made and entered into this 8<sup>th</sup> day of January, 2014, ("Effective Date") by and between the County of Maui, a political subdivision of the State of Hawaii, whose address is 200 South High Street, Wailuku, Maui, Hawaii 96793, hereinafter referred to as the "County", and Maui Resource Recovery Facility, LLC, a Delaware limited liability company, whose address is 5780 Fleet Street, Suite 310, Carlsbad, California 90028, hereinafter referred to as "MRRF", both collectively referred to as the "Parties".

**RECITALS**

WHEREAS, the County owns and operates the Central Maui Landfill located at 1 Pulehu Road in Pu'unene, Maui, Hawaii, which includes a gas collection and control system ("GCCS") (collectively, "Landfill");

WHEREAS, landfill gas, consisting primarily of methane and carbon dioxide, is produced as a byproduct of the decomposition of refuse within the Landfill ("Landfill Gas"), and MRRF has sampled or otherwise become familiar with the Landfill Gas;

WHEREAS, the Landfill receives the following resources suitable for recovery of recycled materials and for conversion to energy, fuel, and/or other products: commercial and residential municipal solid waste ("MSW"), Green Waste; Sewage Sludge; and Fats, Oils, and Grease ("FOG"), all of which MRRF has sampled or otherwise become familiarized;

WHEREAS, on November 9, 2012, the County issued Request for Proposals No. 12-13/P32, Integrated Waste Conversion and Energy Project ("RFP");

WHEREAS, Anaergia Services LLC ("Anaergia"), responded to the County's RFP and the County selected Anaergia, which formed the MRRF to finance, plan, design, permit, construct, own, operate, and maintain an Integrated Waste Conversion and Energy Project ("MRRF's Facility" or "Facility"), intended to be located on privately owned real property in the vicinity of the Landfill;

WHEREAS, MRRF's Facility is intended to be a "Resource Recovery Facility," as defined in Section ("§") 340A-1, Hawaii Revised Statutes ("HRS").

WHEREAS, this Agreement is for performance of services as defined in HRS § 103D-104 such that MRRF's Facility will receive and convert Acceptable Waste and Landfill Gas into Fuel, as defined in HRS §196-2, or Renewable Energy, as defined in HRS §196-11, or other marketable commodities, thereby diverting a significant percentage of such waste from disposal in the Landfill;

WHEREAS, the County wishes to provide to MRRF, and MRRF wishes to accept from

the County, such or all of the Landfill Gas produced at the Landfill and Acceptable Waste received at the Landfill as further described in the Agreement ;

WHEREAS, pursuant to HRS §46-1.5(4) the County is authorized to enter into this Agreement; and

NOW, THEREFORE, in consideration of the mutual agreements contained herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the County and MRRF agree as follows:

### **Article I. Definitions**

Unless otherwise required by the context in which any term appears: (a) capitalized terms used in this Agreement shall have the respective meanings set forth in this Article I; (b) the singular shall include the plural and vice versa; (c) the word "including" shall mean "including, without limitation", (d) references to "Sections" and "Exhibits" shall be to sections and exhibits hereof; (e) the words "herein," "hereof" and "hereunder" shall refer to this Agreement as a whole and not to any particular section or subsection hereof; and (f) references to this Agreement shall include a reference to all exhibits hereto, as the same may be amended, modified, supplemented, or replaced from time to time.

"Acceptable Waste" means commercial and residential MSW, FOG, construction and demolition waste ("C&D"), agricultural plastic, Green Waste, tires, Source Separated Recyclables, Sewage Sludge, and residuals from water and wastewater treatment. Acceptable Waste does not include Unprocessibles.

"Acceptable Waste Delivery Point" shall mean the designated physical interconnection point at which the County delivers, or causes to be delivered, Acceptable Waste to MRRF, at which point ownership, possession, and control of the Acceptable Waste is transferred from the County to MRRF.

"Acceptable Waste Tipping Fee" means the amount paid by the County to MRRF for each ton of Acceptable Waste delivered to MRRF's Facility.

"Affiliate" means, when used with reference to a specified Party, any Party that, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with the specified Party. For this purpose, "control" means the direct or indirect ownership of ten percent (10%) or more of the outstanding capital stock or other equity interests having ordinary voting power.

"Agreement" shall mean this Integrated Waste Conversion and Energy Project Services Agreement, including all exhibits and schedules hereto, as the same may be amended from time to time.

"Applicable Laws" shall mean any act, statute, law, regulation, permit, license, ordinance, rule, judgment, order, decree, directive, guideline, or policy (to the extent mandatory) or any similar form of decision or determination by, or any interpretation or

administration of, any of the foregoing by any governmental authority with jurisdiction over the County's Facilities, MRRF's Facility, the GCCS and Landfill, or the performance of the work hereunder and the transaction contemplated hereunder.

"BTU" shall mean British Thermal Unit.

"Business Day" shall mean any Day other than a Saturday, Sunday, or a legal holiday in the State of Hawaii.

"Bypassed Waste" means Acceptable Waste delivered to MRRF's Facility that is unable to be stored or processed at MRRF's Facility due to MRRF's Facility downtime and must be directed to the Landfill or another disposal facility.

"Change Order" means any approved request or written authorization that is agreed to by the Parties in writing that authorizes or requires additional or extra services or work or deletes or omits services or work. A Change Order may also modify a schedule of performance or otherwise alter the services or work to be performed.

"Commercial Operation Date" shall be the date upon which full commercial operation of MRRF's Facility's primary project components and processes, as identified in Section 3.01, commence.

"Condensate" shall mean any liquid(s) that condense or otherwise separate from the Landfill Gas or biogas during collection, transportation, or processing by the GCCS or MRRF's Facility.

"Contract Year" shall mean every twelve (12) month period which begins at 12:01 a.m. Hawaii Standard Time on the Commercial Operations Date and on every anniversary thereof during the Term.

"County's Facilities" shall mean the Landfill and GCCS together with all appurtenant facilities.

"Day" shall mean a calendar day.

"Delivery Commencement Date" shall mean the date on which the County commences delivery of Acceptable Waste and/or Landfill Gas, as applicable, to MRRF and MRRF accepts initial delivery of Acceptable Waste and/or Landfill Gas from the County, in accordance with the terms hereof.

"Effective Date" shall mean the date first set out above.

"Effluent" means wastewater generated by MRRF's Facility.

"Effluent Requirements" means any wastewater effluent limitations required by Applicable Law.

"Environmental Attributes" means any and all credits, benefits, emissions reductions, offsets and allowances, howsoever entitled, attributable to the generation from MRRF's Facility, and its displacement of conventional energy generation, including but not limited to Renewable Energy Certificates/Credits ("RECs"), (REC being defined as a tradable instrument representing the renewable attributes associated with the production of one (1) MWh of electricity by a certified renewable generator), Greenhouse Gas ("GHG")/Carbon Offsets/Credits (being defined as the offset, allowance, or credit associated with GHG reduction or GHG removal enhancement of one metric ton of CO<sub>2</sub>e) as well as: (1) any avoided emissions of pollutants to the air, soil, or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and other GHGs that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the earth's climate by trapping heat in the atmosphere; and (3) the reporting rights to these avoided emissions, including the right of a party to report the ownership of accumulated offsets, green tags, GHG offsets, or REC reporting rights under any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program (which, as of the Effective Date include certificates issued by Green-e in accordance with the Green-e Renewable Electric Certification Program, National Standard Version 1.3 administered by the Center of Resource Solutions).

Environmental Attributes do not include (i) any energy, capacity, reliability, or other power attributes from MRRF's Facility, (ii) production tax credits associated with the construction or operation of MRRF's Facility, or any other associated contract or right, and other financial incentives in the form of credits, reductions, or allowances associated with MRRF's Facility that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies, local subsidies, or tipping fees received by MRRF for the destruction of particular pre-existing pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by MRRF's Facility or the County for compliance with local, state, or federal operating and/or air quality permits.

"Excess Acceptable Waste" shall mean that quantity of the following individual sub-categories of Acceptable Waste in excess of 211,000 tons of MSW, or 35,000 tons of Green Waste, or 48,000 tons of C&D Waste, or 33,000 tons of Sewage Sludge, or 6,000 tons of FOG, as measured on an annual basis according to the Contract Year. Excess Acceptable Waste shall additionally mean quantities in excess of the daily maximum, measured in tons per Day ("TPD"), as follows: 700 TPD of MSW, 160 TPD of Commercial C&D, 25 TPD of Residential C&D, 150 TPD of Green Waste, 150 TPD of Sewage Sludge, and 50 TPD of FOG.

"Expansion Plant" shall mean any processing capacity added to MRRF's Facility to process Excess Acceptable Waste.

"Fats, Oils, and Grease" or "FOG" means any liquid, semi-liquid, or solid fat, oil, or grease of animal or vegetable origin that is removed from commercial food service establishments through the use of an interceptor or grease trap.

"Flare Turndown Landfill Gas" shall mean that volume of Landfill Gas that the County does not deliver to MRRF to meet the County's Flare Turndown Requirements.

"Flare Turndown Requirements" shall mean the minimum continuous volume and quality of Landfill Gas necessary to operate the County's flare(s) at the Landfill in compliance with manufacturer's specifications and Applicable Laws and Permits.

"Force Majeure" shall mean acts of God, strikes, lockouts or other industrial disturbances, epidemics, landslides, lightning, earthquakes, fires, storms, hurricanes, floods, high-water washouts, acts of the public enemy, wars, blockades, insurrections, riots, arrests and restraints by governments, civil disturbances, catastrophic events such as explosions, breakage, or accident to machinery or lines of pipe, freezing of or damage to wells or lines of pipe, and governmental actions such as the enactment of statutes, laws or regulations, acts of governmental bodies and any other cause or causes, whether of the kind herein enumerated or otherwise, not within the control of the party claiming Force Majeure and which, by the exercise of reasonable diligence, such party is unable to prevent or overcome. Force Majeure shall not include a Party's financial inability to perform any obligation under this Agreement.

"Landfill Gas Collection and Control System" or "GCCS" shall mean the GCCS as now constituted and as may be expanded or relocated from time to time within the Landfill during the term of this Agreement, comprised of Landfill Gas wells or trenches, lateral piping, blowers, and other equipment or facilities required for the extraction of Landfill Gas from the Landfill.

"Government Incentives" shall mean any monetary awards or other value provided by any governmental or other agency with respect to MRRF's receipt and utilization of Landfill Gas or Acceptable Waste or any activities of MRRF in connection with this Agreement or MRRF's Facility; provided such awards or other value shall exclude Environmental Attributes and Tax Credits.

"Green Waste" shall mean leaves, garden residues, shrubbery and tree trimmings, grass clippings, and similar material.

"Hawaii Administrative Rules" or "HAR" shall mean the Hawaii Administrative Rules, as amended.

"Hawaii Revised Statutes" or "HRS" shall mean the Hawaii Revised Statutes, as amended.

"Hazardous Waste" shall have the meaning set out in HRS §342J-2. Hazardous Waste does not include Household Hazardous Waste.

"Household Hazardous Waste" shall have the meaning set out in Section 342G-1, HRS.

"Interconnection Agreement" shall mean a written agreement between MRRF and the local electric utility specifying the business and technical arrangements pursuant to Rule 14H necessary to allow MRRF's Facility to operate in parallel with the utility's power system, and to allow MRRF's Facility to deliver electric energy to the utility's power system.



"kWh" shall mean kilowatt-hour.

"Landfill" shall mean the Central Maui Landfill located on Pulehu Road, Pu'unene.

"Landfill Gas" or "LFG" shall have the meaning set forth in the Recitals hereto.

"Landfill Gas Interconnection Point" shall mean the designated physical interconnection point at which the County delivers Landfill Gas to MRRF, at which point ownership, possession and control of the Landfill Gas is transferred from County to MRRF.

"Maui County Code" or "MCC" shall mean Maui County Code, as amended.

"MECO" shall mean the Maui Electric Company, Ltd.

"Month" shall mean one (1) full calendar month.

"MMBtu" shall mean 1,000,000 British Thermal Units of Energy.

"MRRF's Facility" or "Facility" shall mean MRRF's Facility and all appurtenant facilities and equipment necessary, including associated structures and interconnection equipment, installed at the Site and easements or leases to enable MRRF to accept delivery of Landfill Gas and Acceptable Waste. MRRF's Facility shall not include the GCCS.

"MWh" shall mean megawatt-hour.

"Municipal Solid Waste" or "MSW" shall have the same meaning as set forth in the definition of "solid waste or municipal solid waste" as set forth in HRS § 342G-1.

"Offtake Agreement" shall mean a written agreement pursuant to which MRRF has agreed to sell the commodities produced or refined by MRRF's Facility to a third party.

"Performance Guarantees" are identified in Article IX.

"Permits" shall mean all permits, authorizations, waivers, variances, licenses, approvals, consent decrees or agreements, or similar orders of or from any federal, state or local government authority, agency or any entity having jurisdiction over the matter in question.

"Power Sale Agreement" shall mean a written agreement pursuant to which MRRF has agreed to sell the output of MRRF's Facility to MECO, County, or to another third party.

"Procurement Officer" shall mean the director of the County of Maui Department of Finance.

"psia" shall mean pounds per square inch absolute.

"Renewable Compressed Natural Gas" or "RCNG" is a compressed natural gas created from Landfill Gas and/or the biogas created in MRRF's Facility.

"Renewable Liquefied Natural Gas" or "RLNG" is a liquefied natural gas created from Landfill Gas and/or the biogas created in MRRF's Facility.

"Residue" shall mean those substances or materials remaining after Acceptable Waste has been processed, refined, or otherwise handled by MRRF's Facility that are intended to be landfilled or otherwise disposed. Residue does not include Bypassed Waste, Unprocessibles, and bottom or fly ash.

"Rule 14H" shall mean the MECO's Public Utility Commission Tariff Rule No. 14, Section H entitled "Interconnection of Distributed Generating Facilities Operating in Parallel with the Company's Electric System".

"SCFM" shall mean "standard cubic feet per minute," the volumetric flow rate of Landfill Gas adjusted to standardized conditions of temperature (being 68° F) and pressure (being 14.73 psia).

"Sewage Sludge" shall have the same meaning as set forth in HRS §342G-1.

"Site" shall mean the real property upon which MRRF's Facility is located, along with all easements, licenses, or rights of entry benefiting such property.

"Solid Fuel" or "SF" is a solid fuel produced by processing Acceptable Waste.

"Source Separated Recyclables" means recyclable materials separated at the point of generation by the generator thereof from solid waste for the purposes of recycling.

"Standard Operating Procedures" or "SOP" shall mean a written document or instruction related to the steps and activities of a process or procedure related to the operation and maintenance of MRRF's Facility.

"Tax Credits" shall mean all or any of the credits against or with reference to any federal, state, or local taxes available to MRRF related to the Acceptable Waste and/or Landfill Gas delivered to MRRF at the Acceptable Waste Delivery Point and/or Landfill Gas Interconnection Point, and the operation and production of MRRF's Facility. For the avoidance of doubt, Tax Credits shall include cash payments in lieu of tax credits or depreciation.

"Term" shall have the meaning set forth in Article IV hereof.

"Title V permit" shall mean a permit issued pursuant to the federal Clean Air Act (CAA § 501-507; USC § 7661-7661f), as amended.

"Tons" or "tons" shall mean straight tons or 2,000 pounds of material regardless of moisture content.

"Unprocessibles" means material that cannot be processed at MRRF's Facility because of its size or its characteristics; e.g., oversized and/or bulky items (such as household appliances), Hazardous Waste, or Household Hazardous Waste. Unprocessibles are diverted by

MRRF from entering any of MRRF's Facility's processes and are not transformed by MRRF's Facility's processes.

## **Article II. Utility Interconnection and Offtake Infrastructure**

Section 2.01 MRRF will be responsible for the costs of any required interconnection study and the cost, including design and permitting, to construct the utility or other third-party interconnection infrastructure related to offtake of any fuels or electricity produced by MRRF's Facility.

## **Article III. Construction, Installation, and Testing of MRRF's Facility**

Section 3.01 MRRF Facility Description. MRRF's Facility will function to substantially divert from the Landfill all of the Landfill Gas generated by and Acceptable Waste received at the Landfill. MRRF's Facility will comprise the following primary project components and processes: materials recovery facility, anaerobic digester, and Solid Fuel facility. Landfill Gas will be used to generate fuel and/or electricity primarily to accommodate the power needs of MRRF's Facility. Acceptable Waste will be sorted within a materials recovery facility, which will separate and recover metals, plastics, glass, and/or other recyclables. Anaerobic digester(s) will be used to process the organic portion of the waste streams to produce biogas that will be used or marketed as fuel. The relevant remaining fraction of the incoming waste streams will be converted to Solid Fuel. As of the Effective Date, MRRF will not use the fuels produced in MRRF's Facility to produce electricity for sale to others, including the County; however, during the Term, MRRF may expand MRRF's Facility to include such capability through technology such as, but not limited to, gasification or internal combustion engines. The Facility will be designed to utilize or flare all of the Landfill Gas generated within the Landfill and to divert approximately eighty-five percent (85%) of the incoming Acceptable Waste streams (excluding C&D) and approximately sixty-five percent (65%) of the incoming C&D waste from disposal in the Landfill. Such target diversion rates are dependent upon the composition of the waste and do not include Unprocessibles.

Section 3.02 Progress Reports. MRRF shall report in writing to the County on at least a monthly basis from the Effective Date through the Commercial Operation Date on MRRF's progress toward completion of each Project Milestone, pursuant to Article IX.

Section 3.03 Plans and Specifications. MRRF shall prepare and submit for review to the County Department of Environmental Management ("DEM") detailed plans and specifications related to MRRF's Facility and the Landfill Gas Interconnection Point and the Acceptable Waste Delivery Point, including all structures, electrical systems, interfaces with the grid electricity supply, and any necessary Facility or utility infrastructure improvements. MRRF's Facility shall comply with all Applicable Laws, including the applicable Institute of Electrical and Electronic Engineers rules for interconnected distributed generation systems and shall be compliant with the applicable National Electrical Code and relevant state and local building codes. All equipment shall be labeled as required by the applicable National Electrical Code with special "High Voltage" warning labels where applicable.

Section 3.04 County's Plan Review. Within twenty (20) Days after MRRF's submission of

the plans and specifications to DEM, DEM shall inform MRRF in writing of any comments or objections to the plans and specifications. MRRF shall authorize reasonable changes thereto, provided that they do not materially alter the design, character, capacity, cost, and appearance of MRRF's Facility. The County's review of MRRF's plans and specifications shall not alter any obligations or responsibilities of MRRF hereunder, nor shall such review create any warranties as to the design, suitability, capability, or expected performance of MRRF's Facility or operations.

Section 3.05 Title V Permit. If necessary, MRRF shall apply for a Title V permit in connection with MRRF's Facility. If the Hawaii Department of Health advises MRRF that a separate Title V permit will not be allowed, and that the County's Landfill permit should be amended to include MRRF's Facility, MRRF shall so notify the County within thirty (30) Days of MRRF's receipt of such advice or notice from the Hawaii Department of Health. In such event, the Parties will cooperate to determine the best course of action or either Party may terminate this Agreement by notice to the other within sixty (60) Days after the County's receipt of MRRF's notice and, upon termination, neither Party shall have any further obligation to the other. If the County's Title V permit is amended to include MRRF's Facility, all costs associated with said modification shall be borne by MRRF. The Parties agree that a condition of this Agreement is that their respective activities and operations will be treated as independent sources or independent air emissions.

Section 3.06 Permits and Authorizations.

- (a) Prior to commencing construction, MRRF shall obtain, at MRRF's sole cost and expense, all necessary environmental assessments or impact studies, statements or reports, zoning and land use approvals, permits, licenses, and utilities for the installation, construction, and operation of MRRF's Facility, and shall comply with all applicable local, state, and federal laws and regulations. All applications, filings, or communications with third parties in connection with any of the foregoing shall be provided to the County for review.
- (b) At all times during the Term, MRRF shall, at its sole cost and expense, obtain and maintain in effect all permits, authorizations, easements, and rights of way required in connection with the installation, construction, expansion, modification, or addition to, or the operation, repair, or maintenance of MRRF's Facility, and MRRF shall comply with all conditions of any and all permits, licenses, and other governmental and regulatory approvals required for MRRF's use of MRRF's Facility.
- (c) At MRRF's request and expense, the County shall reasonably cooperate with MRRF in connection with any hearings, proceedings, or other procedures, and with the preparation of any environmental impact reports, assessments, statements, or studies required in connection with any permits, authorizations, or easements related to the installation, construction, or expansion of, modification or addition to, or the operation, repair, or maintenance of MRRF's Facility. Notwithstanding the foregoing, the County may elect to participate in any hearings, proceedings, or other procedures, and with the preparation of any

environmental impact reports, assessments, statements, or studies required in connection with any permits, authorizations or easements related to the installation, construction, or expansion of, modification or addition to, or operation, repair, or maintenance of MRRF's Facility.

Section 3.07 Conditions Precedent to Commencement of Construction and Installation of MRRF's Facility. Commencement by MRRF of construction and installation activities with respect to MRRF's Facility shall be subject to the satisfaction of the following conditions precedent:

- (a) MRRF shall have submitted detailed plans and specifications and its draft SOP (which shall include, as applicable, the categories identified in Section 3.08(c)) for the County's review pursuant to Section 3.04;
- (b) If required, MRRF shall have an Interconnection Agreement with the local electric utility as provided in Article II;
- (c) MRRF shall have obtained prior to such commencement the permits, licenses, and other approvals required by Applicable Law;
- (d) If the conditions set forth in this Article are not completed, waived, or extended by written agreement within thirty-six (36) months of the Effective Date and MRRF is not diligently pursuing such permits, licenses, and other approvals, the County shall have the option to terminate the Agreement without triggering the default provisions of this Agreement or incurring any liability under this Agreement.
- (e) At any time prior to commencement of construction, MRRF may terminate the Agreement without triggering default provisions if MRRF determines that reasonable financing of MRRF's Facility will not be achieved, financially viable Offtake Agreements can not be obtained, or a determination by MRRF that MRRF's Facility as contemplated will not be economically viable.

Section 3.08 Installation, Construction, and System Testing.

- (a) No later than the beginning of construction of MRRF's Facility, MRRF shall obtain and maintain, or cause to be obtained and maintained, all appropriate insurance coverages for intended construction.
- (b) Following construction start-up and through the Commercial Operation Date, a representative of MRRF and a representative of the County shall meet periodically at a place to be mutually agreed upon by the Parties ("Consultation Meetings"). The meetings shall take place no less often than once each calendar month. The purpose of these meetings is to discuss the construction of MRRF's Facility and to attempt to resolve any issues relating to such construction.
- (c) Prior to the Commercial Operation Date, MRRF shall provide MRRF's Facility's

SOP to the County, which shall include at a minimum:

- (i) General Site Description, including permits and regulatory compliance and access control;
  - (ii) Equipment and Personnel Requirements, including operating personnel, supervision, technical support, third-party assistance, training requirements, operating equipment, equipment inventory and usage, and maintenance procedures (including schedule of maintenance and procedure for emergency maintenance and shutdown);
  - (iii) Condensate management;
  - (iv) Landfill Gas and Acceptable Waste management including Excess Landfill Gas and Excess Acceptable Waste;
  - (v) Notification procedures;
  - (vi) Fire and safety procedures and controls;
  - (vii) Operational controls;
  - (viii) Environmental monitoring;
  - (ix) Record keeping;
  - (x) Reporting, including incident reports, non-compliance reports, annual operating report, and environmental monitoring reports; and such and further information as required by the County.
- (d) Start-up testing of equipment and systems will be completed to demonstrate that each is installed correctly, functions as intended, and meets the applicable conditions specified. Start-up testing will occur once the equipment or system has been installed and is mechanically and electrically complete. The County or its representatives shall have the right to observe any start-up testing. MRRF shall notify the County not less than ten (10) Days prior to the anticipated date(s) of all start-up testing.
- (e) Upon successful completion of the start-up testing, the Commissioning Test will occur. The purpose of the Commissioning Test (which may include a series of sub-tests, as shall be further refined by MRRF with review by the County) is to demonstrate that the Facility functions as intended and meets its permit limits, Applicable Laws, and MRRF's Facility's equipment design, manufacturer specifications, and other relevant factors. The Commissioning Test Plan is to include sequencing of operations, test methodologies, and scheduling of the testing to demonstrate each unit process in MRRF's Facility. A Draft

Commissioning Test Plan shall be submitted to the County a minimum of 30 Days prior to the start of the Commissioning Test. A Final Commissioning Test Plan shall be submitted to the County a minimum of 15 Days prior to the start of said test. As necessary, MRRF shall include regulatory agencies to witness and approve the Commissioning Test.

- (f) All documentation and test results shall be provided to the County for review after an evaluation at MRRF's expense by a third party engineering firm and determination that MRRF's Facility has passed "Commissioning". The County's review of MRRF's System Testing and Commissioning information and documentation shall not alter any obligations or responsibilities of MRRF hereunder, nor shall such review and approval create any warranties as to the design, suitability, capability, or expected performance of MRRF's Facility or operations.

#### **Article IV. Term and Termination**

Section 4.01 Term. Subject to the other provisions contained herein, the Term shall begin on the Effective Date and expire on the date ("the Expiration Date") that is twenty (20) years from the Commercial Operations Date (the period ending on the Expiration Date is the "Term"), unless terminated earlier as provided in this Agreement (the date of any such termination is the "Termination Date").

Section 4.02 Upon Expiration of Term or Early Termination of Agreement. Upon expiration of the Term or upon early termination in full or in part of the Agreement, MRRF shall provide services necessary for a transition of the services provided by MRRF under this Agreement to the County or its designee, for no more than six (6) months from the date of expiration of the Term or date of Termination.

Section 4.03 Multi-term Contract. Pursuant to state law, HRS §103D-315 and HAR §3-122-149, and unless otherwise provided for by law, this Agreement may be entered into for any period of time deemed to be in the best interests of the County, provided the term of the Agreement and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore. Further, when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the Agreement shall be cancelled and MRRF shall be reimbursed for the actual, reasonable value of any non-recurring costs incurred but not amortized in the price of services delivered under this Agreement. The cost of cancellation may be paid from any appropriations available for such purposes.

Section 4.04 Termination for Convenience by the County.

- (a) The Procurement Officer may, when the interests of the County so require, terminate this Agreement in whole or in part, for the convenience of the County. The Procurement Officer shall give written notice of the termination to MRRF

specifying the part of the Agreement terminated and when such termination becomes effective.

- (b) MRRF shall incur no further obligations in connection with the terminated performance, and on the date(s) set in the notice of termination MRRF shall stop performance to the extent specified. After receiving a Notice of Termination for Convenience or Notice of Partial Termination for Convenience, MRRF shall immediately proceed with the following obligations, regardless of any delay in determining or adjusting any amounts due under this Section 4.04:

- (i) Terminate outstanding orders and subcontracts as they relate to the terminated performance;
- (ii) Settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance; and
- (iii) Complete the performance not terminated by the notice of termination and may incur obligations as are necessary to do so.

- (c) Submission of Termination Claim.

- (i) MRRF shall submit a termination claim specifying the amounts due because of the termination for convenience, together with cost or pricing data to the extent required by subchapter 15, chapter 3-122 of the HAR, bearing on the claim. If MRRF fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the MRRF, if at all, an amount set in accordance with Subsection 4.04(d) based on the information available, and MRRF shall be bound by the Procurement Officer's determination.
- (ii) If a termination hereunder is partial, MRRF may file a proposal with the County for an equitable adjustment for the applicable price for the continued portion(s) of this Agreement. Any such proposal shall be submitted to the County within 90 Days of the Notice of Partial Termination. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to this Agreement.
- (iii) The Procurement Officer and MRRF may agree upon the whole or any part of the amounts to be paid to MRRF by reason of the total or partial termination for convenience pursuant to this Section 4.04, provided MRRF has filed a termination claim supported by cost or pricing data submitted to the extent required by subchapter 15, chapter 3-122 of the HAR, and further provided that such amount shall not exceed the reasonable value of any non-recurring costs incurred but not amortized in the price of services delivered under



this Agreement with respect to which a total or partial termination for convenience has occurred, plus settlement costs, reduced by payments previously made by the County.

- (iv) Nothing in Subsection 4.04(d) below prescribing the amount to be paid to MRRF in the event that MRRF and the County fail to agree upon the whole amount to be paid to MRRF by reason of the termination pursuant to this Subsection 4.04(c) shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts that may be agreed upon to be paid to MRRF pursuant to this Subsection 4.04(c). The County's execution and delivery of any settlement agreement under this Subsection 4.04(c) shall not affect any of its rights under the Agreement with respect to the portions of the Agreement that have been completed or relieve MRRF from its obligations with respect thereto.
- (d) No Agreement as to Amount of Termination Settlement. If MRRF and the County fail to agree upon the whole amount to be paid to MRRF by reason of the termination of the Agreement pursuant to this Section 4.04, the amount payable shall be determined by the County in accordance with the following, but without duplication of any items or of any amounts agreed upon in accordance with Subsection 4.04(c). The Procurement Officer shall pay the MRRF the following amounts:
  - (i) MRRF's actual, reasonable out-of-pocket costs incurred but not amortized in the price of providing the services delivered under this Agreement, without profit, in preparing to perform and performing the terminated portion of the Agreement.
  - (ii) A markup on the amount in Subsection 4.04(d)(i) above, determined by the County to be fair and reasonable, but in no event to exceed five percent (5%) of the amount determined under Subsection 4.04(d)(i); provided, however, the markup shall not include anticipatory profit or consequential damages, and further provided that if it appears that MRRF would have sustained a loss if the entire Agreement would have been completed, no markup shall be allowed or included and the amount of compensation under Section 4.04(d)(i) shall be reduced to reflect the anticipated rate of loss; and
  - (iii) Subject to the prior approval of the Procurement Officer, costs of settling and paying claims arising out of the termination of subcontracts pursuant to Subsection 4.04(b)(ii). Subcontractors shall be entitled to a markup of no more than ten (10) percent on direct costs incurred to the date of termination. These costs must not include costs paid in accordance with Section 4.04(c).
  - (iv) The total amount to be paid to MRRF, exclusive of costs described in

Subsection 4.04(b)(ii), shall not exceed the actual, reasonable value of any non-recurring costs incurred but not amortized in the price of services delivered under this Agreement with respect to which a total or partial termination for convenience has occurred, less the amount of payments otherwise made. Upon the Procurement Officer's determination of the amount of the termination payment, this Agreement shall be amended to reflect the agreed termination payment, MRRF shall be paid said amount, and the Agreement shall be amended to reflect the reduced scope of services.

Section 4.05 MRRF acknowledges and agrees that it shall not be entitled to any compensation in excess of the actual, reasonable value of any non-recurring costs incurred but not amortized in the price of services delivered under this Agreement, plus its settlement costs, and that items such as lost or anticipated profits, unabsorbed overhead, and opportunity costs shall not be recoverable by it upon termination of this Agreement pursuant to Article IV. For the purpose of determining the actual, reasonable value of any non-recurring costs incurred but not amortized in the price of services delivered under this Agreement under this Article IV, deductions will be made for the amounts paid by the County or to be paid for accepted services under the Agreement, depreciation or amortization related to MRRF's Facility or its fixed or mobile infrastructure or components, the cost of materials, supplies, hardware, software, machinery, and equipment to be retained by MRRF, amounts realized by the sale of such items, the cost of common items or infrastructure usable on MRRF's other work, and for other appropriate credits. Upon notice by the County of the intent to terminate this Agreement in whole or in part, MRRF shall use its best efforts to mitigate the effect of the full or partial termination of this Agreement.

#### **Article V. Landfill Gas and Acceptable Waste**

Section 5.01 Landfill Gas. The County does not warranty the quantity or quality of the Landfill Gas. MRRF assumes all risk and cost associated with testing, treatment, and use and/or destruction of the Landfill Gas upon delivery at the Landfill Gas Interconnection Point. In no event shall any Landfill Gas be returned to the County's flare or control absent the County's express election. All Landfill Gas delivered to MRRF at the Landfill Gas Interconnection Point shall be utilized by MRRF in MRRF's Facility, processed and sold as a marketable commodity, or destroyed by MRRF in its flare in accordance with Applicable Laws.

Section 5.02 Landfill Gas Quality. The County is not required to deliver and MRRF is not required to accept Landfill Gas having less than 40% methane and/or greater than 10% nitrogen and/or greater than 2.5% oxygen by volume.

Section 5.03 Unused Landfill Gas. The County shall not sell Landfill Gas to third parties and shall not use Landfill Gas to produce energy and/or fuel during the Term, provided that to the extent MRRF does not accept any Landfill Gas made available to MRRF at any time, the County may, at its option, sell, utilize, or flare any unused Landfill Gas in the manner it deems appropriate. To the extent reasonably possible, MRRF shall provide advance notice to the County of its intent not to utilize all or a portion of the Landfill Gas and the duration of

such event. If at any time after the Commercial Operations Date Landfill Gas is made available by the County to MRRF and MRRF does not accept such Landfill Gas for a continuous period 90 Days, it shall be assumed that such event constitutes notice to the County of MRRF's intent to discontinue acceptance of Landfill Gas.

Section 5.04 Delivery and Use of Landfill Gas.

- (a) On or prior to the Commercial Operation Date, the County agrees to deliver to MRRF, and MRRF agrees to accept Landfill Gas extracted from the Landfill each day during the Term, with the exception allowed in Section 5.02; provided that MRRF shall be entitled to shut down MRRF's Facility for maintenance purposes, during which days MRRF shall have no obligation to receive Landfill Gas. MRRF agrees to give the County sufficient notice of any planned shutdown of MRRF's Facility that would affect acceptance of Landfill Gas, pursuant to the provisions of MRRF's SOP.
- (b) MRRF's compensation to the County for Landfill Gas is reflected in the tip fees set in Section 6.02, which contemplates full implementation of MRRF's Facility's primary processes outlined in Section 3.01. If practicable and at MRRF's option, the Landfill Gas processing/conversion component of MRRF's Facility may be developed and implemented prior to the full implementation of MRRF's Facility's processes and/or prior to the Commercial Operations Date. In such event, payment from MRRF to the County for use of the Landfill Gas shall be mutually agreed by the Parties in writing.
- (c) MRRF shall design and construct (including the cost of permitting), at its sole expense, piping and related equipment and infrastructure (collectively, "infrastructure") required to transfer Landfill Gas from the current location of the County's Flare to the Landfill Gas Interconnection Point. Said infrastructure shall include the controls, monitors, and/or equipment necessary to comply with Applicable Laws, the County's permits, and the operation of the GCCS and County's flare. The infrastructure shall be designed and constructed by MRRF. The County shall approve all plans prior to commencement of construction, and modification to said plans shall be made to accommodate the County's permit requirements and the operation of the GCCS. MRRF shall deliver to the County a bill of sale for the infrastructure and other documentation reasonably required by the County, transferring title to the County for consideration of one dollar (\$1), free and clear of all liens and encumbrances, on or before the Delivery Commencement Date. The County shall operate and maintain this infrastructure until the end of the Term. The Parties will execute a Right of Entry relating to the construction of the infrastructure. Any costs associated with booster pumps or other equipment necessary to bring the Landfill Gas from the location of the County's flare at the Effective Date to the Landfill Gas Interconnection Point shall be borne by MRRF.

Section 5.05 Delivery of Acceptable Waste. Commencing on the Commercial Operations Date, the County agrees to provide or cause to be provided to MRRF, and MRRF agrees to

accept and process all of the Acceptable Waste received by the County at the Central Maui Landfill. As of the Effective Date, the County's Source Separated Recyclables programs on Maui include the County Residential Recycling Centers (community residential recycling dropboxes) and the County curbside recycling collection program. The County will cause such County-owned Source Separated Recyclables received by these programs after the Commercial Operations Date to be delivered to MRRF, provided that the County may increase, decrease, or cease such programs at its sole discretion.

Section 5.06 Excess Acceptable Waste. MRRF shall not be obligated to receive Excess Waste, but has the right of first refusal to such Excess Acceptable Waste and shall be obligated to exercise a good faith effort to accept such Excess Acceptable Waste to the extent practicable up to the capacity of MRRF's Facility. The per-ton tip fee for Excess Acceptable Waste shall be the same as for Acceptable Waste.

Section 5.07 Unprocessibles and Bypassed Waste. Unprocessibles and Bypassed Waste transported to but not unloaded and accepted by MRRF at the Acceptable Waste Delivery Point may be redirected by MRRF to return to the Landfill scale house for re-weighing and delivery to the Landfill. The County will be credited for any associated tip fee. Unprocessibles and Bypassed Waste unloaded at the Acceptable Waste Delivery Point shall become the property of MRRF. Such Unprocessibles and Bypassed Waste shall be transported at MRRF's expense to the County scale house for weighing and on to such site within the Landfill as designated by the County. Unprocessibles and Bypassed Waste that enter any of MRRF's Facility's processes shall be deemed Acceptable Waste.

Section 5.08 Residue. MRRF shall test Residue in accordance with Applicable Laws prior to transport and disposal at the Landfill to ensure that such Residue is not Hazardous Material, according to the parameters set out in the SOP and Applicable Laws. MRRF shall be responsible for all costs associated with transportation and disposal of Residue to such site within the Landfill as identified by the County.

Section 5.09 Title/Risk of Loss. Title to and control and possession of all materials, including Landfill Gas, shall pass to and be absolutely vested in MRRF upon delivery at the Acceptable Waste Delivery Point or the Landfill Gas Interconnection Point, as applicable. Title to Residue, Bypassed Waste, and Unprocessibles shall pass to the County upon acceptance of such materials to the Landfill at such delivery point designated by the County. Liability for and the risk of loss shall follow title.

## **Article VI. Compensation and Revenue/Benefits Sharing**

Section 6.01 MRRF Compensation. MRRF shall be paid monthly an Acceptable Waste Tipping Fee that shall be the sum of the amounts calculated by multiplying the quantity of each waste type by the appropriate per-ton cost, as measured at the County scale house, as set forth in this Article, plus any payments or adjustments that might be due MRRF as a result of the Annual Settlement Process provided in this Article. Unless specifically allowed for in this Agreement, no other source of payment or cost recovery from the County shall be allowed MRRF. MRRF shall not enter into any agreements with any party for acceptance of Acceptable Waste absent the express written agreement of the County.

Section 6.02 Acceptable Waste Tipping Fee. The following per ton tipping fees shall be effective on the Delivery Commencement Date and shall be paid by the County to MRRF. The per ton tipping fees shall increase by two percent (2%) annually, effective on the first day of the month following the first annual anniversary of the Commercial Operations Date.

<u>Acceptable Waste Type</u>	<u>Tipping Fee (per ton)</u>
Municipal Solid Waste (residential and commercial)	\$68
Source Separated Recyclables (County dropbox or curbside pickup)	\$100 for the first 2,250 tons per Contract Year; \$68 thereafter
Green Waste (commercial and residential self-haul)	\$29
Sewage Sludge	\$76
Construction & Demolition Waste (residential and commercial)	\$68
Fats, Oils, and Grease	\$100

Section 6.03 Guaranteed Annual Minimum Tonnage of Acceptable Waste. Beginning on the Commercial Operations Date, the County will deliver or cause to be delivered a minimum of 125,000 tons of Acceptable Waste per Contract Year to MRRF, provided that the County does not control and can not guaranty the quality or composition of said Acceptable Waste or its suitability for any purpose. The Guaranteed Annual Minimum Tonnage of Acceptable Waste shall be measured as the average of the preceding three Contract Years. For example, the Guaranteed Annual Minimum Tonnage for Contract Years 1, 2, and 3 shall be the average of those Contract Years. Thereafter, the Guaranteed Annual Minimum Tonnage for Contract Year 4 shall be the average of Contract Years 2, 3, and 4, and the Guaranteed Annual Minimum Tonnage for Contract Year 5 shall be the average of Contract Years 3, 4, and 5, and so on. If the Guaranteed Annual Minimum Tonnage is not delivered, the County shall compensate MRRF by paying the then-applicable per-ton price for MSW for the tonnage of deficiency as part of the Annual Settlement Process in Section 6.10. If MRRF does not accept up to the per ton limits set out in the definition of Excess Acceptable Waste, as measured on a Contract Year basis, fails to meet any of the Performance Guarantees applicable to the current Contract Year as set out in Article IX, or accepts Acceptable Waste from others pursuant to Section 6.01, this Section 6.03 shall not apply.

Section 6.04 Fuel Sale. In the event the County becomes able to utilize fuels produced by MRRF's Facility, under a separate fuel sales agreement, MRRF and the County may exercise the option to sell these commodities to the County, at a fixed price that results in net cost savings to the County as compared to other sources of transportation or power generation

fuel, including fossil fuel. The escalation factor applied to such a fuel sales agreement pricing shall be 2% annually.

Section 6.05 Electricity Sale by MRRF to the County. Under a separate fixed-price Power Purchase Agreement, and using fuels produced at MRRF's Facility, MRRF and the County may exercise the option to sell electricity behind the meter to County sites such as wastewater treatment plants, water pumping facilities, and other County facilities, at a price that results in net cost savings to the County as compared to the then-cost of electricity purchased by the County from MECO, less demand charges of \$.30 per kWh, escalating at 2% annually. MRRF will bear the sole costs for installation of the required equipment and infrastructure necessary for such electricity usage at County sites.

Section 6.06 Electricity Wheeling by MRRF to County Sites. If wheeling of electricity becomes possible in the State of Hawaii, under separate Power Purchase Agreements, and using fuels produced at MRRF's Facility, MRRF and the County may exercise the option to wheel and sell electricity at a fixed price to County sites such as wastewater treatment plants, water pumping facilities, and other County facilities at a price that results in net cost savings to the County as compared to the then-cost of electricity purchased by the County from MECO. The escalation factor applied to such a Power Purchase Agreement shall be fixed at 2% annually.

Section 6.07 Prompt Payment. Pursuant to HAR §3-125-23, any money, other than retainage, paid to MRRF shall be dispersed to subcontractors within thirty (30) Days after receipt of the money in accordance with the terms of the subcontract; provided that the subcontractor has met all the terms and conditions of the subcontract and there are no bona fide disputes; and, upon final payment to MRRF, full payment to the subcontractor, including retainage, shall be made within forty-five (45) Days after receipt of the money; provided that there are no bona fide disputes over the subcontractor's performance under the subcontract.

Section 6.08 County Compensation.

- (a) MRRF's Tipping Fees. The following shall be effective on the Delivery Commencement Date and shall be paid by MRRF to the County. The per ton tipping fees shall increase by two percent (2%) annually, effective on the first day of the month following the annual anniversary of the Commercial Operations Date.

	<u>Tipping Fee (per ton)</u>
Residue	\$71
Bypassed Waste (by type):	
MSW	\$68
Green Waste	\$29
Sewage Sludge	\$76
C&D Waste	\$68
FOG	\$100
Unprocessibles	\$68

Total MRRF tipping fees shall be the sum of the amounts calculated by multiplying the quantity of each waste type (i.e., Residue, Bypassed Waste, Unprocessibles) by the appropriate per-ton cost. MRRF is responsible for the physical transportation of and/or the costs associated with transporting the Residue, Bypassed Waste, Unprocessibles, or other products and materials from MRRF's Facility to the County's scale house and on to a specified disposal site within the Landfill, or another disposal site, at the County's instruction.

- (b) MRRF's payment for its tipping fees plus any payments or adjustments that might be due the County as a result of the annual settlement process provided in this Article shall be paid to the County monthly by the twentieth day of each month following the month in which such costs are incurred, or they may be withheld from MRRF's Compensation at the County's discretion.

Section 6.09 Revenue/Benefit Sharing. During the Term, MRRF shall share revenues/benefits with the County, as follows and in the manner described under "Annual Settlement Process," below. "Sharing" reflects monetary compensation for value and does not reflect co-application or co-ownership of the same. Costs to vest Environmental Attributes and Government Incentives, or similar benefits shall be reimbursed to the vesting party at cost, with no markup, prior to the equal sharing of the balance.

- (a) Tax Credits shall be retained by MRRF.
- (b) Government Incentives shall be shared equally by MRRF and the County, with the exception of grants or incentives related to increasing recycling activities, equipment, or programs received by MRRF for the benefit of the County, which shall be retained by MRRF.
- (c) Environmental Attributes shall be shared equally between MRRF and the County, with the exception of RECs that can not be unbundled.
- (d) Notwithstanding the foregoing, neither Party shall claim credits or certificates under this Section 6.09 if obtaining such credits would require the other Party to lose or reduce any of the credits or certificates currently being received or claimed by that Party or require the Party not receiving such credits or certificates to purchase, trade, or otherwise acquire credits or certificates related to the operation of the Landfill or MRRF's Facility to comply with any mandatory scheme or system under which such credits or certificates could be obtained.
- (e) MRRF shall make all necessary applications and take all additional steps necessary in connection with Environmental Attributes and Government Incentives, or similar benefits that are or become available during the Term of this Agreement and that the Parties receive the full value of the foregoing and of all such benefits and incentives. In no event shall failure of MRRF to apply for such applications be considered a breach of this Agreement. If MRRF fails to obtain the value of any Environmental Attributes, Government Incentives, or

similar benefits that are or become available during the Term of this Agreement, then the County shall have the right to apply for any such benefits or incentives and retain the full value thereof. Notwithstanding the foregoing, MRRF and/or the County shall in no event be obligated to apply for or obtain any new Environmental Attributes, Government Incentives, and Tax Credits ("new" meaning such benefits arising or being enacted or otherwise occurring after the Effective Date) if doing so would impair, reduce, or eliminate any Party's ability to continue to obtain the benefit of existing Environmental Attributes, Government Incentives, and/or Tax Credits.

- (f) Recyclables. MRRF's Facility is intended to extract and generate marketable Recyclable Material, as listed below. MRRF shall share with the County fifty percent (50%) of gross revenues net of transportation cost and brokerage commission (such commission up to a maximum of five percent (5%)) from the sale of any of the following materials recovered by MRRF's Facility in any Contract Year in which the baseline commodity price such material exceeds two hundred percent (200%) effective in the first Contract Year following Commercial Operations Date. The baseline per-ton commodity pricing shall increase by two percent (2%) on the annual anniversary of Commercial Operations Date. Should additional recyclable materials be identified, the Parties shall mutually agree on a baseline commodity price relevant to the Contract Year the recyclable is marketed. "HI-5" refers to the Hawaii Deposit Beverage Container Program.

<u>Recyclable Material</u>	<u>Baseline Commodity Pricing (\$/ton)</u>
Ferrous metals	\$800
Cardboard	\$160
Plastic Bottles	\$300
Tin Cans	\$800
Aluminum Cans	\$1,500
Aluminum Cans HI-5	\$1,700
Non-ferrous metals (non-cans)	\$1,500
Glass bottles	\$5
Glass bottles HI-5	\$205

Section 6.10 Annual Settlement Process. Within 90 Days of the conclusion of each Contract Year, MRRF shall provide the County with an Annual Settlement Statement setting forth data supporting the Contract Year's Performance Guarantees, and the determination of outstanding fees or obligations of the Parties with respect to such Contract Year and a reconciliation of such amount with the amounts actually paid by each Party with respect to such Contract Year. The Annual Settlement Statement shall include the calculation of the revenues that are to be shared, as provided for under Section 6.09, "Revenue Sharing". The Annual Settlement Statement shall include sufficient documentation to allow the County to verify quantities, unit prices, and all resulting costs and revenues as applicable. The County, or MRRF, as appropriate, shall pay all known and undisputed amounts within 45 days after



the receipt of such Annual Settlement Statement. If any amount is then in dispute or is for other reasons not definitely known at the time the Annual Settlement Statement is due, the Annual Settlement Statement shall identify the subject matter and reasons for such dispute or uncertainty, and include a good faith estimate of the amount in question. The appropriate Party shall review any disputed matter within thirty (30) Days of the receipt of the notice of dispute and, if the matter cannot be resolved through discussion and negotiation, shall refer the matter to the Procurement Officer pursuant to Section 11.01.

Section 6.11 Errors in Billing. If either Party hereto shall find at any time within thirty (30) Days after the date of any payment hereunder that there has been an overcharge or undercharge, the Party finding the error shall promptly notify the other party in writing. In the event of an undercharge, the Party undercharged shall pay the amount due within thirty (30) Days of the date of the notice of error. In the event of an overcharge, the Party overcharged shall refund the overpayment to the other Party within thirty (30) Days of the date of the notice of error. If the Party receiving notice of an error in billing notifies the other Party in writing within thirty (30) Days of receipt of such notice that such Party disagrees with the allegation of error, the Parties shall meet, by telephone conference call or otherwise, within ten (10) Days of the County's response for the purpose of attempting to resolve the dispute.

Section 6.12 Late Payments. All payments hereunder shall be made without set-off or deduction. Any payment not made within the time limits specified in Article VI shall bear interest from the date on which such payment was required to have been made through and including the date such payment is actually received by the Party. Such interest shall accrue at the rate of one percent (1%) per month or as permitted by applicable law. If any portion of an invoice is disputed, interest shall not be assessed on the entire amount, only that portion finally determined to be owed. All payments made under this Article VI shall be non-refundable, and shall be made free and clear of any tax, levy, assessment, duties, or other charges.

Section 6.13 Records. Each Party shall have the right, at its sole expense during normal business hours and with reasonable advance notice, to examine the other Party's relevant records to the extent necessary to verify the accuracy of any statement, change, notice, or computation made hereunder.

Section 6.14 Price Adjustment. Pursuant to HAR 3-125-12, any adjustment in Agreement price shall be made in one or more of the following ways: By agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable; by unit prices; or in such other manner as the Parties may mutually agree in writing. MRRF shall provide cost or pricing data for any price adjustments subject to the provisions of HAR Chapter 3-122.

## **Article VII. The County's Facilities**

Section 7.01 Priorities Between Operations of the Parties. In the event of a conflict between the County's operations at the Landfill and MRRF's operations, the County's Landfill operations shall take precedence. Collecting, extracting, and disposing of Landfill Gas

components, including but not limited to Landfill Gas, to meet environmental regulations or otherwise in connection with the operation of the Landfill will take precedence over collecting Landfill Gas for commercial purposes. The County shall be free at all times to take actions that it deems necessary or appropriate in connection with its collection and disposal of Landfill Gas and its operation of the Landfill. The County shall have the right to operate the Landfill, the GCCS, the County's blower and flare, and all related equipment in such manner as the County, in its sole discretion, deems advisable, including without limitation the right but never the obligation to drill new wells, to rework and repair old wells, to abandon any well, to build, test, modify, extend, repair, dispose of or discontinue the use of any or all facilities owned or installed by the County. The County reserves the right, at all times, to sufficient Landfill Gas to meet the County's Flare Turndown Requirements, and to meet any permit, regulatory, or maintenance requirements including annual source testing and Condensate disposal. If the Landfill Gas delivery to MRRF's Facility is impaired, County will use its best efforts to resume delivery in a reasonable time frame.

Section 7.02 County's Flare. The Parties intend that the County's enclosed flare shall operate as backup to MRRF's flare. MRRF shall include in the SOP protocols related to planned and emergency maintenance or shutdown of MRRF's Facility, including without limitation its flare, that would necessitate use of the County's enclosed flare to destroy Landfill Gas.

Section 7.03 Damage to Landfill, GCCS, or other the County Facilities or Equipment. Any damage or repairs caused by MRRF or its subcontractors, vendors, or suppliers to the Landfill facilities, including the GCCS, equipment, or projects shall be paid for or repaired by MRRF to the satisfaction of the County. All construction and/or replacement shall be done with materials and equipment of the same kind constructed or product installed. If MRRF does not repair the damaged facility/area within a reasonable period of time, MRRF shall pay for all construction/installation and related costs performed by the County plus a five percent (5%) administration fee.

#### **Article VIII. Operation and Maintenance of MRRF's Facility**

Section 8.01 Maintenance of MRRF's Facility and Site. At all times during the Term, MRRF's Facility shall be designed, constructed, and operated in compliance with all Applicable Laws and Permits.

Section 8.02 MRRF's Flare. MRRF's Facility shall at all times include a combination of flare and other necessary equipment capable of destroying all of the Landfill Gas in accordance with all Applicable Laws. MRRF shall solely bear all costs and expenses associated with management and destruction of the Landfill Gas upon delivery at the Landfill Gas Interconnection Point.

Section 8.03 Condensate. Beginning on the Delivery Commencement Date and continuing until expiration of the Term or Termination of the Agreement, MRRF shall manage and dispose of the Condensate generated within MRRF's Facility and GCCS (stored in the County's condensate tank, located near the County flare) in accordance with Applicable Laws and Permits, at MRRF's sole cost. If allowed under Permits and Applicable Laws, MRRF may

dispose of Condensate on the working face of the Landfill or as otherwise directed and approved by the County. The County will work collaboratively with MRRF to determine alternative means of Condensate disposal, provided that MRRF shall reimburse the County for any reasonable out of pocket costs in connection with such collaboration.

Section 8.04 Comprehensive Inspections. Upon reasonable written notice and at County's sole cost, the County, or its designee, may periodically perform a comprehensive inspection of all facilities operated or controlled by MRRF subject to this Agreement, and relevant records of MRRF each Contract Year to determine compliance with the Agreement and Applicable Law. MRRF shall cooperate fully with such inspections, which shall not interfere unreasonably with MRRF's performance of the Agreement and operations of MRRF's Facility.

Section 8.05 Noise Containment and Odor Prevention.

- (a) MRRF shall provide for noise containment in the design and operation of MRRF's Facility as needed to reduce the noise from MRRF's Facility and be in compliance with state law.
- (b) MRRF shall take steps necessary to ensure that odors are reasonably mitigated.

Section 8.06 Expansion of MRRF's Facility. MRRF may modify or expand MRRF's Facility as needed to comply with Applicable Laws, the terms of this Agreement, and to accommodate processing of Excess Acceptable Waste. MRRF may at its sole discretion expand the facility to accommodate Excess Acceptable Waste, but is under no obligation to do so or to accept any or all Excess Acceptable Waste.

Section 8.07 Security of MRRF's Facility. MRRF shall assume full responsibility for the security of MRRF's Facility. At no cost to the County, MRRF shall construct a suitable fence to enclose and secure its Site. MRRF shall comply with all of the County's rules and requirements applicable to all persons that enter the Landfill, and shall cause MRRF's officers, directors, employees, agents, contractors, and invitees to comply with all such rules and regulations, provided that the County shall provide MRRF with copies of all such rules from time to time during the Term.

Section 8.08 Monitoring and Reporting. MRRF shall monitor MRRF's Facility in accordance with Applicable Laws and shall report results of monitoring as required by permits and regulation to the County within ten (10) Days after monitoring completion. If MRRF or one of its contractors detects an exceedance of permits or regulations concerning any of its operations, including Landfill Gas control, MRRF shall use its best efforts to notify the County within one (1) hour after an exceedance is detected. If applicable, MRRF shall coordinate and conduct periodic performance (source) testing of MRRF's control device(s) pursuant to operating permits. MRRF shall (1) promptly provide the County within 24 hours with copies of any notices sent to or received from any Governmental Body having regulatory jurisdiction with respect to any violations of Applicable Law; (2) pay any resulting direct damages, fines, judgments or awards, including liquidated damages, levies, assessments, impositions, penalties, or other charges resulting therefrom; (3) promptly prepare all public notifications required by Applicable Law; and (4) assist the County with all public relations matters

necessary to adequately address any public concern caused by such non-compliance, including, but not limited to, preparation of press releases, attendance at press conferences, and participation in public information sessions and meetings.

**Section 8.09 Storage and Disposal of Materials, Supplies, and Waste Generated by MRRF.**

- (a) MRRF shall be responsible for the storage and protection of any and all products, materials, equipment, and supplies in accordance with the manufacturer's instructions; product seals and labels shall be intact and legible, and sensitive products shall be stored in weather tight, climate controlled enclosures.
- (b) MRRF is responsible for proper handling, storage, transportation, and disposal (per local, state, and federal regulations) of any Hazardous Wastes, liquid wastes, or nuisance wastes (i.e., finely divided, powdery/dusty materials, strong odor, etc.) generated by MRRF.
- (c) If the operation of MRRF's Facility results in RCRA Subtitle C waste, or in any other waste that cannot be disposed of in the Landfill in compliance with Permits and Applicable Laws, then MRRF shall dispose of such waste at its sole expense and in compliance with Applicable Laws.

**Article IX. Milestones and Performance Guarantees**

**Section 9.01 Milestones.** MRRF shall have the following milestones in connection with the construction of MRRF's Facility:

Milestone	Deadline
Permits and Entitlements (Completion)	24 months from Effective Date
Project Financing Close	6 months from Permits and Entitlements (Completion)
Construction Commencement	6 months from Project Financing Close
Substantial Construction Completion	24 months from Construction Commencement
Commercial Operations Date	3 Months from Substantial Completion

The Commercial Operations Date shall be 63 months from the Effective Date, unless extended by mutual agreement in writing or due to Force Majeure. MRRF shall have the right to extend the Commercial Operation Date for a twelve-month grace period by beginning to pay the Avoided Cost Payment of fifty thousand dollars (\$50,000) per month to the County, starting on the first Day of the month following the deadline for the Commercial Operation Date. If the Commercial Operation Date has not occurred by the last Day of the twelve-month grace period, then the County shall have the

right to terminate this Agreement by notice to MRRF.

Section 9.02 MRRF's Performance Guarantees.

- (a) The following Performance Guarantees shall be the average of the preceding three Contract Years. For example, the Performance Guarantee for Contract Years 1, 2, and 3 shall be the average of those Contract Years. Thereafter, the Performance Guarantee for Contract Year 4 shall be the average of Contract Years 2, 3, and 4, and the Performance Guarantee for Contract Year 5 shall be the average of Contract Years 3, 4, and 5, and so on.
  - (i) Availability Guarantee. MRRF shall guarantee that MRRF shall receive and accept for processing all Acceptable Waste and Landfill Gas at least ninety percent (90%) of the total operational hours of the Landfill. As an example: If the Landfill is open for 300 Days in a Contract Year, the Availability Guarantee shall be 270 Days.
  - (ii) Waste Diversion Guarantee. MRRF shall guarantee that Acceptable Waste shall be diverted from the Landfill at a rate of at least seventy percent (70%). Said diversion rate shall be calculated as follows: Tons of Acceptable Waste delivered minus Residue returned to the Landfill, divided by tons of Acceptable Waste. Such calculation shall exclude Construction and Demolition Waste. As an example, if the County delivers or causes to be delivered 150 tons of Acceptable Waste, the Waste Diversion Guarantee is 105 tons.
  - (iii) Waste Acceptance Guarantee. MRRF shall guarantee that all Landfill Gas and Acceptable Waste (with the exclusion of FOG, Green Waste, and Sewage Sludge) up to the per ton annual maximum limits enumerated in the definition of Excess Acceptable Waste shall be received and processed by MRRF's Facility.
- (b) Waste Acceptance Guarantee for FOG, Green Waste, and Sewage Sludge. MRRF shall guarantee that all FOG, Green Waste, and Sewage Sludge received at the Landfill shall be accepted by MRRF and processed up to the per ton annual maximum limits enumerated in the definition of Excess Acceptable Waste. This Performance Guarantee shall apply to each Contract Year beginning with the second Contract Year and shall apply to each waste type individually.
- (c) MRRF shall take any commercially practicable action (including, without limitation, making repairs, replacements, and operating and management practices changes) necessary, in light of the nature, extent, and repetitiveness of such noncompliance or anticipated non-compliance with Performance Guarantees, to continue or resume performance hereunder, and to eliminate the cause of, if reasonably possible, and to reasonably assure that such non-compliance will not recur.

- (d) Notice, Cure, and Liquidated Damages. MRRF understands and agrees that if MRRF fails to meet the Performance Guarantees, the County will suffer substantial losses, and MRRF agrees that it shall be liable for such losses. MRRF acknowledges and agrees that the Liquidated Damages are intended to compensate the County solely for MRRF's failure to meet one or more of the Performance Guarantees and shall not excuse MRRF from liability from any other breach of the requirements of the Agreement. When MRRF is given notice of delay or nonperformance of one or more Performance Guarantees specified in Section 9.02, MRRF shall cure the delay or nonperformance promptly within thirty (30) Business Days of such notice (the "Cure Period"). If such cure can not be reasonably effected within the initial Cure Period and if MRRF thereafter diligently pursues the cure to completion, the Cure Period shall be extended to 180 Days from the date of the notice (the "Extended Cure Period"). If MRRF fails to cure within the Cure Period or Extended Cure Period, as applicable, it is agreed that MRRF shall immediately pay to the County the amount of \$5,000 per Day as Liquidated Damages from the date set for cure until the earlier of the following and as limited in this section: (i) the County reasonably obtains similar services if MRRF is terminated in whole or in part for default, or (ii) until MRRF provides the services if MRRF is not terminated in whole or in part for default. At no time will the cumulative total payment of Liquidated Damages exceed \$5 million for the entire term of this Agreement. To the extent MRRF's delay or nonperformance is excused due to Force Majeure, or such reason for nonperformance is caused by the County, such Liquidated Damages shall not be due the County.

#### **Article X. Defaults**

Section 10.01 MRRF's Events of Default. Subject to the opportunity to cure provided in Section 11.02, an event of default shall occur with respect to MRRF if, for reasons other than the occurrence of an event of Force Majeure:

- (a) MRRF refuses or fails to meet the Commercial Operation Date Milestone;
- (b) MRRF fails to meet any of the Performance Guarantees described in Article IX and/or repeatedly fails or refuses to meet any of the Performance Guarantees;
- (c) MRRF abandons or discontinues the operation of MRRF's Facility, or any primary component or process of MRRF's Facility, for a period in excess of thirty (30) Days. "Primary component or process" includes those identified in Section 3.01;
- (d) MRRF makes any intentional misrepresentation of information or facts relating to MRRF's performance obligations and/or MRRF's Facility's performance;
- (e) MRRF defaults in the performance of its obligations pursuant to the terms of MRRF's financing in connection with MRRF's Facility or pursuant to the terms of

its Offtake Agreements;

- (f) MRRF fails to make any payment, including Avoided Cost Payment, to the County pursuant to this Agreement on or before the due date for such payment;
- (g) MRRF fails to comply with Applicable Laws;
- (h) Any representation or warranty made herein by MRRF shall have been false in any material respect when made;
- (i) MRRF (i) files a petition in bankruptcy, reorganization or similar proceedings under the bankruptcy laws of the United States, (ii) has filed against it a petition in bankruptcy, reorganization or similar proceedings under the bankruptcy laws of the United States which petition is not dismissed within sixty (60) Days, (iii) is adjudicated bankrupt under the bankruptcy laws of the United States, (iv) has a receiver, permanent or temporary, appointed for it by a court of competent jurisdiction, (v) requests the appointment of a receiver; (vi) makes a general assignment for the benefit of creditors, (vii) has its bank accounts, property or receivables attached and such attachment proceedings are not dismissed within sixty (60) Days, or (viii) is dissolved or liquidated;
- (j) Ownership of any or all of MRRF's Facility is transferred to an entity in violation of the terms of this Agreement; or
- (k) MRRF fails or refuses to timely perform or observe any material obligation under this Agreement that is not specifically described above as an event of default.

Section 10.02 County's Events of Default. Subject to the opportunity to cure provided in Section 11.02, an event of default shall occur with respect to the County if, for reasons other than the occurrence of an event of Force Majeure:

- (a) Failure or refusal to timely perform or observe any material obligation pursuant to this Agreement; or
- (b) Any representation or warranty made herein by the County shall have been false in any material respect when made.

Section 10.03 Notice of Default. The Party in default under this Agreement shall be referred to as the "Defaulting Party," and the other Party shall be referred to as the "Non-Defaulting Party." The Non-Defaulting Party shall deliver to the Defaulting Party a Notice of Default describing the default in reasonable detail and state the date by which the default must be cured, if applicable.

## **Article XI. Disputes and Remedies Following Default**

Section 11.01 Disputes. Any dispute arising under or out of this Agreement shall be resolved in accordance with HRS § 103D-703 and HAR Chapter 3-126.

Section 11.02 Cure Period. In the case of a failure to make a payment hereunder when due, the Defaulting Party may cure the default within thirty (30) Days after the Defaulting Party's receipt of the Notice of Default by payment of the full amount due plus interest as provided in Article VI calculated from the date due until paid. In the case of all other defaults, the Defaulting Party shall cure the default within thirty (30) Business Days, except where the default cannot be cured within thirty (30) Business Days, in which event, if the Defaulting Party begins actions to cure the default promptly within thirty (30) Business Days and thereafter diligently pursues the cure to completion, the cure period shall be extended to 180 Days from the date of the Notice of Default. If, within the specified cure period, the Defaulting Party does not cure the default, then the Non-Defaulting Party shall have the right to suspend its performance as it pertains to that particular default under this Agreement or to terminate this Agreement by notice to the Defaulting Party, and the Non-Defaulting Party shall be entitled to all remedies available under this Agreement, or at law and in equity.

Section 11.03 Notwithstanding the provisions of Section 11.02, any breach or default by MRRF that subjects the County to any risk of loss, liabilities, legal actions, penalties, fines, with respect to any permits or authorization related to the County's operation of the Landfill and related activities, MRRF's right to cure shall be for a period equal to the lesser of thirty (30) Days or such lesser period as may be mandated by any applicable regulatory authority with respect to the County's obligation to cure or rectify any violations relating to its permits or other authorizations. Any Notice of Default given pursuant to this Section shall include a specific reference to this Section.

Section 11.04 County Remedies upon Occurrence of MRRF Default. If an event of default as described in Section 10.01 has occurred and is not subject to cure or is continuing beyond notice and cure periods:

- (a) The County may terminate this Agreement or part of this Agreement as to which there has been delay or other breach of contract, and cease to deliver all or part of the Landfill Gas and/or Acceptable Waste to MRRF. The Termination provisions of Section 4.02 shall apply;
- (b) The County may sell all or part of the Landfill Gas and/or Acceptable Waste to any other user(s) or otherwise utilize the Landfill Gas and/or Acceptable Waste;
- (c) In the event of termination of this Agreement in whole or in part, the Procurement Officer may procure similar services in a manner and upon terms deemed appropriate by the Procurement Officer. MRRF shall continue performance of the Agreement to the extent it is not terminated and shall be liable for the excess costs incurred in procuring similar services, including the costs of handling and otherwise disposing of Acceptable Waste and/or Landfill Gas;
- (d) The County may withhold from amounts due MRRF as the Procurement Officer deems to be necessary to protect the County against loss because of outstanding liens or claims of former lien holders and to reimburse the County for the excess costs incurred in procuring similar services; and/or



- (e) The County may proceed to protect and enforce any or all of its rights and remedies under this Agreement, and to exercise any or all other rights and remedies available to it at law, in equity, and/or by statute.

Section 11.05 MRRF Remedies upon Occurrence of the County Default. If an event of the County default as described in Section 10.02 above has occurred and is continuing beyond notice and cure periods, then MRRF may:

- (a) Terminate this Agreement.
- (b) Proceed to protect and enforce any or all of its rights and remedies under this Agreement, and to exercise any or all other rights and remedies available to it at law, in equity, and/or by statute.

Section 11.06 Damages.

- (a) For breach of any provision for which an express remedy or measure of damages is provided in this Agreement, the liability of the defaulting Party shall be limited as set forth in such provision. MRRF agrees to insert the substance of this Section 11.06 in all subcontracts hereunder.
- (b) If no remedy or measure of damages is expressly provided, then, in the event of MRRF Default, the County shall be entitled to all available damages, which may include, without limitation, consequential, incidental, punitive, exemplary and indirect damages. This provision shall survive the expiration or early termination of this Agreement.
- (c) Nothing in this Agreement is intended to cause the County to be, and the County shall not be, liable to MRRF for any lost business, lost profits or revenues, or other special, indirect, or consequential damages, all claims for which are hereby irrevocable waived by MRRF. Notwithstanding the foregoing, none of the payments for Acceptable Waste or any other amount specified as payable by the County to MRRF under the terms of this Agreement upon the termination of this Agreement shall be deemed consequential damages.

Section 11.07 Effect of Termination of Agreement. Upon the expiration of the Term or the Termination Date, as applicable, any amounts then owing by a Party to the other Party shall become immediately due and payable and then future obligations of the County and MRRF under this Agreement shall be terminated (other than the obligations set forth in Articles XI and XII). Such termination shall not relieve either Party from obligations accrued prior to the effective date of termination or expiration.

**Article XII. Indemnification and Responsibility as Permitted by Law**

Section 12.01 Indemnification by MRRF.

- (a) Indemnification. Except as provided in HRS §103D-713, MRRF shall defend,

indemnify, and hold harmless the County and directors, officers, employees, agents, representatives, subcontractors, assignees, and servants from and against any and all claims penalties, demands, actions, proceedings, liability or losses of whatsoever nature, including without limitation for reasonable attorneys' fees, for injury or death to person(s) or for damage or loss to or of property arising out of or in connection with the acts or omissions of MRRF or MRRF's employees, officers, agents, or subcontractors under this Agreement. The provisions of this Paragraph shall remain in full force and effect notwithstanding the expiration or early termination of this Agreement for any reason.

- (b) Intellectual Property Indemnity. MRRF shall indemnify the County, its officers and employees, from liability, of any nature or kind on account of use of any copyrighted or un-copyrighted composition, secret process, patented or un-patented invention articles or appliance furnished or used under this Agreement.
- (c) Notice of Claims. The County shall deliver to MRRF a notice describing the facts underlying its indemnification claim and the amount of such claim (each such notice a "Claim Notice"). Such Claim Notice shall be delivered promptly to MRRF after the County receives notice that an action at law or a suit in equity has commenced; provided, however, that failure to deliver the Claim Notice as aforesaid shall not relieve MRRF of its obligations under this Section 12.01, except to the extent that MRRF has been prejudiced by such failure.
- (d) Defense of Action. In case the County shall, without any fault on its part, be made a party to any litigation commenced by or against the County in connection with this Agreement, if requested by the County, MRRF shall assume on behalf of the County, and conduct with due diligence and in good faith, the defense of the County with counsel reasonably satisfactory to the County (including those of the County Counsel and counsel retained by the County), expenses (including but not limited to expert fees, litigation costs, and investigation costs), and liabilities incurred in the defense of any claim, action or proceeding brought against the County during the progress of the work or the provision of services pursuant to this Agreement; provided, however, that if MRRF is a defendant in any such action and the County believes that there may be legal defenses available to it that are inconsistent with those available to MRRF, the County shall have the right to select separate counsel to participate in its defense of such action at MRRF's expense. If any claim, action, proceeding or investigation arises as to which the indemnity provided for in this Article XII applies, and MRRF fails to assume the defense of such claim, action, proceeding or investigation after having been requested to do so by the County, then the County may, at MRRF's expense, contest or, with the prior written consent of MRRF, which consent shall not be unreasonably withheld, settle such claim, action, proceeding or investigation. All reasonable costs and expenses incurred by the County in connection with any such contest or settlement shall be paid upon demand to MRRF.

Section 12.02 County's Responsibility as Permitted by Applicable Law.

- (a) Limitation of Liability. The County shall be responsible, to the extent permitted by Applicable Law, for damage or injury caused by the County's officers and employees in the scope of their employment provided that the County's liability for such damage or injury has been determined by a court of competent jurisdiction or otherwise agreed to by the County, and the County shall pay for such damage or injury to the extent permitted by law and authorized by the Maui County Council pursuant to Maui County Code ("MCC" section 3.16). The County's total liability under this Agreement, if any, is strictly limited to the provisions in this paragraph.
- (b) Notice of Claims. MRRF shall deliver a Claim Notice promptly to the County after MRRF receives notice that an action at law or a suit in equity has commenced; such Claim Notice shall be delivered promptly to the County after MRRF receives notice that an action at law or a suit in equity has commenced; provided, however, that failure to deliver the Claim Notice as aforesaid shall not relieve the County of its obligations under this Section 12.02, except to the extent that the County has been prejudiced by such failure.

Section 12.03 Survival of Provisions. The provisions of this Article XII shall survive the expiration or termination of this Agreement.

**Article XIII. Prevailing Wages**

Section 13.01 Payment of Prevailing Wages. MRRF shall pay prevailing wages during any performance of work that constitutes a public works project as defined by Hawaii law, (including, but not limited to, construction, improvement, demolition, alteration, renovation, or repair of a publicly leased or operated building or structure, including the GCCS) and shall require compliance with all provisions of Hawaii law regarding construction of a public works project, including Chapter 104, HRS. In addition, all such agreements between MRRF and a third party for work that constitutes a public works project shall include the following provision:

"MRRF shall pay, and shall require any subcontractor to pay minimum prevailing wages (basic hourly rate plus fringe benefits), as determined by the State of Hawaii Director of Labor and Industrial Relations and published in wage rate schedules, to the various classes of laborers and mechanics employed by them in the execution of this Contract in accordance with the provisions of Chapter 104 of the Hawaii Revised Statutes. Laborers and mechanics working on a Saturday, Sunday, or a legal holiday of the State or more than eight (8) hours a day on any other day shall be paid overtime compensation at one and one-half times the basic hourly rate plus the cost of fringe benefits for all hours worked. The current State of Hawaii prevailing wage rate schedules are online at <http://hawaii.gov/labor> and shall be posted by MRRF in a prominent and easily accessible place at the job site and given to each laborer and mechanic employed under the contract, except when the employee is covered by a

collective bargaining agreement. A certified copy of all payrolls shall be submitted weekly to the County."

Section 13.02 Indemnification. MRRF shall protect, defend, indemnify and hold the County harmless from and against any and all claims arising in whole or in part from a failure of MRRF and/or its agents, contractors, or employees to comply with the terms and conditions set out in this Article.

#### **Article XIV. Compliance with Applicable Laws and Change in Law**

Section 14.01 Compliance. MRRF shall keep fully informed of all applicable federal, state, and county laws, ordinances, codes, rules and regulations, governmental general and development plans and all changes thereto including, but not limited to, the Americans with Disabilities Act, health and safety, labor, anti-discrimination and environmental laws and regulations, and with all other laws, ordinances, codes, rules, regulations, design standards and criteria, governmental general and development plans applicable to MRRF's performance of its obligations under this Agreement.

Section 14.02 Change in Law. Notwithstanding any other provision of this Agreement, if the governmental agencies that administer Applicable Laws or any other federal, state, or local governmental or nongovernmental agency, or any court or administrative tribunal passes, issues, or promulgates any law, rule, regulation, standard, interpretation, order, decision or judgment, excluding any change in tax law, (collectively or individually, "Legal Event"), which was not in effect and not anticipated as of the Effective Date, in the good faith judgment of one party (the "Noticing Party"), materially and adversely increases or decreases the cost of performing or materially increases or decreases the scope of a Party's obligations under the Agreement (such "material increase or decrease" shall be a net cost increase or decrease in excess of \$20 million applicable to the remainder of the Term), and which subjects the Noticing Party to a risk of prosecution or civil monetary penalty, then the Noticing Party may give the other Party notice of intent to amend or terminate this Agreement in accordance with this Section.

- (a) Notice Requirements. The Noticing Party shall give notice to the other Party together with an opinion of counsel setting forth the following information:
  - (i) The Legal Event(s) giving rise to the notice;
  - (ii) The consequences of the Legal Event(s), including any necessary change in the terms, scope, or timing of the Agreement;
  - (iii) The anticipated net loss or gain of revenue directly resulting from the Legal Event;
  - (iv) Any capital expenditure that is required or no longer required as a result of a Legal Event taking effect during the Term; and
  - (v) The Noticing Party's proposed amendment(s) to the Agreement, and

a statement that the purpose thereof is (1) to further comply or satisfy Applicable Law or Permit requirements created or affected by the Legal Event(s); and/or (2) to eliminate or minimize the risk of prosecution or civil monetary penalty.

- (b) The Parties shall have ninety (90) Days from the giving of such notice in subsection (a) above ("Renegotiation Period") within which to negotiate, and the Parties shall negotiate in good faith an amendment to this Agreement in accordance with the Noticing Party's proposal (if any), or otherwise as the Parties may agree. The Renegotiation Period may be extended by mutual written agreement. During the Renegotiation Period, the Parties shall discuss and agree to the issues referred to in subsection (a) and the ways in which MRRF or the County, as applicable, has or will mitigate the effect of the Legal Event, including:
- (i) Providing evidence that MRRF has used reasonable endeavors (including, where practicable, competitive quotes to oblige its subcontractors) to minimize any increase in costs and maximize any reduction in costs;
  - (ii) Demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, any foreseeable Legal Event(s) at that time have been taken into account by MRRF;
  - (iii) Giving evidence as to how the Legal Event has affected prices charged for services similar to those of this Agreement by any similar businesses to that of MRRF, including similar businesses in which MRRF or its Affiliates carry on business; and
  - (iv) Demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Legal Event concerned, has been taken into account in the amount which in the Party's opinion has resulted or is required under paragraph (a) (iii) and/or (iii) above.
- (c) Termination Due to Change in Law. If this Agreement is not amended within the Renegotiation Period, the Party affected by the Legal Event shall have the option to (i) assume the costs and obligations related to such Legal Event or (ii) exercise the right to terminate the Agreement only as to the portion of the Agreement directly affected by the Change in Law. Except as otherwise required by Applicable Law, any amounts owing to either party hereunder shall be paid, on a pro rata basis, up to the date of such partial or complete termination, and any obligation hereunder that is to continue beyond expiration or termination shall so continue pursuant to its terms. No later than 30 Days from the date of termination due to change in law, the Parties shall meet to negotiate amicably

and in good faith to determine an equitable sharing between MRRF and the County of the Parties' direct, out-of-pocket costs resulting from such termination. Such direct costs shall not include consequential costs, lost or anticipated profits, unabsorbed overhead, and/or opportunity costs. In making such determination, the Parties will take into account MRRF's and the County's out of pocket costs resulting from the Termination. If the Parties cannot reach an agreement to the distribution of costs of termination under this section, the amount and sharing of such costs shall be finally determined by a court of law.

- (d) Confidentiality. All opinions of counsel presented by the Noticing Party hereunder, and any corresponding opinions given by the other party in response, shall be deemed confidential and given solely for purposes of renegotiation and settlement of a potential dispute, and shall not be deemed disclosed so as to waive any privileges otherwise applicable to said opinions.

#### **Article XV. Independent Contractor Status and Responsibilities, Including Tax Responsibilities**

Section 15.01 Independent Contractor. In the performance of services required under this Contract, MRRF is an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under this Contract; however, the County shall have a general right to inspect work in progress to determine whether, in the County's opinion, the services are being performed by MRRF in compliance with this Agreement.

Section 15.02 MRRF's Employees and Agents. MRRF and MRRF's employees and agents are not by reason of this Agreement, agents or employees of the County for any purpose. MRRF and MRRF's employees and agents shall not be entitled to claim or receive from the County any vacation, sick leave, retirement, workers' compensation, unemployment insurance, or other benefits provided to County employees. Unless specifically authorized in writing by the County, MRRF and MRRF's employees and agents are not authorized to speak on behalf and no statement or admission made by MRRF or MRRF's employees or agents shall be attributed to the County, unless specifically adopted by the County in writing.

Section 15.03 Taxes. MRRF shall pay or cause to be paid all taxes and assessments imposed upon MRRF with respect to MRRF's Facility and operations on the Site, including without limitation, real and personal property taxes, as well as any taxes that the County is required to collect from MRRF (including but not limited to sales tax, General Excise Tax, or use tax). This Article shall be subject to HRS §103-53.

Section 15.04 Property Taxes. The Parties agree that the per ton tipping fees in Article VI as of the Effective Date are based upon the assumption that the County will exempt the payment of property taxes related to the MRRF's Facility, or otherwise credit MRRF for MRRF's payment of such annual property taxes during the Term. As of the Effective Date, no provision exists in the Maui County Code to exempt or relieve facilities such as MRRF's from payment of property taxes. When and if such a provision is enacted by the Maui County Council ("Council"), MRRF shall timely submit a completed application for such exemption.

If thereafter the County does not grant an exemption from such property taxes or if such an exemption is not enacted by the Council, MRRF shall timely pay such property taxes, and shall deduct an equal amount from any sum owed by MRRF to the County under the Annual Settlement Process identified in Section 6.10 for the applicable Contract Year in which such taxes have been paid. Should such circumstance result in the Department of Environmental Management's requiring a budget amendment for payment of all or a portion of the Annual Settlement amount, the deadline for such payment to MRRF shall be extended. Nothing in this paragraph is intended to relieve MRRF of its obligation to timely remit property taxes to the County.

## **Article XVI. Force Majeure**

**Section 16.01 Suspension of Obligations.** If either Party is rendered unable, wholly or in part, by an event of Force Majeure to carry out its obligations under this Agreement, then the obligations of the Party giving such notice as described in Section 16.02, other than the obligation to make any payment due hereunder, shall be suspended during the period of any inability to perform its obligations hereunder caused by the event of Force Majeure, but for no longer period, and such cause shall, to the extent possible, be remedied with all reasonable dispatch.

**Section 16.02 Procedure for Claiming Force Majeure.** Any Party claiming the occurrence of a Force Majeure Event shall advise the other Party of the reasonably full particulars of such event of Force Majeure in writing or by electronic mail as soon as reasonably possible, followed by a written notice within ten (10) Days of the occurrence of the Force Majeure Event. Parties shall make reasonable efforts to avoid the adverse impacts of a Force Majeure Event and to resolve the impact(s) of the event or occurrence once it has occurred in order to resume performance. The Party claiming such event shall include with any notice all available documentation supporting the claim. If the responding Party agrees that the delay or anticipated delay is due to a Force Majeure Event, the time for performance of the obligations under this Agreement affected by such event will be extended. The responding party will notify the claiming Party in writing of the extension. If the responding Party does not agree, it shall so notify the claiming Party within ten (10) Days of receipt of the Notice; thereafter, the claiming Party may seek to resolve the dispute pursuant to Section 11.01.

**Section 16.03 Termination in Consequence of Force Majeure Event.** If a Force Majeure Event shall have occurred that has materially and adversely affected a Party's performance of its obligations hereunder and that has continued for a period of twenty-four (24) consecutive months, then either Party shall be entitled to terminate this Agreement upon thirty (30) Days prior written notice to the other Party. If at the end of such thirty (30) Day period such Force Majeure Event shall still continue, this Agreement shall automatically terminate. Upon such termination for a Force Majeure Event, neither Party shall have any liability to the other. By mutual agreement of the Parties, MRRF's Facility damaged or destroyed by a Force Majeure Event may be replaced by MRRF within the time frames set forth above, or as otherwise agreed in writing, and subsequent to replacement and upon commencement of operation of the replacement Facility(ies) all terms and conditions of this Agreement will remain in effect, including the remaining Term of this Agreement.

Section 16.04 Strikes and Lockouts. The Parties agree that the settlement of strikes or lockouts shall be entirely within the discretion of the Party having the difficulty, and, that the foregoing requirement that any Force Majeure remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing Party when such course is inadvisable in the sole discretion of the Party affected by the strike or lockout.

## Article XVII. Insurance Requirements

Section 17.01 Maintenance of Insurance. MRRF shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work by MRRF or MRRF's agents, representatives, employees or subcontractors. The County reserves the right to request and receive a certified copy of any insurance policy, including all endorsements, related to MRRF's Facility or this Agreement. Failure to maintain the necessary insurance in accordance with the provisions set forth in this article shall constitute a material breach of this Agreement and the County shall thereafter have the option of pursuing remedies for such breach and/or immediate termination of this Agreement. Nothing in the insurance requirements of this Agreement shall be construed as limiting the extent of MRRF's responsibility for payment of damages resulting from its operations under this Agreement, including MRRF's separate and independent duty to defend, indemnify, and hold the County and its officers and employees harmless pursuant to other provisions of this Agreement.

Section 17.02 The County of Maui as Additional Insured and Named Holder of the Insurance Certificates. With the exception of Workers' Compensation and Employer's Liability insurance, the County, its officers, officials, employees, and volunteers shall be added as additional insured with respect to the work contracted for herein, and the insurance policies required herein shall not be cancelled, limited in scope of coverage, or non-renewed by MRRF on the applicable policies during the Term, provided however, should any policy required herein be cancelled and not immediately replaced, the County, in addition to other remedies, reserves the right to procure the cancelled insurance and deduct the cost, upon documentation and proof provided of such cost thereof from any money due to MRRF. Coverage must be primary in respect to the additional insured. Any other insurance carried by the County shall be excess only and not contribute with this insurance. MRRF shall submit proof of the insurance coverage(s) by providing to the County a certificate of insurance prior to the commencement of the work. Such certificates of insurance shall name the County as additional insured and holder of said certificate and shall contain the following statement:

"Should any of the policies described herein be cancelled before the expiration date thereof, notice shall be delivered to the County, Department of Corporation Counsel, Risk Management Division, 200 South High Street, Wailuku, Hawaii 96793, in accordance with policy provisions. This insurance includes coverage for the liability assumed by the insured under the Agreement between the insured and the County of Maui, dated [insert Effective Date]."



Section 17.03 Subcontractors. When a subcontractor is utilized, MRRF shall furnish or require the subcontractor to furnish the Procurement Officer within ten (10) Days after execution of the contract, or within such further time as the County may allow, with a copy of a policy or policies of insurance and certificate of insurance covering the subcontractor and the subcontractor's employees or agents in the same amount and for the same liability specified in this Article, unless a lesser amount or type of coverage is approved by the County in writing. In the event of cancellation or termination of any required policy or any substitute policy, MRRF or the subcontractor, as the case may be, shall immediately furnish the Procurement Officer with a substitute policy. Said insurance policy(ies) shall name MRRF and the County as additional insureds and holders of the insurance certificates and shall also provide a waiver by the insurer of any right of subrogation in MRRF's and the County's favor and coverage for the subcontractor's completed operations.

Section 17.04 Minimum Insurance Coverage Requirements. Unless otherwise approved by the County, the policy or policies of insurance maintained by MRRF shall provide the following minimum limit(s) and coverage(s) as specified herein, or greater amount of coverage as may be required from time to time by the County, be placed with an insurance carrier licensed to do business in the State of Hawaii with a current A.M. Best's Financial Strength Rating of no less than A (Excellent), and Financial Size Category of no less than VII. Any lesser Best's Rating will be subject to approval by the County. If the required insurance is not commercially available at a reasonable cost, the County may, in its sole discretion, accept a lower coverage amount or type of coverage. The minimum liability limits of liability may be provided by a combination of primary and Umbrella or Excess Liability policies.

(a) Commercial General Liability. Commercial General Liability by a carrier authorized to do business in the State of Hawaii on an "occurrence" form, naming the County as an additional insured and holder of the insurance certificate, to include coverage for:

- (i) Premises Operations,
- (ii) Independent Contractors,
- (iii) Products and Completed Operations,
- (iv) Broad Form Property Damage including Completed Operations,
- (v) Blanket Contractual Liability,
- (vi) Personal Injury,
- (vii) Employees named as Additional Insureds,
- (viii) Explosion, Collapse, and Underground Property Damage, and

- (ix) Severability of Interest. The minimum acceptable limits of liability for such coverage shall be:

\$10,000,000 per occurrence;  
\$10,000,000 general aggregate.

- (b) Automobile Liability. MRRF shall provide Automobile Liability coverage from a carrier admitted to do business in the State of Hawaii for all owned, non-owned, and hired autos, naming the County as an additional insured. The coverages maintained will be in compliance with Hawaii law. The minimum acceptable Combined Single Limit is \$6,000,000 (via combination of primary and excess limits).
- (c) HRS Chapter 383 (Unemployment Insurance), 386 (Workers' Compensation), 392 (Temporary Disability Insurance), and 393 (Prepaid Health Care) requirements. MRRF shall submit an approved certificate of compliance issued by the Hawaii State Department of Labor and Industrial Relations (DLIR). The certificate shall be valid for six (6) months from the date of issue and must be valid on the date it is received by the County. The application for the certificate shall be the responsibility of MRRF, and must be submitted directly to the DLIR and not to the County. [HRS §103D-310(c)]. MRRF shall carry workers' compensation insurance for MRRF's employees in the amounts required by Applicable Laws.

The minimum limits of liability to be maintained are as follows and MRRF shall request a waiver of subrogation in favor of the County:

Coverage A: State of Hawaii Workers' Compensation Law  
Coverage B: Employer's Liability:

Bodily Injury from each accident: \$5,000,000  
Bodily Injury from disease per employee: \$5,000,000  
Bodily Injury from disease aggregate: \$5,000,000

- (d) Pollution Liability Insurance. The Pollution Liability policy must include a minimum limit of \$10 million per accident or occurrence, \$10 million aggregate. The policy must, on a blanket basis or by specific reference to the Agreement, extend to assumed liabilities with respect to contractual provisions. In addition to fixed site coverage related to MRRF's Site and Facility, the policy coverage must extend to losses arising from any waste, products or materials transported, shipped, or delivered via any transportation mode to a location beyond the boundaries of the Site at which MRRF or any entity for which MRRF is legally liable is performing or has performed the operations described in the Agreement. The policy must extend to off-site third party bodily injury and property damage due to releases from storage tanks (above and below ground). Coverage must include corrective action and clean-up due to releases from storage tanks.

- (e) Fire and Standard Extended Coverage Insurance. MRRF shall insure MRRF's Facility for \$1,000,000, or such other limit acceptable to the County, plus one hundred percent (100%) of the replaceable value thereof for the life of the Agreement against all loss or damage by fire at the Site and against all loss or damage covered by the Standard Extended Coverage Insurance endorsement, including vandalism and malicious mischief, by an insurance company or companies acceptable to the County. The amount of insurance may vary with the extent of MRRF's Facility completed, but shall at all times be at least equal to the replacement value. The insurance policy or policies shall be held jointly in the names of the County, MRRF, and MRRF's subcontractors, as their interests may appear.

Section 17.05 Proof of Coverage. After award of the contract, prior to the commencement of performance of services, MRRF shall furnish certificates of insurance to the County at the addresses specified, evidencing the insurance coverage, including endorsements above required. These certificates shall provide that such insurance shall not be terminated or expire without thirty (30) Days written notice to the County and MRRF shall maintain such insurance from the time MRRF commences performance of services hereunder until the completion of such services. For the purpose of this document, "commencing services" refers to any activity toward completing the project goal. If MRRF does not obtain the described insurance, or if the County is not furnished at the time specified with the requisite insurance certificates, or if the described insurance is terminated, altered, or changed in a manner not acceptable to the County, then MRRF shall not commence services and the County may withhold Landfill Gas and/or Acceptable Waste to MRRF or terminate this Agreement. Performance milestones will apply.

Section 17.06 Other Insurance Provisions. Insurance coverage in the minimum amounts set forth herein shall not be construed to relieve MRRF from liability in excess of such coverage, nor shall it preclude the County from taking such other actions as available to it under any other provision of this Agreement or otherwise in law. For any claims related to this Agreement, MRRF's insurance coverage shall be primary insurance as respects the County, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the County, its officers, officials, employees, and volunteers shall be excess of MRRF's insurance and shall not contribute with it. The submission of insurance documentation to and acceptance by the County which does not meet the requirements herein shall not be considered a waiver of MRRF's obligations or the County's rights under the terms of this Agreement.

Section 17.07 Subrogation Waiver. All insurance policies in any way related to this Agreement and secured and maintained by MRRF or its Subcontractors as required herein shall include clauses stating that each carrier shall waive all rights of recovery, under subrogation or otherwise, against MRRF or the County, its agencies, institutions, organizations, officers, agents, employees, and volunteers.

## **Article XVIII. Representations And Warranties**

Section 18.01 County's Representations and Warranties. The County hereby warrants and represents to MRRF, as of the Effective Date, that except as explicitly set forth in this Agreement to the contrary:

- (a) MRRF shall receive good and marketable title to the Landfill Gas and Acceptable Waste free and clear of all liens, claims, and encumbrances;
- (b) The County is a municipal corporation duly organized, validly existing and in good standing under the laws of the State of Hawaii and has the power to carry on its business as it is contemplated to be conducted under this Agreement;
- (c) The execution, delivery, and performance by the County of this Agreement is within the powers of the County, have been duly authorized by all necessary municipal action, and does not violate any Applicable Laws, the Maui County Charter, or the terms of any agreement to which the County is a party;
- (d) There are no bankruptcy, insolvency, reorganization, receivership, or other arrangement proceedings pending or being contemplated by it, or to its knowledge threatened against it;
- (e) To its knowledge, there are no actions, proceedings, judgments, rulings, or orders issued by or pending before any court or other governmental body that would materially adversely affect its ability to perform its obligations pursuant to this Agreement; and
- (f) To its knowledge, there is no RCRA Subtitle C permit for any portion of the Landfill.

Section 18.02 MRRF's Representations and Warranties. MRRF hereby agrees, warrants, and represents to the County, as of the Effective Date, that except as explicitly set forth in this Agreement to the contrary:

- (a) MRRF is a limited liability company duly organized and validly existing under the laws of the State of Delaware, in good standing under the laws of the State of Delaware, authorized to conduct business in the State of Hawaii, and has the power to carry on its business as it is contemplated to be conducted under this Agreement;
- (b) The execution, delivery, and performance by MRRF of this Agreement is within corporate powers of MRRF, have been duly authorized by all necessary corporate action, and does not violate any Applicable Laws, the terms of the articles of organization or by-laws of MRRF, or the terms of any agreement to which MRRF or any Affiliate of MRRF is a party;
- (c) MRRF has all necessary experience, rights, licenses, patents, copyrights, and

other approvals related to the processes and technology necessary to design, construct, equip, and operate MRRF's Facility.

- (d) There are no bankruptcy, insolvency, reorganization, receivership, or other arrangement proceedings pending or being contemplated by it, or to its knowledge threatened against it;
- (e) To its knowledge, there are no actions, proceedings, judgments, rulings or orders, issued by or pending before any court or other governmental body that would materially adversely affect its ability to perform its obligations pursuant to this Agreement; and
- (f) MRRF covenants that neither MRRF, nor any employees nor agents of MRRF, presently has any interest, and promises that no such interest, direct or indirect, shall be acquired, that would or might conflict in any manner or degree with MRRF's performance under this Agreement, except as expressly agreed to by County.

#### Section 18.03 Warranty Exclusions.

- (a) The Parties agree that the implied warranties of merchantability and fitness for a particular purpose and all other warranties, express or implied, are excluded from this transaction and do not apply to the Landfill Gas and the Acceptable Waste provided by the County to MRRF hereunder.
- (b) The County makes no warranties or representations as to the quantity or quality of Landfill Gas that will be extracted from the Landfill during the term of this Agreement.
- (c) The County makes no warranties or representations as to the characteristics or quantities of Acceptable Waste provided to MRRF pursuant to this Agreement.

### **Article XIX. Public Information Program**

Section 19.01 MRRF shall create a public information program, which may include the following as developed with County input:

- (a) Creation of a website informing the public of the status of MRRF's Facility and various public education materials and programs available associated with MRRF's Facility. Such website shall include annual data regarding MRRF's Facility's Performance Guarantees.
- (b) Issuance of newsletters and/or press releases to inform the public of MRRF's activities related to MRRF's Facility.
- (c) Preparation of fact sheets and household guides explaining State and County regulations and activities at MRRF's Facility that positively affect recycling and

renewable energy generation.

- (d) Presentations to local civic, environmental, and other groups or at public events, which will include presentation of available videos.
- (e) Providing a web-based repository of publications pertaining to waste policies and waste reduction and recycling programs, information about purchasing products made from recyclable products and directories of companies that provide these types of goods, recycling guidance documents and technologies that will be available to interested parties at MRRF's Facility or another location agreed to by the County. Such repository shall be inclusive of information or guides generated and provided by the County to MRRF.
- (f) Hosting tours of MRRF's Facility for interested members of the public and County.
- (g) Technical assistance on source and waste toxicity reduction to target users of concern.
- (h) Participation in public hearings, public meetings, and meetings of elected officials and interested groups.
- (i) Participation in State, County, and local community public events.

#### **Article XX. Miscellaneous**

Section 20.01 Assignment. Neither Party may assign its rights or obligations pursuant to this Agreement to a third party without the other Party's prior written consent, other than as a collateral assignment to MRRF's lenders in connection with MRRF's financing solely of MRRF's Facility as further set forth in Section 20.02, provided however, that 30 Days written notice be provided by MRRF to the County of such intention to assign as collateral, and further provided that the assignee pursuant to any such collateral assignment may not assign any rights or obligations hereunder to a third party without the County's prior written consent. For purposes of this Agreement, a change in direct or indirect control of MRRF shall be deemed to be an assignment of MRRF's rights and obligations under this Agreement. When in the best interest of the County and at the County's election, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee, and the County shall agree that: The transferee assumes all of the transferor's obligations; the transferor remains liable for all obligations under the Agreement but waives all rights under the Agreement as against the County; and the transferor shall continue to furnish, and the transferee shall also furnish, all required bonds or other required security. The rights, powers, and remedies of each Party shall inure to the benefit of such party and its successors and permitted assigns.

Section 20.02 Cooperation with Financing. The County acknowledges that MRRF may be financing MRRF's Facility, and the County agrees that it shall reasonably cooperate with MRRF and its financing parties in connection with such financing, including (a) the furnishing

of such usual and customary financial information, (b) the giving of such consents, estoppels, or certificates, (c) any collateral assignments, provided that MRRF shall pay the reasonable costs and expenses of the County relating to the review and negotiation of a mutually acceptable form of collateral assignment, and (d) providing such opinions of counsel and other matters as MRRF and its financing parties may reasonably request; provided, that the foregoing undertaking shall not obligate the County to materially change any rights or benefits, or materially increase any burdens, liabilities, or obligations of the County under this Agreement (except for providing notices and additional cure periods to the financing parties with respect to Events of Defaults with respect to MRRF as a financing party may reasonably request).

Section 20.03 Severability. If any provision of this Agreement is held invalid by a court having jurisdiction, the other provisions of this Agreement shall not be affected thereby. If the application of this Agreement or any of its provisions as to any person or circumstance is held invalid, the application of this Agreement and its provisions as to other persons or circumstances shall not be affected thereby.

Section 20.04 Entire Agreement. This Agreement, including all exhibits or attachments hereto, contains the complete agreement concerning the subject arrangement between the Parties and shall, as of the effective date hereof, supersede all other agreements between the Parties. The Parties stipulate that neither has made any representations with respect to the subject matter, execution, and delivery of this Agreement except as such representations are specifically set forth herein. Each Party acknowledges that the Party has relied on the Party's own judgment in entering into this Agreement. The Parties further acknowledge that any payments or representations that may have previously been made by either of them to the other are of no effect and that neither has relied thereon in connection with its dealing with the other.

Section 20.05 Notices. All notices, requests, demands and other communications provided with respect to the transactions described in this Agreement shall be in writing, shall be sent (a) by first class U.S. Certified Mail, return receipt requested, (b) by private courier service, (c) personally delivered, or (d) delivered by email, and shall be deemed to have been properly given upon actual receipt as shown by a receipt signed by the recipient and provided by the entity delivering the notice, or in the case of email by return email from the Party recipient acknowledging receipt. Notices shall be delivered to the Parties at the following addresses:

To the County:

Director  
Department of Environmental Management  
County of Maui  
2200 Main Street, Suite 100  
Wailuku, Hawaii 96793

Additionally, for all matters related to Article XVII (Insurance):

Risk Management  
Department of Corporation Counsel  
200 S. High Street, Third Floor  
Wailuku, Hawaii 96793

To MRRF:

Maui Resource Recovery Facility, LLC  
5780 Fleet Street, Suite 310  
Carlsbad, California 92008

Each Party shall notify the other Party in the manner specified above of any change in the above addresses for receipt of communications. All notices, communications, and waivers under this Agreement, if applicable, to any person who has or will make a loan to MRRF to help finance MRRF's Facility shall be to the name and address specified in a notice from MRRF to the County.

Section 20.06 Officer in Charge. The Director of Department of Environmental Management, or an authorized representative, shall be the Officer-in-Charge for all services provided herein, and shall have the right to oversee the successful completion of Agreement requirements, including monitoring, coordinating, and assessing MRRF's performance and approving completed work/services with verification of same for MRRF's invoices or requests for payment. The Officer-in-Charge also serves as the point of contact for MRRF during the Term.

Section 20.07 Amendments to Agreement. This Agreement shall not be amended, modified, or supplemented without the written agreement of MRRF and the County at the time of such amendment, modification, or supplement. However, this Agreement shall, at all times, be subject to such changes or modifications by the Hawaii Public Utilities Commission as it may, from time to time, direct in the exercise of its jurisdiction.

Section 20.08 Assistance of Legal Counsel. The Parties have carefully read and fully understand all of the provisions and effects of this Agreement. The Parties shall consult with their respective counsel if any provision of this Agreement is not fully understood. The Parties are voluntarily entering into this Agreement and neither Party has made representations concerning the terms or effects of this Agreement other than those contained herein.

Section 20.09 Waivers; Approvals. No waiver of any provision of this Agreement shall be effective unless set forth in writing signed by the Party making such waiver, and any such waiver shall be effective only to the extent it is set forth in such writing. Failure by a Party to insist upon full and prompt performance of any provision of this Agreement, or to take action in the event of any breach of any such provisions or upon the occurrence of any Event of Default by MRRF or the County, as applicable, shall not constitute a waiver of any rights of such Party, and, subject to the notice requirements of this Agreement, such Party may at any



time after such failure exercise all rights and remedies available under this Agreement with respect to such Event of Default by MRRF or the County. Receipt by a Party of any instrument or document shall not constitute or be deemed to be an approval of such instrument or document. Any approvals required under this Agreement must be in writing, signed by the Party whose approval is being sought.

Section 20.10 Governing Law; Jurisdiction; Forum. This Agreement shall be governed by and construed in accordance with the laws of the State of Hawaii without regard to choice of law principles. The County and MRRF irrevocably agree that any action, suit or proceeding by or among MRRF and the County may be brought in whichever of the Circuit Courts of the State of Hawaii, has subject matter jurisdiction over the dispute and waives any objection that the County and MRRF may now or hereafter have regarding the choice of forum whether on personal jurisdiction, venue, forum non convenience or on any other ground. The County and MRRF hereby agree that service of process in any action, suit or proceeding may be effected by mailing copies thereof by registered or certified mail, postage prepaid, to it at its address set forth herein. Nothing in this Agreement shall affect the right to service of process in any other manner permitted by law. The County and MRRF further agree that final judgment against it in any action or proceeding shall be conclusive and may be enforced in any other jurisdiction within or outside the State of Hawaii by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of such judgment.

Section 20.11 Conflict Between Agreement and Procurement Rules. In the event of a conflict between the terms and conditions of this Agreement and the procurement rules in the HAR, the procurement rules in effect on the Effective Date shall control and are hereby incorporated by reference.

Section 20.12 Campaign Contributions. MRRF acknowledges that it is unlawful under HRS § 11-355, unless specifically permitted under that law, for MRRF, at any time during the Term of this Agreement to: (a) directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or noncandidate committee, or to any candidate or to any person for any political purpose or use; or (b) knowingly solicit any contribution from any person for any purpose during the Term.

Section 20.13 Offset. The County may offset against any monies or other obligations the County owes to MRRF under this Agreement, any amounts owed to the County by MRRF under this Agreement, or any other contracts, or pursuant to any law or other obligation owed to the County by MRRF, including, without limitation, the payment of any taxes or levies of any kind or nature. The County will notify MRRF in writing of any offset and the nature of such offset. For purposes of this Section 20.13, amounts owned to the County shall not include debts or obligations which have been liquidated, agreed to by MRRF, and are covered by an installment payment or other settlement plan approved by the County, provided, however, that MRRF shall be entitled to such exclusion only to the extent that MRRF is current with, and not delinquent on, any payments or obligations owed to the County under such payment or other settlement plan. Except as otherwise set forth herein, each Party reserves to itself all rights, setoffs, counterclaims and other remedies and/or

defenses to which it is or may be entitled, arising from or out of this Agreement or arising out of any other contractual arrangements between the Parties. All outstanding obligations to make, and rights to receive, payment under this Agreement may be offset against each other.

Section 20.14 No Third Party Rights. This Agreement is only for the benefit of the Parties to this Agreement, their successors and permitted assigns and persons expressly benefited by the indemnity provisions of this Agreement. No other person (including, without limitation, tenants of the Site and Landfill) shall be entitled to rely on any matter set forth in, or shall have any rights on account of the performance or non-performance by any Party of its obligations under, this Agreement.

Section 20.15 No Agency. This Agreement is not intended, and shall not be construed, to create any association, joint venture, agency relationship, or partnership between the Parties or to impose any such obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act as or be an agent or representative of, or otherwise bind, the other Party.

Section 20.16 No Public Utility. Nothing contained in this Agreement shall be construed as an intent by MRRF to dedicate its property to public use or subject itself to regulation as a "public utility" (as defined in Chapter 269 HRS, as amended) or any other Applicable Law.

Section 20.17 Records Retention and Right to Audit Records. MRRF and any subcontractors shall maintain the books and records that relate to the Agreement, and any cost or pricing data for the Term and for three (3) years from the date of final payment under the Agreement or end of the Term, whichever is later. In the event that any litigation, claim, investigation, audit, or other action involving the records retained under this provision arises, then such records shall be retained for three (3) years from the date of final payment, or the date of the resolution of the action, whichever occurs later. During the period that records are retained under this section, MRRF and any subcontractors shall allow the County access to such records pursuant to HRS §103D-317 and Subchapter 19, Chapter 3-122, HAR.

Section 20.18 Confidentiality of Material. The County shall not in any way be liable or responsible for disclosure of information or records if disclosure is required under the Public Records Act (Government Code, Section 6250, et seq.), Hawaii Uniform Practices Act (HRS §92F, et seq.), or pursuant to law or legal process. County will apply exemptions to disclosures that are available under law and statute, with respect to the protection of confidential information. MRRF shall provide to the County any reasonable argument and relevant law to support MRRF's position on confidentiality of its materials, which County shall consider. MRRF shall save, defend, keep, hold harmless, and fully indemnify the County, its elected officials, officers, employees, agents, and volunteers from all damages, claims for damages, costs, or expenses, whether in law or in equity, that may at any time arise or be set up for not disclosing material provided by MRRF to the County, if expressly requested by MRRF of County to not disclose such material, pursuant to the aforementioned laws or regulations, including those arising from or connected to the County's refusal to disclose any protectable item or document to any party making a request for those items.

Section 20.19 Change of Name. When MRRF asks to change the name under which it holds

this Agreement with the County, the contract officer of the purchasing agency shall, upon receipt of a document acceptable or satisfactory to said officer indicating such change of name (for example, an amendment to MRRF's articles of incorporation), enter into an amendment to this Agreement with MRRF to effect such a change of name. The amendment to this Agreement changing MRRF's name shall specifically indicate that no other terms or conditions of this Agreement are thereby changed. All assignment contracts and amendments to this Agreement effecting changes of MRRF's name or novations hereunder shall be reported to the chief procurement officer as defined in HRS §103D-203(b) within 30 days of the date that the assignment contract or amendment becomes effective. When MRRF holds contracts with more than one purchasing agency of the County, the assignment contracts and the novation and change of name amendments herein authorized shall be processed only through the County Department of Finance.

Section 20.20 Antitrust Claims. The County and MRRF recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, MRRF hereby assigns to the County any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to the County under an escalation clause.

Section 20.21 Hazardous Materials and Pollution Control. MRRF shall fully comply with all federal, State of Hawaii, and County laws, statutes, regulations, and ordinances in effect or which shall come into effect during the term of the contract regarding the generation, use, storage, handling, transportation, and disposal of Hazardous Materials. If MRRF encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in HRS §128D-1, MRRF shall immediately notify the County and all other appropriate state, County, or federal agencies as required by law. MRRF shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders that the Environmental Protection Agency or the state Department of Health issues in response to the release. In the event there is an ensuing cease-work period, and the County determines that this Agreement requires an adjustment of the time for performance, this Agreement shall be modified in writing accordingly.

Section 20.22 Execution in Counterparts. This Agreement may be executed in counterparts, and when all counterparts have been executed, each counterpart shall be considered an original but when assembled shall constitute one and the same instrument, and shall have the same force and effect as though all of the signatories had executed a single signature page. The Parties agree that facsimile and/or electronic signatures are authorized and binding on all Parties to this Agreement.

Section 20.23 Waiver. The failure of a Party to insist upon the strict compliance with any term, provision, or condition of this Agreement shall not constitute or be deemed to constitute a waiver or relinquishment of the Party's right to enforce the same in accordance with this Agreement. The fact that a Party does not specifically refer to one provision of the law, and

does not include other provisions shall not constitute a waiver or relinquishment of the Party's rights or the other Party's obligations under the law.

Section 20.24 Headings. The headings in this agreement are explanatory, and shall not be deemed to affect, qualify, or amplify the contents of the terms in any particular clause.

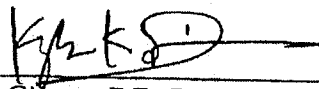
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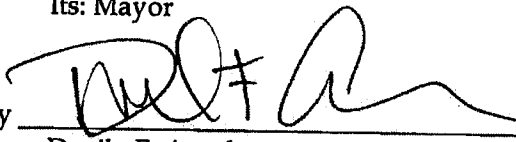
IN WITNESS WHEREOF, the Parties hereto have duly executed and delivered this Agreement as of the date set forth above.

APPROVAL RECOMMENDED:


By   
Kyle K. Ginoza, P.E., Director  
Department of Environmental Management

COUNTY OF MAUI

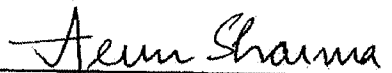
By   
Alan M. Arakawa  
Its: Mayor

By   
Danilo F. Aagsalog  
Its: Finance Director

APPROVED AS TO FORM  
AND LEGALITY:

  
Richelle M. Thomson  
Deputy Corporation Counsel

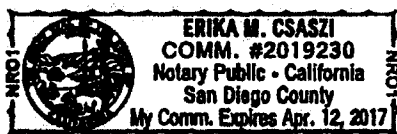
MAUI RESOURCE RECOVERY FACILITY, LLC

By   
Arun Sharma  
Its: President

STATE OF California )  
COUNTY OF San Diego ) SS.

On this 6<sup>th</sup> day of January, 2014, before me personally appeared ARUN SHARMA, ~~to me personally known~~, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity. IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

[Stamp or Seal]



Erika M. Csaszi  
Notary Public, State of California  
Print Name: Erika M. Csaszi, Notary Public  
My commission expires: April 12, 2017

NOTARY PUBLIC CERTIFICATION	
Doc. Date: _____	# Pages: _____
Notary Name: _____	Judicial Circuit: _____
Doc. Description: _____	
_____	
_____	
_____	
Notary Signature: _____	
Date: _____	

[Stamp or Seal]

EMC  
1/6/14



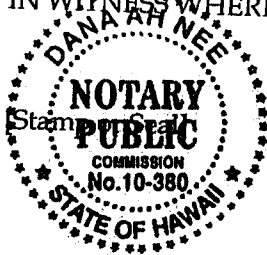
STATE OF HAWAII

COUNTY OF MAUI

)  
) SS.  
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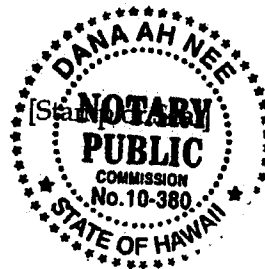
On this 8<sup>th</sup> day of January 2014, before me personally appeared DANILO F. AGSALOG, to me personally known, who, being by me duly sworn, did say that he is the Finance Director of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said the County of Maui, and that the said instrument was signed and sealed on behalf of said the County of Maui pursuant to Section 8-4.3 of the Charter of the County of Maui and Section 3.12.070, Maui County Code; and the said DANILO F. AGSALOG acknowledged the said instrument to be the free act and deed of said the County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



Dana Ah Nee  
Notary Public, State of Hawaii  
Print Name: **DANA AH NEE**  
My commission expires: **NOV 14 2014**

NOTARY PUBLIC CERTIFICATION		
Doc. Date:	<u>undated at time of notarization</u>	# Pages: <u>57</u>
Notary Name:	<u>DANA AH NEE</u>	Judicial Circuit: <u>2nd</u>
Doc. Description:	<u>M1014 - Maui County Integrated Waste Conversion and Energy Project Services Agreement</u>	
Notary Signature:	<u>Dana Ah Nee</u>	
Date:	<u>JAN - 8 2014</u>	



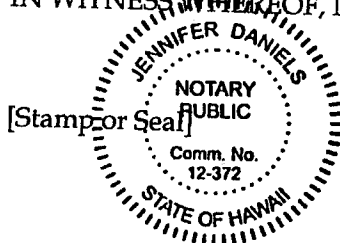
STATE OF HAWAII

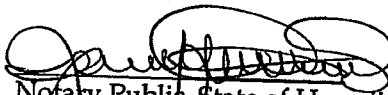
COUNTY OF MAUI

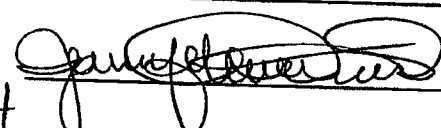
} SS.  
}

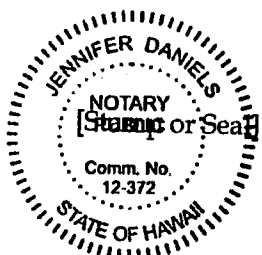
On this 8<sup>th</sup> day of January 2014 before me personally appeared ALAN M. ARAKAWA, to me personally known, who, being by me duly sworn, did say that he is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said the County of Maui, and that the said instrument was signed and sealed on behalf of said the County of Maui pursuant to Section 7-5.11 and Section 9-18 of the Charter of the County of Maui; and the said ALAN M. ARAKAWA acknowledged the said instrument to be the free act and deed of said the County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



  
Notary Public, State of Hawaii  
Print Name: JENNIFER DANIELS  
My commission expires:

NOTARY PUBLIC CERTIFICATION			
Doc. Date:	<u>1/8/14</u>	# Pages:	<u>57</u>
Notary Name:	<u>JENNIFER DANIELS</u>	Judicial Circuit:	<u>2nd</u>
Doc. Description:	<u>Services Agreement</u> <u>Maui County Integrated Waste</u> <u>Conversion &amp; Energy Project</u>		
Notary Signature:			
Date:	<u>1/8/14</u>		



AMENDMENT NO. 1 TO CONTRACT NO. M1016

Department: Environmental Management - Solid Waste Division

Project Title: Integrated Waste Conversion and Energy Project

RFP No.: 13-13/P32

Additional Certification Requested from County: \$0.00

This AMENDMENT NO. 1 TO CONTRACT is made and entered into by and between the COUNTY OF MAUI, a political subdivision of the State of Hawaii, whose business address is 200 South High Street, Wailuku, Maui, Hawaii 96793, hereinafter referred to as the "County," and MAUI RESOURCE RECOVERY FACILITY, LLC, a Delaware limited liability company, whose mailing address is 5780 Fleet Street, Suite 310, Carlsbad, California 92008, hereinafter referred to as the "Contractor." County and Contractor shall hereinafter be referred to collectively as the "Parties."

RECITALS:

1. WHEREAS, County and Contractor entered into the following Contract and Amendment(s), if any, with certified availability of funds in the amount indicated and time of performance as indicated:

CONTRACT NO.	DATE	ADDITIONAL CERTIFIED AMOUNT	TOTAL CERTIFIED AMOUNT	TIME OF PERFORMANCE/EXTENSION	RENEWAL OPTION FOR MULTI TERM CONTRACT
M1014	1/8/2014	NOT APPLICABLE	\$ 0.00	1/8/2014 to 20 years from Commercial Operations Date	None

2. WHEREAS, the Contract and any Amendment(s) thereto listed above shall be hereafter collectively referred to as "Contract;" and

3. WHEREAS, the Contract is on file with the Director of Finance; and

4. WHEREAS, the Parties now desire to amend the Contract.

AMENDMENT NO. 1 TO CONTRACT NO. M1016

NOW, THEREFORE, the Parties mutually agree to amend the Contract as follows:

1. The definition of "Excess Acceptable Waste" is hereby modified to remove Sewage Sludge from said definition and any obligations of Contractor relating to accepting Excess Acceptable Waste as it relates to Sewage Sludge.
2. The definition of "Sewage Sludge" is hereby modified to exclude Sewage Sludge that has been processed and dried with the intent by the County to utilize such material as landfill cover. Such dried Sewage Sludge received at the Central Maui Landfill does not constitute Acceptable Waste requiring delivery or payment of a tipping fee to the Contractor.
3. Section 3.07(d) is amended in full as follows:

"(d) If the conditions set forth in this Article are not completed, waived, or extended by written agreement within forty-eight (48) months of the Effective Date and MRRF is not diligently pursuing such permits, licenses, and other approvals, the County shall have the option to terminate the Agreement without triggering the default provisions of this Agreement or incurring any liability under this Agreement."

4. Section 6.03 of the Contract is amended in full as follows:

"Guaranteed Annual Minimum Tonnage of Acceptable Waste. Beginning on the Commercial Operations Date, the County will deliver or cause to be delivered a minimum of 103,000 tons of Acceptable Waste per Contract Year to MRRF ("Guaranteed Annual Minimum Tonnage of Acceptable Waste"), provided that the County does not control and cannot guaranty the quality or composition of said Acceptable Waste or its suitability for any purpose.

Whether the County meets the Guaranteed Annual Minimum Tonnage of Acceptable Waste shall be measured as the average tonnage delivered in the current Contract Year and the two prior Contract Years. For example, if the tonnage of Acceptable Waste delivered in Contract Years 1, 2, and 3 is 105,000, 104,000, and 102,000, respectively, the average annual tonnage delivered is 104,000, and the County is deemed to have met its obligation to deliver the Guaranteed Annual Minimum Tonnage of Acceptable Waste in Contract Year 3. However, if in Contract Year 4, the

AMENDMENT NO. 1 TO CONTRACT NO. M1016

tonnage of Acceptable Waste delivered is 102,000, the average of Years 2, 3, and 4 then is 102,666, and the County is deemed to have delivered a shortfall of 334 tons in Contract Year 4.

If the Guaranteed Annual Minimum Tonnage is not delivered, the County shall compensate MRRF by paying the then-applicable per-ton price for MSW for the tonnage of deficiency as part of the Annual Settlement Process in Section 6.10. If MRRF does not accept up to the per ton limits set out in the definition of Excess Acceptable Waste, as measured on a Contract Year basis, fails to meet any of the Performance Guarantees applicable to the current Contract Year as set out in Article IX, or accepts Acceptable Waste from others pursuant to Section 6.01, this Section 6.03 shall not apply."

The entire Contract, as amended herein, shall remain in full force and effect.

**[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]**

AMENDMENT NO. 1 TO CONTRACT NO. M1016

IN WITNESS WHEREOF, the Parties execute this Amendment No. 1 by their signatures, on the dates below, to be effective as of the date of last signature hereto.

I hereby represent and warrant that I have the legal right and authority to execute this Contract on behalf of the Contractor.

CONTRACTOR:

MAUI RESOURCE RECOVERY FACILITY, LLC

By Arun Sharma  
(Signature)

Its: Arun Sharma  
President

Date 1/12/17.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

CALIFORNIA NOTARY ACKNOWLEDGMENT

For An Individual Acting In His/Her Own Right.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )

) ss.

County of San Diego )

On 01/12/2017 before me, Maria E Fisco Notary Public, personally appeared  
Arun P Sharma

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal



Signature

Print Name

Maria E Fisco

My commission expires: 08/18/2018

AMENDMENT NO. 1 TO CONTRACT NO. M1016

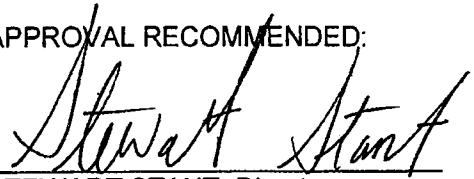
COUNTY EXECUTION PAGE

COUNTY OF MAUI


By   
DANILO F. AGSALOG  
Its Director of Finance

Date FEB 14 2017

APPROVAL RECOMMENDED:

  
STEWART STANT, Director  
Department of Environmental Management  
Date 1/17/17

APPROVED AS TO FORM  
AND LEGALITY:

  
RICHELLE THOMSON  
Deputy Corporation Counsel  
County of Maui  
Date 1/19/2017

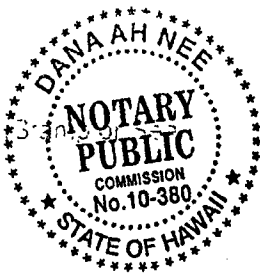


AMENDMENT NO. 1 TO CONTRACT NO. M1016

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF MAUI                 )

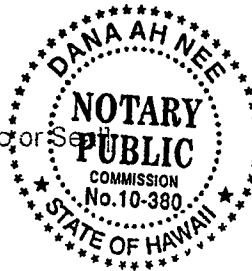
On this 14<sup>th</sup> day of February, 20 17, before me appeared DANILO F. AGSALOG, to me personally known, who being by me duly sworn, did say that he is the Director of Finance of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed on behalf of said County of Maui pursuant to Section 9-18 of the Charter of the County of Maui; and the said DANILO F. AGSALOG acknowledged the said instrument to be the free act and deed of said County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

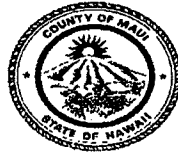


Dana Ah Nee  
Notary Public, State of Hawaii  
Print Name: DANA AH NEE  
My commission expires: NOV 14 2018

NOTARY PUBLIC CERTIFICATION	
Doc. Date: <u>FEB 14 2017</u>	# Pages: <u>7</u>
Notary Name: <u>DANA AH NEE</u>	Judicial Circuit: <u>2nd</u>
Doc. Description: <u>Amendment no. 1 to Contract</u>	
<u>no. M1016</u>	
[Stamp or Seal]	
Notary Signature: <u>Dana Ah Nee</u>	
Date: <u>FEB 14 2017</u>	



ALAN M. ARAKAWA  
Mayor



MARK R. WALKER  
Director of Finance

COUNTY OF MAUI  
DEPARTMENT OF FINANCE  
200 S. HIGH STREET  
WAILUKU, MAUI, HAWAII 96793

November 29, 2017

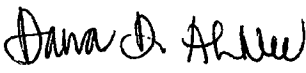
Maui Resource Recovery Facility, LLC  
5780 Fleet Street, Suite 310  
Carlsbad, CA 92008

RE: CONTRACT FOR INTEGRATED WASTE CONVERSION AND ENERGY  
PROJECT FOR THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
RFP NO. 13-13/P-32  
CONTRACT NO. M1016 – AMENDMENT NO. 2

Dear Maui Resource Recovery Facility, LLC:

Transmitted is a copy of the fully executed contract amendment for your file.

Sincerely,

  
for Mark R. Walker  
Director of Finance

MRW:dda  
Enclosure

xc: Department of Environmental Management, Solid Waste Division

AMENDMENT NO. 2 TO CONTRACT NO. M1016

Department: Environmental Management - Solid Waste Division

Project Title: Integrated Waste Conversion and Energy Project

RFP No.: 13-13/P32

Additional Certification Requested from County: \$0.00

This AMENDMENT NO. 2 TO CONTRACT is made and entered into by and between the COUNTY OF MAUI, a political subdivision of the State of Hawaii, whose business address is 200 South High Street, Wailuku, Maui, Hawaii 96793, hereinafter referred to as the "County", and MAUI RESOURCE RECOVERY FACILITY, LLC, a Delaware limited liability company, whose mailing address is 5780 Fleet Street, Suite 310, Carlsbad, California 92008, hereinafter referred to as the "Contractor." County and Contractor shall hereinafter be referred to collectively as the "Parties".

RECITALS:

1. WHEREAS, the County and the Contractor entered into the following Contract and Amendment(s), ~~if any~~, with certified availability of funds in the amount indicated and time of performance as indicated:

CONTRACT NO.	DATE	ADDITIONAL CERTIFIED AMOUNT	TOTAL CERTIFIED AMOUNT	TIME OF PERFORMANCE/ EXTENSION	RENEWAL OPTION FOR MULTI TERM CONTRACT
M1014	1/8/2014	NOT APPLICABLE	\$0.00	1/8/2014 to 20 years from Commercial Operations Date	None
Amd 1	2/14/2017	\$0.00	\$0.00	Same	None

2. WHEREAS, the Contract and any Amendment(s) thereto listed above shall be hereafter collectively referred to as "Contract"; and

3. WHEREAS, the Contract is on file with the Director of Finance; and

4. WHEREAS, the Parties now desire to amend the Contract.

AMENDMENT NO. 2 TO CONTRACT NO. M1016

NOW, THEREFORE, the Parties mutually agree to amend the Contract as follows:

1. Section 3.07(d) is amended in full as follows:

"(d) If the conditions set forth in this Article are not completed, waived, or extended by written agreement within sixty (60) months of the Effective Date and MRRF is not diligently pursuing such permits, licenses, and other approvals, the County shall have the option to terminate the Agreement without triggering the default provisions of this Agreement or incurring any liability under this Agreement."

The entire Contract, as amended herein, shall remain in full force and effect.

IN WITNESS WHEREOF, the Parties execute this Amendment No. 2 by their signatures, on the dates below, to be effective as of the date of last signature hereto.

I hereby represent and warrant that I have the legal right and authority to execute this Contract on behalf of the Contractor.

CONTRACTOR:

MAUI RESOURCE RECOVERY FACILITY, LLC

By Arun Sharma  
(Signature)

ARUN SHARMA  
(Print Name)

Its PRESIDENT  
(Title)

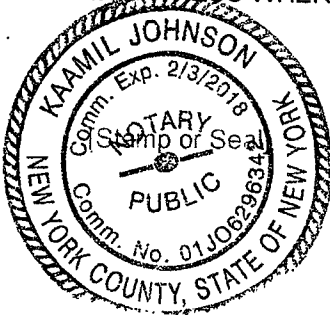
Date 11/9/17

AMENDMENT NO. 2 TO CONTRACT NO. M1016

STATE OF New York )  
New York ) SS.

On this 9<sup>th</sup> day of November, 2018, before me personally appeared Arun Sharma, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



Notary Public, State of New York

Print Name: Kaamil Johnson

My commission expires: 02/03/2018

NOTARY PUBLIC CERTIFICATION	
Doc. Date: _____	# Pages: _____
Notary Name: _____	Judicial Circuit: _____
Doc. Description: _____	
_____	
_____	
_____ [Stamp or Seal]	
Notary Signature: _____	
Date: _____	

AMENDMENT NO. 2 TO CONTRACT NO. M1016

COUNTY EXECUTION PAGE

COUNTY OF MAUI

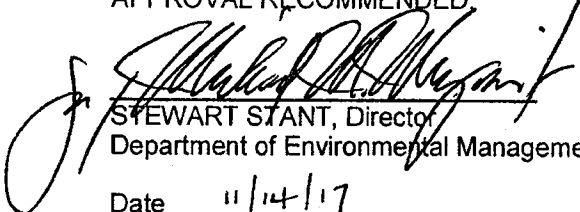
By   
ALAN M. ARAKAWA  
Its Mayor

Date 11/16/17

By   
MARK R. WALKER  
Its Director of Finance

Date NOV 29 2017

APPROVAL RECOMMENDED:

  
STEWART STANT, Director  
Department of Environmental Management  
Date 11/14/17

APPROVED AS TO FORM  
AND LEGALITY:

  
RICHELLE THOMSON  
Deputy Corporation Counsel  
County of Maui

Date 11/14/17

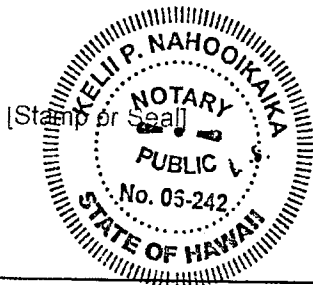
LF2016-0541

AMENDMENT NO. 2 TO CONTRACT NO. M1016

STATE OF HAWAII                     )  
  ) SS.  
COUNTY OF MAUI                    )

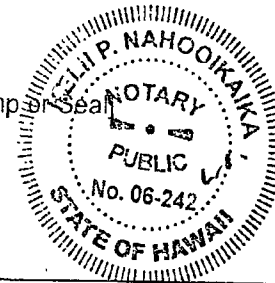
On this 17<sup>th</sup> day of November, 20 17, before me appeared ALAN M. ARAKAWA, to me personally known, who being by me duly sworn, did say that he is the Mayor of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed on behalf of said County of Maui pursuant to Section 9-18 of the Charter of the County of Maui; and the said ALAN M. ARAKAWA acknowledged the said instrument to be the free act and deed of said County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



Kelii P. Nahookaika  
Notary Public, State of Hawaii  
Print Name: KELII P. NAHOOIKA  
My commission expires: 4-30-18

NOTARY PUBLIC CERTIFICATION	
Doc. Date: <u>undated</u>	# Pages: <u>6</u>
Notary Name: <u>KELII P. NAHOOIKA</u>	Judicial Circuit: <u>2nd</u>
Doc. Description: <u>amendment no. 2 to contract</u>	
<u>no. M1016</u>	
<u>11/17/17</u>	
Notary Signature: <u>Kelii P. Nahookaika</u>	[Stamp or Seal]
Date: <u>11.17.17</u>	

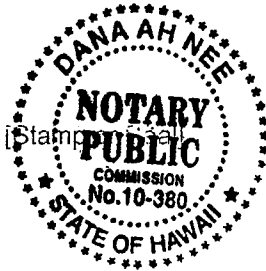


AMENDMENT NO. 2 TO CONTRACT NO. M1016

STATE OF HAWAII )  
 ) SS.  
COUNTY OF MAUI )

On this 21<sup>st</sup> day of November, 2017, before me appeared MARK R. WALKER, to me personally known, who being by me duly sworn, did say that he is the ~~Acting~~ Director of Finance of the County of Maui, a political subdivision of the State of Hawaii, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed on behalf of said County of Maui pursuant to Section 9-18 of the Charter of the County of Maui; and the said MARK R. WALKER acknowledged the said instrument to be the free act and deed of said County of Maui. a p.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.



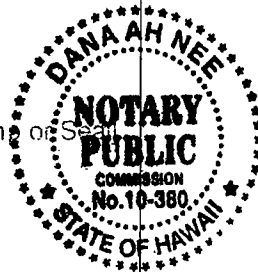
*Dana Ah Nee*

Notary Public, State of Hawaii

Print Name: DANA AH NEE

My commission expires: NOV 14 2018

NOTARY PUBLIC CERTIFICATION			
Doc. Date:	<u>NOV 29 2017</u>	# Pages:	<u>6</u>
Notary Name:	<u>DANA AH NEE</u>	Judicial Circuit:	<u>2nd</u>
Doc. Description: <u>Amendment No. 2 to Contract</u> <u>No. M1016</u>			
Notary Signature: <i>Dana Ah Nee</i>		[Stamp or Seal]	
Date:	<u>NOV 29 2017</u>		





**C6207**

**SERVICES AGREEMENT  
FOR ELECTRICAL ENERGY GENERATION AND SLUDGE DRYING**

By and between:

COUNTY OF MAUI, Department of Environmental Management

and

CONTRACTOR/PROVIDER: MAUI ALL NATURAL ALTERNATIVE, LLC

**FOR OFFICIAL USE:**

SOURCE OF FUNDS	Annual operating budget
CERTIFICATION REQUESTED FROM COUNTY	\$0.00
RFP No. 15-16/P98	Design, Construction, Operation and Maintenance of a Gas Turbine System with Sludge Dryer for the Wailuku-Kahului Wastewater Reclamation Facility Under a Power Purchase Agreement
LF2016-0273	

**SERVICES AGREEMENT FOR ELECTRICAL ENERGY GENERATION  
AND SLUDGE DRYING**

This Services Agreement for Electrical Energy Generation and Sludge Drying ("**Agreement**"), dated as of February 14, 2017 ("**Effective Date**"), is entered into by and between **Maui All Natural Alternative, LLC**, a Limited Liability Company formed under the laws of the State of Delaware ("**Provider**"), and the **COUNTY OF MAUI**, a political subdivision of the State of Hawaii ("**COM**").

**RECITALS**

WHEREAS, COM owns and operates a wastewater treatment and reclamation plant described as the Wailuku-Kahului Wastewater Reclamation Facility ("WWRF") located at 281 Amala Place, Kahului, Hawaii (the "Site"), further described as Tax Map Key No. (2) 3-8-001:188, which is owned by the State of Hawaii and leased to the County under Executive Order No. 3006, as may be amended from time to time.

WHEREAS, COM and Provider intend to enter into that certain Site Lease (the "Lease"), attached hereto as Exhibit D, pursuant to which Provider agrees to lease a portion of COM's Site ("Facility Site").

WHEREAS, Provider intends to finance, design, own, operate and maintain a facility on the Site to produce electricity and to dry municipal sewage sludge (the "Facility") as more particularly shown and described in Exhibits A, B, and C hereto.

WHEREAS, Provider desires to sell to COM and COM desires to purchase from Provider, the Energy generated by the Facility and sludge drying services during the Term in accordance with the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual promises set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

**AGREEMENT**

**1. DEFINITIONS**

Unless otherwise required by the context in which any term appears: (a) capitalized terms used in this Agreement shall have the respective meanings set forth in this Section 1; (b) the singular shall include the plural and vice versa; (c) the word "including" shall mean "including, without limitation", (d) references to "Sections" and "Exhibits" shall be to sections and exhibits hereof; and (e) the words "herein," "hereof" and "hereunder" shall refer to this Agreement as a whole and not to any particular section or subsection hereof.

**"Additional Improvements"** means any additional improvements or modifications to the Facility as a result of any change in or enactment of any law, permit, regulation or requirement under financing of the Facility.

**"Affiliates"** means with respect to a Party, any entity that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with that Party. For this purpose, "control" means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.

**"Agreement"** means this Services Agreement for Electrical Energy Generation and Sludge Drying between COM and Provider, which is comprised all appendices, exhibits, schedules, and any written supplements attached hereto and incorporated herein by reference, as well as all written and signed amendments and modifications thereto.

**"Applicable Law"** means, with respect to any Governmental Authority, any constitutional provision, law, statute, rule, regulation, ordinance, treaty, order, decree, judgment, decision, certificate, holding, injunction, registration, license, franchise, permit, authorization, guideline, governmental approval, consent or requirement of such Governmental Authority, enforceable at law or in equity, along with the interpretation and administration thereof by any Governmental Authority.

**"Biofuel"** has the meaning set forth in Hawaii Revised Statutes ("HRS") §269-91.

**"Business Day"** means any day except a Saturday, Sunday, or a Maui County holiday and shall be between the hours of 8:00 a.m. and 4:30 p.m. local time for the relevant Party's principal place of business where the relevant Party, in each instance unless otherwise specified, shall be the Party by whom the Notice or payment or delivery is to be received.

**"Change in Law"** shall have the meaning set forth in Section 4.9.

**"Claims"** means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject matter of an indemnity, and the resulting losses, damages, expenses, attorneys' fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination or expiration of this Agreement.

**"Claim Notice"** shall have the meaning set forth in Section 15.3.

**"COM"** shall have the meaning set forth in the preamble.

**"Condition(s) Precedent"** means each of, or one of, the conditions set forth in Section 2.

**"Confidential Information"** shall have the meaning set forth in Section 17.

**"Construction Start Date"** means the actual date of the start of construction by Provider as set forth in Section 3.4.3.

**"Contract Services"** means Provider's installation, design, construction, operation and maintenance of the Facility; and delivery of Sludge Drying Services and Energy.

**"Contract Year"** means a period of twelve (12) consecutive months. The first Contract Year shall commence on the Operations Commencement Date and each subsequent Contract Year shall commence on the anniversary of the Operations Commencement Date.

**"Deemed Delivered Energy – Load"** shall have the meaning set forth in Section 5.

**"Deemed Delivered Energy – Shortfall"** shall have the meaning set forth in Section 5.

**"Default"** shall have the meaning set forth in Section 12.

**"Delay Liquidated Damages"** shall have the meaning set forth in Section 3.6.

**"Delivered Energy"** means the Energy produced by the Facility and delivered to and received by COM at the Delivery Point as measured in kWh.

**"Delivery Point"** means the physical location(s) of interconnection between the Facility and the WWRF's electrical system at which Energy is delivered by Provider and received by COM and measured by the Meter.

**"Differing Site Conditions"** means unknown physical conditions of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this Agreement.

**"Dried Sludge"** means the product produced by the Facility from the Specification Sludge in accordance with Section 6.9.

**"Dried Sludge Quality Guarantee"** means Dried Sludge that meets the quality specifications in Section 6.9.

**"Electric System Upgrades"** means any Facility or WWRF electrical system upgrades or "Facility Parties Interconnection Facilities" set forth in Exhibit B to Rule 14 or Hawaiian Electric Company Rule 19 "Interconnection and Transmission Upgrades" (a copy of said Rule 14 and 19, effective as of the Effective Date, are hereby attached as Exhibits I and J), or as identified in the Interconnection Requirements Study or Interconnection Agreement, that are determined to be necessary by the Utility Provider, as applicable, to physically and electrically interconnect the Facility or WWRF to the Utility Provider's electric system under the terms of the Interconnection Agreement. Costs related to Electric System Upgrades include design, permitting, and construction of the Upgrades.

**"Energy"** means Renewable Electric Energy as defined in HRS §269-91, generated by the Facility, measured at the Meter and delivered to and received by the COM at the Delivery Point(s) that meets or exceeds the power quality and reliability specifications required by the Utility Provider for interconnection with Utility Provider's grid, pursuant to Rule 14, and the electric load profile of the WWRF, as detailed in Exhibit H.

**"Energy Delivery Guarantee"** means the Facility's guaranteed delivery to COM of Energy per Contract Year, as described in Section 5.3.

**"Environmental Attributes"** means any and all credits, benefits, emissions reductions, offsets, or allowances (not including Financial Incentives) attributable to the generation of Energy at the Facility, including but not limited to: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the earth's climate by trapping heat in the atmosphere; and (3) the reporting rights to these avoided emissions, including the right of a party to report the ownership of accumulated offsets under any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program.

**"EPC Contract"** means the Provider's engineering, procurement and construction contract with the EPC Contractor for construction of the Facility.

**"EPC Contractor"** means an engineering, procurement, and construction contractor, selected by Provider, with substantial experience in the engineering, procurement, and construction of power plants of the same type of facility as the Provider's.

**"Equitable Defenses"** means any bankruptcy, insolvency, reorganization or other laws affecting creditors' rights generally and, with regard to equitable remedies, the discretion of the court before which proceedings may be pending to obtain same.

**"Event of Default"** has the meaning set forth in Section 12.

**"Excess Energy"** has the meaning set forth in Section 5.8.

**"Facility"** shall include, without limitation, all equipment (ancillary and central to the Facility), anaerobic digester(s), cogeneration system with generator(s), sludge dryer and all related machinery, Meter and other assets used to measure or connect the Facility to the WWRF's electrical system at the Delivery Point, equipment, pipelines, facilities and improvements further described in Section 3.1 and Exhibit B and where Provider will perform the Contract Services. This definition of Facility and as used in this Agreement expressly excludes the WWRF.

**"Facility Development Security"** is the collateral required of Provider, as specified and referred to in Section 10.

**"Facility Site"** means the location as described in and subject to the Site Lease, wherein the Facility will be built.

**"Forced Outage"** means any unplanned reduction, deviation of quality or flow, or suspension of the Energy from the Facility or unavailability of the Facility in whole or in part in response to a mechanical, electrical, or hydraulic control system trip or operator-initiated trip in response to an alarm or equipment malfunction and any other unavailability of the Facility for operation, in whole or in part, for maintenance or repair that is not a planned outage.

**"Government Approvals"** means all orders of approval, permits, licenses, authorizations, consents, certifications, exemptions, rulings, entitlements and approvals issued by a Government Authority which are required under Applicable Law and to be obtained or maintained by a Party or Subcontractor with respect to the obligations in this Agreement.

**"Governmental Authority"** shall mean any federal, state, regional, county, town, city, or municipal government, whether domestic or foreign, or any department, agency, bureau, or other administrative, regulatory or judicial body of any such government having jurisdiction thereof.

**"Guaranteed Construction Start Date"** has the meaning set forth in Section 3.4.3.

**"Guaranteed Facility Milestones"** are the Guaranteed Construction Start Date and the Guaranteed Operations Commencement Date set forth in 3.4.3.

**"Guaranteed Operations Commencement Date"** has the meaning set forth in Section 3.4.3.

**"Hazardous Material"** means waste, substance, object or material deemed hazardous under Applicable Law including, without limitation, "hazardous substances" as defined under CERCLA and "hazardous waste" as defined under RCRA, including chemicals listed by the United States Environmental Protection Agency.

**"Interconnection Agreement"** shall mean a written agreement between Provider and/or COM and the Utility Provider specifying the business and technical arrangements pursuant to Rule 14 necessary to allow the Energy produced by the Facility to operate with the Utility Provider's power system ("Interconnection").

**"kWh"** means revenue-grade kilowatt-hour(s) of electricity.

**"Liens"** shall have the meaning set forth in Section 9.2.2 and 9.3.1.

**"Meter"** means a revenue-grade system output meter that meets or exceeds the American National Standards Institute (ANSI) Standard C12.1-2008 (or as may be revised or amended during the Term) kilowatt-hour meter installed and maintained by the Provider to accurately measure the Energy delivered by Provider to COM at the Delivery Point or energy received or delivered to Provider as further described in Section 5.1.

**"Monthly Period"** shall mean the period commencing on the Operations Commencement Date and ending on the last day of the calendar month in which the Operations Commencement Date occurs, and, thereafter, all subsequent one (1)-month periods during the Term.

**"MWh"** means revenue-grade megawatt-hour(s) of electricity measured by the Meter.

**"Net Energy Metering"** shall have the same meaning as set forth in Chapter 269, HRS.

**"Notice to Proceed"** means the notice provided by Provider to the EPC Contractor following execution of the EPC Contract between Provider and such EPC Contractor by which Provider authorizes such EPC Contractor to perform all of the work and services thereunder.

**"Operations Commencement Date"** means the actual date of commencement of operations as set forth in Section 3.4.3.

**"Party"** shall mean each of COM or Provider.

**"Performance Assurance"** means collateral provided by Provider to COM to secure Provider's obligations hereunder as described in Section 10.

**"Performance Guarantees"** means Provider's Sludge Acceptance Guarantee, Dried Sludge Quality Guarantee, and the Energy Delivery Guarantee pursuant to Sections 5 and 6.

**"Person"** shall mean any individual, corporation, partnership, company, joint venture, association, trust, unincorporated organization or Governmental Authority.

**"Pick-Up Point"** shall mean the physical location in the Facility at which COM will pick up the Dried Sludge meeting the Dried Sludge Quality Guarantee from the Facility.

**"Prolonged Outage"** is any period after the Operations Commencement Date of more than fifteen (15) consecutive days during which the Facility or WWRF is or will be unable, for whatever reason, to deliver or receive Energy.

**“Provider”** shall have the meaning set forth in the Preamble. For purposes of access rights and other rights necessary for Provider to perform its obligations hereunder, the term “Provider” shall include Provider’s Affiliates, authorized agents, contractors and subcontractors.

**“Provider Default”** shall have the meaning set forth in Section 12.

**“Rate”** means the price in U.S. dollars to be paid by COM to Provider for the purchase of the Energy, as specified in Section 5.2.

**“Rule 14”** shall mean Maui Electric Company, Ltd.’s PUC Tariff Rule No. 14, as may be amended from time to time. A copy of said Rule, in effect as of the Effective Date, is attached as Exhibit “I”.

**“Site”** shall mean the Wailuku-Kahului Wastewater Reclamation Facility (“WWRF”), located at 281 Amala Place, Kahului, Maui, Hawaii.

**“Site Lease Agreement” “Site Lease” or “Lease”** means that certain Site Lease, attached hereto as Exhibit D, in respect of the Facility Site entered into by Provider and COM.

**“Sludge”** means “Sewage Sludge” as defined in HRS §342D-1.

**“Sludge Acceptance Fee”** means the fee COM shall pay Provider per ton for processing Specification Sludge into Dried Sludge as set forth in Section 6.2.1.

**“Sludge Acceptance Guarantee”** has meaning in set forth in section 6.5

**“Sludge Delivery Point”** means the physical point at which COM delivers Specification Sludge to Provider.

**“Sludge Drying Services”** means the Facility’s sludge drying and odor abatement and control system to produce and deliver Dried Sludge meeting the Dried Sludge Quality Guarantee to COM as described in Section 6.

**“Specification Sludge”** means is Sludge that has a minimum 10-15% dry solids content, produced by the WWTPs in compliance with Applicable Laws and the WWTPs’ operating permits.

**“Standard Operating Procedures”** means the operating procedures for the Facility prepared by the Provider and delivered to COM.

**“Supplemental Fuel”** shall mean suitable alternative fuel, such as biodiesel, propane or diesel, that may be used on an on-demand basis to supplement or replace the supply of Biofuel, as may be needed, for generating energy or providing Sludge Drying Services.

**“Tax” or “Taxes”** means any and all taxes, fee, levy, duty, impost, charge, surcharge, assessment or withholding, or any payment-in-lieu thereof, and any related interest, payment or addition to tax.

**“Tax Credits and Financial Incentives”** shall mean all federal, state and local tax credits, including without limitation, investment tax credits, production credits, grants, rebates, accelerated depreciation and any other financial incentives related to the Facility.

**“Term”** shall have the meaning set forth in Section 11.2.

**“Termination Date”** shall have the meaning set forth in Section 11.2.

**"Unacceptable Sludge"** means Sludge that fails to meet the definition of Specification Sludge. For clarity, this does not include Diverted Sludge as defined in Section 6.5.

**"Uncontrollable Circumstances"** means any act, event or condition that (1) is beyond the reasonable control of the Party relying on it as a justification for not performing an obligation or complying with any condition required of the Party under this Agreement (other than an obligation to pay money for work or liability previously incurred), and (2) materially expands the scope, materially interferes with, materially delays or materially increases the cost of performing the party's obligations under this Agreement, to the extent that such act, event or condition is not the result of the willful or negligent act, error or omission, failure to exercise reasonable diligence to avoid or mitigate the effect of such event on such Party's ability to perform its obligations under this Agreement, 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 may include the following:

(a) landslides, underground movement, earthquakes, lightning, drought, volcanic eruption, tornadoes, hurricanes, floods, epidemics, tsunamis, and other acts of God, natural disaster, or extreme weather condition;

(b) terrorism, sabotage or similar occurrence, acts of a declared public enemy, extortion, war (declared or undeclared), blockade or insurrection, riot or civil disturbance, except as provided in the exclusions to this definition with respect to acts, events or circumstances occurring outside of the United States;

(c) labor disputes involving employees of Provider or COM, its Affiliates, or Subcontractors, which materially affect the performance each Party's obligations;

(d) the preemption, confiscation, diversion or destruction of materials or services by a Governmental Authority, including COM, in connection with a public emergency or any condemnation;

(e) a violation of Applicable Law by a Person other than Parties to this Agreement, or their Affiliates, or Subcontractors that materially affects a Party's ability to meet its obligations under the Agreement;

(f) the failure of any appropriate Governmental Body or private Utility having operational jurisdiction in the area in which the Facility is located to provide and maintain Utilities to the Facility which are required for the performance of this Agreement; or

(g) a Party's inability, despite diligent efforts, to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility or WWRF that materially affects such Party's ability to perform its obligations under the Agreement.

(2) **Exclusions.** It is specifically understood that none of the following acts, events or circumstances shall constitute Uncontrollable Circumstances:

(a) any act, event or circumstance that would not have occurred if the affected Party had complied with its obligations hereunder;



(b) changes in interest rates, inflation rates, wage rates, commodity prices, currency values, or exchange rates;

(c) with respect to Provider, any changes in the financial condition of Provider affecting the ability to perform its obligations under the Agreement;

(d) weather conditions or natural disasters that are not declared a State of Emergency by a Governmental Authority;

(e) any act, event, circumstance or Change in Law occurring outside of the United States;

(f) a Change in Law pertaining to Taxes;

(g) a Forced Outage except where such Forced Outage is caused by an event of Uncontrollable Circumstances.

**"Utilities"** means any and all utility services, including Interconnection with the Utility Provider and installations whatsoever (including gas, water, electricity, telephone, internet, cable and any other telecommunications), and all piping, wiring, conduit, and other fixtures of every kind whatsoever related thereto or used in connection therewith.

**"Utility Provider"** means the local public utility providing electricity services to WWRF, which as of the Effective Date is Maui Electric Company, Ltd. ("MECO").

**"WWRF"** (also referred to as "Site") means the Wailuku-Kahului Wastewater Reclamation Facility located at 281 Amala Place, Kahului, Hawaii, and any structures, improvements, equipment, systems, wastewater, curbs, utilities or any other systems, fixtures or real or personal property owned, leased, operated, maintained or occupied by COM at the WWRF.

**"WWTPs"** shall mean COM wastewater treatment facilities existing as of the Effective Date and located on the Island of Maui: Wailuku-Kahului Wastewater Reclamation Facility ("WWRF"), Lahaina Wastewater Reclamation Facility, and Kihei Wastewater Reclamation Facility.

## **2. CONDITIONS PRECEDENT**

The respective rights and obligations of the Parties under this Agreement are expressly conditioned upon the satisfaction in full (or written waiver) of all of the following conditions:

**2.1 Site Lease.** COM and Provider shall have entered into the Site Lease, subject to approval by the Maui County Council and the State of Hawaii in their sole discretion. COM makes no representation and assumes no risk as to such approvals. Should either the Maui County Council or State of Hawaii decline to approve the Lease, the Provider shall have 180 days from the date of the final decision to secure an alternative site upon which to develop the Facility, or such other date as may be mutually agreed in writing. No additional costs or obligations related to such alternative site will be passed through to COM.

**2.2 Site Conditions.** COM makes no representation as to the suitability of the Site or the Facility Site for the Facility. Provider acknowledges that as of the Effective Date, Provider's representatives have visited, inspected and are familiar with the Site and the Facility Site, meaning the surface conditions, normal and usual soil conditions, roads, Utilities, topographical conditions and air quality conditions. Provider is familiar with all local and other conditions which

may be material to Provider's performance of its obligations under this Agreement (including transportation; seasons and climate; access, availability, disposal, handling and storage of materials and equipment; and availability and quality of labor and Utilities).

During the period beginning with the Effective Date and continuing for 365 days thereafter, or for such longer period as the Parties may agree in writing, COM authorizes Provider to enter into the Site to conduct such reasonable testing, including sub-surface borings, Provider deems required or advisable to provide a baseline analysis for the development and construction of the Facility on the Site ("Baseline Analysis"). Provider's entry onto the Site is subject to the terms and conditions of this Agreement and the Site Lease and shall be coordinated in advance with COM. Provider shall provide the Baseline Analysis to COM for review and comment as soon as reasonably possible, but no later than 365 days from the Effective Date. No comments made by COM to the Baseline Analysis or to any of Provider's documents or analysis of the Site or Facility Site shall relieve Provider from any duty or obligation under this Agreement. Should Provider's Baseline Analysis conclude that the Site is unsuitable for the Facility or such conditions render it commercially unreasonable to build the Facility, Provider shall have 180 days from the date of delivery of the Baseline Analysis to COM to look for an alternative site and shall provide COM with written notice of Provider's intent to seek an alternative site. No additional costs or obligations related to such alternative site will be passed through to COM. If Provider does not elect to look for an alternative site or cannot locate an alternative site, Provider shall promptly notify COM and either Party may terminate this Agreement without penalty and without triggering the default provisions of Article 12 or incurring any liability under this Agreement whatsoever.

If at any time from the Construction Start Date through the completion of the ground altering phase of construction, Provider encounters Differing Site Conditions ("DSC"), Provider shall immediately notify COM of such DSC. If Provider chooses not to fund the costs related to the DSC, then within fifteen (15) Business Days, Provider shall provide notice to COM along with documentation supporting all DSC costs and Provider's request for cost reimbursement and/or scheduling relief ("formal request"). At its sole discretion, COM may agree to reimburse Provider for all or a portion of the DSC costs and/or schedule relief. If COM elects to reimburse Provider, reimbursement shall be made in the form of a credit to Provider in addition to COM's payment for Energy as set out in Section 5, or as otherwise agreed. If COM does not elect to reimburse Provider for all or a portion of the DSC costs within 45 days of Provider's formal request, Provider may choose to fund all of the costs or may terminate this Agreement with written notice and without penalty and without triggering the default provisions of Section 12.

**2.3 Biofuels Contract.** Provider shall have entered into a contract for biomass, Biofuels or feedstock such that the Facility will be capable of generating and delivering to COM the Energy Quantity as 100% Renewable Electrical Energy. At Provider's sole discretion and at any time during the Term, Provider has right to modify or replace such contract.

**2.4 MECO Agreements.** COM and Provider shall have entered into a Three-Party Interconnection Agreement, Standby Agreement, and/or other applicable agreement related to the provision of electrical energy to the WWRF from the Utility Provider (Maui Electric Company or "MECO") and the Interconnection Requirements Study (if required by the Utility Provider) will have been completed (collectively "MECO Agreements").

**2.4.1** Promptly after execution of this Agreement, each Party, at its own cost and expense, shall commence negotiations with MECO, seeking to execute a Three-Party Interconnection

Agreement, pursuant to Rule 14. The Parties shall have the right to send a representative to attend any or all meetings with MECO and shall keep the other Party apprised of the status of negotiations with MECO and each shall have the right to review the interconnection and power sale agreements with MECO.

**2.4.2 "Interconnection Costs"** include costs related to the MECO Agreements and the Electric System Upgrades of the WWRF. For clarification, the Interconnection Costs do not include any costs related to Electric System Upgrades of the Facility and infrastructure and equipment necessary to transmit or deliver electricity from Provider's Facility to COM or to MECO.

Subject to the limitations set forth in this Section 2.4.2, Provider shall pay the first \$200,000.00 of the Interconnection Costs and Provider shall not seek reimbursement for the same from COM. If such costs exceed \$200,000.00 (the "Interconnection Cost Excess"), Provider shall have the right, but not the obligation, to assume and fully fund Interconnection Cost Excess, without reimbursement from COM, and shall notify COM of this election within fifteen (15) Business Days after Provider's receipt of documentation of the anticipated costs. If Provider chooses not to fund any portion of the Interconnection Cost Excess then within fifteen (15) Business Days after receipt of cost documentation the Provider shall provide notice to COM along with documentation supporting all Interconnection-related Costs. At its sole discretion, COM may agree to reimburse Provider for all or a portion of the Interconnection Cost Excess. If the COM elects to reimburse Provider, reimbursement shall be made in the form of a credit to Provider in addition to COM's payment for Energy as set out in Section 5, or as otherwise agreed. If COM does not elect to reimburse Provider for all or a portion of the Interconnection Cost Excess, Provider may choose to fund the Interconnection Cost Excess or, if Provider declines, either Party may terminate this Agreement with written notice and without penalty and without triggering the default provisions of Section 12.

**2.5 Governmental Approvals.** Provider shall have obtained all necessary permits, licenses, and other approvals, including compliance with Chapter 343, HRS, required by Applicable Law for the construction of the Facility. Notwithstanding the foregoing, COM agrees to reasonably assist Provider in obtaining such permits, licenses, and approvals, provided that COM assumes no risk related to Provider's ability to obtain such permits, licenses, and approvals.

**2.6 Security.** Provider shall have provided proof of compliance with the Security Requirements pursuant to Section 10.

**2.7 Provider's Financing.** Provider shall have achieved financing of the Facility for the procurement and installation of the Facility on terms acceptable to Provider in its sole and absolute discretion.

**2.8 Exhibits.** "Description of Facility O&M" (Exhibit F) and "Design and Construction Management Process" (Exhibit G) shall be prepared by Provider and provided to COM prior to the Conditions Precedent Termination Date in Section 2.9.

**2.9 Conditions Precedent Termination Date.** Provider shall give written notice to COM when each and all of the Conditions Precedent are satisfied. Provider's contract for the Biofuels feedstock, pursuant to Section 2.3, shall be executed within 12 months of the Effective Date, and the remaining Conditions Precedent shall be satisfied within 24 months of the Effective Date, or either Party may terminate this Agreement with written notice and without penalty and without triggering the default provisions of Section 12 or incurring any liability under this Agreement

whatsoever, with the exception of Section 15 (Indemnity) (the "Conditions Precedent Termination Date").

The Conditions Precedent Termination Date may be extended upon mutual agreement in writing for up to 730 days due to Uncontrollable Circumstances, provided that Provider submits written notice to COM at least 30 days prior to the termination of the applicable Conditions Precedent Period along with documentation supporting Provider's continued use of commercially reasonable efforts to achieve the Conditions Precedent.

### **3. CONSTRUCTION, INSTALLATION AND TESTING OF THE FACILITY**

**3.1 Facility General Description.** As more fully described and detailed within Exhibits B and C, the Facility will be designed and constructed such that on the Operations Commencement Date, the Facility will be capable of generating and delivering one-hundred percent (100%) Renewable Electrical Energy from Biofuel produced through anaerobic digestion to meet the Energy Delivery Guarantee further described in Section 5.3; generally follow the load requirements of the WWRF as detailed in Exhibit H; and deliver Energy to COM such that COM's import of electrical energy from the Utility Provider is minimized. Provider will use its best efforts to secure a reliable and sufficient source of Biofuels feedstock; provided that the Parties acknowledge that all or a portion of the feedstock required to produce 100% Renewable Electrical Energy may be unavailable from time to time during the Term and only in that circumstance, Supplemental Fuel may be utilized in the Facility.

The Facility shall include anaerobic digester(s), sludge dryer(s), engines and auxiliary equipment to deliver Contract Services and to meet the Performance Guarantees.

#### **3.2 Design and Construction Obligations.**

**3.2.1** Unless stated otherwise in this Agreement and in accordance with the terms and conditions set forth herein, Provider, at no cost to COM, shall be responsible to:

- a. Design and construct the Facility. Provider will engineer, install, construct, and own the Facility at the Facility Site at its sole cost and expense, which shall include the installation of proper power conditioning and safety equipment, submittal of necessary specifications, coordination of Utility testing and verification, and all related costs.
- b. Perform all studies, pay all fees and costs (including Interconnection Costs up to \$200,000 pursuant to Section 2.4.2), obtain all necessary approvals and execute all necessary agreements required by the Utility Provider pursuant to the Interconnection Agreement and to schedule and deliver the Energy as necessary to meet the Energy Delivery Guarantee. Provider agrees to furnish, install, operate and maintain its interconnection with WWRF and the Utility Provider pursuant to the Maui Electric Company's PUC Tariff Rule No. 14 entitled "Interconnection of Distributed Generating Facilities Operating in Parallel with the Company's Electric System" ("Rule 14"), and agrees to meet the requirements of Rule 14 or receive a written waiver there from. Provider shall ensure that the Facility's operation or delivery of Energy to COM shall not adversely affect COM's ability to receive electricity from the Utility Provider, and shall provide sufficient information to COM to support this obligation.
- c. Acquire all permits and other approvals necessary for the construction, operation, and maintenance of the Facility. COM agrees to reasonably assist Provider in obtaining such necessary permits, licenses, and approvals.
- d. Provide to COM electrical, civil, mechanical, structural, and other specifications and design drawings pertaining to the Facility for COM's review and comment prior to finalizing design of the Facility and before beginning construction work based on such

specifications and drawings. Provider shall provide to COM reasonable advance Notice of any material changes in the Facility and provide to COM specifications and design drawings of any such changes.

e. Within fifteen (15) days after the close of each month following the Effective Date until the Operations Commencement Date, provide to COM a Monthly Progress Report and attend regularly scheduled meetings between representatives of COM and Provider to review such monthly reports and discuss Provider's construction progress. The Monthly Progress Report shall identify the Milestones set forth in Exhibit G and indicate whether Provider has met or is on target to meet such Milestones. Report shall track the progress of the Facility for the overall project and for each sub-area including design, procurement, electrical, mechanical, civil, structural, and commissioning. Report shall include details of any permit violations, Hazardous Material discharges, and health and safety performance.

f. Provider shall perform construction at the Site between 7:00 a.m. and 3:00 p.m. on COM workdays, or as otherwise approved by COM and in a manner that minimizes inconvenience to and interference with the operation of the WWRF.

g. Obtain and provide proof to COM of compliance with the Security and Insurance requirements pursuant to Section 10.

**3.2.2** COM shall have the right, but not the obligation, to:

a. Notify Provider in writing of the results of the review under 3.2.1.d within thirty (30) days of COM's receipt of all specifications for the Facility, including a description of any flaws perceived by COM in the design.

b. Approve all Facility plans or drawings, or request reasonable modifications thereto, related to direct connection with WWRF facilities.

c. Inspect the Facility's construction site or on-site Provider data and information pertaining to the Facility during business hours upon reasonable notice to Provider.

d. No comments to any of Provider's documents or plans made by COM shall relieve Provider from any duty or obligation under this Agreement.

**3.3 Utilities.** Provider shall design and secure the availability of all Utilities necessary for the performance of the Facility and shall be responsible for extending and modifying all existing Utilities, as reasonably necessary, at the Facility in order to support the construction, commissioning, and operations of the Facility.

**3.3.1 Facility Sub-Meter.** In compliance with the requirements in Section 5.1, Provider shall design and install a sub-meter to accurately measure the Facility's usage of Utility Provider electrical energy. Provider's payment for such usage may be in from of credit against sums owed by the County to Provider, or a true-up for each billing cycle, or as mutually agreed between Parties. Provider's usage of Utility Provider electrical energy is further subject to the terms of Section 5.

### **3.4 Construction Milestones.**

**3.4.1** The Parties agree time is of the essence in regards to this Agreement. As such, the Parties also agree certain milestones for the construction of the Facility as set forth in Exhibit G hereto ("Milestones") must be achieved in a timely fashion. Provider shall provide COM with any reasonably requested documentation to support the status of the Milestones in regards to

achievement of the Milestones within ten (10) Business Days of receipt of such request by Provider.

**3.4.2 Remedial Action Plan.** If Provider misses three (3) or more Milestones, other than a Guaranteed Facility Milestone, or misses any one (1) by more than ninety (90) days, except as the result of Uncontrollable Circumstances, Provider shall submit to COM, within ten (10) Business Days of such missed Milestone completion date, a remedial action plan ("Remedial Action Plan"), which will include a detailed description of Provider's proposed course of action to achieve the missed Milestone and all subsequent Milestones by the Guaranteed Operations Commencement Date; provided, that delivery of any Remedial Action Plan shall not relieve Provider of its obligation to meet any subsequent Milestones and the Guaranteed Operations Commencement Date. Progress on achieving the Remedial Action Plan shall be included in the Monthly Progress Report.

**3.4.3 Guaranteed Facility Milestones.** "Guaranteed Facility Milestones" are as follows:

a. The Construction Start Date shall occur within 180 days of the conclusion of the Conditions Precedent period in Section 2 (the "Guaranteed Construction Start Date").

b. The Operations Commencement Date shall occur no later than 30 months from the Guaranteed Construction Start Date, (the "Guaranteed Operations Commencement Date"). The Operations Commencement Date is the date on which all of the following shall have occurred:

1. Provider notifies COM that delivery of Energy has commenced.  
2. Provider delivers a certification of a Licensed Professional Engineer, confirming satisfactory completion of the Operations Certification Procedure as provided in Exhibit G hereto.

3. Meter certification(s) have been obtained and provided to COM;  
4. All required Interconnection documents and authorizations have been received, including Interconnection authorization (if applicable) to deliver Energy to the Utility Provider if available.

5. Provider shall have submitted a certificate of an authorized representative of Provider familiar with the Facility after due inquiry stating that applicable permits and licenses required to be obtained under Applicable Law in connection with the operation of the Facility have been obtained and are in full force and effect, and shall provide copies of same to COM.

6. Proof of continued compliance with the Security and Insurance requirements of Section 10 shall have been obtained and submitted to COM.

7. Provider's Standard Operating Procedures shall have been provided to COM.

8. Provider shall have provided any notices and satisfied any conditions precedent in the Interconnection Agreement and Standby Agreement.

**3.5 Uncontrollable Circumstances Related to Facility Damage or Destruction during Construction.** If Provider is unable, due solely to an Uncontrollable Circumstances related to Facility damage or destruction, Provider shall have not more than ninety (90) days from the date of such Uncontrollable Circumstances event to obtain a report from a professionally certified engineer stating whether the Facility is capable of being repaired or replaced within eighteen (18) additional months and provide COM a copy of the engineer's report, at no cost to COM, provided further that if such engineer's report concludes that the Facility is capable of being repaired or replaced within such eighteen (18) month period and Provider undertakes and continues such

repair or replacement with due diligence, then COM shall not have the right to terminate this Agreement pursuant to Section 12 until the expiration of the period deemed necessary by the engineer's report (not to exceed eighteen (18) months), after which time, COM may terminate unless the Facility has been repaired or replaced, as applicable, and the Provider has resumed and is satisfying its performance obligations under this Agreement. Provider shall provide notice and documentation as detailed in Section 8.

### **3.6 Delay Liquidated Damages.**

**3.6.1** Unless extended by Uncontrollable Circumstances, if the Construction Start Date occurs after the Guaranteed Construction Start Date or the Operations Commencement Date occurs after the Guaranteed Operations Commencement Date, as applicable, then Provider shall pay COM \$750.00 per day as Delay Liquidated Damages for each day or portion of a day that (a) the Construction Start Date occurs after the Guaranteed Construction Start Date or (b) the Operations Commencement Date occurs after the Guaranteed Operations Commencement Date. Delay Liquidated Damages are not imposed on any other delays other than the Guaranteed Construction Start Date and the Guaranteed Operations Commencement Date of the Facility Milestones.

a. Assessment of Delay Liquidated Damages applicable to failure to meet the Guaranteed Construction Start Date shall occur on the actual Construction Start Date if the Construction Start Date occurs after the Guaranteed Construction Start Date. Payment of these assessed Delay Liquidated Damages shall occur on the Guaranteed Operations Commencement Date. The Parties agree that COM's receipt of these Delay Liquidated Damages related to failure to achieve the Guaranteed Construction Start Date shall extend the Guaranteed Operations Commencement Date on a day for day basis (the "Extended Guaranteed Operations Commencement Date").

Provider shall receive a proportional credit for assessed Delay Liquidated Damage related to the Guaranteed Construction Start Date if Provider achieves the Guaranteed Operations Date earlier. As an example, if the Provider fails to meet the Guaranteed Construction Start date by 10 days, without qualifying for an Uncontrollable Circumstances relief, then Provider shall be assessed and shall owe COM \$7,500 in Delay Liquidated Damages. If the Provider is able to achieve the Operations Commencement Date 5 days prior to the Guaranteed Operations Commencement date, the Provider shall be credited for those 5 days (a total credit of \$3,750). In this example, Provider shall pay COM \$3,750 in Delay Liquidated Damages on the Guaranteed Operations Commencement Date.

b. Assessment of Delay Liquidated Damages applicable to Provider's failure to meet the Guaranteed Operations Commencement Date shall occur on such date and shall continue to be assessed until the actual Operations Commencement Date.

The Parties agree that COM's receipt of Delay Liquidated Damages shall (a) extend the Guaranteed Operations Commencement Date on a day-for-day basis for each day beyond such deadline, for up to 24 months from the applicable deadline, and (b) not be construed as COM's declaration that a Provider's Event of Default has occurred under any provision of Section 12 until the expiration of the 24 month period. Payment for assessed Delay Liquidated Damages shall be made within 30 days of the applicable deadline, and every 30 days thereafter.

**3.6.2** Each Party agrees and acknowledges that (a) the damages that COM would incur due to Provider's delay in achieving either of the Guaranteed Facility Milestones would be difficult

or impossible to predict with certainty, (b) the Delay Liquidated Damages are an appropriate approximation of such damages, and (c) shall be considered liquidated damages and not a penalty.

**3.7 Facility Commissioning.** No less than sixty (60) days prior to the Operations Commencement Date, Provider shall submit to COM a commissioning plan for the Facility which will include proposed test procedures and protocols for receipt of Energy and delivery of Specification Sludge and pick up of Dried Sludge. During the commissioning process at the request and direction of Provider and upon reasonable advance notice to COM, COM shall, to the extent practicable allowing for normal operation of the WWTPs, cause to make available Specification Sludge, pay for Energy, and pick up Dried Sludge. The provisions of Section 6.9 and Dried Sludge Quality Guarantee shall apply. COM acknowledges the importance of commissioning the Facility and COM's sufficient delivery of Sludge to the Facility is necessary to facilitate such commissioning. Provider shall notify COM not less than three (3) days prior to the anticipated date(s) of Facility testing and COM shall have the right, but not the obligation, to be present at and observe the testing. The fees to Provider for services provided during this commissioning period shall be at the rate applicable to the first Contract Year.

**3.8 Additional Improvements.** Subject to COM's prior written approval, during the Term and under the following conditions, Provider may reconfigure and modify the Facility processes and expand its capacities, including make Additional Improvements, so long as it remains capable of meeting Provider's obligations set forth in this Agreement.

For modifications, which cause Provider to receive additional revenue from third parties, Provider shall share the additional revenue (less the cost of capital improvements to the Facility and operations and maintenance costs that are directly related to the increase in capacity required to produce such additional revenue) provided for by third parties. In any such amendment to this Agreement, the Parties shall agree the additional net revenues resulting from the Additional Improvements will be shared equally.

COM's consent shall not be required for maintenance, repair, or replacement of facilities or equipment in accordance with standard industry practice or for the alteration or modification of the Facility, which does not affect Provider's ability to provide Contract Services or meet the Performance Guarantees.

#### **4. GENERAL OPERATION AND MAINTENANCE OF THE FACILITY.**

**4.1 Operations and Maintenance.** Notwithstanding COM's obligations to operate and maintain the WWRF, including the weigh scales (Section 6.3), Provider, at its sole cost and expense, shall provide or cause to be provided commercially standard operation, repair, monitoring and maintenance of the Facility during the Term of this Agreement, including the monitoring and maintenance of the Metering equipment (collectively, the "Facility O&M"). Provider shall ensure that the Facility remains in good working condition and achieves the Energy Delivery Guarantee, Sludge Acceptance Guarantee, and Dried Sludge Quality Guarantee, including without limitation, the maintenance, repair and replacement requirements for the Facility which are set forth on Exhibit F. Provider shall be responsible for providing trained staff to operate the Facility and to perform all of the operation, maintenance and repair activities for the Facility. Provider shall operate the Facility on a continuous, daily basis throughout each Contract Year.



**4.2 Operations Logs.** Provider shall maintain a complete and accurate log of all material operations and maintenance information for the Facility on a monthly basis. Such log shall include, but not be limited to, information on electrical energy production (including the percentage of Renewable Electrical Energy production and the electrical energy produced using Supplemental Fuel), efficiency, availability, maintenance performed, outages, results of inspections, manufacturer recommended services, replacements, electrical characteristics of the generators, control settings or adjustments of equipment and protective devices. Provider shall provide this information electronically to COM within thirty (30) days of COM's request.

**4.3 Safety and Security.** COM shall provide security and lighting for the Site in accordance with its general security measures for the WWRF, which includes a security fence around the perimeter of the WWRF to the extent such security measures exist as of the Effective Date of this Agreement. The security of the Facility and the Facility Site is Provider's sole responsibility and Provider shall implement such security measures it deems advisable.

The Parties shall coordinate with one another to require any contractors or visitors invited to the Facility to comply with all safety procedures required by Applicable Law, Provider's policy and COM policy.

COM, its authorized agents, employees and inspectors shall have the right of ingress to and egress from Facility Site on reasonable advance notice during normal business hours and for any purposes reasonably connected with this Agreement or the exercise of any and all rights secured to COM, including those related to the Interconnection Agreement. COM shall make reasonable efforts to coordinate its activities with the safety and security personnel, if any, of the Facility and shall at all times comply with Provider's safety and security requirements when at the Facility Site. Provider shall keep COM advised of current procedures for contacting the Facility's safety and security personnel.

**4.4 Disposal of All Facility Related Discharges.** Provider shall dispose of all Facility related liquid discharges (other than those covered in section 4.5) gaseous emissions, and residual process material and any other by-products from Provider's performance of the Contract Services and operation of the Facility in accordance with Applicable Laws.

**4.5 Disposal of Sludge Dryer Blower Blowdown.** Provided that Provider obtain and comply with a Wastewater Discharge Permit, pursuant to Title 14, Maui County Code, and following Provider testing to ensure compliance with COM's operating permits and COM certification of the results, not to be unreasonably withheld, and at COM's cost, Provider may discharge Sludge Dryer wash water and blower blowdown at WWRF's headworks, or at a physical location as otherwise instructed by COM.

**4.6 Electrical System Upgrades and Modifications.** Each Party shall be solely responsible for that Party's Electrical System Upgrades following the Operations Commencement Date. If after the Operations Commencement Date, a Party's upgrades or modifications to its own facilities or processes result in required modification to the other Party's facilities for compliance with that Party's obligations under the Agreement, the affected Party may request reimbursement of the actual and reasonable documented associated costs of its upgrades, which such reimbursement will not be unreasonably withheld.

**4.7 Malfunctions and Emergencies.** Subject to Uncontrollable Circumstances, the Parties shall notify the other Party immediately, but in no circumstance more than twenty-four (24) hours

following the discovery of any material malfunction in the operation of the Facility or WWRF. If the malfunction or interruption is the responsibility of the Provider, then Provider shall take prompt action to correct such malfunction or interruption. If the malfunction or interruption is the responsibility of COM, then COM shall take prompt action to correct the malfunction or interruption.

Provider shall commence repairs to any malfunction in the Facility and restore the delivery of Energy as soon as reasonably possible after notice or upon its discovery of any of the conditions specified in this Section 4.7, and take steps to mobilize personnel to commence repairs after notice or discovery of a condition requiring repair or other corrective action. If an emergency condition exists, Provider shall promptly dispatch the appropriate personnel immediately upon becoming aware thereof to perform the necessary repairs or corrective action in an expeditious and safe manner. Emergency maintenance personnel representing Provider shall be on site within twenty-four (24) hours of the notification to assess the condition and commence corrective actions. Provider shall provide a service representative located on the island of Maui prior to the Operations Commencement Date.

**4.8 Notice.** Provider shall promptly notify COM of any matters it is aware of pertaining to any damage to or loss of the use of the Facility or that could reasonably be expected to adversely affect the WWRF.

**County of Maui:**

Wastewater Division Chief  
2200 Main Street, Suite 610  
Wailuku, HI 96793  
Phone: 808.270.7417, after hours 808.270.7465

**Provider:**

Maui All Natural Alternative, LLC  
5780 Fleet Street, Suite 310  
Carlsbad, CA 92008  
Phone: 760.436.8870  
Fax: 760.448.6847  
[arun.sharma@anaergia.com](mailto:arun.sharma@anaergia.com)

**4.9 Change in Law.** Notwithstanding any other provision of this Agreement, if the Governmental Authorities that administer Applicable Laws or any other federal, state, or local governmental or nongovernmental agency, or any court or administrative tribunal passes, issues, or promulgates any law, rule, regulation, standard, interpretation, order, decision or judgment, excluding any change in tax law, (collectively or individually, "Legal Event"), which was not in effect and not anticipated as of the Effective Date and not caused by a Party, in the good faith judgment of the affected party (the "Noticing Party"), materially and adversely increases the cost of performing or materially increases or decreases the scope of a party's obligations under the Agreement (such "material increase or decrease" shall be a net cost increase or decrease in excess of \$1 million applicable to the remainder of the Term), or which subjects the Noticing Party to a risk of prosecution or substantial civil monetary penalty, then the Noticing Party may give the other Party notice of intent to amend or terminate this Agreement in accordance with this Section.

**4.9.1 Notice Requirements.** The Noticing Party shall give notice to the other Party together with an opinion of counsel setting forth the following information:

- a. The Legal Event(s) giving rise to the notice;
- b. The consequences of the Legal Event(s), including any necessary change in the terms, scope, or timing of the Agreement;
- c. The anticipated net loss or gain of revenue directly resulting from the Legal Event;
- d. Any capital expenditure that is required or no longer required as a result of a Legal Event taking effect during the Term; and
- e. The Noticing Party's proposed amendment(s) to the Agreement, and a statement that the purpose thereof is (1) to further comply or satisfy Applicable Law or Permit requirements created or affected by the Legal Event(s); and/or (2) to eliminate or minimize the risk of prosecution or civil monetary penalty.

**4.9.2 Renegotiation Period.** The Parties shall have ninety (90) days from the giving of such notice in Section 4.9.1 above ("Renegotiation Period") within which to complete negotiations, and the Parties shall negotiate in good faith an amendment to this Agreement in accordance with the Noticing Party's proposal (if any), or otherwise as the Parties may agree. The Renegotiation Period may be extended by mutual written agreement. During the Renegotiation Period, the Parties shall discuss and agree to the issues referred to in Section 4.9.1 and the ways in which Provider or COM, as applicable, has or will mitigate the effect of the Legal Event, including:

- a. Providing evidence that the Noticing Party has used reasonable endeavors (including, where practicable, competitive quotes) to oblige its subcontractors to minimize any increase in costs and maximize any reduction in costs;
- b. Demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, any foreseeable Legal Event(s) at that time have been taken into account by the Noticing Party;
- c. Giving evidence as to how the Legal Event has affected prices charged for services similar to those of this Agreement by any similar businesses to the Provider's, including similar businesses in which Provider or its Affiliates carry on business; and
- d. Demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain assets that have been affected by the Legal Event concerned, has been taken into account in the amount which in the Party's opinion has resulted or is required under Sections 4.9.1(c) and (d) above.

**4.9.3 Termination Due to Change in Law.** If this Agreement is not amended within the Renegotiation Period, the Party affected by the Legal Event shall have the option to (a) assume the costs and obligations related to such Legal Event or (b) exercise the right to terminate the Agreement only as to the portion of the Agreement directly affected by the Change in Law. Except as otherwise required by Applicable Law, any amounts owing to either party hereunder shall be paid, on a pro rata basis, up to the date of such partial or complete termination, and any obligation hereunder that is to continue beyond expiration or termination shall so continue pursuant to its terms. No later than 30 days from the date of termination due to change in law, the Parties shall meet to negotiate amicably and in good faith to determine an equitable sharing between Provider and COM of the Parties' direct, out-of-pocket costs resulting from such termination. Such direct costs shall not include consequential costs, lost or anticipated profits, unabsorbed overhead, and/or opportunity costs. In making such determination, the Parties will take into account the Provider's and COM's out of pocket costs resulting from the Termination. If the Parties cannot reach an agreement to the distribution of costs of termination under this section, the amount and sharing of such costs shall be finally determined by a court of law.

**4.9.4 Confidentiality.** All opinions of counsel presented by the Noticing Party hereunder, and any corresponding opinions given by the other party in response, shall be deemed confidential and given solely for purposes of renegotiation and settlement of a potential dispute, and shall not be deemed disclosed so as to waive any privileges otherwise applicable to said opinions.

## **5. ENERGY OUTPUT PRODUCTION**

**5.1 Metering.** Provider shall install and maintain a Meter (or Meters, including a sub-meter, collectively "Meter") for 1) the measurement of energy utilized by the Facility (as measured by a sub-meter to WWRF's MECO meter) and 2) Energy delivered by Provider to COM at the Delivery Point. The Meter shall measure the Facility's energy production, consumption, and delivery on a continuous basis, including 5-minute data logging. Provider shall furnish a copy of all technical specifications and accuracy calibrations for such Meter prior to the initial delivery of Energy or the Operations Commencement Date, whichever is earlier. Provider shall have the Meter tested once prior to the Operations Commencement Date, upon the first anniversary of the Operations Commencement Date, and every two (2) years thereafter at Provider's expense by a certified, independent, third party approved by COM. COM shall be allowed to observe the Meter test and Provider shall provide notice of the testing to COM at least ten (10) Business Days prior to the test date. Provider shall provide signed copies of the results of the Meter test to COM. In addition to the initial, first anniversary and biennial tests, Provider shall test the Meter at any reasonable time upon the request of COM. COM shall reimburse Provider for the costs of any additional tests requested by COM, unless such testing demonstrates that the Meter was operating outside of industry standard tolerance allowances for meter calibration and operation.

Provider shall provide Meter data on a monthly basis to COM. COM may install a check meter at COM's sole cost and expense.

If the COM's check meter data or testing of the Meter indicates that the Meter is in error by more than two percent (2%), then Provider shall promptly investigate. If the investigation shows the Meter is in actual error, then Provider will repair or replace the Meter. Provider shall make a corresponding adjustment to the records of the amount of Energy based on such test results for (a) the actual period of time when such error caused inaccurate Meter recordings, if such period can be determined to the mutual satisfaction of the Parties, or (b) if such period cannot be so determined, then a period equal to one-half (1/2) of the period from the later of (i) the date of the last previous test confirming accurate metering and (ii) the date the Meter was placed into service; provided, that such period shall in no case exceed two (2) years.

Energy shall be delivered to COM at the Delivery Point. Provider shall be responsible for any costs or charges imposed on or associated with the Energy or its delivery of the Energy up to the Delivery Point. COM shall be responsible for any costs or charges imposed on or associated with the Energy after its receipt at and from the Delivery Point. Each Party agrees to act in good faith in the performance of its obligations under this Agreement.

**5.2 COM Payment for Energy.** The Rate for Energy shall be \$0.2948 per kWh, subject to an annual escalation of 2.2% on the first and each subsequent anniversary of the Operations Commencement Date.

**5.3 Provider's Energy Delivery Guarantee.** Provider's "Energy Delivery Guarantee" ("EDG") is Provider's commitment, beginning on the Operations Commencement Date and through the Term, to deliver the Energy Quantity each Contract Year to COM at the Delivery Point.

The Energy Quantity is expressed mathematically as:

$$(AED + DDEL) + [(COM \text{ Shortfall}) \times (AED + DDEL) / (AED + DDEL + EM)]$$

AED = actual Energy delivered by Provider in MWh

DDEL = Deemed Delivered Energy Load as defined in Section 5.4

COM Shortfall = as defined in Section 5.5

EM = electric energy consumed by WWRF from any source other than the Facility

For example, if AED=3000, DDEL=200, COM Shortfall=500, and EM=800, then:

Energy Quantity =

$$3000 + 200 + [(500) \times (3000 + 200) / (3000 + 200 + 800)] = 3,600 \text{ MWh}$$

If Provider fails to achieve the Energy Delivery Guarantee in in any Contract Year (an "EDG Failure"), then as part of the Annual Settlement Process in Section 7.5, Provider shall promptly notify COM of such failure and shall pay EDG Damages to COM. In no event shall COM be obligated to pay EDG Damages.

EDG Damages shall be calculated as follows:

$$(A-B) \times C = \text{EDG Damages}$$

A = All of Utility Provider's fees and charges as provided on the Utility Provider's applicable tariff or fee schedule minus Utility Provider's "Demand Charge" and "Customer Charge."

B = Rate.

C = 3,825,000 kWh minus Energy Quantity (in kWh)

**5.4 COM Low Load.** Unless excused by Uncontrollable Circumstances and provided that Provider is capable of meeting the Energy Delivery Guarantee described in Section 5.3, COM agrees and acknowledges that for the duration of time WWRF's load falls below 450 kW ("Low Load Condition"), a deemed energy delivery charge ("Load Charge") will be billed to COM with each billing cycle or as soon as reasonably possible. This charge will be equal to difference between a) 530 kW, and b) average actual load in kW during the Low Load Condition, multiplied by the c) duration in hours for which Low Load Condition persists, multiplied by the d) then applicable Rate in dollars per kWh. As an example, if the Low Load Condition of 420 kW persists for one hour and the then applicable rate is \$0.2948 per kWh, the Load Charge shall be calculated as follows:

$$\text{Load Charge} = (530 \text{ kW} - 420 \text{ kW}) \times 1 \text{ hour} \times \$0.2948/\text{kWh} = \$32.42$$

Any Energy billed under Load Charge will be considered deemed to be delivered ("Deemed Delivered Energy - Load" or "DDEL") and will be given full credit towards Provider's Energy Delivery Guarantee obligation in Section 5.3.a. As an example if in a Contract Year actual delivery of Energy to COM was 4000 MWh and a Load Charge was assessed on 10MWh of Energy then the Provider would have met 4,010 MWh towards its Energy Delivery Guarantee. Deemed Energy Delivery-Load and/or Load Charge shall be credited toward COM's obligation to purchase Energy Quantity from Provider.

**5.5 COM Energy Quantity Purchase Shortfall.** Unless excused by Uncontrollable Circumstances and provided that Provider has 1) met or is capable of meeting the Energy Delivery Guarantee in Section 5.3 and 2) is capable of delivering 4,500 MWh of Energy to COM, if in any Contract Year the sum of a) Actual Energy Delivered by Provider in MWh or ("AED"), plus b) Deemed Delivered Energy Load in MWh as described in Section 5.4 ("DDEL"), and c) electric energy consumed by WWRF from any source other than the Facility in MWh or ("EM") falls below 4,500 MWh, Provider shall promptly notify COM of such event. A portion of the positive difference between 4,500 MWh and the sum of a), b) and c) above ("COM Shortfall") shall be deemed to be delivered ("Deemed Delivered Energy – Shortfall") and will reflect Provider's estimated lost net revenue attributable to such shortfall ("Shortfall Charge"). COM shall pay Provider a Shortfall Charge as part of the Annual Settlement Process in Section 7.5. The Shortfall Charge will be product of a) COM Shortfall, b) applicable Rate in dollars per MWh, c) sum of AED and DDEL, divided by AED + DEL + EM.

Mathematically it will be expressed as follows:

$$\text{Shortfall Charge (in US Dollars)} = (\text{COM Shortfall} \times \text{Rate in MWh}) \times (\text{AED} + \text{DDEL}) / \text{AED} + \text{DDEL} + \text{EM}$$

For example, if AED = 4,000 MWh, DDEL = 50 MWh, EM = 400 MWh, then,  
COM Shortfall = 4,500 - (4000 + 50 + 400) = 50 MWh  
Assuming applicable rate is \$294.8/MWh  
Shortfall Charge = 50 x 294.8 x (4000 + 50)/(4,000 + 50 + 400) = \$13,451.06

## **5.6 Renewable Electrical Energy.**

### **5.6.1 Utility Provider Fees.**

a. Each Party shall pay all Utility Provider fees and charges attributable to its own operations until the Operations Commencement Date.

b. COM represents that for a 5 year period of historical data (2010-2015), the average Utility Provider Demand Charge applicable to the WWRF has been 655 kW and that, except for the addition of new demand, operational-originated demand has not occurred and that the peak demand has been 715 kW. Following the Operations Commencement Date and conditioned upon Provider's delivery of 100% Renewable Electrical Energy to COM at the Delivery Point, COM will pay Utility Provider's standby, demand load, and demand charges imposed by the Utility Provider as a condition of providing electrical service to the WWRF during the applicable Contract Year ("Utility Provider Fees") up to 699 kW. Any demand charges incurred by WWRF and/or Provider (and billed to COM) and above 700 kW will be paid by Provider. Should Provider fail to deliver 100% Renewable Electrical Energy to COM, each Party shall be responsible to pay its share of Utility Provider standby, demand load, and demand charges.

c. COM acknowledges that demand charges may be incurred and increased due to WWRF load growth and other reasons not attributable to Provider. Any such charges will not be passed on to the Provider. As an example, should COM add demand-consuming products such as an ultraviolet treatment system or COM chooses to operate its high load equipment in parallel with the Facility such that it causes a surge in demand charges, such demand charges are not attributable to the Provider, and Provider will not be responsible for the related additional demand charges. In consideration of this five year historical data, the Parties acknowledge that any demand in excess of 715 kW that is not directly and traceably attributed to WWRF's addition of demand-consuming loads, is attributable to the Provider.

d. Provider estimates that the Facility's peak electrical demand will be approximately 250 kW. Should the combined Facility and WWRF demand load exceed 700 kW such that Utility Provider demand-related charges are triggered, Provider shall promptly pay or reimburse COM for Utility Provider Fees attributable to demand load over this 700 kW threshold. The Parties acknowledge that the Utility Provider's demand-related charges are imposed on a rolling basis and that the Provider is responsible for demand-related charges, as reflected in this Section 5.6.1 until such point that they fall below the threshold again.

e. The Parties will use their best efforts to manage their individual electrical loads and delivery and receipt of Energy by Provider to COM with the goal to "zero out" usage of Utility Provider energy and to decrease or avoid Utility Provider Fees.

**5.6.2 Facility's Delivery of Renewable Electrical Energy & Annual True Up.** Should the Facility deliver less than 100% Renewable Electrical Energy in any Contract Year, Provider shall pay an annual true-up to COM, as follows:

$$(A - B) \times C$$

A = Utility Provider's rate, including all fees and charges as provided on the Utility Provider's applicable tariff or fee schedule.

B = Rate.

C = kWh of non-Renewable Electrical Energy delivered to COM expressed as a % of total delivered energy up to 3,825 MWh/Contract Year (i.e., the % of delivered energy generated using Supplemental Fuels).

If the result of the calculation above is zero or less, Provider shall not be obligated to pay COM. Within sixty (60) days after the last day of the Contract year, Provider shall notify COM of the Contract Year's total quantity of energy delivered to COM, including the percentage and totals for Energy and non-Renewable Electrical Energy, and shall pay any sum owed to COM under this Section 5.6.2 as part of the Annual Settlement Process in Section 7.5. In no event shall COM be required to pay Provider for the difference in energy cost.

**5.6.3 Use of Supplemental Fuel to Generate Energy & Cure Period.** Should the Facility deliver less than 3,825 MWh of 100% Renewable Electrical Energy to COM in any Contract Year (i.e., deliver energy generated using Supplemental Fuel), Provider shall so notify COM in writing and promptly effect a cure, being the return to delivery of at least 3,825 MWh Renewable Electrical Energy within 12 Months from the beginning of the next Contract Year, or such time period as may be mutually agreed in writing ("Renewable Energy Cure Period").

**5.6.4** For the avoidance of doubt, COM may, but shall have no obligation to, purchase energy produced by the Facility using Supplemental Fuels.

**5.7 Material Fluctuation in Biofuels Cost.** A documented material increase in cost of procurement of Biofuel feedstock shall not be considered a default under this Agreement and provides the Provider a right to terminate this Agreement and neither Party shall have further obligations under the Agreement, with the exception of obligations related to Section 10, and Sections 11.5 and 11.6.

To exercise Provider's right to terminate, Provider must provide documentation supporting its use of commercially reasonable efforts to secure reliable, long-term Biofuels feedstock sources and must provide COM with at least 90 days' notice of such Material Biofuels Cost Increase along with

sufficient documentation to support the claim. "Material change in cost of procurement means" a net cost increase of at least 20% during the Term. Provider acknowledges that the COM has not been provided with information necessary to make any determination on the Material nature of any aspect of the project as it relates to the cost of procurement nor the overall financial viability of the project and that the allowance herein to recognize "Material" does not extend past the ability of the Provider to terminate this Agreement and is in no way an allowance of evidence for an increase in the Rate paid to the Provider.

**5.8 Excess Energy.** If the Facility is capable of delivering Energy in excess of 3,825 MWh per Contract Year ("Excess Energy"), and if COM has demand at the WWRF, COM shall have the obligation to purchase Excess Energy from Provider at the then-current Rate up to a total of 5,200 MWh or WWRF's actual energy demand per Contract Year, whichever is less. COM shall have the right of first refusal to purchase Excess Energy above 5,200 MWh. If COM declines to purchase Excess Energy, Provider may sell that Excess Energy in the open market, provided that all fees and charges imposed by the Utility Provider and all Facility upgrades or Additional Improvements related to such generation or delivery of Excess Energy to third-parties (including the Utility Provider) are borne solely by Provider, unless otherwise provided for in this Agreement.

## **5.9 Outages and Notification.**

**5.9.1 Notification.** The Parties shall notify the personnel identified in Section 4.8.

**5.9.2 Planned Outages.** If a Party's outage is capable of being scheduled, such Party shall notify the other Party in writing at least fourteen (14) days or as soon as reasonably possible in advance of the commencement of such outage. Within this fourteen (14) day period, a Party may request reasonable changes to the outage schedule and provide prompt notice thereof to the other Party. After any planned outage has been scheduled, at any time up to the commencement of work for the planned outage, a Party may request that the other Party change its planned outage schedule, and such Party shall use commercially reasonable efforts to accommodate such request.

**5.9.3 Prolonged Outages.** To the extent the either Party is made aware of a Prolonged Outage of either the Facility or the WWRF, such Party shall notify the other Party of a Prolonged Outage as soon as practicable. Thereafter, the noticing Party shall notify the other Party in writing when the Facility or WWRF is again capable of delivering or accepting the Energy Quantity.

**5.9.4 Utility Provider Effects.** Should the Facility's operations directly and solely cause the Utility Provider to take the WWRF "offline" (i.e., temporarily or permanently disconnect or curtail delivery of electrical energy from Utility Provider to WWRF), the Provider shall use commercially reasonable efforts to promptly address and remedy the cause.

## **6. SLUDGE DRYING SERVICES**

**6.1 Sludge Drying Services.** Provider warrants that the Facility shall be designed and constructed to receive and process up to 80 tons per day and 24,000 tons per year of Specification Sludge, pursuant to COM's monthly and annual cyclic norms as shown in Exhibit E, to meet the Dried Sludge Quality Guarantee ("Sludge Drying Services"). The Facility will include storage of 160 tons of Specification Sludge and 20 tons of Dried Sludge. Provider shall bear all responsibility and risk associated with Sludge Drying Services. Provider shall not accept Sludge from any source other than COM without COM's express written instruction or consent. Provider has



discretion to use Supplemental Fuel in providing Sludge Drying Services, provided that to the maximum extent practicable, Provider shall use waste heat from its electrical generation facilities these Sludge Drying Services.

## **6.2 Payment for Sludge Drying Services.**

**6.2.1 Sludge Acceptance Fee.** COM shall pay the Provider \$80/ton for the first Contract Year for any Sludge delivered by COM or at COM's direction and accepted and processed to meet the Dried Sludge Quality Guarantee by Provider. The Sludge Acceptance Fee escalates 2.2% on the first and each subsequent anniversary of the Operations Commencement Date.

**6.2.2 Low Sludge Delivery.** Unless excused by Uncontrollable Circumstances and provided that Provider is capable of providing Sludge Drying Services, for any duration of time exceeding 3 consecutive days in a monthly billing period that COM's Sludge delivery falls below an average of 50 tons/day ("Low Sludge Condition"), a deemed sludge delivery charge ("Sludge Charge") will be billed to COM with each billing cycle (30 days) or as soon as reasonably possible, and COM shall pay the Sludge Charge for each additional day of Low Sludge Condition. The Sludge Charge will be equal to difference between a) 60 tons/day, and b) average actual Sludge delivery in tons/day during the Low Sludge Condition, multiplied by the c) duration in days for which Low Sludge Condition persists, multiplied by the d) then applicable Sludge Drying Services Rate in dollars per ton. As an example, if the Low Sludge Condition of 25 tons/day persists for 5 days within a billing period (i.e., 2 days of "Low Sludge Condition") and the then applicable rate is \$80/ton, the Sludge Charge is calculated as follows:

$$\text{Sludge Charge} = (60 \text{ tons/day} - 25 \text{ tons/day}) \times 2 \text{ days} \times \$80/\text{ton} = \$5,600$$

Any Sludge billed under the Sludge Charge will be considered deemed to be delivered ("Deemed Delivered Sludge") and will be given full credit toward COM's obligation to purchase Sludge Drying Services from Provider and Provider's meeting the Sludge Acceptance Guarantee.

**6.2.3 Sludge Shortfall.** Unless excused by Uncontrollable Circumstances and provided that Provider is capable of providing Sludge Drying Services, if in any Contract Year the sum of a) Actual Sludge Delivered by COM in tons or ("ASD"), plus b) Deemed Delivered Sludge in tons or ("DDS") as described in Section 6.2.2, and c) tons of Diverted Sludge as described in Section 6.5 ("DS") falls below 22,000 tons, Provider shall promptly notify COM of such event. A portion of the positive difference between 22,000 tons and the sum of a), b) and c) above ("Sludge Shortfall") shall be deemed to be delivered ("Deemed Delivered Sludge Shortfall"), and will reflect Provider's estimated lost net revenue attributable to such shortfall ("Sludge Shortfall Charge"). COM shall pay Provider a Sludge Shortfall Charge as part of the Annual Settlement Process in Section 7.5. The Shortfall Charge will be product of a) Sludge Shortfall, b) applicable Sludge Acceptance Fee in U.S. dollars per ton, c) sum of ASD and DDS divided by the sum of ASD + DDS + SD.

Mathematically it will be expressed as follows:

$$\text{Shortfall Charge (in US Dollars)} = (\text{Sludge Shortfall} \times \text{Sludge Acceptance Fee in } \$/\text{ton}) \times (\text{ASD} + \text{DDS}) / (\text{ASD} + \text{DDS} + \text{DS})$$

For example, if ASD = 21,000 tons, DDS = 500 tons, DS = 100 tons, then;

$$\text{Shortfall} = 22,000 - (21,000 + 500 + 100) = 400 \text{ tons}$$

Assuming applicable fee is \$80/ton

$$\text{Shortfall Charge} = 400 \times \$80 \times (21,000 + 500) / (21,000 + 500 + 100) = \$31,851.85$$

**6.2.4 Supplemental Fuel Pass-through.** The Parties agree on a Benchmark fuel price for Supplemental Fuel of \$18/MMBtu ("Lower Heating Value" or "LHV") that escalates at 2.2% on the first anniversary of the Effective Date and each subsequent annual anniversary date thereafter ("Benchmark"). To the extent Supplemental Fuel is used by the Facility in providing Sludge Drying Services, the Provider may purchase such fuel independently without pass-through of any associated costs to COM. Supplemental Fuel purchased from the COM shall be at the Benchmark and at COM's sole discretion with respect to the type of fuel. The price of the fuel the Provider purchases from COM is the Benchmark. Should the total actual cost of Supplemental Fuel to the COM exceed the Benchmark, the COM allows for \$150,000 in Total Excess Cost above the Benchmark in each Contract Year applicable only to Sludge Drying Services. Such Total Excess Cost shall escalate at the rate of 2.2% beginning with the first and each anniversary of the Term. All costs related to Supplemental Fuel above the Total Excess Cost shall be borne by Provider. Provider shall reimburse COM for purchase of Supplemental Fuels upon presentation of an invoice or statement. Provider shall include sufficient storage for Supplemental Fuel within the Facility Site. For the avoidance of doubt, all costs related to use of Supplemental Fuel to produce energy for sale to COM pursuant to Section 5 and all costs related to use of Supplemental Fuel for all Facility operations with the exception of Sludge Drying Services as described in this Section 6.2.4 shall be borne by Provider.

### **6.3 Delivery of Specification Sludge.**

**6.3.1 Weigh Scales & Sludge Solids Concentration.** No later than the Operations Commencement Date, COM shall install and maintain equipment at the WWRF for the weighing of Specification Sludge delivered to the Facility. As of the Effective Date, COM tests the solids concentration of the Sludge at the WWTPs on an annual basis in accordance with the operating permits and standard operating procedures of the WWTPs, which Sludge has historically averaged approximately 13% total solids. Following the Operations Commencement Date, COM shall promptly provide a copy of these Sludge total solids testing results and such results shall be conclusive as to the solids concentration of the Sludge measured by such annual testing.

Provider will have the right to audit and inspect the weigh records and scales during business hours upon reasonable notice to COM. If an actual error in the weigh records and/or scales is determined by Provider's investigation, then COM shall repair or replace the scales. COM shall make a corresponding adjustment to the records and payments to Provider in the amount of Sludge provided by COM.

**6.4 Unacceptable Sludge.** Provider, at its sole discretion, may, but is not obligated to, accept Unacceptable Sludge so long as Provider (a) promptly notifies COM of COM's delivery of Unacceptable Sludge, (b) isolates such Unacceptable Sludge, (c) provides adequate written proof (test results) of such Sludge meeting the definition of Unacceptable Sludge, and (d) provides COM the opportunity to redirect such Unacceptable Sludge. If COM declines redirecting Unacceptable Sludge and such sludge is accepted by Provider, Provider shall (a) provide adequate written proof of such Sludge meeting the definition of Unacceptable Sludge and (b) submit an invoice to COM for the actual cost increase, if any, due to processing Unacceptable Sludge to meet the Dried Sludge Quality Guarantee or disposal of such Unacceptable Sludge if COM declines disposal. Upon COM's review and verification of Provider's written proof, COM shall pay for such cost concurrent with COM's subsequent monthly payment. Provider shall not receive title or risk of loss to any Unacceptable Sludge that is diverted by Provider. Any

Unacceptable Sludge, except for Hazardous Materials or Hazardous Sludge, accepted by Provider shall be considered Actual Delivered Sludge for purposes of Section 6.2 and Provider shall bear risk of loss to such delivered and accepted Unacceptable Sludge and acceptance of such Sludge will be considered a part of the Sludge Acceptance Guarantee.

If either Party disputes the validity of the other's test results then within ten (10) days of a notice of dispute as to a Party's test results, the Parties will agree to methodology and process of testing the WWTP's Sludge total solids and perform a re-test, which will then be conclusive as to the solids concentration of the Sludge for that period.

#### **6.5 Sludge Acceptance Guarantee.**

Except to the extent excused by Uncontrollable Circumstances and COM is capable of delivering Specification Sludge, and following the Operations Start Date, Provider shall accept and provide Sludge Drying Services for all Specification Sludge delivered to the Facility by COM up to a minimum of 80 tons per day and 22,000 tons per year and following the COM's average monthly and annual sludge production data set forth in Exhibit E, which is the Sludge Acceptance Guarantee. If Provider fails to meet the Sludge Acceptance Guarantee for two or more consecutive Contract Years, or is not able to accept Sludge for 6 consecutive months, COM may, at its option, declare an Event of Default pursuant to Section 12. This Sludge Acceptance Guarantee reflects allowances for scheduled and unscheduled downtime (with the exception of Uncontrollable Circumstances) for maintenance, repair, and replacement.

In the event Provider cannot accept Specification Sludge up to the Facility's capacity as described in Section 6.1 or the Facility is unable for any reason to produce Dried Sludge meeting the Dried Sludge Quality Guarantee in Section 6.9, Provider shall promptly notify COM to request that COM divert Sludge from delivery to the Facility ("Diverted Sludge"). COM shall cause all such Diverted Sludge to be transported and disposed of at COM's expense. Provider shall not receive fees associated with Diverted Sludge. COM will receive a credit for the Diverted Sludge, as applied to the calculation of Sludge Shortfall in Section 6.2.3.

**6.6 Title and Risk of Loss to Sludge.** COM shall have title to Sludge at all times. COM shall have risk of loss of Sludge until Provider accepts the Specification Sludge and, if applicable, the Unacceptable Sludge, at the Delivery Point. Provider shall have risk of loss and care and custody of the Specification Sludge and Unacceptable Sludge upon acceptance at the Delivery Point and until Dried Sludge meeting the Dried Sludge Quality Guarantee is delivered to COM at the Pick-Up Point pursuant to the agreed-upon schedule.

**6.7 Hazardous Sludge.** In the event Sludge is delivered by COM to Provider at the Delivery Point that constitutes Hazardous Material, Provider shall isolate the Hazardous Sludge to the extent practicable and shall provide prompt notice and documentation to COM and appropriate Governmental Authority as required by Applicable Law. Any documented costs Provider incurs due to receipt, handling, and disposal of such Hazardous Sludge shall be reimbursed by COM.

**6.8 Dried Sludge Quality Guarantee.** The County intends to use the Dried Sludge as landfill cover material and/or as fertilizer. Dried Sludge from the Facility will conform to the quality specifications as "Class A Biosolids" as defined in the Environmental Protection Agency's Part 503 Biosolids Regulations, the State of Hawaii Department of Health's regulations regarding use of Biosolids as fertilizer and landfill cover, and Applicable Law, whichever is most restrictive. Dried

Sludge shall be dewatered to at least 85% solids, or as required to meet the above criteria, whichever is most restrictive, as determined at the Pick-Up Point and at the time of COM loading pursuant to the agreed-upon pick-up schedule. Dried Sludge meeting the criteria in this Section 6.9 is the Dried Sludge Quality Guarantee. Provider shall provide COM with documentation sufficient to show that Dried Sludge meets the Dried Sludge Quality Guarantee.

Should Provider fail to meet the Dried Sludge Quality Guarantee, Provider shall pay COM as a credit on the next monthly invoice: a) Substantiated and reasonable cost of disposal of the unacceptable Dried Sludge; and b) Any cost associated with loss of beneficial use such as landfill cover.

**6.9 Storage and Transportation of Dried Sludge.** Provider's Facility shall include sufficient indoor area for loading and storage of Dried Sludge designed to prevent blowing, spilling, exposure to moisture, and leakage of the Dried Sludge. COM shall pick up the Dried Sludge from the Pick-Up Point on a schedule to be mutually agreed. The loading, transportation, and disposal of Dried Sludge shall be performed by COM at COM's cost and expense, except if the Dried Sludge does not meet the Dried Sludge Quality Guarantee, such reasonable costs and expenses to dispose of such Dried Sludge as are incurred by COM shall be reimbursed by the Provider to COM as set forth in section 6.9.

If COM fails to pick up the Dried Sludge, which meets the Dried Sludge Quality Guarantee, according to the agreed-upon schedule and such failure is not due to Uncontrollable Circumstances, then, upon 24 hours' notice to COM, Provider has the right but not the obligation to do one of the following at Provider's discretion: 1) cause such Dried Sludge to be transported and stored off-Site or 2) cause such Dried Sludge to be transported and disposed. COM shall reimburse Provider for the documented costs of storage, transportation, and/or disposal. Provider shall also have the right to stop accepting Sludge from COM until COM resumes its obligation to pick up the Dried Sludge and Provider may pursue all remedies available under law and this Agreement.

Unless excused by Uncontrollable Circumstances, during any time COM fails to pick up Dried Sludge for more than three (3) consecutive days in a billing period and Provider exercises its right to stop accepting Sludge as detailed in this Section 6.10, a "Low Sludge Condition" shall be deemed to have occurred and the provisions of Section 6.2.2 shall apply.

**6.10 Title and Risk of Loss of Dried Sludge.** Risk of Loss of Dried Sludge shall be transferred to COM upon the loading of the Dried Sludge at the Pick Up Point. Notwithstanding the foregoing, risk of loss to Dried Sludge not meeting the Dried Sludge Quality Guarantee will remain with Provider pursuant to Section 6.6.

## **7. PAYMENT, TAXES, CREDITS AND INCENTIVES.**

**7.1 Taxes.** Provider's fees and charges in this Agreement are inclusive of all taxes (with the exception of property taxes as described in Section 7.2), and without limitation, Provider shall be responsible for all federal, state, and municipal taxes and any other tax imposed in connection with its performance of the Contract Services and its ownership of the Facility. Provider will pay and hold harmless COM from any sales or use tax imposed upon COM arising from Provider's performance of the Contract Services, including but not limited to Provider's manufacture, installation and ownership of the Facility.

**7.2 Property Taxes.** The Parties agree that Provider's fees set forth in Sections 5 and 6 as of the Effective Date, are exclusive of property taxes which may be assessed upon Provider and are based upon the assumption that COM will exempt the payment of property taxes related to the Facility, or otherwise credit Provider for Provider's payment of such annual property taxes during the Term. As of the Effective Date, no provision exists in the Maui County Code to exempt or relieve properties and/or uses such as the Facility from payment of property taxes. When and if such a provision is enacted by the Maui County Council ("Council"), Provider shall timely submit a completed application for such exemption or any other exemption to which Provider believes it is entitled. If thereafter the COM does not grant an exemption from such property taxes or if such an exemption is not enacted by the Council, Provider shall timely pay such property taxes, and shall deduct an equal amount from any sum owed by Provider to COM for the applicable Contract Year in which such taxes have been paid. Nothing in this paragraph is intended to relieve the Provider of its obligation to timely remit property taxes to the County pursuant to the Lease.

**7.3 Monthly Statements/Billing.**

**7.3.1** COM shall provide Provider with a statement of the quantity of Sludge delivered to the Facility for the previous calendar month by the 7th of the following month. COM shall provide Provider with Utility invoices related to the Facility's usage of such services.

**7.3.2** Provider shall provide COM with an invoice by the 15th day of each calendar month which sets forth:

- a. Delivered Energy
- b. Deemed Delivered Energy
- c. Low Load Charge/Deemed Delivered Energy – Load
- d. Excess Energy
- e. Sludge Acceptance Fee/Charges
- f. Sludge Charge
- g. Sludge Shortfall Charge
- h. Supplemental Fuel Pass-Through

Provider's invoice shall show the annual Rate/fee and each component thereof as calculated for the then current Contract Year. Provider's invoice shall additionally state the quantities (in kWh) of Energy and energy produced using Supplemental Fuels delivered to COM and/or used in providing Sludge Drying Services. COM shall pay the invoice within thirty (30) days of receipt, pursuant to HRS §103-10.

Provider's monthly invoice shall include the monthly and Contract Year cumulative totals for each of the above fee categories and the supporting information reflected in Sections 5 and 6, along with Provider's status as to achieving each of the Performance Guarantees.

**7.4 Reimbursements or Credits.** Provider's monthly invoice additionally shall set forth and apply any applicable credits or reimbursements to COM for Provider's purchase of Supplemental Fuel from COM, Utility Provider demand charges pursuant to Section 5.6.1, and electrical energy or other utility services billed to COM and received by the Facility, and property taxes assessed, or as otherwise detailed in Sections 4, 5, and 6.

**7.5 Annual Settlement Process.** Within 60 days of the conclusion of each Contract Year, Provider shall provide COM with an Annual Settlement Statement setting forth data supporting the Contract Year's Performance Guarantees, all data detailed in Sections 5 and 6, and the determination of outstanding fees or obligations of the Parties with respect to such Contract Year and a reconciliation of such amount with the amounts actually paid by each Party with respect to such Contract Year. The Annual Settlement Statement shall include sufficient documentation to allow COM to verify quantities, unit prices, and all resulting costs, charges, credits, and revenues as applicable. The County, or Provider, as appropriate, shall pay all known and undisputed amounts within 45 days after the receipt of such Annual Settlement Statement. If any amount is then in dispute or is for other reasons not definitely known at the time the Annual Settlement Statement is due, the Annual Settlement Statement shall identify the subject matter and reasons for such dispute or uncertainty, and include a good faith estimate of the amount in question. The appropriate Party shall review any disputed matter within thirty (30) days of the receipt of the notice of dispute and, if the matter cannot be resolved through discussion and negotiation, shall refer the matter to the Procurement Officer pursuant to Section 14.1.

**7.6 Overdue Amounts.** Any amount owed by a Party to the other Party and remaining unpaid thirty (30) days from the date when due shall bear interest pursuant to the rate and terms in Chapter 103-10, HRS, as amended during the Term.

**7.7 Tax Credits and Incentives.** Provider will be entitled to the benefit of and be owner of all Tax Credits, Environmental Attributes and Financial Incentives in connection with or relating to the Facility. COM shall act in good faith in completing documentation or taking actions reasonably requested by the Provider in compliance with the laws and regulations applicable to Tax Credits, Financial Incentives or Environmental Attributes to which Provider is entitled.

## **8. UNCONTROLLABLE CIRCUMSTANCES**

**8.1 Relief from Obligations.** 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 during the Term. 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.

**8.2 Notice and Mitigation.** The Party that asserts the occurrence of an Uncontrollable Circumstance shall notify the other Party by telephone or electronically, on or promptly after the date the Party experiencing such Uncontrollable Circumstance first knew of the occurrence and understood or reasonably should have understood such event was an Uncontrollable Circumstance thereof, followed within 30 days, by 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 initial written notice of the occurrence of an Uncontrollable Circumstance, but no longer than 90 days from the initial notice, the asserting Party shall also provide the other Party with a description of: (1) the effect, if any, on the delivery or acceptance of any Contract Services as a result of such Uncontrollable Circumstance; (2) any areas where costs might be reduced and the approximate amount of such cost reductions; (3) the estimated impact on the other obligations of such Party under this Agreement; and (4) a schedule for implementation of any measures to

be taken to prevent or mitigate the Uncontrollable Circumstance or the effect of the Uncontrollable Circumstance. Failure to comply with these requirements shall preclude the Party from asserting any claim of Uncontrollable Circumstances for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. The enumerated obligations in this paragraph are collectively referred to as the "Notice of Uncontrollable Circumstance."

If the Party not claiming Uncontrollable Circumstances reasonably agrees that the delay or anticipated delay is attributable to an Uncontrollable Circumstances event, the time of performance of the obligations under this Agreement affected by the event will be extended by the Party not claiming Uncontrollable Circumstances for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Uncontrollable Circumstances event does not, by itself, extend the time for performance of any other unrelated obligation.

If the non-claiming Party does not reasonably agree with the claiming Party's Notice of Uncontrollable Circumstances, that Party must notify the other Party in writing within 15 days. If the Party claiming Uncontrollable Circumstances disagrees, it may elect the dispute resolution procedures set forth in Section 14.1. In any such proceeding, the Party claiming Uncontrollable Circumstances shall have the burden of demonstrating that the delay or anticipated delay has been or will be caused by an Uncontrollable Circumstances event, the duration of the delay or the extension sought was or will be warranted under the circumstances, that reasonable efforts were used to avoid or mitigate the effects of the delay, and that the Party complied with the notice requirements above.

The claiming Party shall also provide prompt written notice of the cessation of such Uncontrollable Circumstance. Whenever such act, event or condition shall occur, for Uncontrollable Circumstances, other than COM fault (if Provider is claiming Uncontrollable Circumstances) or Provider fault (if COM is claiming Uncontrollable Circumstances), 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. If the Provider is claiming Uncontrollable Circumstances due to COM fault, or if COM is claiming Uncontrollable Circumstances due to Provider fault, the Party who is at fault 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 claiming 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.

**8.3 Uncontrollable Circumstances Termination.** The Party claiming Uncontrollable Circumstances shall have the right, but not the obligation, to terminate this Agreement, without any further liability of either Party subject to the survival provisions set forth in Sections 10, 11.5, 11.6, and 15 of this Agreement after occurrence of the following:

**8.3.1** If the Uncontrollable Circumstance or the effect of the Uncontrollable Circumstance continues for more than 12 months from the date of the occurrence of the Uncontrollable Circumstance, unless agreed by the Parties to extend such time, or unless otherwise stated in this Agreement and affects the material performance of a Party;

**8.3.2** If the Facility or WWRF is destroyed or rendered inoperable by an Uncontrollable Circumstances Event, and a qualified consultant or a Licensed Professional Engineer determines in writing that the Facility or WWRF cannot be repaired or replaced to resume normal operations within an aggregate period of twenty-four (24) months after the first day of the catastrophic natural disaster, then the affected Party shall notify the other Party and provide a copy of the engineer's report to the other Party as soon as practicable, so that either Party may exercise its termination right prior the expiration of the twelve (12) consecutive rolling month period in Section 8.3.1; or

**8.3.3** If, after the Operations Commencement Date, the Provider fails to meet the Performance Guarantees in the periods set forth in this Agreement, or COM fails to accept the Energy at the Delivery Point or deliver Specification Sludge for a period of twelve (12) consecutive rolling months following an Uncontrollable Circumstances event that materially and adversely impacts the Facility or WWRF, provided that if the Facility or WWRF may be capable of resuming delivery or acceptance of the Contract Services identified in this paragraph, as determined in writing by a qualified consultant or a Licensed Professional Engineer, then the affected Party shall be entitled to an additional period of time (not to exceed six (6) months) to remedy the effect of the Uncontrollable Circumstances.

## **9. GENERAL COVENANTS AND REPRESENTATIONS**

**9.1 General Covenants.** Each Party covenants that throughout the Term that it shall:

- a. continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation.
- b. maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Agreement.
- c. perform its obligations under this Agreement in a manner that does not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Law, rule, regulation, order or the like applicable to it.

**9.1.1 Ownership and Risk of Loss.** Provider shall at all times remain the owner of the Facility under federal and state law and shall bear the risk of loss of same. Provider shall be entitled to exclusive possession of the Facility Site, subject to the terms and conditions of the Agreement, Site Lease, and State of Hawaii Executive Order 3006, as may be amended from time to time.

COM shall at all times be the owner of the WWRF and shall bear the risk of loss of same.

**9.1.2 Notice of Damage.** The affected Party shall promptly notify the other Party of any matters it is aware of pertaining to any damage to or loss of the use of the WWRF or Facility or that could reasonably be expected to adversely affect the WWRF or Facility.

**9.1.3 Compliance with Applicable Law.** The Parties shall perform each of its obligations in this Agreement in accordance with Applicable Law and cause all subcontractors to comply with Applicable Law. Each Party shall fully and promptly respond to all inquiries, investigations and examinations undertaken by a Governmental Authority. Should a Party fail to timely comply with Applicable Law and without limiting any other remedy available to a Party, the violating Party shall a) immediately correct such failure and resume compliance with Applicable Law; b) pay or reimburse the other Party for resulting damages, fines, assessments or other charges and; c) comply with any corrective action plan provided by Government Authority. A



Party has the right to contest such action in good faith by appropriate proceedings conducted with due diligence and shall have no liability as a result of the failure to pay such fine or penalty during the period of good faith contest.

**9.1.4 Governmental Approvals.** The Parties shall make all filings, applications, and reports necessary to obtain and maintain all Government Approvals required to be made, obtained, maintained, renewed, or extended by or in the name of Provider under Applicable Law for Provider to design, construct, operate, and maintain the Facility. The Parties shall a) assist one another in the preparation of the application and help to develop, supply and furnish all necessary supporting material; b) take all other actions reasonably necessary in obtaining, maintaining, renewing, extending and complying with the terms of such Government Approvals. Provider shall obtain and maintain, and secure and deliver to COM copies of, all consents, approvals, permits, licenses, and authorizations relating to the performance of Provider's obligations under this Agreement, and that are required by the terms, conditions, or provisions of any restriction or this Agreement.

**9.1.5 Consents and Approvals.** The Parties shall obtain and maintain, and secure and deliver to each other copies of, all consents, approvals, permits, licenses, and authorizations relating to the performance of a Party's obligations under this Agreement, and that are required by the terms, conditions or provisions of any restriction or this Agreement.

**9.1.6 Hazardous Materials and Pollution Control.** The Parties shall fully comply with all federal, State of Hawaii, and COM laws, statutes, regulations, and ordinances in effect or which shall come into effect during the term of the contract regarding the generation, use, storage, handling, transportation, and disposal of Hazardous Materials. If a Party encounters a "release" or a "threatened release" of a reportable quantity of a "hazardous substance," "pollutant," or "contaminant" as those terms are defined in HRS §128D-1, the Parties shall immediately notify the COM and all other appropriate state, COM, or federal agencies as required by law. Provider shall take all necessary actions, including stopping work, to avoid causing, contributing to, or making worse a release of a hazardous substance, pollutant, or contaminant, and shall promptly obey any orders that the Environmental Protection Agency or the state Department of Health issues in response to the release.

**9.1.7 Operations and Maintenance of the Facility, WWTPs, and WWRF.** COM shall operate and maintain the WWTPs to maintain the necessary resources to deliver Specification Sludge and pick up Dried Sludge. COM shall maintain the WWRF to ensure the ability to receive the Energy as described in Section 5. Provider shall operate and maintain the Facility to ensure the ability to deliver Contract Services and meet the Performance Guarantees. Reasonable and documented costs and expenses incurred by a Party in operating and maintaining the Facility (for Provider) or WWRF (for COM) due to changes to the operations and maintenance of the WWRF or Facility, will be borne by the Party making such changes or as otherwise agreed in advance in writing.

**9.2 Covenants of Provider.** As a material inducement to COM's execution and delivery of this Agreement, Provider covenants and agrees to the following:

**9.2.1 No Nuisance Covenant.** Provider shall keep the Facility clean and litter free and ensure that the implementation of Provider's Contract Services does not cause excessive non-operational noise or excess fugitive dust within the limitations of the Facility's designs. Should any such nuisance condition occur which is not caused by Uncontrollable Circumstances,

Provider shall immediately remedy the condition, pay any applicable fines or penalties relating thereto, make all changes in operating and management practices necessary to prevent a recurrence of the nuisance condition.

**9.2.2 Liens.** Provider shall not directly or indirectly cause, create, incur, assume or suffer to exist any mortgage, pledge, lien (including mechanics', labor, or materialman's lien), charge, security interest, encumbrance, or claim of any nature ("Liens") on or with respect to the WWRF and Facility Site or any interest therein; provided that this Section 9.2.2 shall not limit Liens on the Facility as authorized under Section 18.2.1. Provider shall also pay promptly before a fine or penalty may attach to the Facility any taxes, charges, or fees of whatever type of any relevant Governmental Authority for which Provider is responsible under the Agreement. If Provider breaches its obligations under this Section, it shall immediately notify COM in writing, shall promptly cause such Lien to be discharged and released of record without cost to COM, and shall defend and indemnify COM against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such Lien.

**9.2.3 Health and Safety.** Provider shall take all reasonably necessary safety precautions and shall comply in all material respects with all Applicable Laws pertaining to the safety of persons and real and personal property.

**9.2.4 Records Retention and Right to Audit Records.** Provider and any subcontractors shall maintain the books and records that relate to the Agreement, and any cost or pricing data for the Term and for three (3) years from the date of final payment under the Agreement or end of the Term, whichever is later. In the event that any litigation, claim, investigation, audit, or other action involving the records retained under this provision arises, then such records shall be retained for three (3) years from the date of final payment, or the date of the resolution of the action, whichever occurs later. During the period that records are retained under this section, Provider and any subcontractors shall allow the COM access to such records pursuant to HRS §103D-317 and Subchapter 19, Chapter 3-122, HAR.

**9.2.5 Tax Clearance Certificate.** As a prerequisite to execute this Agreement and as a requirement for payment, Provider shall obtain tax clearance from the State of Hawaii Director of Taxation and the Internal Revenue Service stating that all tax returns due have been filed, and all taxes, interest, penalties levied or accrued under the provisions of Title 14 that are administered by the Department of Taxation and under the Internal Revenue Code against Provider have been paid.

**9.2.6 Certificate of Compliance and Certificate of Good Standing.** As a prerequisite to execute this Agreement, in addition to the Tax Clearance referred to in the preceding paragraph, a Certificate of Good Standing is required from the State of Hawai'i Department of Commerce and Consumer Affairs, Business Registration Division. Further, in addition to the tax clearance for final payment referred to in the preceding paragraph, a Certification of Compliance from Provider is also required for final payment.

**9.2.7 Insurance Certificates.** Provider shall provide all insurance certificates described in Section 10 before any work proceeds.

**9.2.8 No Infringement.** The Facility's and Provider's services hereunder, including the Installation Work, Services, and O&M Work, shall not infringe any third party's intellectual property or other proprietary rights.

**9.3 COM's Covenants.** As a material inducement to Provider's execution of this Agreement, COM covenants and agrees as follows:

**9.3.1 Liens.** COM shall not directly or indirectly cause, create, incur, assume or suffer to exist any third party Liens on or with respect to the Facility or any interest therein. If COM breaches its obligations under this Section, it shall immediately notify Provider in writing, shall promptly cause such Lien to be discharged and released of record without cost to Provider, and shall indemnify Provider against all costs and expenses (including reasonable attorneys' fees and court costs at trial and on appeal) incurred in discharging and releasing such Lien.

**9.3.2 COM Records.** COM shall keep complete and accurate records related to its obligations hereunder and shall maintain such data as may be necessary to determine with reasonable accuracy any item relevant to this Agreement. Provider shall have the right to examine all such records insofar as may be necessary for the purpose of ascertaining COM's compliance with its obligations under this Agreement.

## **10. SECURITY REQUIREMENTS.**

### **10.1 Credit and Collateral Requirements.**

**10.1.1 Grant of Security Interest/Remedies.** To secure its obligations under this Agreement Provider hereby grants to COM, as the secured party fifty-thousand dollars (\$50,000) as in the form of cash or Letter of Credit within 30 days of the Effective Date. Upon or any time after the occurrence and during the continuation of an Event of Default or an Early Termination Date, COM, as the Non-Defaulting Party, may do any one or more of the following: (a) exercise any of the rights and remedies of a secured party with respect to all Security in this Section 10, as applicable, including any such rights and remedies under Applicable Law then in effect; (b) exercise its rights of setoff against any and all property of Provider, as the Defaulting Party in the possession of the COM or COM's agent; and (c) draw on any outstanding Letter of Credit or receive payment under any Guaranty issued for its benefit. COM shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Provider's obligations under this Agreement (Provider remaining liable for any amounts owing to COM after such application), subject to the COM's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

### **10.1.2 Performance Assurance.**

**a. Payment and Performance Bonds.** Pursuant to HRS §103D-324, no later than the Construction Start Date, Provider is required to obtain and deliver to COM a performance bond in an amount equal to one hundred percent of the price specified in the EPC contract. Provider is required to obtain and deliver to COM a payment bond in a form provided by the County, attached hereto as Exhibit K, for the protection of all persons supplying labor and material to the Provider for the performance of the work provided for in the EPC Contract. The payment bond shall be in an amount equal to one hundred percent of the price specified in the EPC Contract.

**b. Decommissioning Security.** Provider shall provide COM security sufficient to meet its obligations in Section 11.6 in the form of a performance bond to ensure the availability of funds for such costs (the "Decommissioning Security").

At Provider's cost and expense, the Decommissioning Security amount shall be determined in writing by an independent Hawaii licensed engineer, once prior to the Construction Start Date, annually during construction of the Facility, once every five (5) years from the Operations Commencement Date, with the final Decommissioning Security amount to be determined two (2) years prior to the end of the Term. COM reserves the final approval over the adequacy of the estimate of decommissioning and reclamation costs, which such approval shall not be unreasonably withheld. The performance bond shall be 1.2 times the decommissioning and reclamation costs, as approved by COM, and shall be for a term of one (1) year, shall be continuously renewed, extended, or replaced so that it remains in effect for the remaining Term of this Agreement or until the secured decommissioning obligations are satisfied, whichever occurs sooner. In order to ensure continuous renewal of the performance bond with no lapse, each performance bond shall be required to be extended or replaced at least one month in advance of its expiration date.

Failure to secure such renewal or extension shall constitute a default of Provider under this Agreement and the Lease.

**10.1.6** All bonds required under Section 10.1 shall be in a form provided by COM, attached hereto as Exhibit K, or a form proposed by Provider and approved by COM, executed by a surety licensed to do business in the State of Hawaii with a current A.M. Best's Financial Strength Rating of no less than A (Excellent), and Financial Size Category of no less than VII. Any lesser Best's Rating will be subject to approval by the COM. COM reserves the right to reject any security which is reasonably deemed inappropriate or insufficient, and further reserves the right to require Provider to obtain replacement collateral if the rating of the institution providing any collateral drops below the levels stated herein. Replacement collateral shall be submitted by Provider within sixty (60) days of COM's notice to Provider that the rating has fallen and the collateral must be replaced. Provider may not terminate existing collateral until replacement collateral has been secured.

**10.1.7** Any Performance Assurance or Security provided under this Agreement shall not be deemed a limitation of damages, unless otherwise specifically provided by the terms set forth in this Agreement. The provisions of this Section 10.1 shall survive the Expiration Date or termination of this Agreement.

## **10.2 Provider's Insurance**

**10.2.1 Maintenance of Insurance.** Provider shall procure and maintain for the duration of the Agreement, up through and including fulfillment of all obligations under Section 11.6, insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work by Provider or Provider's agents, representatives, employees or subcontractors. The COM reserves the right to request and receive a certified copy of any insurance policy, including all endorsements, related to Provider's Facility or this Agreement. Failure to maintain the necessary insurance in accordance with the provisions set forth in this article shall constitute a material breach of this Agreement and the COM shall thereafter have the option of pursuing remedies for such breach and/or immediate termination of

this Agreement. Nothing in the insurance requirements of this Agreement shall be construed as limiting the extent of Provider's responsibility for payment of damages resulting from its operations under this Agreement, including Provider's separate and independent duty to defend, indemnify, and hold the COM and its officers and employees harmless pursuant to other provisions of this Agreement.

**10.2.2 COM of Maui as Additional Insured and Named Holder of the Insurance Certificates.** With the exception of Workers' Compensation and Professional's Liability insurance, the COM, its officers, officials, employees, and volunteers shall be added as additional insured with respect to the work contracted for herein, and the insurance policies required herein shall not be cancelled, limited in scope of coverage, or non-renewed by Provider on the applicable policies during the Term, provided however, should any policy required herein be cancelled and not immediately replaced, the COM, in addition to other remedies, reserves the right to procure the cancelled insurance and deduct the cost, upon documentation and proof provided of such cost thereof from any money due to Provider. Coverage must be primary in respect to the additional insured. Any other insurance carried by the COM shall be excess only and not contribute with this insurance. Provider shall submit proof of the insurance coverage(s) by providing to the COM a certificate of insurance prior to the commencement of the work. Such certificates of insurance shall name the COM as additional insured and holder of said certificate and shall contain the following statement:

"Should any of the policies described herein be cancelled before the expiration date thereof, notice shall be delivered to the COM, Department of Corporation Counsel, Risk Management Division, 200 South High Street, Wailuku, Hawaii 96793, in accordance with policy provisions. This insurance includes coverage for the liability assumed by the insured under the Agreement between the insured and the COM of Maui, dated [insert Effective Date]."

**10.2.3 Subcontractors.** When a Subcontractor is utilized, Provider shall furnish or require the Subcontractor to furnish the Procurement Officer within ten (10) Days after execution of the contract, or within such further time as the COM may allow, with a copy of a policy or policies of insurance and certificate of insurance covering the Subcontractor and the Subcontractor's employees or agents in the same amount and for the same liability specified in this Section 10.2, unless a lesser amount or type of coverage is approved by the COM in writing. In the event of cancellation or termination of any required policy or any substitute policy, Provider or the subcontractor, as the case may be, shall immediately furnish the Procurement Officer with a substitute policy. Said insurance policy(ies) shall name Provider and the COM as additional insureds and holders of the insurance certificates and shall also provide a waiver by the insurer of any right of subrogation in Provider's and the COM's favor and coverage for the subcontractor's completed operations.

**10.2.4 Minimum Insurance Coverage Requirements.** Unless otherwise approved by the COM, the policy or policies of insurance maintained by Provider shall provide the following minimum limit(s) and coverage(s) as specified herein, or greater amount of coverage as may be commercially reasonable from time to time by the COM, be placed with an insurance carrier licensed to do business in the State of Hawaii with a current A.M. Best's Financial Strength Rating of no less than A (Excellent), and Financial Size Category of no less than VII. Any lesser Best's Rating will be subject to approval by the COM. If the required insurance is not commercially

available at a reasonable cost, the COM may, in its sole discretion, accept a lower coverage amount or type of coverage. The minimum liability limits of liability may be provided by a combination of primary and Umbrella or Excess Liability policies.

**10.2.5 Installation Coverage.** Prior to commencing construction and up to and on the Operations Commencement Date, Provider shall obtain and maintain or cause to be obtained and maintained builder's risk coverage in an amount equal to the replacement cost of the materials being installed at the Site.

**10.2.6 Commercial General Liability Coverage.** From the Construction Start Date, Provider shall maintain or cause to be maintained Professional Liability Insurance and Commercial General Liability insurance against claims for bodily injury or property damage occurring on the Site and WWRF (including within the buildings thereon); and on the portion of the street and the sidewalks adjacent thereto with a combined single limit of not less than Two Million Dollars (\$2,000,000.00) per occurrence and Five Million Dollars (\$5,000,000.00) in the aggregate, or such greater amount as may be required from time to time by COM. Such insurance shall include coverage in like amount for products/completed operations, contractual liability, and personal and advertising injury. "Claims made" policies are not acceptable under this section

**10.2.7 Pollution Liability Insurance.** Coverage for bodily injury and property damage including cleanup costs and defense costs resulting from sudden and accidental and gradual pollution conditions, including the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hydrocarbons, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water shall be maintained. The Pollution Liability policy must include a minimum limit of \$2 million per accident or occurrence, \$5 million aggregate. The policy must, on a blanket basis or by specific reference to the Agreement, extend to assumed liabilities with respect to contractual provisions. In addition to fixed site coverage related to the Facility Site and Facility, the policy coverage must extend to losses arising from any waste, products or materials transported, shipped, or delivered via any transportation mode to a location beyond the boundaries of the Facility Site at which Provider or any entity for which Provider is legally liable is performing or has performed the operations described in the Agreement. The policy must extend to off-site third party bodily injury and property damage due to releases from storage tanks (above and below ground). Coverage must include corrective action and clean-up due to releases from storage tanks.

**10.2.8 Automobile Coverage.** During the Installation Work, Provider or its contractors, as applicable, shall carry a business automobile policy with a combined single limit of not less than One Million Dollars (\$1,000,000) per accident.

**10.2.9 Workers Compensation Coverage.** During the Term, Provider and/or its contractors, as applicable, shall carry Workers' Compensation insurance during the full term or duration of the Agreement, to insure statutory liability for injury to his/her employees in the State of Hawaii. The policy should include coverage for Employers' Liability with limits as follows: Bodily injury by accident, \$1,000,000 each accident, and each employee a \$1,000,000 policy limit, or such higher limit as required by applicable law.

**10.2.10 All Policies.** All insurance required hereunder, including Workers Compensation coverage, shall include an insurer's Waiver of Subrogation in favor of COM and will be in a form

and with insurance companies acceptable to COM. Before the Construction Start Date, Provider shall furnish to COM reasonably satisfactory proof that Provider has, or, as applicable, its contractors, have taken out for the period covered by the work under this Agreement, full compensation insurance for all persons employed directly by him/her or through subcontractors in carrying out the work contemplated under this Contract, all in accordance with the Applicable Law and any acts amendatory thereof.

**10.2.11 Evidence Required.** Insurance certificates for all coverage required by this Agreement shall be provided by Provider to COM within twenty (20) Business Days before the Construction Start Date and upon renewal during the Term hereof, but not less than once annually or as may be otherwise reasonably requested in writing by COM.

**10.3 COM Insurance.** At all times from the Construction Commencement Date, COM shall obtain and maintain property insurance and general liability insurance to the WWRF with reasonable deductibles or self-insured retention amounts as is generally in place as of the Effective Date and as may be modified from time to time during the Term and subject to Maui County Council authorization and as provided by law. COM shall be responsible for the payment of deductibles or self-insured retention amounts under this section.

## **11. TERM; COM OPTIONS; TERMINATION**

**11.1 Multi-term Contract.** Pursuant to state law, HRS §103D-315 and Hawaii Administrative Rule ("HAR") §3-122-149, and unless otherwise provided for by law, this contract may be entered into for any period of time deemed to be in the best interests of the COM, provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore. Further, when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the Provider shall be reimbursed for the reasonable value of any non-recurring costs incurred but not amortized in the price of goods or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

**11.2 Term.** The term of this Agreement shall commence on the Effective Date and shall expire on the Expiration Date that is twenty (20) years after the Operation Commencement Date (the "Term") unless and until terminated earlier pursuant to express terms of this Agreement (the date of any such earlier termination, the "Termination Date"); provided, however, that this Agreement shall thereafter remain in effect until (i) the Parties have fulfilled all obligations with respect to the Agreement, including payment in full of amounts due or other damages (whether directly or indirectly such as through set-off or netting) and (ii) the undrawn portion of the Security Requirements in Section 10.1 is released and/or returned as applicable (the "Satisfaction Date"). Notwithstanding anything to the contrary in this Agreement, the following survival rights shall apply: (i) all rights under Section 15 (Indemnities) and any other indemnity rights shall survive the Satisfaction Date or the end of the Term (whichever is later) for an additional twelve (12) months.

**11.3 Events of Termination.** Upon the occurrence of any of the following events of termination and proper notice provided, this Agreement may terminate:

**11.3.1** Failure to meet Conditions Precedent pursuant to Section 2 of this Agreement.

**11.3.2** Termination for Convenience pursuant to Section 11.4 of this Agreement.

**11.3.3 Termination for Cause.** Event of Default has occurred and the applicable cure period has expired.

**11.3.4 Uncontrollable Circumstance** affecting a Party's performance that lasts beyond the period assigned for the applicable Uncontrollable Circumstance.

**11.4 County Termination for Convenience.**

**11.4.1** The Procurement Officer may, when the interests of the COM so require, terminate this Agreement, in whole or in part, for the convenience of the COM, which termination shall be subject to the terms of this Section 11.4. The Procurement Officer shall give written notice of the termination to Provider specifying the part of the Agreement terminated and when such termination becomes effective.

**11.4.2** Provider shall incur no further obligations in connection with the terminated performance, and on the date(s) set in the notice of termination, Provider shall stop performance to the extent specified.

**11.4.3** Provider shall submit a termination claim specifying the amounts due because of the termination for convenience bearing on the claim within 90 days of the Notice of Termination. Provider's claim shall include Provider's reasonable out-of-pocket costs incurred but not amortized in the price of providing the services delivered under this Agreement, without profit, in preparing to perform and performing the terminated portion of the Agreement. Such costs shall not include consequential costs, lost or anticipated profits, unabsorbed overhead, and/or opportunity costs.

No later than 30 days from the date of termination specified in COM's notice, the Parties shall meet to negotiate Provider's termination claim amicably and in good faith. If the Parties cannot reach an agreement, Provider's termination claim shall be finally determined by a court of law.

If a termination hereunder is partial, Provider may file a proposal with the COM for an equitable adjustment for the applicable price for the continued portion(s) of this Agreement. Any such proposal shall be submitted to the COM within 90 days of the Notice of Partial Termination. The amount of any such adjustment as may be agreed upon shall be set forth in an amendment to this Agreement.

**11.5 Option to Purchase Facility.** COM shall have the option, by giving written notice to Provider prior to the Termination Date or at least 18 months prior to the expiration of the Term, to purchase all or portions of the Facility from Provider at Fair Market Value ("FMV"). The Parties shall first meet and confer in a good faith effort to determine the FMV within 30 days of COM's notice of exercise of the option, failing which, the FMV of the Facility shall be the value determined by an independent, certified appraiser with experience and expertise in facilities of the type and nature of the Facility selected jointly by the Parties. If the Parties are unable to agree on the selection of an appraiser within 45 days of COM's option notice, such appraiser shall be jointly selected by the appraiser firm proposed by COM and the appraiser firm proposed by the Provider. The appraiser will be instructed to determine the value of the Facility and its major components in place using the cost approach. Upon COM's delivery to Provider of the FMV, title to the Facility, Environmental Attributes, and the remaining period (if any) on all warranties for the Facility will be transferred from Provider to COM. The Parties acknowledge that such purchase is subject to approval by the Maui County Council.



**11.6 Decommissioning and Removal of the Facility.** If the Parties fail to agree on the fair market value or if COM declines to purchase all or a part of the Facility, Provider shall have a reasonable period, not to exceed 180 days, to decommission and remove the Facility, except for the infrastructure related to interconnection with the Utility Provider, and reasonably return the Facility Site to the condition prior to construction of the Facility, or as otherwise agreed to by the Parties.

#### **11.7 Effect of Termination of Agreement.**

**11.7.1** Upon the Termination Date or the Expiration Date, as applicable, any amounts then owing by a Party to the other Party shall become immediately due and payable and the then future obligations of COM and Provider under this Agreement shall be terminated (other than the rights and obligations in Sections 10, 11.5, 11.6, and 15). Such termination shall not relieve either Party from the rights and obligations accrued prior to the Termination Date or the Expiration Date.

**11.7.2** Subject to Section 11.5, following the Termination Date or the Expiration Date, Provider shall have the right to dismantle, remove and transport the Facility from the Site pursuant to Section 11.6. Provider shall give COM no less than ten (10) days written notice of its intent to remove the Facility from the Facility Site and the work shall be subject to the requirements set forth in Section 11.6.

### **12. DEFAULTS**

#### **12.1 Events of Default.** An "Event of Default" shall mean:

**12.1.1** With respect to a Party that is subject to the Event of Default, the occurrence of any of the following:

a. the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within thirty (30) Business Days after written Notice is received by the Party failing to make such payment;

b. any representation or warranty made by such Party herein (1) is false or misleading in any material respect when made or (2) becomes false or misleading in any material respect during the Term; provided that, if a Change in Law occurs after the Effective Date that causes the representation and warranty made by a Party to be materially false or misleading, such breach of the representation or warranty shall not be an Event of Default if the affected Party has used commercially reasonable efforts to comply with such Change in Law during the Term in order to make the representation and warranty no longer false or misleading;

c. the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default), if such failure is not remedied within thirty (30) days after Notice; provided that if the remedy may not reasonably be effected within such thirty (30) day period through the exercise of commercially reasonable efforts, the Defaulting Party shall have up to one hundred and eighty (180) days total to cure the Event of Default if it commences to cure the Event of Default within the initial thirty (30) day period, it advises the Non-Defaulting Party of its plan for such cure, and diligently pursues such cure, and such default is capable of being cured by the Defaulting Party and is in fact cured within one hundred and eighty (180) days after receiving Notice of the Event of Default;

d. such Party becomes Bankrupt; or

e. such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor

was a party by operation of Law or pursuant to an agreement reasonably satisfactory to the other Party.

**12.1.2 A Party fails to comply with the terms and conditions of the Site Lease.**

**12.1.3** With respect to Provider as the Defaulting Party, the occurrence of any of the following:

a. If at any time during the Term of this Agreement, Provider delivers or attempts to deliver to the Delivery Point for sale under this Agreement energy that was not generated by the Facility.

b. Failure by Provider to meet the Guaranteed Construction Start Date or the Guaranteed Operations Commencement Date (as extended by permitted extension, if any, and after the cure period has expired).

c. Failure by Provider to satisfy the Security Requirements pursuant to Section 10 of this Agreement.

d. Provider's relinquishment of possession or demonstrable exclusive right to control the Facility without the prior written consent of COM. Provider shall be deemed to have relinquished possession of the Facility if, after the Construction Start Date, Provider has ceased work on the Facility or, if after the Operations Commencement Date ceased production and delivery of Energy or Sludge Drying Services for a consecutive one hundred eighty (180) day period and such cessation is not a result of (A) an event of Uncontrollable Circumstances, or (B) attributable solely to any action or inaction of COM.

e. Failure by Provider to deliver 100% Renewable Electrical Energy, pursuant to Section 5 of this Agreement.

f. Failure by Provider to meet the Energy Delivery Guarantee, Sludge Acceptance Guarantee, or Dried Sludge Quality Guarantee for two consecutive Contract Years.

**12.2 Declaration of Early Termination Date.** If an Event of Default with respect to a Defaulting Party shall have occurred and is continuing and has not cured the Event of Default within the applicable cure period, the other Party ("Non-Defaulting Party") shall have the following rights:

a. To send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement ("Early Termination Date");

b. To accelerate all amounts owing between the Parties, terminate the Agreement and end the Term effective as of the Early Termination Date, or collect or retain liquidated damages, if applicable;

c. Withhold any disputed payments due to the Defaulting Party under this Agreement;

d. Suspend performance;

e. Exercise its rights pursuant to Section 3 or 10 to draw upon and retain Performance Assurance; and

f. Exercise any other rights or remedies available at Law or in equity to the extent otherwise permitted under this Agreement.

The foregoing shall not relieve the Non-Defaulting Party of its obligation to pay for performance rendered prior to termination.

## **13. REMEDIES**

**13.1. Remedies Upon Event of Default.** If an Event of Default as described in Section 12 has occurred and the Non-Defaulting Party has supplied notice to the defaulting Party thereof, and if

the defaulting Party fails to correct or cure the conditions causing such Event of Default within the applicable cure period, then the non-defaulting Party may select one or all of the following:

- a. Elect the dispute resolution procedures in Section 14.1.
- b. Terminate this Agreement.
- c. Proceed to protect and enforce any or all of its rights and remedies under this Agreement, and to exercise any or all other rights and remedies available to it at law, in equity, and/or by statute.

**13.2 Duty to Mitigate.** COM and Provider shall each have a duty to mitigate damages pursuant to this Agreement, and each shall use reasonable efforts to minimize any damages it may incur as a result of the other Party's non-performance of this Agreement, including with respect to termination of this Agreement.

**13.3 Cumulative Remedies.** Either Party may pursue any remedies provided by law and in equity for the breach of this Agreement, including termination of the Agreement. No right or remedy is intended to be exclusive of any other right or remedy and each shall be cumulative and in addition to any other right or remedy existing at law or in equity or by virtue of this Agreement.

## **14. DISPUTES**

**14.1 Dispute Process.** The Parties shall meet to negotiate in good faith and attempt to resolve any dispute, controversy or claim (each, a "Dispute") arising out of or relating to this Agreement or any breach or alleged breach hereof, within thirty (30) days after the date that a Party receives written notice of such Dispute to the other Party. Any dispute arising under or out of this Agreement shall be resolved in accordance with HRS § 103D-703 and HAR Chapter 3-126.

In the event that the Parties are unable to reach an agreement within such thirty (30) day period (or such longer period as the Parties may agree) then the Parties may agree, in each of their sole discretion, in a writing signed by both parties, to either mediate the Dispute or submit the Dispute to binding arbitration. Should the Parties agree, in writing to mediate the Dispute or submit the Dispute to binding arbitration, such mediation or arbitration shall be conducted pursuant to the rules of Judicial Arbitration and Mediation Services ("JAMS"), as amended or as augmented in this Agreement (the "Rules").

**14.2 Arbitration.** If the Parties agree to submit the Dispute to arbitration, such arbitration shall be final and binding upon the Parties and shall be the exclusive remedy for all claims subject hereto. Either party may bring an action in court to enforce an arbitration award. All Disputes shall be decided by a single arbitrator. The arbitrator shall be selected by mutual agreement of the parties within thirty (30) days of the Parties' execution of a written agreement to submit the Dispute to binding arbitration. If the Parties cannot agree on an arbitrator, then they shall notify JAMS and request selection of an arbitrator in accordance with the Rules. The arbitrator shall have only such authority to award equitable relief, damages, costs, and fees as a court would have for the particular claim(s) asserted. In no event shall the arbitrator award punitive damages of any kind. The Parties acknowledge that one of the purposes of utilizing arbitration is to avoid lengthy and expensive discovery and allow for prompt resolution of the Dispute. The arbitrator shall have the power to limit or deny a request for documents or a deposition if the arbitrator determines that the request exceeds those matters which are directly relevant to the claims in controversy.

**14.3 Rights and Remedies.** Notwithstanding the Dispute resolution provisions contained herein, each party may pursue any rights and remedies as each may have, whether in law or at

equity. Except to the extent that this Agreement expressly permits a Party to suspend performance, pending final resolution of a Dispute, the Parties shall each proceed diligently and faithfully with performance of their respective obligations under this Agreement.

## **15. INDEMNIFICATION**

**15.1 Indemnity by Provider.** Provider shall defend, indemnify, and hold harmless COM, the contracting department and their directors, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorneys' fees and costs, and all claims, suits, and demands therefor, arising out of or in connection with any acts or omissions of the Provider or Provider's employees, officers, agents, or subcontractors under this Agreement. The provisions of this Section 15.1 shall remain in full force and effect notwithstanding the expiration or early termination of this Agreement for any reason.

**15.2 COM's Responsibility as Permitted by Applicable Law and Limitation of Liability.** COM shall be responsible, to the extent permitted by Applicable Law, for damage or injury due to the negligent acts or omissions of COM's officers and employees in the scope of their employment provided that the COM's liability for such damage or injury has been determined by a court of competent jurisdiction or otherwise agreed to by the COM, and the COM shall pay for such damage or injury to the extent permitted by law or authorized by the Maui County Council pursuant to Chapter 3.16, Maui County Code, as amended.

**15.3 Notice of Claims.** COM shall deliver to Provider a notice describing the facts underlying its indemnification claim and the amount of such claim (each such notice a "Claim Notice"). Such Claim Notice shall be delivered promptly to Provider after COM receives notice that an action at law or a suit in equity has commenced; provided, however, that failure to deliver the Claim Notice as aforesaid shall not relieve Provider of its obligations under this Section 15, except to the extent that Provider has been prejudiced by such failure.

**15.4 Defense of Action** If requested by COM, Provider shall assume on behalf of COM, and conduct with due diligence and in good faith, the defense of COM with counsel reasonably satisfactory to the COM; provided, however, that if Provider is a defendant in any such action and COM believes that there may be legal defenses available to it that are inconsistent with those available to Provider, COM shall have the right to select separate counsel to participate in this defense of such action at Provider's expense. If any claim, action, proceeding, or investigation arises as to which the indemnity provided for in this Section 15 applies, and Provider fails to assume the defense of such claim, action, proceeding, or investigation after having been requested to do so by COM, then COM may, at Provider's expense, contest or, with the prior written consent of Provider, which consent shall not be unreasonably withheld, settle such claim, action, proceeding, or investigation. All costs and expenses incurred by COM in connection with any such contest or settlement shall be paid upon demand by Provider.

**15.5 Survival of Provisions.** The provisions of this Section 15 shall survive the Expiration Date or termination of this Agreement.

## **16. Prevailing Wages**

**16.1 Payment of Prevailing Wages.** Provider shall pay prevailing wages during any performance of construction work that constitutes a "public works" project as defined by Hawaii law, (including construction, improvement, demolition, alteration, renovation, or repair of a publicly leased or operated building or structure) and shall require compliance with all provisions of Hawaii

law regarding construction of a public works project, including Chapter 104, HRS. In addition, all such agreements between Provider and a third party for work that constitutes a public works project shall include the following provision:

"Provider shall pay, and shall require any subcontractor to pay minimum prevailing wages (basic hourly rate plus fringe benefits), as determined by the State of Hawaii Director of Labor and Industrial Relations and published in wage rate schedules, to the various classes of laborers and mechanics employed by them in the execution of this Contract in accordance with the provisions of Chapter 104 of the Hawaii Revised Statutes. Laborers and mechanics working on a Saturday, Sunday, or a legal holiday of the State or more than eight (8) hours a day on any other day shall be paid overtime compensation at one and one-half times the basic hourly rate plus the cost of fringe benefits for all hours worked. The current State of Hawaii prevailing wage rate schedules are online at <http://hawaii.gov/labor> and shall be posted by Provider in a prominent and easily accessible place at the job site and given to each laborer and mechanic employed under the contract, except when the employee is covered by a collective bargaining agreement. A certified copy of all payrolls shall be submitted weekly to the County of Maui."

**16.2 Indemnification.** Provider shall protect, defend, indemnify, and hold the COM harmless from and against any and all claims arising in whole or in part from a failure of Provider and/or its agents, contractors, or employees to comply with the terms and conditions set out in this Section.

## **17. CONFIDENTIAL INFORMATION**

**17.1 Confidentiality Obligation.** To the extent permitted by law, if either Party provides information, including business plans, strategies, financial information, proprietary, patented, licensed, copyrighted or trademarked information or technical information regarding the design, operation and maintenance of the Facility, or of COM's facilities or operations ("Confidential Information") to the other or, if in the course of performing under this Agreement or negotiating this Agreement a Party learns Confidential Information regarding the facilities or plans of the other, the receiving Party shall (a) protect the Confidential Information from disclosure to third parties with the same degree of care accorded its own confidential and proprietary information, and (b) refrain from using such Confidential Information except in negotiating or performing under this Agreement. Notwithstanding the foregoing, a Party may provide such Confidential Information to its officers, directors, members, managers, employees, agents, contractors and consultants (collectively "Representatives"), and Affiliates, lenders, and potential assignees of this Agreement (provided that such potential assignees be bound by a written agreement restricting use and disclosure of Confidential Information), in each case whose access is reasonably necessary to the negotiation and performance of this Agreement. Each such recipient of Confidential Information shall be informed by the Party disclosing Confidential Information of its confidential nature, and shall be directed to treat such information confidentially and shall agree to abide by these provisions. In any event, each Party shall be liable (with respect to the other Party) for any breach of this provision by any entity to whom that Party improperly discloses Confidential Information.

The COM shall not in any way be liable or responsible for disclosure of information or records if disclosure is required under the Public Records Act (Government Code, Section 6250, et seq.), Hawaii Uniform Practices Act (HRS §92F, et seq.), or pursuant to law or legal process. COM will apply exemptions to disclosures that are available under law and statute, with respect to the

protection of confidential information. Provider shall provide to the COM any reasonable argument and relevant law to support Provider's position on confidentiality of its materials, which COM shall consider. Provider shall save, defend, keep, hold harmless, and fully indemnify the COM, its elected officials, officers, employees, agents, and volunteers from all damages, claims for damages, costs, or expenses, whether in law or in equity, that may at any time arise or be set up for not disclosing material provided by Provider to the COM, if expressly requested by Provider of COM to not disclose such material, pursuant to the aforementioned laws or regulations, including those arising from or connected to the COM's refusal to disclose any protectable item or document to any party making a request for those items.

**17.2 Permitted Disclosures.** Notwithstanding any other provision herein, neither Party shall be required to hold confidential any information that:

- a. becomes publicly available other than through the receiving Party;
- b. is required to be disclosed by a Governmental Authority or under Applicable Law or pursuant to a validly issued subpoena or pursuant to its legal obligations as a publicly held company, but a receiving Party subject to any such requirement shall promptly notify the disclosing Party of such requirement;
- c. is required to be disclosed by COM as a public agency pursuant to the requirements of a Government Authority or any other applicable legal requirement, provided, however, that COM shall give Provider reasonable notice prior to any such disclosure;
- d. is independently developed by the receiving Party; or
- e. becomes available to the receiving Party, as proven with documentary evidence without restriction from a third party under no obligation of confidentiality.

**17.3 Goodwill and Publicity.** The Parties shall coordinate and cooperate with each other when making public announcements related to the execution and existence of this Agreement, and each Party shall have the right to promptly review and comment upon any publicity materials, press releases, or other public statements by the other Party that refer to, or that describe any aspect of, this Agreement. At no time will either Party acquire any rights whatsoever to any trademark, trade name, service mark, logo or other intellectual property right belonging to the other Party. Either Party shall have the right to publicize that it is hosting a Biofuel to energy system and to display photographs of the Facility in its advertising and promotional materials; provided that any such materials identify Provider as the owner and developer of the Facility. On all signage at the Site, and in all publicly distributed materials and other public communications issued by either Party that refer to the Facility by name, such name shall be followed by a statement to the effect that Provider owns the Facility. Notwithstanding the foregoing and subject only to the provisions on confidential information set forth in this Section 17 of this Agreement, Provider shall have the right to publish factual information related to the Facility on its website and through other forms of electronic media. Such information may include, but is not limited to, the location of the Facility, the name of COM, and other features of the Facility. Such information does not include the engineering or construction drawings or plans of the Facility or any such drawings or plans of the Site or the WWRF.

## **18. MISCELLANEOUS PROVISIONS**

**18.1 Notices.** All notices, communications and waivers under this Agreement shall be in writing and shall be (a) delivered in person; or (b) sent by reputable overnight express courier, addressed

in each case to the addresses set forth below, or to any other address either of the parties to this Agreement shall designate in a written notice to the other Party:

**If to Provider:**

Maui All Natural Alternative, LLC  
Legal Department  
5780 Fleet St, Suite 310  
Carlsbad, CA 92008  
760.436.8870  
760.448.6847  
EMAIL

**If to COM:**

Director, Department of Environmental Management  
County of Maui  
2200 Main Street, Suite 2B  
Wailuku, Hawaii 96793

Additionally, for all matters related to Section 10.2 (Insurance):  
Risk Management  
Department of Corporation Counsel  
200 S. High Street, Third Floor  
Wailuku, Hawaii 96793

Additionally, for all legal matters:  
Department of Corporation Counsel  
200 S. High Street, Third Floor  
Wailuku, Hawaii 96793

All notices sent pursuant to the terms of this Section 18.1 shall be deemed received (i) if personally delivered, then on the date of delivery, or (ii) if sent by reputable overnight, express courier, then on the next Business Day immediately following the day sent.

**18.2 Assignment.** Neither Party may assign its rights or obligations pursuant to this Agreement to a third party without the other Party's prior written consent, other than as a collateral assignment to Provider's lenders in connection with Provider's financing solely of Provider's Facility as further set forth in Section 18.2.1, provided however, that 30 days' written notice be provided by Provider to the COM of such intention to assign as collateral, and further provided that the assignee pursuant to any such collateral assignment may not assign any rights or obligations hereunder to a third party without the COM's prior written consent. For purposes of this Agreement, a change in direct or indirect control of Provider shall be deemed to be an assignment of Provider's rights and obligations under this Agreement. When in the best interest of the COM and at the COM's election, a successor in interest may be recognized in an assignment agreement in which the transferor, the transferee, and the COM shall agree that: The transferee assumes all of the transferor's obligations; the transferor remains liable for all obligations under the Agreement but waives all rights under the Agreement as against the COM; and the transferor shall continue to furnish, and the transferee shall also furnish, all required bonds or other required security. The

rights, powers, and remedies of each Party shall inure to the benefit of such party and its successors and permitted assigns.

**18.2.1 Assignment to Financing Providers.** Provider shall be permitted to assign this Agreement as collateral for any financing (including a financing lease and leaseback or leveraged lease structure) or refinancing of the Facility with the prior written consent of the COM, which consent shall not be unreasonably withheld. COM's consent to assignment of this Agreement shall be in a form substantially similar to the Form of Consent to Assignment attached hereto as Exhibit L provided that (i) COM, Provider, and the prospective financing parties may negotiate modifications to the Form of Consent reasonably acceptable to the COM, Provider and prospective financing parties, (ii) Provider shall be responsible at COM's request for COM's reasonable costs associated with the review, negotiation, execution, and delivery of documents in connection with such assignment, including without limitation attorneys' fees.

**18.2.2 Unauthorized Assignment.** Any assignment or purported assignment in violation of this Section 18.2 is void.

**18.3 Successors and Assigns.** The rights, powers and remedies of each Party shall inure to the benefit of such party and its successors and permitted assigns.

**18.4 Entire Agreement.** This Agreement (including all exhibits attached hereto) and the Site Lease represent the entire agreement between the Parties to this Agreement with respect to the subject matter hereof and thereof and supersede all prior and contemporaneous oral and prior written agreements. In the event of any conflict between the provisions of this Agreement and the provisions of the Site Lease, the provisions of this Agreement shall govern and control.

**18.5 Amendments to Agreement.** This Agreement shall not be amended, modified, or supplemented without the written agreement of Provider and COM at the time of such amendment, modification, or supplement.

**18.6 Waivers; Approvals.** No waiver of any provision of this Agreement shall be effective unless set forth in writing signed by the Party making such waiver, and any such waiver shall be effective only to the extent it is set forth in such writing. Failure by a Party to insist upon full and prompt performance of any provision of this Agreement, or to take action in the event of any breach of any such provisions or upon the occurrence of any Provider Default or COM Default, as applicable, shall not constitute a waiver of any rights of such Party, and, subject to the notice requirements of this Agreement, such Party may at any time after such failure exercise all rights and remedies available under this Agreement with respect to such Provider Default or COM Default. Receipt by a Party of any instrument or document shall not constitute or be deemed to be an approval of such instrument or document. Any approvals required under this Agreement must be in writing, signed by the Party whose approval is being sought.

**18.7 Partial Invalidity.** In the event that any provision of this Agreement is deemed to be invalid by reason of the operation of Applicable Law, Provider and COM shall negotiate an equitable adjustment in the provisions of the same in order to effect, to the maximum extent permitted by law, the purpose of this Agreement (and in the event that Provider and COM cannot agree then such provisions shall be severed from this Agreement) and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected by such adjustment and shall remain in full force and effect.



**18.8 Execution in Counterparts.** This Agreement may be executed in counterparts, and all said counterparts when taken together shall constitute one and the same Agreement.

**18.9 Good Faith and Fair Dealing.** The Parties shall act diligently, cooperatively, ethically, honestly and in good faith in undertaking, performing, fulfilling and discharging their respective covenants, duties and obligations under this Agreement.

**18.10 Governing Law; Jurisdiction; Forum.** This Agreement shall be governed by and construed in accordance with the laws of the State of Hawaii without regard to choice of law principles. COM and Provider irrevocably agree that any action, suit or proceeding by or among Provider and COM may be brought in whichever of the Circuit Courts of the State of Hawaii has subject matter jurisdiction over the dispute and waives any objection that the COM and Provider may now or hereafter have regarding the choice of forum whether on personal jurisdiction, venue, forum non-convenience or on any other ground. COM and Provider hereby agree that service of process in any action, suit, or proceeding may be effected by mailing copies thereof by registered or certified mail, postage prepaid, to it at its address set forth herein. Nothing in this Agreement shall affect the right to service of process in any other manner permitted by law. COM and Provider further agree that final judgment against it in any action or proceeding shall be conclusive and may be enforced in any other jurisdiction within or outside the State of Hawaii by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of such judgment.

**18.11 Attorneys' Fees.** If any action other than mediation or arbitration pursuant to Section 14 shall be instituted between COM and Provider in connection with this Agreement, the Party prevailing in such action shall be entitled to recover from the other Party all of its reasonable costs and expenses incurred in connection with such action by arbitration or other legal proceeding, including reasonable attorneys' fees.

**18.12 No Third Party Rights.** This Agreement is only for the benefit of the Parties to this Agreement, their successors and permitted assigns, and persons expressly benefited by the indemnity provisions of this Agreement. No other person (including, without limitation, tenants of the Site) shall be entitled to rely on any matter set forth in, or shall have any rights on account of the performance or non-performance by any Party of its obligations under this Agreement.

**18.13 Conflict Between Agreement and Procurement Rules.** In the event of a conflict between the terms and conditions of this Agreement and the procurement rules in the Hawaii Administrative Rules, the procurement rules in effect on the Effective Date shall control and are hereby incorporated by reference.

**18.14 Campaign Contributions.** Provider acknowledges that it is unlawful under HRS §11-355, unless specifically permitted under that law, for Provider, at any time during the Term of this Agreement to: (a) directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or non-candidate committee, or to any candidate or to any person for any political purpose or use; or (b) knowingly solicit any contribution from any person for any purpose during the Term.

**18.15 Relationship of the Parties.** This Agreement is not intended, and shall not be construed, to create any association, joint venture, agency relationship, or partnership between the Parties or to impose any such obligation or liability upon either Party. Neither Party shall have any right,

power, or authority to enter into any agreement or undertaking for, or act as or be an agent or representative of, or otherwise bind, the other Party.

**18.16 No Public Utility.** Nothing contained in this Agreement shall be construed as an intent by Provider to dedicate its property to public use or subject itself to regulation as a "public utility" (as defined in the Public Utilities Code, Chapter 269, HRS, or any other Applicable Law).

**18.17 No Recourse to Affiliates.** This Agreement is solely and exclusively between the Parties, and any obligations created herein on the part of either Party shall be the obligations solely of such Party. No Party shall have recourse to any parent, subsidiary, partner, member, Affiliate, lender, director, officer or employee of the other Party for performance or non-performance of any obligation hereunder, unless such obligations were assumed in writing by the Person against whom recourse is sought.

**18.18 Setoff.** COM may offset against any monies or other obligations COM owes to Provider under this Agreement, any amounts owed to the COM by Provider under this Agreement, or any other contracts, or pursuant to any law or other obligation owed to the COM by Provider, including, without limitation, the payment of any taxes or levies of any kind or nature. COM will notify Provider in writing of any offset and the nature of such offset. For purposes of this Section 18.18, amounts owed to COM shall not include debts or obligations which have been liquidated, agreed to by Provider, and are covered by an installment payment or other settlement plan approved by COM, provided, however, that Provider shall be entitled to such exclusion only to the extent that Provider is current with, and not delinquent on, any payments or obligations owed to COM under such payment or other settlement plan.

Except as otherwise set forth herein, each Party reserves to itself all rights, set-offs, counterclaims and other remedies and/or defenses to which it is or may be entitled, arising from or out of this Agreement or arising out of any other contractual arrangements between the Parties. All outstanding obligations to make, and rights to receive, payment under this Agreement may be offset against each other.

**18.19 Antitrust Claims.** COM and Provider recognize that in actual economic practice, overcharges resulting from antitrust violations are in fact usually borne by the purchaser. Therefore, Provider hereby assigns to COM any and all claims for overcharges as to goods and materials purchased in connection with this Contract, except as to overcharges which result from violations commencing after the price is established under this Contract and which are not passed on to COM under an escalation clause.

**18.20 Service Contract.** It is the express intent of the Parties that this Agreement shall be treated as a "services contract" within the meaning of Section 7701(e) of the Internal Revenue Code of 1986 and that Provider will be treated as the owner of the Facility for income tax purposes. No Party will take a position on any tax return or in any other filing that is inconsistent with this intent and this section of the Code.

**18.21 Estoppel.** Either Party hereto, without charge, at any time and from time to time, within ten (10) business days after receipt of a written request by the other Party hereto, shall deliver a written instrument, duly executed, certifying to such requesting Party, or any other person, firm or corporation specified by such requesting Party: (i) that this Agreement is unmodified and in full force and effect, or if there has been any modification, that the same is in full force and effect as so modified, and identifying any such modification; (ii) whether or not to the knowledge of any

such Party there are then existing any offsets or defenses in favor of such Party against enforcement of any of the terms, covenants and conditions of this Agreement and, if so, specifying the same and also whether or not to the knowledge of such party the other party has observed and performed all of the terms, covenants and conditions on its part to be observed and performed, and if not, specifying the same; and (iii) such other information as may be reasonably requested by a Party hereto. Any written instrument given hereunder may be relied upon by the recipient of such instrument, except to the extent the recipient has actual knowledge of facts contained in the certificate.

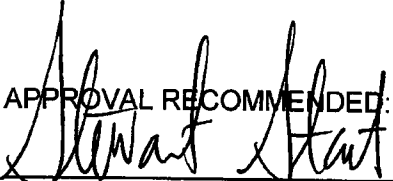
[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT AS OF THE DATE SET FORTH ABOVE.

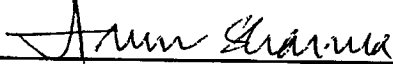
COUNTY OF MAUI

By   
DANILO F. AGSALOG  
Its Finance Director


APPROVAL RECOMMENDED:

  
STEWART STANT, Director  
Department of Environmental  
Management, County of Maui

MAUI ALL NATURAL ALTERNATIVE, LLC

By   
ARUN SHARMA  
Its President

APPROVED AS TO FORM AND  
LEGALITY:

  
RICHELLE M. THOMSON  
Deputy Corporation Counsel  
County of Maui

STATE OF HAWAII           )  
  ) SS.  
COUNTY OF MAUI         )

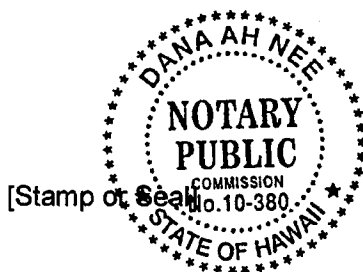
On this 14<sup>th</sup> day of February, 2017, before me appeared DANILO F. AGSALOG, to me personally known, who being by me duly sworn did say that he is the Finance Director of the County of Maui, a political subdivision of the State of Hawaii, in the capacity shown, having been duly authorized to execute such instrument in such capacity, and that the seal affixed to the foregoing instrument is the lawful seal of the said County of Maui, and that the said instrument was signed and sealed in behalf of said County of Maui by authority of its Charter, and the said DANILO F. AGSALOG acknowledged the said instrument to be the free act and deed of said County of Maui.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

Dana Ah Nee  
Notary Public, State of Hawaii

Print Name: DANA AH NEE

My commission expires: NOV 14 2018



NOTARY PUBLIC CERTIFICATION			
Doc. Date:	<u>FEB 14 2017</u>	# Pages:	<u>251</u>
Notary Name:	<u>DANA AH NEE</u>	Judicial Circuit:	<u>2nd</u>
Doc. Description:	<u>CE207- Services Agreement</u> <u>for Electrical Energy Generation and</u> <u>Sludge Drying, RFP No. 15-141P98</u>		
Notary Signature:	<u>Dana Ah Nee</u>		
Date:	<u>FEB 14 2017</u>		

CALIFORNIA NOTARY ACKNOWLEDGMENT

For An Individual Acting In His/Her Own Right:

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )  
 ) ss.  
County of San Diego )

On 6/25/2017 before me, MICHAEL FISCO Notary Public, personally appeared  
ARUN G SHARMA

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal



My commission expires: 6/19/2018

Signature

Print Name