CITY OF NEW BEDFORD

Department of Public Infrastructure

ADDENDUM #2

The City of New Bedford issues the following Addendum #2 for

RFP # 20439047 Contract Operation, Maintenance, & Management Services of the Wastewater Treatment Facility

To: All Bidders of Record

This addendum is issued to advise Bidders of the following:

Please find example of what the finalized contract documents will look like, beginning on next page. Please note that this contract is still in draft form and is to be finalized upon award of contract. It is subject to minor changes that should not affect any substantial terms of the agreement.

Addendum No. 2 becomes part of the Contract Documents.

Acknowledge receipt of this addendum by inserting its number on the Bid form. Failure to acknowledge receipt of the Addendum may subject the Bidder to disqualification.
AGREEMENT FOR OPERATION, MAINTENANCE AND MANAGEMENT SERVICES
FOR THE
CITY OF NEW BEDFORD
WASTEWATER TREATMENT FACILITY
BETWEEN
(VENDOR)
AND
THE CITY OF NEW BEDFORD, MASSACHUSETTS

DATED AS OF ___________________
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THIS AGREEMENT FOR OPERATION, MAINTENANCE AND MANAGEMENT SERVICES (this “Agreement”) is made and entered into as of the _________ day of ____, ____, by and between ______________________, (the “Company”), a ____________ Corporation, and the CITY OF NEW BEDFORD, MASSACHUSETTS (the “City”) a municipal corporation existing under the laws of The Commonwealth of Massachusetts (the “Commonwealth”). The City or the Company or both may be referred to herein as the “Party” or the “Parties”, as the context of the usage of such term may require.

RECITALS:

WHEREAS, the City owns and operates a Class VI secondary wastewater treatment facility located within the municipal boundaries of the City (as herein more particularly described), the “Wastewater Facility”;

WHEREAS, pursuant to Massachusetts General Law Chapter 30B, The City issued a Request for Proposals in _________________ for the long term operation, maintenance and management of the Wastewater Facility;

WHEREAS, the City issued Addenda numbered ____________ to the Request for Proposals ___________________________ and ___________________________ ___________________________ respectively (the “Addenda”)

WHEREAS, in response to the Request for Proposals (as amended by the
Addenda, being the “RFP”) the Company submitted a proposal for the management, operation and maintenance of the Wastewater Facility;

WHEREAS, the City has selected the Company, pursuant to the RFP as amended by the Addenda, and the Company’s proposal, to operate, maintain and manage the Wastewater Facility, in accordance with the terms, conditions and provisions of this Agreement and in reliance on the Company’s skill, expertise and past successful experience in performing operations, maintenance and management of facilities comparable to the Wastewater Facility;

WHEREAS, ____________________________________________________________

(the “Guarantors”) shall execute the Guarantees in the respective forms set forth in Schedules 3 guaranteeing the Company’s performance of its obligation under this Agreement, as required by the RFP;

WHEREAS, the City desires to employ the services of the Company for the operation, maintenance and management of the Wastewater Facility and the Company desires to perform such services for the compensation provided herein.

NOW, THEREFORE, in consideration of the mutual agreements herein contained, and the terms and conditions hereinafter set forth, the Company and the City to hereby agree as follows:
ARTICLE I

DOCUMENTS

Section 1.01 Schedules.

The following Schedules are attached hereto and made a part of this Agreement.

In the event of a conflict or inconsistency between or among the Schedules and the Agreement, it is agreed that the provisions of the Agreement control over the Schedules.

Schedule 1 - Performance Standards and Guarantees
Schedule 2 - Operation and Maintenance Standards
Schedule 3 - Form of Guarantee
Schedule 4 - Insurance
Schedule 5 - Operations and Maintenance Fee
Schedule 6 - Permits
Schedule 7 - Maximum Utilities Utilization
Schedule 8 - Equipment and Chemicals Inventory
Schedule 9 - Pass Though Costs
Schedule 10 - Personnel
Schedule 11 - Cost Adjustment Methodology
Schedule 12 - Form of Performance Bond
Schedule 13 - Capital Improvements in Progress
Schedule 14 - Wastewater Facility Description (including site description)

This Agreement, together with the foregoing Schedules, constitutes the entire Agreement between the Company and the City with respect to the management, operations and maintenance of the Wastewater Facility and shall govern exclusively the obligations of the Parties.
ARTICLE II

DEFINITIONS; TERMS GENERALLY

Section 2.01 Terms Generally.

Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include”, “includes”, and “including” shall be deemed to be followed by the phrase “without limitation”.

The words “agree”, “agreement”, “approval” and “consent” shall be followed by the phrase “which shall not be unreasonably withheld or unduly delayed” except as the context may otherwise require.

Section 2.02 Definitions.

For purposes of this Agreement, the following words and phrases shall have the following respective interpretations and meanings:

“Administrative Consent Order” means the agreement entered with the EPA on 12/9/19.

“Affiliate” means the Guarantors and any corporations, partnership, joint venture or other entity controlled by, controlling or under common control with, directly or indirectly, the Guarantors, the Company or any one of these entities.

“Applicable Law” means any law, rule, regulation, requirement, action, determination, guideline, or order of any legal entitlement issued by any governmental body having jurisdiction, applicable from time to time to the siting, design, possession, testing, operation, maintenance or repair of the Wastewater Facility, the acceptance, treatment, storage or discharge of wastewater, the transfer or handling of Wastewater Sludge or any other transaction or matter contemplated hereby.

“Article” means an Article of this Agreement.
“Authorized Representative” means the Company’s or the City’s representative as the case may be, and any successors thereto designated pursuant to Section 13.07.

“Billing Month” means each calendar month in each Billing Year, except that (a) the First Billing month shall begin on the Commencement Date, and (b) the last Billing Month shall end concurrently with the expiration or termination of this Agreement.

“Billing Year” means each fiscal year of the City during the Term of this Agreement, except that (a) the first Billing Year shall begin on the Commencement Date and end on June 30, 2020 and (b) the last Billing Year shall end of the Term or, as applicable, the date of termination, of this Agreement.

“Capital Expenditure” means any expenditure for (a) the repair, renewal or replacement of any piece of Equipment or component of any equipment or any other component of the Wastewater Facility that has a useful life of at least three (3) years and has an acquisition cost of $10,000 or more or (b) Group or program purchases – the aggregated asset must have a useful life of three (3) years or more and have an aggregated acquisition cost of $25,000 or more and each individual component must have an acquisition cost of $1,000 per unit and be integral in placing the program in service or (c) any capital addition to or change in the Wastewater Facility which the City elects to fund or finance and undertake as a special project for the upgrading or improving of the Wastewater Facility.

“Change in Law” means (a) the enactment, adoption, promulgation, modification or repeal after the Contract Date of any Federal, State, or Local Law, ordinance, code, rule, regulation, official permit, license or approval by any regulatory or Judicial entity having jurisdiction with respect to the operation, maintenance or management of the Wastewater Facility, or (b) the imposition, after the Contract Date, of any material conditions on the issuance, modification or renewal of any official permit, license or approval necessary for the operation, maintenance or management of the Wastewater Facility, which, in the case of Either (a) or (b) necessitates a Capital Expenditure or modifies the Company’s obligations under this Agreement with respect to the Wastewater Facility by
Establishing requirements for operation, maintenance or management of the Wastewater Facility which are more or less burdensome than the most stringent requirements:

(i) in effect on the Contract Date

(ii) agreed to by the City in any applications for official permits, licenses or approvals for the Wastewater Facility, other than any requirements set forth in said applications to comply with future laws, ordinances, codes, rules, regulations or similar legislation; or

(iii) set forth in this Agreement or any Schedule hereto.

For the purposes of part (a) of this definition, no enactment, adoption, promulgation or modification of laws, ordinances, codes, rules, regulations or similar requirement or enforcement policy with respect to any such requirements shall be considered a change in Law if, as of the Contract Date, such law, ordinance, code, rule, regulation or similar requirement or enforcement policy would have directly affected the continued operation, maintenance and management of the Wastewater Facility by the City after the Commencement Date in the absence of this Agreement and such law, ordinance, code, rule, regulation, or other similar requirement was officially proposed by the responsible agency and published in final form in the Federal Register or equivalent federal, State or local publication and thereafter becomes effective without further action. In no event shall a change in any Federal, State or local tax law be considered a change in Law.

“C.M.R.” means Code of Massachusetts Regulations, as in effect from time to time.

“City” means the City of New Bedford, Massachusetts.

“City Fault” means any breach (including the untruth or breach of any City representation or warranty herein set forth) failure, nonperformance, noncompliance or any negligent or willful misconduct by the City under this Agreement (whether or not attributable to any elected or appointed official,
officer, member, agent, employee, contractor, subcontractor of any tier, or any independent contractor of the City) which is not directly attributed to any Uncontrollable Circumstances or Company Fault, and which materially and adversely affects the Company’s rights and obligations or ability to perform under this Agreement.

“Commencement Date” means July 1, 2020. On and after the Commencement Date, The Company shall commence and continue its operation, maintenance and management obligations under this Agreement.

“Commonwealth” means the Commonwealth of Massachusetts and all of its relevant administrative, contracting and regulatory agencies and offices.

“Company” means _______________________________

“Company Fault” means any breach (including the untruth or breach of any Company representation or warranty herein set forth) failure, nonperformance, noncompliance or any negligent or willful misconduct by the Company under this Agreement (whether or not attributable to any officer, member, agent, employee, contractor, Subcontractor of any tier or Independent contractor of the Company or any Affiliate of the Company) which is not directly attributable to any Uncontrollable Circumstance or City Fault.

“Consent Decree” means the agreement entered into with the EPA, the Commonwealth of Massachusetts, the Conservation LAW Foundation and the City on July 29, 1987 including amendments (1990 Modified Consent Decree (1992) and any current or future amendments or modifications.

“CPI” means the Consumer Price Index for Urban Wage Earners and Clerical Workers

CPI-W Northeast Region, as published by the U.S. Department of Labor Statistics.

“Contract Date” means the date first written above.

“Cost Substantiation” means, with respect to any additional or incremental cost or expense necessarily incurred by the Company and not otherwise reimbursed
by the City hereunder, a certificate signed by the Company Authorized Representative stating the reason for incurring such cost, the amount of such cost, and the event or Section of this Agreement giving rise to the Company’s right to incur such cost, and that such cost is, at a maximum, the fair market value price for the materials supplied (it is understood by the Parties that such services or materials may be provided by an Affiliate and it being further understood by the Parties that the fair market value price for services or materials supplied may include a profit allowance for the Company of up to 10% of the total price for the services and materials). Any certification provided by the Company shall include copies of all invoices and charges, together with any additional documentation of such cost or expense incurred which are necessary, in accordance with generally accepted accounting practices and procedures, to verify such cost and expense and to demonstrate the basis for the amount claimed. All the costs to be substantiated shall be subject to the review and conclusive approval of the City.

“Date of Operation and Management Fee Escalation” has the meaning set forth in Schedule 5 hereto.

“DEP “means the Massachusetts Department of Environmental Protection or any other successor thereto.

“Dispute Resolution Committee” has the meaning set forth in Section 8.01

“Enhanced Wastewater Standards” means specific limits pertaining to the effluent quality from the Wastewater Facility set forth in Schedule 1 hereto that may be more stringent than those imposed by Applicable Law from time to time.

“EPA means the United States Environmental Protection Agency or any successor.

“Equipment” means equipment, including operating and processing equipment, tools and Rolling Stock, owned by the City and in use of the Contract Date or subsequently procured and/or provided by the City pursuant to this Agreement for use at or associated with the Wastewater Facility (specifically excluding equipment and tools owned by the Company to perform its obligations under this Agreement).
“Event of Default” means any one or more of those events described in Article X.

“Guarantees” means the agreement between the Guarantors and the City in the forms set forth in Schedule 3 hereto.

“Guarantors” means legal entities personal or corporate that guarantee performance of this Agreement as to a “Guarantee”

“Independent Engineer” means a consulting engineering firm having a national reputation for expertise in the field of design, construction and operation of wastewater treatment facilities to be designated by the City subject to the approval of the Company.

“Insurance” means insurance in the types and amounts more particularly described in Article IX and Schedule 4 hereto.

“Managed Assets” means all buildings equipment, rolling stock and assets that comprise the Wastewater Treatment Plant and such pumping stations that the City elects to include in the Contractor’s scope of services.

“Management Team” means the Project Manager, Plant Manager, Maintenance Manager and Laboratory Manager dedicated to New Bedford. The failure to maintain the required management team will result in financial penalties.

“M.G.L” means Massachusetts General Law

“MOU” means the Memorandum of Understanding between the City and the Massachusetts Division of Marine Fisheries, dated December 1997 as amended.

“Monthly Operating Report” means National Pollutant Discharge Elimination System. “Operation and Maintenance Fee Escalator” has the meaning set forth in Schedule 5 hereto.

“Operation and Maintenance Plan” means the plan for operation, maintenance and management of the Wastewater Facility to be prepared by the Company and submitted to the City in accordance with Section 2.5 of Schedule 2 hereto.
“Pass Through Costs” means the component of the Service Fee calculated pursuant to the Section 6.04 and Schedule 9 hereto.

“Performance Bond” means a Performance Bond in the form set forth in Schedule 12 hereto or a Letter of Credit.

“Permits” means all federal, state and local approvals and permits required to be obtained and/or maintained from time to time in connection with the operation of the Wastewater Facility including, without limitation, the approvals and permits listed in Schedule 6.

“Person” means any natural or artificial entity including an individual, corporation, limited liability company, partnership, joint venture, association, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereto.

“Section” means a Section of this Agreement

“Service Fee” means the amount payable to the Company by the City for the Services provided under this Agreement Calculated in accordance with Article VI

“Services” means the operation, maintenance and management of the Wastewater Facility in accordance with the terms and provisions of the Agreement.

“Subcontractor” means any Person engaged by the Company, subject to Section 13.04, to perform any portion of the services on behalf of the Company.

“Term” has the meaning set forth in Section 13.02.

“Termination Fee” has the meaning set forth in Section 11.03

“Transition Plan” means the written plan for transition of operation, maintenance and management of the Wastewater Facility operations the current operator to the Company, which shall be in form and substance satisfactory to the City.

“Uncontrollable Circumstance(s)” means any act, event or condition to the extent that it impacts the cost of performance of or materially and adversely affects the
ability of either party to perform any obligation under the Agreement (except for payment obligations), if such act, event or condition, in light of the circumstances known or reasonably believed to exist at the time, is beyond the reasonable control and is not a result of the willful or negligent act, or error of omission or failure to exercise reasonable diligence on the part of the party relying thereon; provided, however, that the contesting in good faith or the failure in good faith to contest such action or inaction shall not be construed as a willful or negligent act, error or omission or a lack of reasonable diligence of either party.

(a) **Inclusions.** Subject to the foregoing, such acts, events, or conditions shall include, but shall not be limited to the following

(1) an act of God (but not including reasonably anticipated weather conditions for the geographic area of the Wastewater Facility), landslide, earthquake, fire, explosion, flood, hurricane, sabotage or similar occurrence, acts of a public enemy, extortion, war, blockade or insurrection, riot or civil disturbance

(2) a change in Law;

(3) the failure of any appropriate governmental agency or private utility to provide and maintain utilities;

(4) the preemption, confiscation, diversion, destruction, or other interference in the delivery or supply of materials or services by, on behalf of, or with authority of a governmental body in connection with a declared or asserted public emergency or any condemnation or other taking by eminent domain or similar action of any portion of the wastewater Facility; and

(5) strikes, work stoppages or labor disputes involving employees of non-Affiliates
(b) **Exclusions.** None of the following acts, events, or conditions shall constitute Uncontrollable Circumstances:

1. general economic conditions, interest or inflation rate fluctuations, commodity prices or changes in prices, or currency or exchange rate fluctuations

2. changes in financial condition of the City, the Company, the Guarantors, or any of their Affiliates or subcontractors

3. union work rules which increase the Company’s operating costs

4. any impact of prevailing wage laws on the Company’s costs

5. the consequences of Company error, including any errors of Company affiliates or subcontractors;

6. failure of any subcontractor or supplier to furnish labor, services, materials or equipment on the date agreed to

7. strikes, work stoppages or labor disputes involving employees of the Company or any Affiliate

8. failure of Equipment or of equipment owned or leased by the Company (unless caused by Uncontrollable Circumstances);

9. litigation against the Company or any Affiliate.

“Wastewater Facility” means the certified Class VI New Bedford Wastewater Treatment Facility located at 1000 South Rodney French Boulevard, New Bedford, Massachusetts, including the site, Equipment and related Wastewater Sludge disposal storage facilities, the outfall discharge chamber, and all accessory or
appurtenant fixtures, equipment, tools, and other property, all as more particularly described on Schedule 14 hereto.

“Wastewater Sludge” means any liquid, semisolid or solid material resulting from the treatment of raw and combined sewage at the Wastewater Facility and which requires disposal as waste material, but excluding grit and screenings.

ARTICLE III

CONDITIONS PRECEDENT TO THE COMMENCEMENT DATE

Section 3.01 Company Obligations.

The Commencement Date shall be subject to the satisfaction by the Company of the following conditions precedent:

(a) The Guarantors shall have executed and delivered the Guarantees to the City simultaneously with the execution of and delivery of this Agreement.

(b) The company shall have delivered to the City (i) a certificate of an authorized officer of the Company, dated as of the Commencement Date, to the effect that each of the representations of the Company set forth in Section 12.02 of this Agreement is true and correct in all material respects as if made on such date and (ii) opinion of counsel to the Company, in customary form and reasonably acceptable to the City, to the effect set forth in Sections 12.02(a)(b),(d) and (e).

(c) The City shall have received the documentation more particularly described in Section 9.01 as evidence that all policies of insurance required to be obtained by the Company pursuant to this Agreement have been obtained.

(d) If so requested by the City, the Company shall have delivered to the City a performance Bond duly executed by its issuer.

(e) The Company shall have delivered to the City, and the City shall have approved, the Transition Plan.
(f) The Company shall have recruited, retained and employed all management and other personnel necessary for its performance of the Services hereunder, which personnel shall be duly licensed as and to the extent required by Applicable Law, and shall have delivered to the City a roster of all such personnel together with copies of the licenses of all personnel required to be licensed.

(g) The Company shall have obtained and shall have submitted to the City copies of all Governmental approvals required to be obtained by the Company by Applicable Law as a condition of performing the Services hereunder.

Section 3.02 City Obligations.

The Commencement Date shall be subject to the satisfaction by the City of the following conditions precedent:

(a) The City shall have delivered to the Company a certificate of an authorized official of the City, dated as of [insert date] to the effect that each of the representations of the City set forth in Section 12.01 of this Agreement is true and correct in all material respects as if made on such date and an opinion of the City Solicitor, in customary form and reasonably acceptable to the Company to the effect set forth in Sections 12.01 (a)(b) (c) and (d)

Section 3.03 Satisfaction of Conditions Precedent.

The Company and City shall satisfy the conditions precedent identified in Section 3.01 and Section 3.02 on or before June 1, 2020 and each party shall give the other prompt notice when any condition precedent has been satisfied. Upon satisfaction of all such conditions precedent, the City shall give written notice to the Company and the Commencement Date shall occur on the later (i) such date (ii) July 1, 2019 so long as, as of such date:

(a) No action, suit, proceeding or official investigation shall have been overtly threatened or publicly announced or commenced by any
Person or Federal, State or local Governmental Authority or agency other than the City in any Federal State or local court, that seeks to enjoin, assess civil or criminal penalties against or obtain any judgment, order or consent decree with respect to the City or the Company as a result of the City’s or the Company’s negotiation, execution, delivery or performance of the Agreement, provided, however that any such action, suit, proceeding or investigation would, if adversely determined, materially adversely affect this Agreement or the performance by the Parties of their respective obligations hereunder: or

(b) No changes shall have occurred after the Contract Date and on or before the Commencement Date in any applicable Federal, State or Local rule regulation or ordinance there under, or in the interpretation there of by any applicable regulatory authority, that would make the execution or delivery by the City or the Company of this Agreement or that would made compliance by the City or the Company with the terms and conditions of this Agreement, a violation of such law, rule, regulation, or ordinance.

If all such conditions precedent are not so satisfied or waived on or before June 1, 2019 or if any circumstances described in clauses (a) or (b) above, if any, exist and continues as of July 1, 2019 then either Party, by notice in writing to the other, neither party shall be liable to the other for the termination of this Agreement, except on account of the failure of a party to satisfy its respective conditions precedent set forth in Section 3.01 or 3.02, respectively, and each Party shall bear its respective costs and expenses attributable to the transactions herein contemplated.
ARTICLE IV
MANAGEMENT OPERATION, MAINTENANCE AND MANAGEMENT

Section 4.01 Overall Company Responsibilities.

On and after the Commencement Date and throughout the term of this Agreement:

(a) The Company shall operate, maintain and manage the Managed Assets to process domestic raw sewage, commercial and industrial wastewater and any other influent delivered or caused to be delivered to the Wastewater Treatment Facility by the City in accordance with this agreement (including, without limitation, the requirements set forth in the schedules hereto) and Applicable Law.

(b) Except for Equipment, and other facilities and materials included in the Managed Assets as of the Commencement Date, and except for Capital Expenditures, the Company shall provide, at its sole cost and expense, all labor, materials, machinery, vehicles, equipment, office equipment (i.e. copiers, computers, etc.) fuel, chemicals, supplies, spare parts, expendables, consumables, testing and laboratory analysis and any other item required for operation, maintenance repair, replacement, renewal and management of the Managed Assets in accordance with this Agreement.

Section 4.02 Overall City Responsibilities.

On and after the Commencement Date and during the term of this Agreement:

(a) The City shall pay, or cause to be paid, The Service Fee to the Company in accordance with the terms and conditions of this Agreement for the Company’s performance of its obligations under this Agreement.
(b) As between the Company and the City, the City shall procure and as the Company’s Agreement, all Capital Expenditures in accordance with Article V hereof.

(c) The City shall afford Company access to the Managed Assets to the extent necessary for the Company to perform its obligations hereunder.

(d) The City shall retain responsibility for the operation and maintenance of its wastewater collection system—except those pumping stations included in the Managed Assets, the setting of rates and charges to system users, and the billing and collection of fees and charges there from. The City shall retain responsibility for its Industrial Pretreatment Program.

(e) The City shall make available to the Company Equipment warranty information, engineering drawings, calculations, maintenance manuals, operational records, logs, reports, submittals, repair records, audits, and sludge disposal and wastewater disposal information which may be in the City’s possession or that of its agents, relating to the design, condition, operation or maintenance of the Wastewater Facility from time to time.

(f) The City shall be responsible, at its cost, but subject to section 6.04 (d) for the disposal of Wastewater Sludge, grit and screenings and solid waste generated by the Wastewater Facility so long as such materials are made available to the City or its designated contractor(s) in the manner specified in Schedule 2 hereeto.

(g) The City shall provide for repair of all roadways within the Facility Site.
Section 4.03 Permits

As between the Company and the City, the respective responsibilities with respect to the Wastewater Facility Permits and other Permits required by the Company in order to perform the Services hereunder shall be as set forth in Schedule 6 hereto.

Section 4.04 Management Team

(a) The Company has designated______________ as the Company’s full-time Project Manager, and any City approved successor, shall, within ninety (90) days after the Commencement Date, reside either within the City or within fifty (50) miles of the Wastewater Facility. The City has selected the Company to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Project Manager. Accordingly, the Company shall not, absent good cause, replace such Project Manager during the term of this Agreement, without the prior approval of the City. If such Project Manager or any City approved successor shall retire, resign as Project Manager, request assignment to another location, or cease employment with the Company, the Company shall not appoint a successor Project Manager without the prior written approval of the City. If the City, in its sole discretion, determines that the Project Manager is performing in an unsatisfactory manner, or if an unworkable relationship between the Project Manager and the City shall arise, the Company upon notice by the City of such circumstance, shall promptly replace such Project Manager with a successor acceptable to the City; provided however, the City represents that it will not give such notice to the Company unless and until the City, in its sole determination, has exercised reasonable good faith efforts to rectify to its satisfaction the adverse circumstances regarding the Project Manager.
(b) The Company has designated ______________ as the Company’s full-time Assistant Project Manager, and any City approved successor, shall, within ninety (90) days after the Commencement Date, reside either within the City or within fifty (50) miles of the Wastewater Facility. The City has selected the Company to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Assistant Project Manager. Accordingly, the Company shall not, absent good cause, replace such Assistant Project Manager during the term of this Agreement, without the prior approval of the City. If such Assistant Project Manager or any City approved successor shall retire, resign as Assistant Project Manager, request assignment to another location, or cease employment with the Company, the Company shall not appoint a successor Assistant Project Manager without the prior written approval of the City. If the City, in its sole discretion, determines that the Assistant Project Manager is performing in an unsatisfactory manner, or if an unworkable relationship between the Assistant Project Manager and the City shall arise, the Company upon notice by the City of such circumstance, shall promptly replace such Assistant Project Manager with a successor acceptable to the City; provided however, the City represents that it will not give such notice to the Company unless and until the City, in its sole determination, has exercised reasonable good faith efforts to rectify to its satisfaction the adverse circumstances regarding the Assistant Project Manager.

(c) The Company has designated ______________ as the Company’s full-time Maintenance Manager, and any City approved successor, shall, within ninety (90) days after the Commencement Date, reside either within the City or within fifty (50) miles of the Wastewater Facility. The City has selected the Company to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Maintenance Manager. Accordingly, the Company shall not, absent good cause, replace such Maintenance Manager during the term of this Agreement, without the prior approval of the City. If such
Maintenance Manager or any City approved successor shall retire, resign as Maintenance Manager, request assignment to another location, or cease employment with the Company, the Company shall not appoint a successor Maintenance Manager without the prior written approval of the City. If the City, in its sole discretion, determines that the Maintenance Manager is performing in an unsatisfactory manner, or if an unworkable relationship between the Maintenance Manager and the City shall arise, the Company upon notice by the City of such circumstance, shall promptly replace such Maintenance Manager with a successor acceptable to the City; provided however, the City represents that it will not give such notice to the Company unless and until the City, in its sole determination, has exercised reasonable good faith efforts to rectify to its satisfaction the adverse circumstances regarding the Maintenance Manager.

(d) The Company has designated_______________ as the Company’s full-time Lab Manager, and any City approved successor, shall, within ninety (90) days after the Commencement Date, reside either within the City or within fifty (50) miles of the Wastewater Facility. The City has selected the Company to perform the services contemplated under this Agreement based, in part, on the past successful experience and expertise of the designated Lab Manager. Accordingly, the Company shall not, absent good cause, replace such Lab Manager during the term of this Agreement, without the prior approval of the City. If such Lab Manager or any City approved successor shall retire, resign as Lab Manager, request assignment to another location, or cease employment with the Company, the Company shall not appoint a successor Lab Manager without the prior written approval of the City. If the City, in its sole discretion, determines that the Lab Manager is performing in an unsatisfactory manner, or if an unworkable relationship between the Lab Manager and the City shall arise, the Company upon notice by the City of such circumstance, shall promptly replace such Lab Manager with a successor acceptable to the City; provided however, the City represents that it will not give such notice to the Company unless and until the City, in its sole determination, has exercised
reasonable good faith efforts to rectify to its satisfaction the adverse circumstances regarding the Lab Manager.

Section 4.05 Liquidated Damages.
As set forth in Section 4.01 and Schedules 1 and 2 hereto, the Company is required to satisfy the requirements of Applicable Law and the enhanced Wastewater Standards with respect to the quality of treated effluent discharged from the Wastewater Facility as well as the standards for the Pumping Stations included in the Managed Assets. Failure to satisfy such requirements, or failure to operate the Wastewater Facility in such a manner as to minimize public complaints concerning noise and/or odor emanating from the Wastewater Facility, may, at the election of the City, result in the imposition on the Company of liquidated damages in the manner, and in the amounts set forth in this Section 4.05.

(a) If the Wastewater Facility satisfies the treated effluent standards imposed by Applicable Law but fails to satisfy any one or more of the Enhanced Wastewater standards;
   (1) The Company shall provide a plan to the City outlining corrective actions for achieving compliance with the Enhanced Wastewater Standards within five (5) days after written notice of noncompliance given by the City.
   (2) The City will review and provide written comments on the plan within (48) hours after receipt; and
   (3) The Company shall immediately implement the plan, which shall address the City’s comments.

Failure to either provide a plan and/or implement the corrective actions set forth in the plan shall result in Company liability for liquidated damages in the amount of $5,000 per day from such time that either (i) the plan should have been
submitted, or (ii) the date on which corrective actions should have commenced pursuant to the plan. Neither the review of or comment on, nor the failure of the City to comment on, any corrective plan proposed by the Company, shall relieve the Company of any of its responsibilities under this Agreement or be deemed to constitute a representation by the City that the corrective actions proposed in any such plan will cause the Wastewater Facility to be in compliance with the Enhanced Wastewater Standards, or otherwise impose any liability on the City.

(b) If the Wastewater Facility fails to satisfy any Provision of Applicable law with respect to the quality of treated effluent, the Company shall be required to take the same measures set forth in Section 4.05 (a) above in order to develop and implement a corrective action plan to cause the Wastewater Facility to be in compliance with Applicable Law. Failure to either provide a plan and/or implement the corrective actions set forth in the plan shall result in Company liability for liquidated damages in the amount of $5,000 per day from such time that either (i) the plan should have been submitted, or (ii) the date on which corrective actions should have commenced pursuant to the plan. In addition the Company shall be responsible for payment of any fines or damages imposed by either the City or the Company by any regulatory or other governmental agency or an account of any third party claim as a result of any noncompliance with Applicable Law. Neither the review of or comment on, nor the failure of the City to comment on, any corrective action plan proposed by the Company, shall relieve the Company of any of its responsibilities under this Agreement or be deemed to constitute a representation by the City that the corrective actions proposed by any such plan will cause the Wastewater Facility to be in compliance with Applicable Law, or otherwise impose any liability on the City. Should the Company’s non-compliance result in a fine and/or administrative order by EPA and/or MADEP, the Company shall be responsible for any fines and/or administrative actions imposed as a result of their non-compliance.

(c) If during any Billing Year the Company and/or the City receive complaints of five (5) or more incidents concerning odor allegedly emanating from the
Facility and, after investigation by the City in cooperation with the Company, such complaints are determined by the City to be substantiated and legitimate complaints concerning odor emanating from the Wastewater Facility, caused by the Company’s failure to operate and/or maintain odor control systems, the Company shall be required to take the same measures set forth in Section 4.05(a) above in order to develop and implement a corrective action plan to abate any such odor conditions and the Company shall be liable to the City for liquidated damages in the same manner and in the same amounts as would be required in case of Company failure to achieve an Enhanced Wastewater Standard. Neither the review of or comment on, nor the failure of the City to comment on, any corrective action plan proposed by the Company, shall relieve the Company of any of its responsibilities under this Agreement, be deemed to constitute a representation by the City that the corrective actions proposed in any such plan will be sufficient to abate any odor emanating from the Wastewater Facility or otherwise impose any liability on the City.

(d) If the Company and/or the City receives complaints concerning noise allegedly emanating from the Wastewater Facility in excess of normal operating levels, and, after investigation by the City in cooperation with the Company, such complaints are determined by the City to be substantiated and legitimate complaints concerning noise emanating from the Wastewater Facility in excess of normal operating levels, caused by the Company’s failure to operate and/or maintain the Facility’s equipment, the Company shall be required to take the same measures set forth in Section 4.05(a) above in order to develop and implement a corrective action plan to abate any such noise conditions of excess of normal operating levels and the Company shall be liable to the City for liquidated damages in the same manner and in the same amounts as would be required in case of Company failure to achieve an Enhanced Wastewater Standard. Neither the review of or comment on, nor the failure of the City to comment on, any corrective action plan proposed by the Company, shall
relieve the Company of any of its responsibilities under this Agreement or be deemed to constitute a representation by the City that corrective actions proposed in any such Plan will be sufficient to abate any noise in excess of normal operating levels emanating from the Wastewater Facility or otherwise impose any liability on the City.

(e) If the company fails to provide or maintain staffing levels consistent with the company’s accepted staffing plan including, but not limited to the city’s required management team staffing requirements consisting of a Project Manager, Assistant Project Manager/plant manager, Maintenance Manager, and Lab Manager the Company shall be liable to the City for liquidated damages up the full cost (wages and related overhead costs) for all shortfalls.

(f) Liquidated damages. If any, payable to the Company pursuant to Sections 4.05(a)(b), (c) and (d) shall be cumulative, and not mutually exclusive, and, in addition, are supplemental to, and shall not diminish in any manner, the rights and remedies of the City under Articles X and XI hereof.

Section 4.06 Uncontrollable Circumstances: Company Fault.

(a) Except for payment obligation, and except for obligation of the Parties which by the specific terms of this Agreement are obligations incurred in response to Uncontrollable Circumstances, each Party shall be excused, subject to this Section 4.06, for failure or delay in performance by reason of Uncontrollable Circumstance.

(b) If either Party shall rely on the occurrence of an act, event or condition as an Uncontrollable Circumstance as the basis for not performing its obligation under this Agreement, then the Party relying on such act, event or condition shall (i) provide prompt notice to the other Party of the occurrence of the act, event or condition giving an estimation of its expected duration and the probable impact on the performance of its
obligations hereunder to the maximum extent possible, (ii) in accordance with this Agreement, expeditiously take action to correct or cure the act, event or condition preventing performance, (iii) exercise all reasonable efforts to mitigate or limit damages to the other Party to the extent such action will not adversely affect its own interests and (iv) provide prompt notice to the other Party of the cessation of the act, event or condition giving rise to its inability to perform.

(c) If due to Company Fault, the Wastewater Facility shall be damaged to the extent of preventing Company performance in accordance with this Agreement, the Company shall comply with Section 4.06(b) (i) through (iv) above, In the case of Company Fault, as between the Company and the City, the Company, notwithstanding any other provision in this Agreement, shall be responsible for promptly restoring or repairing the Wastewater Facility at its cost and expense. The Company hereby acknowledges that the City maintains Flood Insurance and does not presently maintain any additional property damage or loss insurance on the Wastewater Treatment Facility and further agrees and acknowledges that the City has no obligation to the Company to obtain or maintain any such insurance coverage, The City hereby acknowledges that the Company does not presently maintain any property damage insurance on the Managed Assets. The Company shall have no responsibility to restore or repair damage to the Managed Assets not due to the Company Fault.

ARTICLE V
CAPITAL EXPENDITURES AND COST SAVINGS

Section 5.01 Capital Expenditures in Progress.

The City from time to time may undertake capital improvements to the Managed Assets. The City shall complete such Capital Expenditures at no cost to the Company and the Company shall cooperate with the City and its contractors so that such Capital Expenditures can be completed in a timely manner, provided, however, that neither the City nor any such other City contractors shall
unreasonably interfere with or impede the Company in performing its obligation hereunder. The Company’s obligation to operate, maintain and manage the Managed Assets shall include the obligation to operate, maintain and manage the Managed Assets as modified by the Capital Expenditures as described in Schedule 13 hereto and such future capital improvements the City elects to undertake. The service fee shall not be subject to adjustment on account of the undertaking or completion of the Capital Expenditures described in Schedule 13 hereto, provided that such Capital Expenditures are completed in accordance with their respective plans and specifications, The City shall provide to the Company copies of all operating manuals, maintenance manuals and equipment specifications required to be delivered to the City in connection with the implementation of any such Capital Expenditures and copies of “as built” drawings relating to any such Capital Expenditures.

Section 5.02 Capital Expenditures Report.

Within ninety (90) days after the Commencement Date, The Company shall conduct a physical audit of the Managed Assets and provide the City with a reasonably detailed report recommending, on a priority basis, Capital Expenditures and other services, if any, that the City should consider undertaking relative to preserving or upgrading of the Managed Assets to facilitate compliance with Applicable Law, including Applicable Law relating to safety. The Company shall update such information annually by conducting such an audit and preparing and filing such a report with the City within one hundred eighty (180) days after the close of each Billing Year during the Term of this Agreement. Notwithstanding anything in this Section 5.02 to the contrary, the City may at any time perform or contract for the performance by an Independent third party of a Wastewater Facility and Pumping Station Capital Expenditures audit. A copy of any such audit and report shall be provided to the Company.

Section 5.03 Elective Capital Expenditures.
The City may from time to time, upon the recommendation of the Company or otherwise, elect to make the Capital Expenditures relating to the Managed Assets. The City shall be responsible for all planning, design, and construction of any such Capital Expenditures and shall bear the entire financial responsibility therefore without contribution from the Company. The Company shall cooperate with the City in connection with any such Capital Expenditures implementation; provided, however, that any such implementation shall not unreasonably interfere with or impede the Company in performance of its obligation hereunder. Further, no such Capital Expenditure shall alter or modify the scope of Services to be provided by the Company hereunder absent a corresponding adjustment to the Operation and Maintenance Fee pursuant to Section 6.02(b).

Section 5.04 Non-Elective Capital Expenditures.

(a) Except as provided in Section 5.04(b), The City shall be responsible for any equipment or other component of the Managed Assets to the extent that any such repair, renewal or replacement requires a Capital Expenditure. The Company, in connection with its performance of the Services, shall advise the City from time to time as to any such repair, renewal or replacement that may be, or may become, necessary, in order to afford the City as much time as possible to arrange for the procurement of equipment, materials and services necessary to effect any such Capital Expenditure. Subject to the provisions of applicable public procurement law, the City may, but is not obligated, to engage the Company to effect any such Capital Expenditure. The Company shall cooperate with the City in connection with any such Capital Expenditure implementation.

(b) Notwithstanding Section 5.04 (a) to the contrary, the Company shall reimburse the City for all costs and expenses incurred by the City in connection with any Capital Expenditure, resulting from or necessitated by
failure of the Company to perform predictive, preventative or corrective maintenance or repairs in accordance with its obligation hereunder. If the City has reason to believe that any such failure has occurred, the Company shall provide to the City access to the Company’s maintenance and/or repair records for the purpose of reviewing the circumstances giving rise to the need for a Capital Expenditure. In connection with any such review, the Company shall have an opportunity to bring to the attention of the City factors, if any, other than maintenance or repair related factors that may have caused or contributed to such circumstances.

ARTICLE VI
PAYMENTS

Section 6.01 Service Fee.
Commencing with the first Billing Month and for each Billing Month thereafter, the City shall pay to the Company a Service Fee for managing, operating and maintaining the Wastewater Facility pursuant to the terms and conditions of this Agreement. The Service Fee shall be computed in accordance with the following formula:

\[ SF = O \& M + PT + MA. \]

Where
\( SF \) = Service Fee
\( O \& M \) = Operation (Operations, Management, Chemicals, Labor, Benefits, Profit and Overhead) and Maintenance* (Parts, Subcontractors and Materials) Fee
PT = Pass Through Costs
MA = Miscellaneous Adjustments

(*) Five hundred thousand dollars ($500,000) per year earmarked for Wastewater Plant Renewal and Replacement and an additional $100,000 for Pumping Station Renewal and Replacement each to be accounted for separately and not be used without written City approval. At the end of each fiscal year (June 30th) any unused portion of this account will be returned to the City. At the City’s discretion, these additional funds, may be allocated to Capital Improvement Projects.
This amount may be adjusted annually in accordance with the provisions of Schedule 5.

Section 6.02 Operation and Maintenance Fee.
(a) For any Billing Month, the Operation and Maintenance Fee shall be in the amount set forth in Schedule 5.1. as adjusted on a pro rata daily basis for a short Billing Month, in the first and last Billing Years, and further adjusted pursuant to this Section 6.02.
(b) The Operation and Maintenance Fee shall be adjusted periodically in accordance with the provisions of Schedule 5.

Section 6.03 Pass Through Costs.
Pass Through costs for any Billing Month shall be the sum of the costs and expenses set forth in Schedule 9 hereto which were incurred by the Company during such Billing Month, to the extent of Cost Substantiation, exclusive of profit to the Company or any Affiliate.

Section 6.04 Miscellaneous Adjustments
The Miscellaneous Adjustments (MA) component of the Service Fee for any particular Billing Month shall be an amounts determined in accordance with this Section 6.04.
(a) The amount determined in accordance with the methodology set forth in Schedule 1 hereto in the event that the actual influent flow rates, or biological loadings of influent, depart from the baseline parameters set forth in Schedule 1 hereto.

(b) A negative amount equal to the amount of liquidated damages, if any, payable by the Company in respect of such Billing Month pursuant to Section 4.05.

(c) A negative amount equal to the cost, as estimated by the City, for any particular Billing Month of performing any required predictive or preventative maintenance specified in Schedule 2 hereto the Company fails to perform.

(d) A negative amount equal to the amount, if any, expended by the City during such Billing Month for repair, renewal or replacement Capital Expenditures pursuant to Section 5.04 hereof and Section 2.4.5 of Schedule 2 hereto.

(e) A positive or negative amount as may be appropriated as a result of Capital Expenditures that may be made to the Managed Assets. However, no such amount shall constitute a Miscellaneous Adjustment component unless (i) agreed to by the parties and (ii) unless the City determines that inclusion of such amount as Miscellaneous Adjustment component will not contravene provisions of Applicable Law (including, without limitation, any law relating to public procurement) or the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued hereunder, including, without limitation, Revenue Procedure 2017-13.

(f) A positive or negative amount, subject to Cost Substantiation, to reflect any increased or decreased cost incurred by the Company (net of any available insurance proceeds), in connection with its performance of the Services as
a result of any Uncontrollable Circumstance; provided, however, that no such amount shall constitute a Miscellaneous Adjustment component unless the City determines that inclusion of such amount as a Miscellaneous Adjustment component will not contravene provisions of Applicable Law (including, without limitation, any law relating to public procurement) or the private activity limitations as described in Section 141 of the Internal Revenue Code and regulations and other official interpretation issued hereunder, including, without limitation, Revenue procedure 2017-13.

(g) A negative amount, determined in accordance with the agreement of the Parties to reflect any reduction in costs incurred by the Company as a result of the implementation of any operation and maintenance improvement proposed by the Company and approved by the City pursuant to Section 5.05. However, no such amount shall constitute a Miscellaneous Adjustment component unless (i) agreed to by the Parties and (ii) unless the City determines that inclusion of such amount as a Miscellaneous Adjustment component any such reduction will not contravene provisions of Applicable Law (including, without limitation, any law relating to public procurement) or the private activity limitations described in Section 141 of the internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitations, Revenue Procedure 2017-13.

Section 6.05 Billing and Payment of Company’s Invoices

(a) The Company shall submit its invoice to the City for each preceding Billing Month no later than the tenth (10th) day after the close of each Billing Month. Each element necessary to calculate the Service Fee payment due to the Company shall be reflected in said invoice.
(b) The City shall pay the Company the Service Fee within forty five (45) days after the date of receipt by the City a complete invoice for any Billing Month. If the City disputes any portion of a complete invoice, the City shall pay the undisputed amount and the dispute relating to the balance shall be resolved in accordance with Article VIII.

Section 6.06 Information, Data and Reports

Together with the invoice submitted by the Company to the City pursuant to Section 6.05(a), the Company shall deliver to the City the Monthly Operating Report for the preceding Month.

Section 6.07 Additional Payment Provisions.

(a) The City shall have the right to equitably adjust the Service Fee payment formula over the course of the Term, as necessary, to comply with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued hereunder, including, without limitation, Revenue Procedure 2017-13. Any such adjustment shall be such that the fixed and variable components of the Service Fee are within the specified percentages allowed by the private activity limitations described in Section 141 of the Internal Revenue Code and regulations issues thereunder. Adjustments shall not entitle the Company to additional compensation, nor shall any adjustment reduce the aggregate compensation payable to the Company under this Agreement absent the consent of the Company. Should such adjustments not be possible so that continued compliance with the private activity limitations described in Section 141 of the Internal Revenue Code and regulations issued thereunder is not possible, the City reserves the right to terminate this Agreement upon thirty (30) days’ notice to the Company. Any such termination shall be deemed to be a Termination for Convenience pursuant to and governed by Section 11.03 hereof.
(b) The Service Fee may be otherwise adjusted by the Parties subject to (i) mutual agreement as to the amount and/ or methodology and (ii) determination by the City that any such adjustment will not contravene the Applicable Law (including, without limitations, any law relating to procurement) or the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued hereunder, including, without limitations, Revenue Procedure 2017-13.

(c) The Service Fee may be otherwise adjusted by the Parties subject to mutual agreement as to the amount and methodology in the event that there is a change in the discharge limits established in the City’s National Pollution Discharge Elimination System (NPDES) and/or any other change in law.

ARTICLE VII
INDEMNIFICATION AND LIMITATION OF LIABILITY

Section 7.01 indemnification.

To the fullest extent permitted by applicable law, the Company shall protect, defend, indemnify and save the City and its agents, officials, employees, servants, and consultants, including contractors or subcontractors with whom the City may have contracted, harmless from and against any and all claims, demands, fines, loss or destruction of property, liabilities, damages, environmental pollution, judgment losses, costs, expenses, suits, actions, and causes of action of every kind and character, for claims based on negligence, willful misconduct, or omissions of the Company’s performance or non-performance of its obligations or operations under this Agreement, except to the extent any such damages arise out of injuries
property claims of third parties caused by the negligence or willful misconduct of the City, or its officials, directors, employees or agents. Further, the Company hereby agrees to indemnify the City for all reasonable expenses, court costs and attorney’s fees including those incident to appeals incurred by or imposed upon by the City in connection therewith for any loss, damage, injury or other casualty. The Company additionally agrees that the Company may, subject to the approval of the City, designate an attorney of the Company’s selection to appear and defend any such action, on behalf of the City, at the expense of the Company. The Company further agrees to pay all reasonable expenses and attorney’s fees incurred by the City in establishing the right to indemnity hereunder.

Section 7.02 Waiver.

The Company and the City hereby waive any and every claim arising pursuant to this Agreement for recovery from the other for any and all loss or damage to the other resulting from the performance of this Agreement, which loss or damage is covered by collected insurance policy proceeds and will require their respective insurers to waive all rights of recovery and subrogation against the City or the Company as the case may be.

Section 7.03 Limitation of Liability.

THE COMPANY AND THE CITY ACKNOWLEDGE AND AGREE THAT BECAUSE OF THE UNIQUE NATURE OF THE UNDERTAKINGS CONTEMPLATED BY THIS AGREEMENT, IT IS DIFFICULT OR IMPOSSIBLE TO DETERMINE WITH PRECISION THE AMOUNT OF DAMAGES THAT WOULD OR MIGHT BE INCURRED BY THE CITY OR THE COMPANY AS A RESULT OF A BREACH OF THIS AGREEMENT BY THE CITY OR THE COMPANY. HOWEVER, IN NO EVENT, BECAUSE OF A BREACH OF THIS AGREEMENT OR ANY CAUSE, WHETHER BASED UPON CONTRACT, TORT (INCLUDING NEGLIGENCE OR STRICT LIABILITY, ) WARRANTY, DELAY OR OTHERWISE, ARISING OUT OF THE PERFORMANCE OR NONPERFORMANCE BY THE CITY OR THE COMPANY OF THEIR OBLIGATIONS UNDER THIS AGREEMENT INCLUDING, WITHOUT LIMITATION, SUITS BY THIRD
PERSONS, SHALL THE CITY OR THE COMPANY BE LIABLE FOR OR OBLIGATED IN ANY MANNER, TO PAY INCIDENTAL, SPECIAL, PUNITIVE, CONSEQUENTIAL OR INDIRECT DAMAGES OF ANY NATURE INCURRED BY IT WHETHER OCCURRING DURING OR SUBSEQUENT TO THE PERFORMANCE OF THIS AGREEMENT.

Section 7.04 Survival.

This Article VII shall survive the termination of this Agreement.

ARTICLE VIII
DISPUTE RESOLUTION

Section 8.01 Scope.
To facilitate the timely and effective resolution of any controversy claim or dispute that may arise under this Agreement (each, a “Dispute”), the Parties shall establish, within thirty (30) days after the Commencement Date, a Dispute Resolution Committee consisting of two senior management representatives of each of the Company and the City; provided, however, that no such representatives may be directly involved in the performance of City or Company obligations, respectively, under this Agreement. Written notice of the appointment of such representatives shall be delivered by each Party to the other no later than sixty (60) days after the Commencement Date. The appointed representatives are subject to change, and written notice of any such change by each Party shall be delivered to the other Party. The Dispute Resolution Committee shall meet as often as the circumstances may deem necessary, to resolve any Dispute. To the extent the Dispute Resolution Committee cannot, after good faith attempts, resolve any Dispute, either Party to the extent its interests are adversely impacted, may refer the matter to non-binding mediation
to be conducted in the Commonwealth under the auspices of a firm or individual specializing in the mediation. If, despite the good faith efforts of the parties to resolve a Dispute, mediation does not conclude with a resolution of the Dispute, either Party may refer the Dispute to a court in the Commonwealth possessing competent jurisdiction, including, without limitation, the Federal District Court for the District of Massachusetts.

Section 8.02 Covenant to Perform.

The Parties shall continue to perform under this Agreement, without interruption or slowdown, pending resolution of any Dispute.

Section 8.03 Survival

This Article VIII shall survive termination of this Agreement.

ARTICLE IX
INSURANCE AND PERFORMANCE BOND

Section 9.01 Insurance Coverages Certificates Premium Payments.

Prior to the Commencement Date, the Company shall secure and continuously maintain through the term of this Agreement the insurance specified in Schedule 4 to protect the Company and the City from claims of the Company’s employees under Workers’ Compensation Acts and claims for bodily injury, death or property damage which may arise out or result from the Company’s obligations and operations under this Agreement or anyone directly or indirectly employed by it for whose acts or omissions it may be liable, The City shall not establish and give any notice to the Company of the Commencement Date unless and until the Company shall have provided the City proof (including copies of policies if requested by the City) that the insurance coverages listed in Schedule 4 and
required to be secured by the Company have been secured and will be in full force on the Commencement Date. Certificates of insurance and copies of policies (if requested by the City) shall (i) be furnished to the City prior to the Commencement Date (ii) be in form and coverage satisfactory to the City, (iii) list the various coverages, and (iv) contain the statement requiring sixty (60) days prior written notice cancellation, non-renewal or material change in the policies given to the City by registered mail, return receipt requested. All such notices shall name the City and identify this Agreement.

Section 9.02 Company Obligations and Policy Requirements.

(a) The Company’s insurers shall have no right of recovery or subrogation against the City or the Company, it being the intention of the Parties that any insurance policy so affected shall protect both Parties and be the primary coverage, to the extent of the Company’s obligations of indemnity herein, for any and all losses covered by the insurance listed in Schedule 4 hereto.

(b) The City shall be named as an additional named insured, to the extent of coverage afforded the Company, in all policies of insurance listed in Schedule 4 hereto, excepting workers’ compensation and employer’s liability coverages maintained by the Company.

(c) The insurance companies issuing the policy or policies shall have no recourse against the City for payment of any premiums or for assessments under any form or policy.

(d) The Company shall assume and shall be solely responsible for the satisfaction of any and all deductibles and self-insured retentions contained in its insurance coverages as well as any excluded loss or losses.

(e) All insurance required to be secured and maintained under this Agreement shall be procured from insurance companies authorized to do business in the
Commonwealth, and all such insurers shall having a rating of at least A XII in the latest edition of Alfred M. Bests Insurance Reports.

(f) If, at any time during the term of this Agreement, any policy listed in Schedule 4 hereto shall be or becomes unsatisfactory to the City as to form or substance or if an insurance company issuing any policy listed in Schedule 4 shall be or become, unsatisfactory to the City, the Company, upon notice thereof from the City, shall immediately obtain a new and substitute policy, submit the same to the City for approval, and submit a certificate and copy of the policy, if requested, to the City as provided in Section 9.01.

(g) Failure of the Company to secure and/or maintain the insurance listed in Schedule 4 hereto shall not relieve it from any liability under this Agreement, nor shall the insurance company pursuant to Article VII.

(h) The Company’s obligation to secure, deliver and maintain the insurance policies and coverages specified in this Agreement shall be considered as “material” for purposes of Section 10.01.

Section 9.03 Performance Bond or Letter of Credit

The Company shall provide to the City, not later than thirty (30) days after the execution of and delivery of this Agreement, a Performance Bond or Letter of Credit issued by a surety reasonably acceptable to the City, The Performance Bond or Letter of Credit shall be in an amount equal to 150% of the Service Fee for the previous Billing Year, or in respect of the first Billing Year, 150% of the Service Fee for the first Billing Year estimated by the City. The Performance Bond or Letter of Credit shall be continuously renewed, extended or replaced for as long as required by the City, any such renewal, extension or replacement to be effective not later than sixty (60) days prior to expiration of the then-effective Performance Bond.
ARTICLE X
EVENTS OF DEFAULT

Section 10.01 Damages as Ordinary Remedy.
The Parties agree, except as otherwise specifically provided for in this agreement, that (1) neither Party shall have the right to terminate this Agreement, and (2) in the event that either Party breaches any obligation under this Agreement, or in the event any representation made by either Party is untrue in any material respect, the other shall have the right to take any action at law or in equity it may have to enforce the payment of any damages or the performance of any obligation hereunder, and that such right to recover damages or to secure the performance of such obligation hereunder, and that such right to recover damages or to secure the performance of such obligations as provided herein shall ordinarily constitute an adequate remedy for any breach of such obligation or any material untruth in any such representation.

Section 10.02 Events of Default by Company.
The following shall constitute Events of Default by the Company:

(a) persistent and repeated failure or refusal of the Company to perform timely any material obligation under this Agreement, unless such failure or refusal is clearly recognized, justified and excused by the terms and conditions of this Agreement, provided, however, that insofar as any such failure or refusal relates to payment obligations of the Company, Section 10.02 (c) shall govern; and provided further that failure by the Company to operate the Wastewater Facility in accordance with Applicable Law for more than ten(10) cumulative days in any Billing Year shall, Ipso facto, constitute persistent and repeated failure or refusal;

(b) failure of the Company to pay any amount owed to the City under this Agreement within forty-five (45) days following the date any such amount has become due and payable;
(c) (i) the Company’s or any Guarantor’s being or becoming insolvent or bankrupt or ceasing to pay its debts as they mature or making an arrangement with or for the benefit of its creditors or consenting to or acquiescing in the appointment of a receiver, trustee or liquidator for a substantial part of its property, or (ii) a bankruptcy, winding up, reorganization, insolvency, arrangement or similar proceeding instituted by or against the Company or any Guarantor under laws of any jurisdiction, which proceeding has not been dismissed within ninety (90) days, or (iii) any action or answer by the Company or any Guarantor approving of, consenting to, or acquiescing in, any such preceding, or (iv) the levy of any distress, execution or attachment upon the property of the Company or any Guarantor which shall substantially interfere with its performance hereunder;

(d) default of any Guarantor under its respective Guarantee;

(e) any failure by the Company to provide or renew the Performance Bond or Letter of Credit in accordance with the requirements of Section 9.03; or

(f) the Company’s abandonment or failure to operate the Wastewater Facility for more than one (1) day in the Billing Year.

Section 10.03 Events of Default by City

The following shall constitute Events of default on the part of the City:

(a) persistent and repeated failure or refusal of the City to perform timely any material obligation under this Agreement: provided, however, that insofar as any such failure or refusal relates to payment obligations of the City, Section 10.03(b) shall govern;
(b) failure of the City to pay amounts owed to the Company under this Agreement within forty-five (45) days following the date any such amount has become due and payable; or

c) (i) the City’s being or becoming insolvent or bankrupt or ceasing to pay its debts as they mature or making an arrangement with or for the benefits of its creditors or consenting to or acquiescing in the appointment of a receiver, trustee or liquidator for a substantial part of its property, or (ii) a bankruptcy, winding up, reorganization, insolvency, arrangement or similar proceeding has not been dismissed within ninety (90) days, or (iii) any action or answer by the City approving of, consenting to, or acquiescing in, any such preceding, or (iv) the levy of any distress, execution or attachment upon the property of the City which shall substantially interfere with its performance hereunder.

Section 10.04 Default Notices.

Neither Party may exercise its termination rights pursuant to Sections 11.01 or 11.02, as applicable, on account of an Event of Default described in Section 10.02 (a) or (b) or 10.03 (a) or (b) respectively, unless and until such Party shall have given the other party written notice of its failure or refusal to perform. If an Event of Default specified in a required notice of default is cured within thirty (30) days after such notice or if such Event of Default cannot be cured within thirty (30) days through the exercise of due diligence but expeditious and substantive steps are taken within said thirty (30) day period to commence to cure the Event of Default and thereafter complete the cure pursuant with due diligence to completion, there shall be no right of termination with respect to such Event of Default under Section 11.01 or 11.02, as the case may be Events of Default other than those described in Sections 10.02 (a) or (b) and10.03 (a) or (b), shall not require any notice as a prerequisite to termination under Section 11.01 or 11.02, respectively.
ARTICLE XI
TERMINATION

Section 11.01 City Termination for Event of Default by Company.

(a) If the City shall have given the Company notice that an Event of Default has occurred pursuant to Section 10.02 (a) or (b) and such Event of Default is not cured by the Company in accordance with Section 10.04 of this Agreement, the City may terminate this Agreement upon thirty (30) days prior notice to the Company.

(b) If an Event of Default has occurred pursuant to Section 10.02 (c), d, (e) or (f) the City may terminate this Agreement forthwith and, except as provided in Section 11.06, shall have no further monetary obligations to the Company.

(c) Termination by the City pursuant to this Section 11.01 shall not preclude the City from seeking recourse, subject to Section 7.03, for damages or any other relief available to it at law or in equity.

Section 11.02 Company Termination for Event of Default by City.

(a) If an event of default has occurred pursuant to Section 10.03 (c), the Company may terminate this Agreement forthwith.

(b) If the Company shall have given the City notice that an Event of Default has occurred pursuant to Section 10.03 (a) or (b) and such Event of Default is not cured by the Company in accordance with Section 10.04 of this Agreement, the Company may terminate this Agreement upon ninety (90) days prior notice to the City.

(c) Termination by the Company pursuant to this Section 11.02 shall not preclude the Company from seeking recourse, subject to Section 7.03, for damages or any other form of relief available to it at law or in equity.

Section 11.03 Termination for Convenience.
The City shall have the right to terminate the Agreement, at its sole discretion, for its convenience and without cause including, without limitations, on account of the City’s failure to appropriate funds to support the City’s payment obligations hereunder after the close of the first fiscal year of the City during the Term or on account of circumstances specified in Section 6.04 (e) at any time after the execution of this Agreement upon ninety (90) days written notice to the Company. If the City exercises its right to terminate this Agreement pursuant to this Section 11.03, the City shall, unless prohibited by Applicable Law, pay the Company a Termination Fee in addition to amounts, if any, due to the Company pursuant to Section 11.06.

The Termination Fee shall be $20,000 if termination to this Section 11.03 occurs within the first year of the Term. Thereafter, the Company shall be reimbursed a prorated amount of the Termination Fee (such pro-ration to reflect a decline by 1/10th of the Termination Fee each year during the Term of Agreement). No additional termination fee will be granted after year 1. Except as provided in Section 11.06, the City shall have no additional monetary obligation to the Company.

Section 11.04 Termination for Labor Unrest

If personnel employed by the Company and performing services pursuant to the Company’s obligation under this Agreement shall go on a labor strike or slowdown, or if a work stoppage, walkout or secondary boycott shall occur, for any reason or cause whatsoever, and such act or event effectively prevents the Company from performing its material obligations under this Agreement for a period in excess of three (3) days, The City may, in its sole discretion, by notice to the Company, terminate this Agreement forthwith, without any monetary obligation to the Company other than as set forth in Section 11.06.

Section 11.05 Termination for Uncontrollable Circumstances
If an Uncontrollable Circumstance shall have the effect of preventing performance of a material obligation of the Company for a period of thirty (30) days, the City, upon notice to the Company may, at its sole discretion, terminate this Agreement forthwith, notwithstanding that such Uncontrollable Circumstance may only be cured by the City’s procurement or implementation of a Capital Improvement which the City determines, in its sole discretion, not to procure or implement. Upon any such termination, the City shall have no monetary obligation to the Company except as provided in Section 11.06.

Section 11.06 Termination Transition

(a) Upon termination of the Company’s right to perform this Agreement pursuant to Section 11.01 or 11.02 hereof or upon the expiration of the term of this Agreement, the Company shall, as applicable:

(i) cease the provision of Services, as applicable;

(ii) promptly take all action as necessary to protect and preserve all materials, equipment, tools, facilities and other City property at the Wastewater Facility;

(iii) promptly remove from the Wastewater Facility all equipment, implements, machinery, tools, temporary facilities of any kind and other property owned or leased by the Company (including, but not limited to sheds, trailers, workshops and toilets) and repair any damage caused by such removal, and generally restore the Wastewater Facility to its configuration and condition as of the Commencement Date, reasonable wear and tear and Capital Expenditures expected.

(iv) clean the Wastewater Facility, and leave the same in a neat and orderly condition;

(v) promptly remove all employees of the Company and any Subcontractors and vacate the Wastewater Facility site;

(vi) promptly deliver to the City copies of all subcontractors, together with a statement of:

The items ordered and not yet delivered pursuant to each agreement;

• The expected delivery date of all such items;
• The total cost of each agreement and the terms of payment; and
• The estimated cost of cancelling each agreement;

(vii) deliver to the City promptly a list of:
• All special order items previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Wastewater Facility; and all other supplies, materials, machinery, equipment, and other property previously delivered or fabricated by the Company or any Subcontractor but not yet incorporated in the Wastewater Facility;

(viii) unless the City directs otherwise, terminate all Subcontractors and make no additional Agreement with Subcontractors;

(ix) promptly transfer to the City all warranties given by any manufacturer or Subcontractor with respect to particular components of the Wastewater Facility;

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

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

(b) Upon termination of or expiration of this Agreement, the Company shall provide, and shall use its best reasonable efforts to cause its Subcontractors to provide, technological and design advice and support to the City or any replacement operator designated by the City. Such advice and support shall be for a period of twelve (12) months and shall include providing any plans, drawings, renderings, blueprints, operating manuals, or other information
useful or necessary for the City or any replacement operator to perform services comparable to the Services. If this agreement is terminated by the City pursuant to Section 11.01 or 11.04 hereof, the Company shall be obligated to pay the costs and expenses of undertaking its post–termination responsibilities under this Section 11.06 or 11.05. The City shall pay on demand all reasonable costs thereof subject to receipt of invoices or other substantiation. If this Agreement is terminated by the Company pursuant to Section 11.03 or 11.05, the City shall pay to the Company’s invoice supported by Cost Substantiation all reasonable cost and expenses incurred by the Company in satisfying the requirements of this Section 11.06(b).

(c) Notwithstanding the foregoing provisions of this Section 11.06 to the contrary, if the City or the Company shall terminate this Agreement prior to the end of the initial ten (10) Year Term or any exercised five (5) year extension Term, the Company shall, for up to ninety (90) days after the actual termination date (as opposed to the notice of termination date) make fully available its managers and employees performing services at the Wastewater Facility to continue to perform the Services contemplated in this Agreement, or such lesser amount of Services as the City shall determine, in order to provide a smooth and orderly transition of the management, operations and maintenance of the Managed Assets to the City administrators, managers and personnel or, as applicable, the City’s successor contract operator; provided however, in no event shall such provision of services by the Company extend beyond the twentieth (20th) anniversary of the Commencement Date. The Company shall fully cooperate with the City to effectuate such a transition, including the provision of training and “know how” in the procedures and techniques employed by the Company in meeting its obligation under Section 4.01. The City shall determine the number of days, if any, not to exceed ninety (90) days, that the Company shall comply with this section 11.06(c).

(d) Notwithstanding the termination of this Agreement, the City shall compensate the Company for performing services requested pursuant to
Section 11.06 (c) in an amount equal to the Operation and Maintenance Fee calculated for the last full Billing Month immediately prior to the termination date; provided however, such Operation and Maintenance Fee shall (i) be calculated on the basis of a daily Operation and Maintenance Fee and (ii) shall be reduced on a pro rata basis to reflect the number of Company employees performing services on a daily basis. To the extent the Company incurs Pass Through Costs for such period, the City shall pay or, as applicable, reimburse such amount to the Company. The Company shall invoice the City for such Operation and Maintenance Fee and Pass Through Costs as calculated pursuant to this Section 11.06 (d) within fifteen (15) days after the end of each calendar month after the termination date, and the City shall pay to the Company the amount due and owing pursuant to this Section 11.06(d) within forty-five (45) days thereafter. The Company shall comply with the invoicing and date and information provisions of this Agreement in submitting any such invoice to the City.

(e) The Company recognizes and understands that the transition outlined in this Section 11.06 may well result in the City or any successor operator(s) designated by the City employing or attempting to employ some or all of the managers and/or personnel employed by the Company and performing services at the Managed Assets. The Company shall facilitate the transfer and employment of any manager(s) and/or personnel who may desire to be employed by the City or any successor operator designated by the City.

(f) All data and information collected, generated, prepared, or provided by the Company as required by or pursuant to this Agreement shall be and remain the property of the City and shall be turned over to the City within ten (10) days after the earlier to occur of the termination or expiration of this Agreement. The Company shall also transfer any and all computer software, hardware, licenses, source codes and other similar information to the City, at no cost to the City other than future license fees to third party licensors, upon the termination of this Agreement.
(g) The Company shall, upon the request of the City at the termination or expiration of this Agreement, promptly deliver to the City, at no cost or expense to the City, two copies of the then current Operation and Maintenance Plan. As built drawings shall be included in such manuals and such manuals shall incorporate such drawings as they occur.

(h) This Section 11.03 shall survive the termination of this Agreement.

Section 11.07 **Survival**

This Section XI shall survive the expiration or termination of this Agreement.

**ARTICLE XII**

**REPRESENTATIONS**

Section 12.01 **Representations of City.**

The City represents to the Company that:

(a) The City is duly organized and an existing entity under the laws of the Commonwealth of Massachusetts and is duly authorized to carry on the governmental functions and operations as contemplated by this Agreement.

(b) As of the Contract Date, the City has the power, authority and legal right to enter into and perform this Agreement and the execution, delivery and performance hereof by the City (i) have been duly authorized by the City, acting by and through its City Council and Mayor (ii) do not require any other approvals by any other governmental officer or body that has not been obtained, other than those permits or approvals that may have to be renewed or reissued during the term of this Agreement, (iii) do not require any consent or referendum of voters, (iv) will not violate any judgment, order, law or regulation applicable to the City and (v) do not constitute a
default under, or result in the creation of, any lien, charge, encumbrance or security interest upon any assets of the City under any agreement or instrument to which the City is a part or by which the City or its assets may be bound or affected.

(c) This Agreement has been duly entered into by the City and, as of the Contract Date, constitutes a legal, valid and binding obligation of the City, enforceable in accordance with its terms, subject to (1) applicable bankruptcy, reorganization, moratorium or similar laws affecting enforcement of creditors’ rights or remedies generally, (2) general equitable principles concerning remedies and (3) limitations on the enforceability of rights to indemnification by federal or State Laws or regulations or public policy.

(d) To the best of the City’s information and belief as of the Contract Date, there is no action, suit or proceeding, at law or in equity, before or by any court or governmental authority, pending or threatened against the City, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by the City of its obligation hereunder, or which, in any way, would adversely affect the validity or enforceability of the this Agreement, or any other agreement or instrument entered into by the City in connection with the transactions contemplated hereby.

Section 12.02 Representations of Company

The Company hereby represents to the City that:

(a) The Company is qualified to do business in the Commonwealth and is duly qualified to do business wherever necessary to carry on the business and operations contemplated by this Agreement.

(b) As of the Contract Date, the Company has the power, authority and legal right to enter into and perform its obligations set forth in this Agreement,
and the execution, delivery and performance hereof, (i) have been duly authorized, (ii) do not require the approval of any governmental office or body, that has not been obtained other than applicable permits or approvals that may have been renewed or reissued during the term of this Agreement, (iii) will not violate any judgment, order, law or regulation applicable to the Company or any provisions of the Company’s articles of incorporation and by-laws, and (iv) do not constitute a default under or result in the creation of, any lien, charge, encumbrance or security interest upon any assets of the Company under this agreement or instrument to which the Company is a party or by which the Company or its assets may be bound or affected.

(c) Since submittal of its proposal in response to the RFP, there has been no material adverse change in the Company’s or the Guarantors financial condition which would impair the Company’s ability to perform its obligation under this Agreement or the Guarantors ability to fulfill its obligation under the Guarantee.

(d) This Agreement has been duly entered into and delivered and constitutes a legal, valid and binding obligation of the Company, fully enforceable in accordance with its terms, subject to (1) applicable bankruptcy, reorganization, moratorium or similar laws affecting enforcement of creditors rights to remedies generally, (2) general equitable principles concerning remedies and (3) limitations on the enforceability of rights to indemnifications by Applicable Law or public policy.

(e) To the best of Company’s information and belief, as of the Contract Date, there is no action, suit or proceeding, at law or in equity, before or by any court or governmental authority, pending or, to the best of the Company’s knowledge, threatened against the Company, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance by the Company of its obligation hereunder, or which, in any way, would adversely affect the validity or enforceability of this Agreement,
or any other Agreement or instrument entered into by the Company in connection with the transaction contemplated hereby.

(f) As of the Contract Date, the Company’s proposal is genuine and not collusive, the Company has not colluded, conspired, or agreed directly or indirectly with any other proposer or person, firm or corporation, to fix the unit prices of its proposal or proposals of any other proposer or to secure any advantage against any person, firm or corporation interested in this Agreement, All statements contained in the Company’s proposal are true and correct.

Section 12.03 Materiality of Representations

The representations enumerated in Sections 12.01 and 12.02 are material for purposes of this Agreement.

ARTICLE XIII

MISCELLANEOUS

Section 13.01 Qualifying Management Contract

It is the intent of the parties that this Agreement qualify as a management contract complying with the provisions and requirements of the private activity limitations described in Section 141 of the Internal Revenue Code and regulations and official interpretations issued thereunder, including, without limitation, Revenue Procedure 2017-13, In the event that; in the reasonable determination of the City this Agreement is, or ceases to be, such a qualifying management
contract, the City reserves its rights, pursuant to and in accordance with Section 11.01 to modify or terminate this Agreement.

Section 13.02 Term

The Term of this Agreement (the term) shall commence on the Contract Date and shall terminate on the tenth (10th), fifteenth (15th), or twentieth (20th) anniversary of the Commencement Date, unless earlier terminated in accordance with the terms and conditions hereof, and depending on whether or not the City exercises its option to enter into the first and second 5-year extension period. On the ninth and fourteenth anniversaries of the Commencement Date, the City shall advise the Company in writing whether or not it will exercise its option to enter into a 5-year extension period for years 11 through 15, and years 16 through 20. The decision to enter into extension periods shall be at the City’s sole option and made in accordance with applicable procurement law at the time of renewal. During the extension periods, the Operation and Maintenance Fee shall continue to escalate pursuant to Schedule 5. The Company shall not be entitled to any other adjustments in the Operation and Maintenance Fee during the extension periods.

Section 13.03 Assignment.

This Agreement shall not be assigned by either Party without the prior written consent of the other Party, as evidence by or instrument in writing executed by its Authorized Representative; provided, however, that the Company may assign its interest without such consent to any Affiliate, successor or Parent of the Company if the Company shall remain liable for all obligations under this Agreement, and the Guarantor, pursuant to Guarantee, fully guarantees the performance of such assignees obligations under this Agreement. Additionally, the City may assign this Agreement, without the consent of the Company, to any
validly constituted agency or authority of the City or the Commonwealth or a duly created public corporation or authority.

Section 13.04 Subcontractors.

(a) The City shall have the right, in its sole discretion, to approve all Subcontractors proposed to be engaged by the Company to perform any portion of the Services. The Company shall furnish the City written notice of its intention to engage any Subcontractor, together with all material information requested by the City or otherwise available to the Company. In the event the City fails to respond to any such notice of intention within twenty (20) days of receipt thereof, the City shall be deemed to have approved the proposed Subcontractor. The approval or withholding thereof by the City of any proposed Subcontractor shall not create any liability of the City to the Company, to third parties or otherwise in no event shall any subcontract be awarded to any person who, under Applicable Law and in accordance with standard procedures, is debarred, suspended or disqualified by the Commonwealth or the City from contracting any services within the scope of the Services between the City and the Company, the Company shall be entirely responsible for the performance of its Subcontractors. The Company shall pay or cause to be paid all direct Subcontractors all amounts due in accordance with their respective Subcontractors. No Subcontractor shall have any right against the City by virtue of this Agreement for labor, services, materials or equipment furnished. The Company acknowledges that its indemnity obligations under Section 7.01 hereof shall extend to all claims for payment or damages by any Subcontractor who furnishes or claims to have furnished any labor, services, materials or equipment in connection with the Services.

(b) The Company shall take all reasonable actions to encourage minority-owned business enterprises and women-owned business enterprises to
compete for portions of the Services that are proposed to be subcontracted by the Company.

Section 13.05 Further Assurances

Each Party agrees to execute and deliver any instruments and to perform any acts that may be necessary or reasonably requested in order to give full effect to this Agreement. The City shall, and shall use all reasonable efforts to provide such information, execute such further instruments and documents and take such action as may be reasonably requested by the Company and not inconsistent with the provisions of this Agreement and not involving the assumption of obligations other than those provided for in this Agreement to carry out the intent of this Agreement.

Section 13.06 Relationship of the Parties

Except as otherwise explicitly provided herein, neither Party to this Agreement shall have any responsibility whatsoever with respect to services provided or contractual obligations assumed by any other Party and nothing in this Agreement shall be deemed to constitute any Party a partner, agent, employee or legal representative of any other Party or to create any fiduciary relationship between or among the Parties. The Parties agree that the Company has entered into this agreement and shall be performing the services contemplated herein as an independent contractor.
Section 13.07 Notices and Authorized Representatives

(a) Any notices or communication required or permitted hereunder shall be in writing and sufficiently given if delivered in person or sent by certified or registered mail; postage prepaid, as follows:

To The Company:

With a copy to:

To the City:

Commissioner

New Bedford Department of Public Infrastructure

1105 Shawmut Avenue

New Bedford, Ma 02746

Changes in the respective addresses to which such notices may be directed may be made from time to time by any Party by written notice to the other Party.

(b) For purposes of this Agreement, the Parties respective Authorized Representatives are as follows:

For Company:

For City: Jonathan F. Mitchell, Mayor
Either Party may change its Authorized Representative at any time by written notice to the other Party.

Section 13.08 Waiver

The waiver by either Party of a default or a breach of any provision of this Agreement by the other Party shall not operate or be construed to operate as a waiver of any subsequent default or breach. The making or the acceptance of a payment by either Party with knowledge of the existence of a default or breach shall not operate or be construed to operate as a waiver of such default or breach.

Section 13.09 Entire Agreement: Modifications and Amendments

The provisions of this Agreement, including the present and all future Schedules, shall (a) constitute the entire Agreement between the Parties for the operation, maintenance and management of the Wastewater Facility and supersedes any negotiation, proposal or Agreement prior to the date of this Agreement, there being no agreements or understandings other than those written or specified herein, and (b) unless otherwise specifically recognized in this Agreement, shall not be modified or amended except by written agreement duly entered into and executed by the Authorized Representatives of the Parties with the same formality as this Agreement.

Section 13.10 Headings

Captions and headings and the Table of Contents in this Agreement are for ease of reference only and do not constitute a part of this Agreement.

Section 13.11 Governing Law
This Agreement and any questions concerning its validity, construction or performance shall be governed by the Law of the Commonwealth of Massachusetts, irrespective of the place of execution or of the order in which the signatures of the Parties are affixed or of the place or places of performance.

Section 13.12 Counterparts

This Agreement may be executed in more than one counterpart, each of which shall be deemed to be an original.

Section 13.13 Severability

In the event that any provisions of this Agreement shall, for any reason, be determined to be invalid, illegal, or unenforceable in any respect, the Parties hereto shall negotiate in good faith and agree such amendments, modifications, or supplements of or to this Agreement or such other appropriate actions as shall, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the Parties as reflected herein, and the other provisions of this Agreement shall, as so amended, modified, supplemented, or otherwise affected by such action, remain in full force and effect.

Section 13.14 Interest on Overdue Payments

All payments to be made under this Agreement by either Party outstanding after the applicable due date shall bear simple interest at the maximum rate permitted by State Law, if applicable, or at the prevailing prime rate of interest published from time to time in the Wall Street Journal, whichever rate is lower.

Section 13.15 Payment Disputes

If any Party shall dispute an amount owing to the other Party, such Party shall give notice to the other Party of such disputed amount together with sufficient information to allow the other Party to understand the nature of the dispute and shall pay all undisputed amounts on the due date. Interest at the rate specified in Section 13.14 shall accrue from the original due date on disputed amounts, or the
portions thereof, to the Party which is ultimately determined to be entitled to such disputed amount, or any portions of such disputed amounts.

Section 13.16 No Liability of Officers and Employees

No member of the City’s City Council nor any officer, agent, representative or employee of either Party shall be charged personally by the other or held contractually liable thereto under any term or provisions of this Agreement, because of either Party’s execution or attempted execution or because of any breach or alleged breach thereof; provided, however, that all Persons remain responsible for any of their own criminal actions.

Section 13.17 No Pledge of Credit

The Company shall not pledge the City’s credit or make it a guarantor of payment or surety for any contract, debt, obligation, judgment, lien or any other form of indebtedness. The Company further warrants and represents that it has no obligation or indebtedness. The Company further warrants and represents that it has no obligation or indebtedness that would impair its ability to fulfill the terms of this Agreement.

<table>
<thead>
<tr>
<th>(Type in Consultant/Vendor)</th>
<th>City of New Bedford, Massachusetts</th>
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</thead>
<tbody>
<tr>
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<tr>
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<tr>
<td>By: Robert Ekstrom</td>
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<tr>
<td>Title: Auditor</td>
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<tr>
<td>By: Jamie Ponte</td>
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<th>Chief Financial Office</th>
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<tr>
<td>APPROVED as to Form and Legality</td>
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<tr>
<td>By: Elizabeth Lydon</td>
</tr>
<tr>
<td>Title: Associate City Solicitor</td>
</tr>
<tr>
<td>By: Ari Sky</td>
</tr>
<tr>
<td>Title: Chief Financial Officer</td>
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<tbody>
<tr>
<td>By: Molly Gilfeather</td>
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<tr>
<td>Title: Director of Purchasing</td>
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PERFORMANCE STANDARDS AND GUARANTEES

WASTEWATER TREATMENT REQUIREMENTS

The Company shall operate and maintain the Wastewater Facility in accordance with Applicable Law pertaining to wastewater treatment. The Wastewater Facility influent characteristics are identified in Table S1-1 below. The Operation and Maintenance Fee reflects that these characteristics are subject to ± 10% changes, and variance within such 10% range shall not be the basis of any adjustment to the Operation and Maintenance Fee. In addition, the Company shall operate the Wastewater Facility to be in compliance with the specific performance standards outlined in the Agreement and Schedules to the Agreement, including the performance standards and guarantees set forth within this Schedule 1. Specific compliance parameters with respect to effluent quality from the Wastewater Facility are included in Table S1-2. All analytical methods used to demonstrate compliance with these standards shall be according to methods approved by the City and DEP.

TABLE S1-1
WASTEWATER SYSTEM INFUENT

<table>
<thead>
<tr>
<th>Parameter</th>
<th>Influent Characteristics</th>
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<tr>
<td>BOD5, mg/l</td>
<td>350</td>
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<tr>
<td>TSS, mg/l</td>
<td>230</td>
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<tr>
<td>Annual Average Flow (mgd)</td>
<td>21.9</td>
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<td>Peak Flow (mgd)</td>
<td>75(1)</td>
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TABLE S1-2
WASTEWATER SYSTEM STANDARDS

<table>
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<tr>
<th>Parameter</th>
<th>NPDES PERMIT LIMIT Average monthly</th>
<th>Contract Limit Average Monthly</th>
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</thead>
<tbody>
<tr>
<td>CBOD, mg/l</td>
<td>25</td>
<td>20</td>
</tr>
<tr>
<td>TSS, mg/l</td>
<td>30</td>
<td>20</td>
</tr>
</tbody>
</table>

(1) The Wastewater Facility has an automatic peak flow regulator at the influent set at 75 mgd.
SCHEDULE 2

OPERATIONS AND MAINTENANCE STANDARDS

2.1 REQUIRED SERVICES

2.1.1 Wastewater Treatment Plant

The Company shall perform the Services in a professional, efficient and economical manner and in accordance with the terms and provisions set forth in the Agreement and in compliance with Applicable Law and generally accepted practices, procedures and standards for municipal wastewater treatment facilities. The Company shall, at all times, keep the Wastewater Facility in good repair and working order. The Company shall provide uninterrupted Services and perform Services twenty-four (24) hours per day, seven (7) days per week.

Operational decision making shall always be based on the following overall objectives (not listed according to priority):

- Compliance with Applicable Law
- Protection of health and welfare of the public
- Protection of the health and safety of the operating staff
- Preservation of the long-term capability to supply wastewater services
- Protection of the environment
- Protection and preservation of the Equipment and other components of the Wastewater Facility
- Maximization of operational efficiency and minimization of operational costs
- Achievement of the “zero tolerance” program objectives for odor control and noise at the Wastewater Facility.

2.1.1 Pumping Stations

The Contract Operator will be responsible for managing, operating and maintain the City’s pumping stations as set forth in Table X.

Table X identifies the pumping stations that are included in the Managed Assets.
The pumping stations shall be operated in accordance with the following objectives:

- Compliance with Applicable Law
- Protection of health and welfare of the public
- Protection of the health and safety of the operating staff
- Preservation of the long-term capability to supply wastewater services
- Protection of the environment
- Protection and preservation of the Equipment and other components of the pumping stations
- Maximization of operational efficiency and minimization of operational costs
- Achievement of the “zero tolerance” program objectives for odor control and noise at the pumping stations.

### 2.2 OPERATIONS AND MAINTENANCE

On and after the Commencement Date and through the term of the Agreement, the Company shall manage, operate and maintain the Managed Assets in accordance with the Agreement and the requirements set forth in this Schedule 2. The Company shall operate the Managed Assets to convey and process domestic raw sewage, commercial and industrial wastewater, and any future influent allowed by the City in accordance with the NPDES Permit, the Consent Decree, the Administrative Order and the terms and provisions of this Agreement. The Company shall comply with the requirements of 314 CMR 12 (Operations and Maintenance of Sewer Systems and Maintenance of Sewer Systems and
Wastewater Treatment Facilities) as applicable, and the policies of the Board of Certification of Operators of Wastewater Treatment Facilities.

The Company shall maintain the Managed Assets in good working order and repair and in a neat and orderly condition (including the cleanup of litter and debris on a daily basis or more frequently as required). The Company shall maintain the aesthetic quality of the Facility as originally constructed and subsequently modified, with due allowance for reasonable wear and tear and depreciation. The Company shall perform all predictive, preventative and corrective maintenance procedures in accordance with Applicable Law, and generally accepted industry maintenance practices, procedures and standards for municipal wastewater treatment facilities, but in no event less frequently and comprehensively than that recommended or specified in manufactures warranties on new Equipment purchased pursuant to this Agreement, and shall fully cooperate and assist the City, at the Company’s sole cost and expense, in enforcing existing equipment warranties and guaranties relative to the Wastewater Facility.

The Company shall develop and implement, making use of the existing City-owned computer hardware and software at the Wastewater Facility to the extent determined to be appropriate by the Company, a comprehensive computer-based maintenance management program that develops readily available historical data, including an inventory of spare parts and provisions for enforcing existing equipment warranties and guarantees and maintaining all warranties on new equipment purchased after the Commencement of Operations. The Company shall implement such a maintenance management program to include preventative, predictive, and corrective maintenance for all components of the Managed Assets, including but not limited to:

- Buildings and structures
- Electrical systems and instrumentation
- Mechanical equipment
- Odor control systems
- Rolling Stock
• Laboratory, monitoring and sampling equipment
• Heating, ventilation, and air conditioning
• Communication equipment (i.e. telephones, facsimiles, etc)
• Computer systems
• Chemical feed systems
• Pumping Systems
• Auxiliary power facilities
• Air pollution control
• SCADA facilities
• Other facilities and Systems contained within the Managed Assets
• Other specialized tools and equipment

The Company shall document its maintenance program in a computerized maintenance management system that the City shall have direct and complete access to the program. For the Wastewater Treatment Plant, the Company shall provide an appropriate package and incorporate the approved maintenance program within that package (Although the city would prefer the use of Lucity which it currently uses for all city assets) At contract completion/termination, the Company shall convey the CMMS package to the City for its continued use. This shall include licenses, maintenance agreements and all similar instruments. For the pumping stations included in the Managed Assets, the Company shall use the City’s existing Lucity system that has been populated with the pumping stations.

The Company shall perform maintenance of the Wastewater Facility to preserve long-term reliability and conservation of the Wastewater Facility. Such maintenance shall be performed in accordance with the terms and provisions of this Agreement, the Company’s Operation and Maintenance Plan, routine maintenance schedule, federal, State and local requirements,
and industry standards. The Company shall maintain documentation of all maintenance activities.

The subsequent sections set forth requirements for the operation and maintenance for the major Wastewater Facility components. The sections below are intended to address the major activities required. The following sections, however, are not intended to include all specific activities that are necessary for meeting the performance requirements set forth in this Agreement and the Schedules hereto.

2.2.1 WASTEWATER TREATMENT FACILITY
The Company shall operate, maintain and manage the Wastewater Facility in accordance with this Agreement. The Company is responsible for ensuring that the effluent discharged from the Wastewater Facility complies with Applicable Law and within the standards set forth in the Agreement. Accordingly, the Company is responsible for reviewing historical City data including flow, concentration and loading variations (i.e. instantaneous, hourly, daily, monthly, and yearly.) The Company is responsible for monitoring and maintaining the balance of the HVAC system throughout the Wastewater Facility. The Company is responsible for reviewing all available information about the Wastewater Facility and should not rely solely on the information presented.

SOLIDS HANDLING
The Company shall deliver all Wastewater Sludge to the containers specified for usage by Synagro or any Successor Wastewater Sludge Contractor designated by the City. The Company shall be responsible for guaranteeing that the Wastewater Sludge delivered complies with the requirements, (i.e. quantity characteristics of sludge, percent solids) of the City’s contract with Synagro dated October 1, 2016. The Company shall deliver liquid Wastewater Sludge to Synagro’s tanker trucks at the loading
dock or sludge cake to the container in the sludge loadout facilities with the outside doors closed. The Company shall take a sludge sample for each tanker while it’s loading and split the sample with the driver. The Company shall keep good records of solid percentage. The Company shall coordinate its management of Wastewater Sludge handling Facilities with Synagro or its successors, as the case may be, to minimize costs to the City for Wastewater Sludge disposal.

SEPTAGE RECEIPT
The City does receive septage at the Septage Receiving Facility located on Shawmut Avenue and delivers such septage to the Wastewater Facility for processing by the Company as a component of the Services. The Company is not authorized to make separate arrangements for receipt septage. Any receipt of septage will be at the sole discretion of the City and shall be coordinated with the Company. The Company shall except septic waste from campers at the designated receiving station within the plant, (Monday – Friday, 7:30am to 2:30pm of all recreational vehicles as directed by the city. A sign in log should be kept on file of all vehicles.

GRIT AND SCREENING HANDLING
The Company shall deliver grit and screenings to the dumpster/container located in the headworks building on the Wastewater Facility. Within a reasonable time frame, the Company shall notify the City when the dumpster/container will reach capacity. Upon notification by the Company, the City shall remove the grit and screenings dumpster/container from the headworks building and replace the dumpster/container.

SOLID WASTE MANAGEMENT
The Company shall deliver all collected solid waste to the designated solid waste dumpsters located on the Wastewater Facility Site and shall notify the City within a reasonable time of when any such dumpster will reach capacity. The City shall be responsible for removing any filled dumpster and replace it with another.

**ODOR CONTROL FACILITIES**
The Company shall be responsible for the continuous operation and maintenance of odor control Equipment in accordance with established operating performance criteria for the various systems and equipment. The Company shall operate such Equipment consistent with the “zero tolerance” program objectives for odor control, except for periods of preventative or emergency maintenance or for reduction of noise. The Company shall be responsible for optimizing the operation of the existing and future odor control system so that it performs to its designed capacity and capability.

The Company shall control all noise and odors generated from within the Wastewater Facility and will be responsible for complying with air quality permit requirements. The Company shall develop a “zero odor tolerance” control program including procedures for responding to each complaint and notification to the City of odor complaints and their resolution, and documentation of such complaints. Such program shall be fully described in a monthly report submitted to the City. Specifically, the Company shall perform the following:

- Implementation of the recommendations contained in the “zero odor tolerance” program
- Regular monitoring of odor control system performance
- On-site and off-site surveys by plant staff
- Development of a 24 hour per day odor hotline to be staffed at all times
- Development of contingency plans for controlling odors in the event of mechanical failure or process upset
- Training for mechanical ventilation and scrubber systems
- Housekeeping, preventative maintenance, and other standard operating procedures related to odor reduction
- Development of a written complaint response procedure that would include the following elements: complaint name and address, time of day, weather conditions including wind speed and direction, odor description, duration of episode, and follow-up by plant staff.

The Company shall notify the City immediately regarding any significant or unusual circumstances effecting the operation of the Wastewater Facility. The Company shall obtain City approval prior to significant operational changes that could be reasonably foreseen to effect odor emissions.

2.2.2 PUMPING STATIONS

The Company shall operate, maintain and manage the Pumping Stations in accordance with this Agreement. The Company is responsible for ensuring that the operations complies with Applicable Law, minimizes system overflows and within the standards set forth in the Agreement.

The Contract Operator shall perform all routine, preventative, predictive and ongoing maintenance of the Pumping Stations such that the facility and structures be maintained at a level adequate for the efficient, long-term reliability and preservation of the capital investment, including maintaining the building in an aesthetically attractive and clean condition. The Contract Operator shall maintain all operational equipment and meter systems in a serviceable condition maximizing their life and functional purpose.

The Contract Operator shall maintain the Pumping Stations and the sites in good working order and repair in a neat and orderly condition. This includes grounds maintenance and snow removal from walkways (City will maintain plowable
Such maintenance shall be in accordance with the Operation and Maintenance Plan. The Contract Operator shall provide or make provisions for all labor, materials, and equipment necessary for the normal operation and maintenance of the facilities, including the required predictive and preventive maintenance requirements of the Operation and Maintenance Plan.

### 2.2.3 ANALYTICAL SERVICES

The Company shall perform testing, sampling and any other analytical procedures to demonstrate compliance with its obligations under the Agreement, applicable regulatory requirements, and Permit provisions. Such testing shall include, but not be limited to, influent and effluent analytical testing, metals analysis and sludge cake analysis. The Company shall perform all applicable testing related to process control and wastewater monitoring. The Company shall be responsible and liable for conducting all necessary analyses whether the analyses are conducted at the on-site laboratory, at an offsite laboratory operated by the Company, or through a subcontracted service. Any subcontracted laboratory must be appropriately certified to perform the required analyses subject to approval by the City in accordance with Section 13.04 of the Agreement. The Company shall prepare the data received from the testing laboratory for all applicable regulatory, Permit monitoring, and operating reports and shall forward the results from the laboratory to the appropriate State and regulatory agencies.

### 2.2.4 EQUIPMENT AND CHEMICALS

The Company shall keep all equipment in good operating condition and maintain adequate Equipment and spare parts in inventory in order to facilitate maintenance and repairs not constituting Capital Expenditures, in a timely fashion so as not to disrupt the operation of the Managed Assets. Any such repairs, shall, at a minimum, meet the specifications provided for Managed Assets plans and specifications.

The Company shall operate all used or useful Equipment, including Equipment placed in service, and perform all tests and testing as may be required or
recommended pursuant to applicable warranties, commercial or industrial standards and Applicable Law. The Company shall make reasonable efforts to enforce, on behalf of the City, all warranties or agreements related to existing Equipment, materials and services that are at the Managed Assets as of the Commencement Date, as well as any replacements thereof or additions thereto. The Company shall make reasonable efforts to obtain extensions of warranties or agreements, as appropriate. The Company shall be responsible for promptly notifying the City in the event of any Equipment failure that necessitates or may necessitate a Capital Expenditure.

All Equipment, with the exception of Rolling Stock, and chemicals provided by the City or the Company on or after the Contract Date, including any Equipment and chemicals on order by the Company or the City for the Managed Assets, shall be deemed to be owned by the City and shall remain a part of the Managed Assets upon termination or expiration of this Agreement. All such Equipment including Rolling Stock shall be in good operating condition, subject to normal wear and tear. Equipment and chemicals provided or to be provided by the Company pursuant to the provisions of this Agreement shall be restricted to the Company’s use as necessary in performance of its obligations under this Agreement.

2.2.5 BUILDINGS AND GROUNDS SERVICES

The Company shall provide for maintenance and repair of landscaping and roadways associated within the Wastewater Facility site, including snow removal, in accordance with Section 4.02(g) of the Agreement.

The Company shall perform Services to maintain the current condition of the Wastewater Facility throughout the Term of the Agreement, reasonable wear and tear expected, and at a level adequate for the efficient, long-term reliability and preservation of the capital investment. The Contractor Operator shall at a minimum perform the following maintenance activities relevant to the buildings and grounds:

a. Wash all windows twice a year or more frequently on an as needed basis.
b. Repair all roof leaks within 10 days of discovery.

c. Implement regularly scheduled pest control measures.

d. Repair all plumbing leaks and failures immediately.

e. Damp mop all floors twice per week or more frequently on an as needed basis with a cleaning solution appropriate for use in such facilities. All spills are to be immediately cleaned.

f. Strip all floors and apply new floor finish annually or as often as necessary to maintain the aesthetics of the facility.

g. Apply floor finish to the extent necessary to maintain appearance and safety standards.

h. Wash down wall tiles and clean all other walls every sixth Billing Month commencing with the first Billing Month of this Agreement.

i. Apply paint as necessary and appropriate, but at a minimum of every 5 years all painted surfaces will be repainted.

j. Clean offices and restrooms Monday through Friday.

k. Provide daily collection services for solid waste and other disposable items generated by the Wastewater Facility during performance of Services. A central location(s) shall be provided for storage. All solid waste shall be made available to the City for disposal on at least a weekly basis, in accordance with Section 2.2.1 of this Schedule 2.

l. Plow snow from all roadways leading to and within the Wastewater Facility beginning at the entrance in Fort Taber Park where sign to plant is located.

m. Shovel all sidewalks to maintain access to the Wastewater Facility free of ice and snow.
n. Vacuum all carpeted areas on a weekly basis, shampoo all rugs/carpeted areas twice per year or more frequently on an as-needed basis.

o. Maintain all landscaping of grounds within the fenced area of the Wastewater Facility including grass cutting, weeding, and trimming of vegetation.

2.2.6 UTILITIES

As part of the Commencement Date, the Company shall be responsible for obtaining, supplying and paying for all utilities including but not limited to natural gas, heating, fuel oil, telephone and water. The cost for electricity shall be a Pass through Cost up to the maximum usage limits more particularly described in Schedule 7.

2.2.7 INDUSTRIAL PRETREATMENT PROGRAM

The Company shall coordinate with the designated person responsible for the City’s Industrial Pretreatment Program and shall notify the City promptly if it becomes aware of any known and/or suspected illegal discharges.

2.3 STAFFING REQUIREMENTS

The Company shall staff the Managed Facilities consistent with its staffing plan provided as part of its proposal and approved by the City. This proposal should include city’s required management team. If the Contract Operator does not comply with the terms of its approved staffing plan for a period of 60 calendar days, the Contract Operator shall reimburse the City for the full cost (wages and related overhead costs) for all such short falls.

2.4 OPERATION AND MAINTENANCE COSTS

As set forth in Section 4.01 (b) of the Agreement, the Company shall provide, at its sole cost and expense, all labor, materials, machinery, vehicles, equipment,
office equipment (i.e. copiers, computers, etc.) fuel, chemicals, supplies, materials, spare parts, expendables, consumables, testing and laboratory analysis, and any items required for the Services, in accordance with the terms and provisions of the Agreement.

2.4 OPERATIONS REVIEW

The City will actively participate in review of Services performed by the Company and any Subcontractor throughout the term of the Agreement.

2.4.1 MONTHLY OPERATING REPORTS

The Company shall prepare Monthly operating Reports regarding the Services for submission to DEP and EPA, as applicable. The Monthly Operating Reports shall be prepared on or before the 10th date of each Billing Month for the previous Billing Month. The Monthly Operating Reports shall be submitted to the City for review and comment prior to submission to the DEP and EPA, as applicable. The Company shall prepare the Monthly Operating Reports in a format subject to approval by the City and DEP. Each Monthly Operating Reports shall include data pertaining to performance, including analysis of permit requirements, flows and any other information required by the applicable regulatory agencies. The Monthly Operating Reports shall also include a description of maintenance activities and emergency services performed during the previous month. The Company shall include the following categories of information in the Monthly Operating Reports:

- EPA’s monthly Discharge Monitoring Report (DMR) requirements (i.e. flow (MGD) high flow diversion, primary sludge, aeration tanks, return sludge, waste sludge, solids, chlorine dosage, chlorine residual, fecal coliform, settled solids, BOD, COD, suspended solids, turbidity, temperature, PH, Wastewater Facility Effluent)
- An accounting of all expenses from the prior month
- Nitrogen data
- The number of samples collected and analyzed for each reportable parameter
- Electrical usage
- Itemized listing of materials, chemicals and supplies used
- Insurance claims filed or pending disposition
- All correspondence, citations, notices, directives or similar information received from any federal, State or local government regulatory agencies having jurisdiction over management, operations, maintenance or ownership of the Managed Assets not otherwise provided to the City by the Company
- Transaction records, data and information arranged or performed by the Company, or for the benefit of the City or the Company, relative to the Managed Assets
- Report of all citizen calls and responses
- Report of all Citizen complaints and actions taken with respect to each such complaint
- Report describing compliance of the Managed Assets with Enhanced Wastewater Standards and Applicable Law, including a summary table of violations
- Summary of preventative maintenance performed
- Summary of unscheduled repairs and action taken
- Summary of scheduled inspections and repairs and action taken or postponed
- Explanations for unscheduled repairs and postponements of repairs
- Information on utility outages
- The results of safety tests or other monitoring procedures conducted by staff or any governmental body

2.4.2 SYSTEM INSPECTIONS

The City or its authorized agents and representatives from the governing regulatory agency (EPA, DEP) reserve the right to visit or inspect the Managed Assets at any time. The City or its authorized agents and representatives may call upon the Company at any time for an oral review of any matter pertaining to the Services.
The City or its authorized agents and representatives shall perform an annual inspection of the Managed Assets which shall be scheduled at a time mutually acceptable to the Company and the City and their authorized agents or representatives but in no event later than sixty (60) days after the close of each Billing Year. The purpose of this annual inspection is to verify that Services are being properly performed in accordance with this Agreement. At least two weeks prior to the annual inspection, the Company shall submit to the City three copies of the Company’s annual Operation and Maintenance Report. This report shall include detailed information about the completed years operation and maintenance of the Managed Assets and current conditions of the Managed Assets.

In the event that any such inspections reveal work not in accordance with the Agreement or a lack of necessary maintenance or repairs (other than reports necessitating Capital Expenditures) at the Managed Facilities, the City or its authorized agent shall identify such items in writing to the Company. The Company shall perform the repairs and maintenance activities identified by the City on a mutually agreeable schedule.

The Company shall maintain and make available to the City upon request, all records of operating data and information relevant to the Managed Facilities, including accounting and financial records. The Company shall provide the City access to all such records upon request.

### 2.4.3 OPERATIONS RECORDS

The Company shall maintain a computerized record keeping system for all operation and maintenance functions performed. Records shall include, but not limited to, records of operations, operation and maintenance costs, maintenance procedures, emergency incidents, personnel, and inventory (equipment and chemicals) Records shall be maintained as required by the Consent Decree, and other Applicable Law. Such records shall include, but not limited to, process evaluation and modification; operating and maintenance activities detailed costs for operations and maintenance; and monthly and annual reports in a format reasonably requested by the City. The City shall have the right to inspect these records upon reasonable notice.
2.4.4 MEETINGS

The City and the Company shall cause their Authorized Representatives or their designees to meet on a monthly basis to discuss performance of the Services, maintenance issues, Equipment conditions, environmental and permit compliance, public relations, and other relevant issues. Minutes of these meetings shall be prepared by the Company and shall be distributed to all attendees. Representatives of the Company shall also be made available to attend and participate in any neighborhood and other community meetings (i.e. City Council, neighborhood civic groups) at the request of the City.

2.4.5 AUDIT

The City shall be responsible for all Capital Expenditures over the term of the Agreement pursuant to the terms and conditions of the Agreement. Within six months of the Commencement Date, the Contract Operator shall hire an Independent Engineer, approved by the City. The Independent Engineer shall conduct a complete Wastewater Facility assessment to determine the base line condition of the Wastewater Facility. Periodically, but in any event within sixty (60) days after the close of the fourth (4th), ninth (9th), fourteenth (14th) and nineteenth (19) Billing Years during the Term a comparable assessment in accordance with the requirements of this Section 2.4.5 shall be conducted. The cost of the services provided by the Independent Engineer shall be paid by the Contractor.

The Independent Engineer will conduct a detailed, comprehensive survey and inspection of the Wastewater Facility and the Pumping Stations to identify the physical and operational conditions and general status of maintenance and repair of all equipment buildings, structures, pavements, grounds, utility lines and system, spare parts inventories, operation and maintenance records, etc. The Independent Engineer shall prepare a detailed report documenting findings of the audit. The Report will include an assessment of the current condition of each item or component, its estimated remaining service life, and whether the current condition is consistent with the maintenance and general upkeep requirements of the Agreement and expected normal wear and tear. An estimated cost for repair,
renewal or replacement will be included for each item or component which is judged deficient. Estimates will include a reasonable contingency allowance that will vary depending on the nature of the work required.

A draft version of the Independent Engineers report will be provided to the City for review and comment, In the case of disagreement between the City and Company as to the appraised condition of items or portions of the Wastewater Facility, or estimated cost for repair, renewal, or replacement, the Independent Engineer will make the final decision.

If the findings contained in the final Independent Engineer’s report indicate that any deficiency in any part of the Managed Assets is attributed to the failure of the Company to perform predictive, preventative or corrective maintenance, or repairs not necessitating Capital Expenditures in accordance with the requirements of this Agreement, the Company, subject to the provisions of Applicable Law governing public procurement, shall be given the option to make any indicated repair renewal, or replacement, which shall be subject to inspection and approval by the Independent Engineer, or alternatively, shall reimburse the City the cost of repair renewal or replacement as set forth in the Independent Engineer’s report. Satisfactory rectification of deficiencies shall be a requirement on a timely basis, subject to the termination provisions of the Agreement for failure to rectify such deficiencies.

**2.5 OPERATION AND MAINTENANCE PLAN**

The Company shall prepare and submit to the City for review and comment a comprehensive Operation and Maintenance Plan within one hundred twenty (120) days after the Commencement Date. The Operation and Maintenance Plan shall specify all procedures and tests to be conducted for the performance of the Services, inclusive of all facilities and equipment, throughout the Agreement. The Operation and Maintenance Plan shall be a comprehensive manual organized into separate sections addressing each of the unit process involved. The overall system operation and control, auxiliary system equipment and systems, and grounds and building maintenance for which Company is responsible shall reflect, at a minimum, generally
accepted or recommended industry maintenance practices, procedures and standards for municipal wastewater facilities. At a minimum, this Operation and Maintenance Plan shall include the following:

a. Schedule of expected shutdowns for routine maintenance
b. Emergency plan of operation, including on-call back up capability.
c. Copies of all permits, licenses, and other regulatory documents obtained for Company’s services, if not previously submitted
d. Staffing plan showing a breakdown by staff classification of all personnel to be utilized during operations and maintenance
e. Maintenance Schedule for the Wastewater Facility
f. Anticipated Capital Expenditures renewal and replacement plan for the Wastewater Facility over the Term of the Agreement
g. Operations procedures for all major Equipment within the Wastewater Facility during normal, alternate, and emergency operation modes.
h. List of equipment and system manufacturers/suppliers Operation and Maintenance Manuals
i. Forms and checklists to be used to monitor Equipment and process system operation and preventative maintenance
j. Monitoring and reporting requirements
k. A schedule for updating to the Operation and Maintenance Plan.

Each separate unit process, auxiliary system processes and grounds/building sections of the Operation and Maintenance Plan shall include a detailed written explanation of the following:

- The process or system including its key components
- The system function including its purpose and normal operating parameters
- Equipment summary including nameplate data, supplier/local representatives, and manufacturer
- Description of instrumentation and control system, including an alarm summary
- Description of normal system operations including startup and shutdown, adjustment of variable functions and settings, interface with
other Wastewater Facility Systems, routine monitoring checklists and record keeping forms.

- Emergency system operations including procedures to be followed in the event of probable plant upset conditions such as temporary power outages, chemical spills, localized or area-wide flooding etc.
- Maintenance, including predicative and preventative maintenance for: process functions such as cleaning and hose down, flushing and inspection; mechanical functions such as changing lubricating fluids and filters, checking rotating equipment balance, and changing valve seals and packing; electrical functions such as checking tightness of wiring terminal connections, exercising breakers, and recalibrating meters; instrument and control functions such as sensor calibration, and structural maintenance such as crack repairs and restoration of surface corrosion protection systems.
- Trouble shooting system malfunctions
- Safety and emergency procedures.

The City will review the Draft Operation and Maintenance Plan and return one marked-up copy with comments and within thirty (30) days of the initial submittal. The Company shall submit five copies of a final version of the Operation and Maintenance Plan addressing the City’s comments within sixty (60) days following the return of the draft. Neither the review of or comment on, nor failure of the City to comment on, the draft Operation and Maintenance Plan or any modification thereto, shall relieve the Company of any of its responsibilities under the Agreement, be deemed to constitute a representation by the City that operation of the Wastewater Facility pursuant to the Operation and Maintenance Plan will cause the Wastewater Facility to be in compliance with this Agreement or Applicable Law, or otherwise impose any liability upon the City.

The Operation and Maintenance Plan shall dedicate a separate section to detail the Company’s maintenance and repair program. Such program shall contain a detailed description of and maintenance repair activities which would be required to be performed by the Company over the Term of the Agreement to maintain
operability, durability and reliability of the Wastewater Facility which are necessary to achieve such standard of repair by performing all such listed activities within time frame indicated in the Operation and Maintenance Plan.

2.6 CONTINUOUS OPERATION

The Company shall operate the Wastewater Facility on a continuous basis, twenty-four hours a day, seven days a week, in accordance with the terms and provisions of this Agreement, and in compliance with Applicable Law.

2.7 SAFETY AND SECURITY

The Company shall provide for and maintain security of all facilities and structures associated with performance of Services at the Wastewater Facility. The Company shall develop and submit to the City a Safety and Security Plan within forty-five (45) days after the Commencement Date. The Company shall be responsible and obligated to enforce all safety, security and health laws, rules, regulations, and/or procedures. The Company shall implement an in-house safety program, including, but not limited to, operations, maintenance, safety, management, chemical handling, confined space entry, emergency response, and safety equipment use. Any and all persons entering the Managed Assets shall be identified and provide appropriate documentation of authorization to have such access, The Company is responsible for providing the appropriate procedures to maintain a log of any and all persons accessing the Wastewater Facility.

The Company shall appoint a Safety Committee. The Safety Committee shall file a copy of any safety recommendation and accident reports. As part of its safety program, the Company shall institute safety standards including a safety information system, regional and corporate specialties, centralized safety equipment procurement system, degreed hazardous materials personnel, a safety information library and a computerized safety equipment preventative maintenance program.

Fences shall be maintained in neat order and structural integrity. Gates, access, points, and doors to the facilities and structures at the Wastewater Facility shall
be kept locked. Entrance to such facilities and structures shall be protected against unauthorized entry. The Company is responsible to maintain all security alarms in working order.

2.8 CUSTOMER SERVICE AND EMERGENCY RESPONSE

The Company shall respond promptly (within 2 hours) and in a reasonable manner to all citizen problems and emergencies pertaining to the Managed Assets in accordance with this Agreement. The Company shall maintain a toll-free 24 hour telephone number throughout the term of the Agreement so that citizens can report any problems and emergencies. The Company shall notify the City of any activity, problem, or circumstance of which it becomes aware that threatens safety or health or welfare. The Company shall maintain a log of all problems and emergencies identified and measures taken by the Company to remedy such problems and emergencies. Emergency procedures shall address at a minimum:

- Chemical spills
- Personnel Emergencies
- Fire and Explosions
- Pipe, Valve or Pump Failure
- Equipment and Process Failure
- Power Failure
- Acts of God (i.e. Hurricanes, Wind Storms, and Floods)
- Wastewater bypass discharges
- Emergency Telephone Numbers
- Emergency Equipment Inventory
- Records Preservation
- Industrial Waste Inventory and Monitoring System
- Coordinating Instructions with Public Safety Agencies
- Troubleshooting Guides
- Odor Events
- Noise Events
- Permit Violations
This Guarantee made as of the ___ day of ____, 201__, by __________________, a Corporation (“Project Guarantor”), having its principal place of business in __________________, to and for the benefit of the City of New Bedford (“City”).

WITNESSETH:

WHEREAS, __________________, a corporation, (the “Contract Operator”) having an office at ________________________, has entered into the Operations and Maintenance Agreement (the “Agreement”) with the City dated as of ________________, 201__.

WHEREAS, Project Guarantor is willing to guarantee, as set forth below, the performance of the Contract Operator under the Agreement; and

WHEREAS, City would not enter into the Agreement unless the Project Guarantor provided this Guarantee;

NOW, THEREFORE, as an inducement to the City to enter into this Agreement, Project Guarantor agrees as follows:

1. Project Guarantor hereby absolutely and unconditionally guarantees the full and prompt performance by the Contract Operator of all of the Contract Operator’s obligations under the Agreement in accordance with the terms and conditions therein.

2. This guarantee shall be governed by the laws of the Commonwealth of Massachusetts exclusive of the choice of law rules thereof, and Project Guarantor hereby agrees to the service of process in the Commonwealth of Massachusetts for any claim or controversy arising out of this Guarantee or relating to any breach hereof.

3. This Guarantee shall be binding upon and enforceable against the Project Guarantor, its successors, assigns and legal representatives (including any successor by merger or consolidation or any transferee of all or substantially all of the properties of Project guarantor), whether or not such obligations are expressly assumed by such successor, assignee or transferee, and is for the benefit of the City, and any permitted successors and assigns under the Agreement.

4. This Guarantee may be enforced by the City without first resorting to any action against Contract Operator or exhausting any other remedies that the City may have.
5. Each and every Event of Default under the Agreement shall give rise to a separate cause of action hereunder, and separate suits may be brought hereunder by the City as each cause of action arises. Project Guarantor waives presentation to, demand of performance from and protest to the City of the obligations of the City under the Agreement.

6. No failure or delay by the City in exercising any right, power or privilege hereunder or under the Agreement shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other right, power or privilege. No waiver, amendment, release or modification of this Guarantee shall be established by conduct, custom or course of dealing, but solely by an instrument in writing duly executed by the party against whom such waiver, amendment, release or modification is sought to be enforced.

7. Project Guarantor may not assign its obligations hereunder without the expressed written consent of the City, which shall not be unreasonably withheld except to a successor by merger or consolidation or to any transferee of all or substantially all of the property of Project Guarantor. Notice of any such assignment shall be given in writing to the City within thirty (30) days of the effective date of any such merger, consolidation or transfer.

8. The respective obligations of Project Guarantor to the City set forth in this Guarantee shall be absolute and unconditional, shall not be subject to any requirement that City first enforce any remedies it may have against the Contract Operator or any other Person, or any requirement to seek to recover from Contract Operator hereunder before proceeding against Project Guarantor hereunder, and shall not be subject to any claim of Project Guarantor against any other Person including the City, other than a claim that the matter giving rise to the City’s claim is the subject of dispute resolution in good faith under the Agreement or in the courts of the United States or the State of Massachusetts.

9. This Guarantee may be executed simultaneously in several counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument. The invalidity or unenforceability of the remaining portions of this Guarantee. This Guarantee is entered into by Project Guarantor solely and exclusively for the benefit of the City and may be enforced against Project Guarantor by the City.

10. Any term used but not otherwise defined herein and defined in the Agreement shall have the meaning attributed to it in the Agreement.

11. Notices to be given pursuant to this Guarantee unless otherwise stated shall be in writing and shall be served personally or sent by certified mail, return receipt requested, to:

    Project Guarantor at: (Name) _______________________________
or to such other address as shall be designated by such party in a written notice to the other party hereto. Any notice given pursuant to this Section if transmitted by certified mail shall be effective immediately upon receipt and if delivered by hand upon delivery.

IN WITNESS WHEREOF, Project Guarantor has executed this instrument under seal the day and year first above written.

ATTEST:

ACCEPTED: By ____________________________

______________________________
Workers Compensation

Statutory benefits as defined by the Commonwealth statutes encompassing all operations contemplated by this contractor agreement to apply to all of the Company’s officers, and employees regardless of the number of employees. Employers Liability will have minimum limits for bodily injury by accident of $500,000 per accident and for bodily injury by disease with a $500,000 policy limit and $500,000 per employee.

Commercial General Liability

Coverage shall apply to premises and/or operations, products and/or completed operations, independent contractors, contractual liability, and broad form property damage exposures on an occurrence basis, with a minimum limits of $1,000,000 per occurrence, and $2,000,000 aggregate.

Business Automobile Liability

Coverage shall apply to Company-owned vehicles and/or non-owned vehicles and employee non-ownership use with minimum limits of $1,000,000 CSL (combined single limit).

Umbrella Liability

Coverage shall apply to general liability, automobile liability and Employer’s Liability conforming to the minimum underlying requirements of the umbrella. Minimum limits of $5,000,000 per occurrence.

Deductibles

Deductible amounts shall be reasonably satisfactory to the City.

Certificate of Insurance

The City shall be listed as a certificate holder and an Additional Insured with respect to Commercial General Liability, Business Automobile and Umbrella Liability coverages.
CITY OF NEW BEDFORD  
MASSACHUSETTS

KNOW ALL MEN BY THESE PRESENTS:

That we, ____________________________________________________________________________, as Principal,
and
______________________________________________________________________________________, as
Surety,
are held and firmly bound unto the City of New Bedford, Massachusetts, as Obligee,
in the sum of ______________________________________________________ dollars
($____________) to be paid to the Obligee, for which payments, well and truly to be made, we bind ourselves, our
respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these
presents.

WHEREAS, the said Principal has made a contract with the Obligee, bearing the date of _________ ___,
20___
for the ______________________________________________________ in _____________,
Massachusetts.

PROJECT TITLE

NOW, the condition of this obligation is such that if the Principal and all Subcontractors under said
contract shall well and truly keep and perform all the undertakings, covenants, agreement, terms and
conditions of said contract on its part to be kept and performed during the original term of said contract
and any extensions thereof that may be granted by the Obligee, with or without notice to the Surety, and
during the life and any guarantee required under the contract, and shall also well and truly keep and
perform all the undertakings, covenants, agreements, terms and conditions of any and all duly authorized
modifications, alterations changes or additions to said contract that may hereafter be made, notice to the
Surety of such modifications, alterations, changes or additions being hereby waived, then this obligation
shall become null and void; otherwise, it shall remain in full force and virtue.
IN THE EVENT, that the contract is abandoned by the Principal, or in the event that the Obligee terminates the employment of the Principal or the authority of the Principal to continue the work, said Surety hereby further agrees that said Surety shall, if requested in writing by the Obligee, take such action as is necessary to complete said contract.

IN WITNESS WHEREOF, the Principal and Surety have hereunto set their hands and seals this:

_______Day of _______________20____

PRINCIPAL ________________________________  SURETY ________________________________

________________________________________  _______________________________________

By: ______________________________________  By: ___________________________________

________________________________________

SEAL  ATTORNEY-IN FACT

Attest: __________________________________  Attest: _______________________________

________________________________________
I HEREBY CERTIFY THAT I HAVE RECEIVED THE FOLLOWING ADDENDUM

ADDENDUM #’S________________________________________________________

____________________________________________________________________

Person submitting bid

____________________________________________________________________

Company Name

Please include this form with your bid if applicable.