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DIRECTOR OF PUBLIC WORKS

131 County of Santa Cruz

DEPARTMENT OF PUBLIC WORKS

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AGENDA: DECEMBER 15, 1998

December 3, 1998

SANTA CRUZ COUNTY BOARD OF SUPERVISORS

701 Ocean Street
Santa Cruz, California 95060

SUBJECT: BUENA VISTA LANDFILL GAS POWER PROJECT

Members of the Board:

On November 24, 1998, Public Works provided your Board with a brief status report on the Buena Vista Landfill Gas Power Project. In this report, we indicated that Public Works has been working on development of this project as a joint public/private venture with Brown, Vence and Associates (BVA). BVA was previously selected to develop this project for the County after completion of a lengthy Request for Proposal process that concluded with your Board's approval on December 13, 1994. Public Works has continued to provide your Board with periodic status reports on this project, and as indicated in our most recent correspondence, this proposed project is now on schedule for construction in early 1999, with your Board's authorization. Attached you will find a tentative schedule for project development (Exhibit 1).

The project as currently envisioned would be a joint public/private venture with County ownership of the power plant and private operation. This differs from previous development scenarios that contemplated both public ownership and operation of the project. We have received comments from your Board and other reviewing departments regarding project risks, particularly with regard to power sales and marketing. This development scenario provides a higher level of risk allocation to BVA's landfill gas operation group, BVA Lfg., Inc., and conversely reduces County risk, provides a nominal revenue stream to the County, and guarantees full repayment of the capital and development expenses incurred by the County. While County revenue generating potential on this project will be reduced under this scenario, this can be viewed as a reasonable trade off for the financial guarantees and the allocation of operational risk to BVA Lfg., Inc.

All the financial and contractual agreements necessary to begin final construction of the Buena Vista Landfill Gas Power Project are nearing completion. Attached you will find copies of three of the draft agreements relating to this project. Please note that these are all draft

agreements for informational purposes only and each is currently under review by Public Works, County Counsel and General Services.

- Exhibit 2. Operations and Maintenance Agreement - This agreement provides for the County's maintenance and operation of the landfill gas collection system including the duties, obligations and conditions for delivery of landfill gas to the power project. Under this agreement the County will maintain its regulatory compliance responsibilities regarding operation of the existing and expanded landfill gas collection system and its by-products, while also guarantying delivery of landfill gas to the leased power project in both defined volume and quality.
- Exhibit 3. Electric Generation Plant Lease - This agreement covers the leasing and operational conditions for the County owned power generation facilities. The agreement will be with BVA's landfill gas operation group, BVA Lfg., Inc. Under this agreement BVA Lfg., Inc. will provide guaranteed operation of the facility for a ten-year period. Conditions of operation include production of electricity at a guaranteed output, assumption of all operational and maintenance costs, liabilities and risks, guaranteed repayment of all County capital and development costs for the project, and provision of a financial surety mechanism (i. e., performance bond or letter of credit) in an amount and form acceptable to the County and adequate to cover the County's full investment in the facilities.
- Exhibit 4. Turn-Key Design and Construction Agreement - This agreement provides for the lessee, BVA Lfg., Inc., to provide design and turn-key construction of the power production facilities. Under this agreement BVA Lfg., Inc. will perform all required design engineering for the project, issue Request for Proposals and assist the County with selection of the power generator equipment vendor, bid and award contracts for construction of the facilities, perform construction management, complete start-up, and assist with final Air District permitting.

There are several significant advantages to this proposed project development scenario. The BVA Lfg., Inc. operational group brings many years of experience and industry connections to the table. They currently operate 12 landfill gas-to-energy projects in California. By allowing this project to be constructed through turn-key agreement, BVA Lfg., Inc. can use its extensive experience to competitively negotiate for the best qualified and most cost competitive vendors and contractors to complete this project. BVA Lfg., Inc. will be further incentivized to keep costs competitive for the project through the Electric Generation Plant Lease which will require them to repay all of the County's capital investment expenses, regardless of the final costs. For informational purposes we have also attached a copy of the engineer's estimate of project capital cost (Exhibit 5) that will be repaid through the Electric Generation Plant Lease. By controlling costs and selecting efficient and low maintenance generating equipment, BVA Lfg., Inc. is highly incentivized to improve the project's profitability for themselves and the County.

A power sales agreement will also be brought back to your Board for approval early next year. For legal purposes, the County may likely be the contracting agency for the power sales agreement, but as condition of the Electric Generation Plant Lease BVA Lfg., Inc. will assume all the marketing risks for power sales. Again, BVA Lfg., Inc. will be provided an incentive to seek out the best possible agreement to improve the project's profitability. They will be responsible for negotiating the most favorable power sales agreement(s), marketing future energy production, and delivery of power in the quantity and quality required by the end users. The County's risk associated with energy marketing will be controlled through the BVA Lfg., Inc.'s financial surety and the contractual guarantee to repay all County capital and development costs. In addition, the County is negotiating a revenue sharing component to the Electric Generation Plant Lease that will provide some return to the County in the event of large upswings in the power sales market conditions. Attached you will find an outline of the financial flow (Exhibit 6) for this project to further clarify proposed project development.

We will also be returning early next year with an agreement to secure additional funding through the Federal Department of Energy's Renewable Energy Production Incentive (REPI) Program. This program provides a cash payment for production of energy from renewable fuel sources. The restriction on the REPI Program is that these production incentives are only available to energy production facilities owned by public agencies. In order to take advantage of these cash incentives, the County must finance and own title to the facility. These funds are available for the first ten years of facility operations and will be shared between the County and BVA Lfg., Inc.

In addition to the above agreements, we will also be returning early next year with a series of agreements related to the monetization of the Federal Section 29 Production Tax Credits. In order to comply with the laws regarding use of the Section 29 tax credits, it is necessary for the County to convey the gas rights and gas collection system to an outside party (BVA Lfg., Inc. or its assignee) for investment purposes. At expiration of the tax credit investment period, the gas rights and collection system will be conveyed back to the County. During the term the tax credits are in place, the County would purchase the landfill gas from BVA Lfg., Inc. for use in the power production facility. There is no net cost to the County in this process and BVA Lfg., Inc. assumes all the outside party investment risks. This is commonly referred to as an "arms length agreement" and while this appears to be a complex arrangement, this process is a legally approved and tested investment strategy typical for all public and private renewable energy projects,

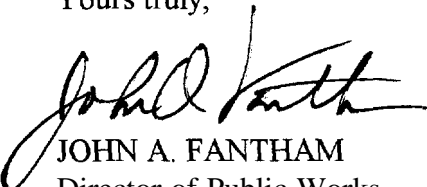
Staff with the California Energy Commission (CEC) have also informed us that our Project Award Package will likely be brought to the full commission for approval in early January 1999. As your Board is already aware, this award will provide \$767,000 of additional project funding in the form of cash payments for electricity production at 1.0 cent per kWh. The award agreement approved by the CEC will also be brought back to your Board for final approval, along with the above mentioned agreements, early next year.

We are seeking your Board's input and approval of this conceptual project development strategy with a direction for Public Works to return on or before February 2, 1999, with a final recommendation and all final agreements necessary to begin construction and start-up of this project.

It is therefore recommended that your Board take the following actions:

1. Accept and file the attached status report on the Buena Vista Landfill Gas Power Project.
2. Approve conceptual development of the Buena Vista Landfill Gas Power Project as a public/private venture with Brown, Vence and Associates Lfg., Inc.
3. Direct Public Works to return on or before February 2, 1999, with a final report and staff presentation, and all agreements and financial plans necessary to commence with final development of the Buena Vista Landfill Gas Power Project.

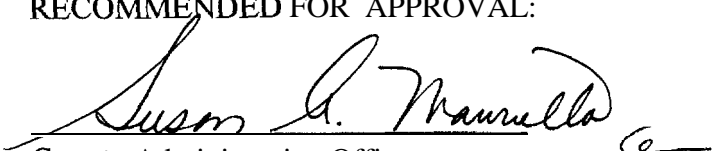
Yours truly,


JOHN A. FANTHAM
Director of Public Works

RPM:bbs

Attachments

RECOMMENDED FOR APPROVAL:


County Administrative Officer

Copy to: General Services (w/a)
Auditor-Controller (w/a)
Brown, Vence and Associates (w/a)
Public Works Department

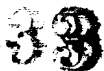


EXHIBIT 1
PROJECT SCHEDULE

Task	Start	End	# Weeks	Oct-98	Nov-98	Dec-98	Jan-99	Feb-99	Mar-99	Apr-99	May-99	Jun-99	Jul-99	Aug-99	Sep-99	Oct-99	Nov-99	Dec-99
Santa Cruz																		
Air permits preparation	10/01/98	10/15/98	2															
Draft PTC contract/agreements	10/15/98	11/13/98	4															
County counsel review of agreements	10/15/98	11/23/98	5															
Term sheet review (Tom Bruen)	10/19/98	10/23/98	1															
Power Sales Agreement draft received																		
GRS-BVA agreement																		
CEQA Categorical Exemption																		
PTC agreements review complete (Tom Bruen)																		
Project Award Package complete																		
PTC due diligence	11/02/98	11/13/98	2															
Air permits processing	11/09/98	12/15/98	6															
PG&E system study complete	11/16/98	11/16/98	Milestone															
BVA cost estimate and pro formas complete	11/16/98	11/16/98	Milestone															
County-BVA agreement complete	11/23/98	11/23/98	Milestone															
Power Sales Agreement complete	11/23/98	11/23/98	Milestone															
GRS letter of credit	12/01/98	12/01/98	Milestone															
Establish GRS-BVA LLC	12/01/98	12/01/98	Milestone															
Electrical engine specifications completed	12/01/98	01/22/99	7															
Site plans and bid documents prep.	12/01/98	03/12/99	14															
Air permits approval	12/15/98	12/15/98	Milestone															
CEC Project Award Package adoption	12/15/98	12/15/98	Milestone															
PG&E Special Facilities Agreement	12/15/98	12/15/98	Milestone															
PG&E Standard Operating Agreement	12/15/98	12/15/98	Milestone															
Execute ISO Participating Generator Agreement	12/15/98	12/15/98	Milestone															
Execute ISO Metered Service Agreement	12/15/98	12/15/98	Milestone															
Present Agreements to Board	12/15/98	12/15/98	Milestone															
Board approval of Agreements	01/12/99	01/12/99	Milestone															
Equity available and engines ordered	01/22/99	07/23/99	Milestone															
Equipment on order	01/22/99	07/23/99	24															
Bid documents issued	03/12/99	03/12/99	Milestone															
Bid response and selection period	04/23/99	04/23/99	5															
Financing complete	04/01/99	04/01/99	Milestone															
Construction contract signed	04/23/99	04/23/99	Milestone															
Site preparation	04/23/99	07/23/99	12															
Equipment delivery	07/23/99	07/23/99	Milestone															
Construction, PG&E inspection	09/17/99	09/17/99	8															
PG&E upgrades, interconnection complete	09/17/99	09/17/99	Milestone															
PG&E testing	09/17/99	10/01/99	2															
Transmission access-line date	10/01/99	10/01/99	Milestone															
Revenues from power sales begin	10/01/99	10/01/99	Milestone															
CEC payments	11/01/04	11/01/04	5 yrs															
REPI application submitted for FY 99/00	10/01/00	10/01/00																

DRAFT

OPERATIONS AND MAINTENANCE AGREEMENT

This Operation and Maintenance Agreement (“O&M Agreement”) is made as of _____ 1998 between Brown Vence & Associates Lfg Corporation, a California corporation duly authorized to conduct business in California (“Brown Vence & Associates Lfg”), and the County of Santa Cruz, a municipal corporation organized under the laws of the State of California, “Operator” or “County”).

WHEREAS, Brown Vence & Associates Lfg is the Lessee of the Premises identified and defined by the Lease (as hereinafter defined);

WHEREAS, Brown Vence & Associates Lfg desires to have County operate, maintain and repair its Gas Collection System located on the Premises pursuant to the terms and conditions of this O&M Agreement; and

WHEREAS, County has the special skills necessary to provide such services.

NOW, THEREFORE, in consideration of the promises and mutual covenants set forth herein, Brown Vence & Associates Lfg and County do hereby agree as follows:

ARTICLE I - DEFINITIONS

Unless the context indicates otherwise, the capitalized terms set forth below shall have the meanings defined as follows:

A. “Actual Production Amount” shall mean, with respect to the Gas Collection System for any quarter, the amount of energy (expressed in MMBtus) which actually results from the Landfill Gas produced by the Gas Collection System and sold by Brown Vence & Associates Lfg or its designee or assignee pursuant to the Gas Purchase Agreement or an Additional Sales Contract during such quarter. The actual amount of such energy shall be based on the information generated by the meters, measuring equipment, charts and records provided for in the Gas Purchase Agreement or the Additional Sales Contract, as the case may be.

B. “Gas Collection System” shall mean the network of gas collection wells, horizontal trenches, interconnecting pipes, valves, blowers, monitoring equipment, all modifications, replacements, additions, expansions and any additional gas extraction equipment installed on the Landfill and used for the purpose of the extraction of Landfill Gas by Brown Vence & Associates Lfg, including, without limitation, the gas collection system installed by County, if then used by Brown Vence & Associates Lfg, all as more particularly described in Exhibit A hereto.

C. “Good Engineering Practice” means any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known, or which in the exercise of due

diligence, should have been known, at the time the decision was made, would have been expected to accomplish the desired result in a manner consistent with reliability, safety, environmental protection, expedition, project economics and applicable laws, ordinances, rules and regulations for similar facilities. Good Engineering Practice is not intended to be limited to consideration of any one practice, method or act, to the exclusion of all others, but rather, is intended to require the consideration of a spectrum of possible practices, methods or acts.

D. “Improvements” mean (i) any replacements, modifications, additions and expansions to or of the Gas Collection System, and (ii) if repairs to or of the Gas Collection System in any year exceed \$50,000 in the aggregate, then the repairs which give rise to any such excess amounts.

E. “Lease” means the Landfill Gas Lease dated as of even date herewith between Brown Vence & Associates Lfg and County pursuant to which County has leased to Brown Vence & Associates Lfg certain rights regarding, among other things, the recovery and use of Landfill Gas from the Landfill.

F. “Landfill” means the Buena Vista Sanitary Landfill located at [address] in Santa Cruz, County, California.

G. “Operations and Maintenance Manual” means the Plan of Operation and Gas System Operation and Maintenance Manual for the County Landfill, and any revisions thereto.

H. “Permits” means all material authorization forms, permits and licenses issued by, consents and approvals of, filings with, notices from, and registrations with, any and all governmental entities, departments or agencies (including all conditions thereof), which may be required to be obtained, from time to time, for or in connection with (i) the production or sale of Landfill Gas (and/or Products) from the Gas Collection System, or (ii) the operation, maintenance, possession or ownership of the Gas Collection System.

I. “Point of Delivery” means the downstream flange of the blower(s) used to exert a vacuum in the Landfill (as defined in the Landfill Gas Lease).

J. “Related Agreements” means the Acquisition and Security Agreement, the Lease, the Project Acquisition Note, the Gas Purchase Agreement and any Additional Sales Contracts, if any.

K. “Sales Meter” shall mean the meter or meters, and measuring equipment installed pursuant to Article III.B(1) of the Gas Purchase Agreement for the purpose of measuring in accordance with Good Engineering Practice the volume of Landfill Gas sold by Brown Vence & Associates Lfg LFG to County at the Point of Delivery.

L. “Work Scope” means the Work Scope for Operation, Monitoring and Maintenance of the Landfill Gas Collection System at the Operating Site in Santa Cruz, California, a description of which is attached as Exhibit B hereto and made a part hereof.

For all capitalized terms not specifically defined in this O&M Agreement, the definitions of such terms contained in the Lease or the Acquisition and Security Agreement shall apply and shall be incorporated by reference herein, except that the definition of the ten-n “Force Majeure” shall refer solely to the obligations under this O&M Agreement.

ARTICLE II,- TERM

Subject to the other provisions hereof, this O&M Agreement shall be effective immediately and shall remain in force for an initial term of ten years and may be extended for two consecutive five year periods as may be mutually agreed upon in writing by the parties hereto, unless the Lease is sooner terminated in accordance with Article VII of the Lease (in which case this O&M Agreement shall terminate) or this O&M Agreement is sooner terminated as provided in Article IX below.

ARTICLE III - GAS COLLECTION SYSTEM OPERATION AND MAINTENANCE

A. Duties. County shall operate and maintain the Gas Collection System (including all Improvements), on behalf of Brown Vence & Associates Lfg, in accordance with (i) Good Engineering Practice, (ii) the Work Scope, (iii) the other provisions of this O&M Agreement and (iv) the applicable standards set forth in the Related Agreements. County recognizes that the most important overall goal of Brown Vence & Associates Lfg for the operation and maintenance of the Gas Collection System is to produce and deliver the maximum commercial quantities of Landfill Gas consistent with Good Engineering Practice, and County hereby agrees to use its best efforts to operate and maintain the Gas Collection System so as to provide Brown Vence & Associates Lfg with such maximum quantities of Landfill Gas, to the extent that such operation does not unreasonably interfere with protection of the environmental safeguards installed by Lessor at the Landfill and compliance with appropriate permits. Without limiting any of the foregoing but subject to Article VIII (B) below, County shall:

- (i) Keep the Gas Collection System in good repair, condition and working order;
- (ii) Replace any part of the Gas Collection System which needs to be replaced because of damage, loss or normal wear and tear as long as such part is required for the continued operation of the Gas Collection System;
- (iii) Furnish any and all supplies (including consumables), labor, tools, materials, parts, mechanisms and devices to keep the Gas Collection System in good repair, condition and working order; and
- (iv) Carry out the duties and obligations set forth in the Work Scope.

County shall carry out the foregoing services for the fees set forth in Article VI hereof and, except as otherwise set forth in Article VIII, without any additional cost or expense to **Brown Vence & Associates Lfg.**

B. **Permits.** County shall, itself or cause others to, at its own expense, prepare and file applications for Permits and diligently prosecute such applications with a view to obtaining and maintaining all Permits (including without limitation, those pertaining to Improvements) which may be required, from time to time. County shall, itself or cause others to, at its own expense, maintain (or cause the maintenance of) all such Permits, whether new or existing, in full force and effect without interruption and shall not take or omit to take (or permit the taking or omission of) any action which would result in any restriction or encumbrance on, or any violation of, any Permit. To the extent legally required or allowed, all Permits shall be transferred to or obtained and maintained (solely or jointly) in the name of Brown Vence & Associates Lfg and current copies thereof shall be provided to Brown Vence & Associates Lfg. A breach of this Article III (B) by County shall be deemed to be a material default for the purposes of Article IX (A).

ARTICLE IV - OPERATION AND STANDARDS

A. **Landfill.** County agrees that the operation of the Gas Collection System shall not unreasonably interfere with any and all operational requirements of the Landfill, and any such interference shall be to the minimum extent required and shall not unreasonably interfere with protection of the environmental safeguards installed by Lessor at the Landfill and compliance with appropriate permits.

B. **Compliance with Laws, Agreements etc.** County's performance of its obligations under this O&M Agreement shall be in material compliance with (i) all applicable laws, ordinances, rules and regulations, (ii) any and all applicable orders, decrees, judgments and Permits of any governmental or judicial authority, and (iii) the Work Scope, Good Engineering Practice, and the applicable provisions of the Related Agreements. In addition, County shall not cause, by its actions or failures to act under or in connection with this O&M Agreement, Brown Vence & Associates Lfg or the Gas Collection System to be in violation of any of the foregoing.

C. **Condensate and Waste Materials.** As part of its responsibilities under this O&M Agreement, County shall be responsible for, and shall bear all costs and expenses incurred in connection with, the proper return to the Landfill of any and all waste material (including without limitation, condensate, all materials and minerals therein, all contaminants and all excavated refuse) produced or collected by the Gas Collection System prior to the Point of Delivery to the purchasers under the Gas Purchase Agreement or any Additional Sales Contract, or otherwise released inside or from the Premises. To the extent such return is not permitted by the Lease or applicable laws and regulations, County shall be responsible for the proper collection, treatment, removal and disposal of such waste material. Such disposal shall at all times be in accordance with applicable laws and regulations.

D. **Measurement of Landfill Gas.**

1. **Measuring Equipment for Sales of Landfill Gas.** County shall maintain and- operate the Sales Meter(s), provided, however, that such Sales Meter(s), as well as the charts and records related thereto, shall be the property of Brown Vence & Associates Lfg. County shall

maintain all charts and records for the term of this Agreement and upon termination hereof and upon request, shall furnish copies of such charts and records to Brown Vence & Associates Lfg. County shall have the right to retain copies and to provide copies of such records to the applicable regulatory authorities as required pursuant to any permits. The parties and their representatives shall have access at all reasonable times to inspect, test and repair such Sales Meter(s), and to inspect or copy such charts and records.

2. Meter Test Notice. County shall conduct a test of the Sales Meter(s) which are used for the billing of Landfill Gas sold to the Buyer at least once every 12 months at County's expense. Such test shall be carried out by County in accordance with the recommendations and guidelines of the manufacturer of such Sales Meter(s) and Good Engineering Practice. County shall give Brown Vence & Associates Lfg notice of the times of all tests of the Sales Meters sufficiently in advance so that Brown Vence & Associates Lfg may conveniently have its representative(s) ready to observe such tests, if desired Brown Vence & Associates Lfg shall have the right to conduct tests of the Sales Meter(s), at its expense, at all reasonable times.

3. Correction for Errors of Sales. If, upon the completion of any test of the Sales Meter(s), any Sales Meter is determined to be recording outside the normal range of accuracy according to the manufacturer's specifications, records thereof shall be corrected for a period extending back to the time such inaccuracy occurred, if such time is ascertainable by Good Engineering Standards, or if not ascertainable or if the amount of Landfill Gas in MMBtus cannot be ascertained because a meter or device is out of service or being repaired, County and Brown Vence & Associates Lfg shall estimate in good faith the volume and quality delivered based upon Brown Vence & Associates Lfg's and County's other operating records for the period in question. Following any test, any measuring equipment found to be inaccurate to any significant degree shall be adjusted or replaced immediately to measure accurately.

E. Environment, Security and Safety. County shall be responsible for (i) the security and safety of the Gas Collection System, Premises and all items of tangible property belonging to Brown Vence & Associates Lfg or County located on the Landfill, (ii) implementing and overseeing a safety program at the Premises, and (iii) ensuring that the operations and maintenance of the Gas Collection System are in compliance with all applicable environmental, health and safety laws, ordinances, rules and regulations. In addition, to the extent that any damage occurs to the Gas Collection System or the Premises proximately caused by the activities of County, or any contractor, agent or employee of County, all of such damages shall be the responsibility of County. Without limiting the foregoing, in its operation and maintenance of the Gas Collection System on behalf of Brown Vence & Associates Lfg hereunder, County shall comply, and shall use its best efforts to ensure that the Gas Collection System and the Premises comply, with all laws, regulations, ordinances and orders pertaining to environmental matters, including without limitation, (i) those relating to the discharge, control, reporting, use, storage, treatment and disposal of Hazardous Materials and (ii) those necessary to ensure protection of environmental safeguards installed at the Landfill and compliance with appropriate permits.

F. No Liens. In connection with the performance of its duties hereunder, County shall not (i) create, or suffer the creation of; any lien or encumbrance on the Gas Collection

or any of the foregoing instruments.

ARTICLE VI- PAYMENT

~~Base Payment~~ operation and maintenance services described herein, Brown Vence & Associates Lfg shall pay to County _____ cents/MMBtu, subject to the adjustment as set forth below, for all Landfill Gas produced and sold by Brown Vence & Associates Lfg as a result of County's operations. Brown Vence & Associates Lfg shall pay all such sums to County as are due under this O&M Agreement on a quarterly basis. The payments hereunder to County in respect of any quarter shall be made on the 20th business day of the next quarter, commencing in the calendar quarter immediately following the execution of this O&M Agreement.

Inflation Commencing January 1, 1999, and on an annual basis thereafter, the payment due per MMBtu shall be increased based on the change in the Consumer Price Index ("CPI") for urban wage earners and clerical workers for the _____ region for the prior year ending June 30, with June as the base year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of Labor and as published in such Bureau of Labor Statistics' Detailed Report. If the manner in which the CPI is determined is substantially revised or the CPI shall become unavailable, Brown Vence & Associates Lfg and County agree to cooperate to determine an acceptable alternative, comparable index.

ARTICLE VII- INDEMNIFICATION

County agrees to indemnify, hold harmless and defend Brown Vence & Associates Lfg and its partners and each such partner's shareholders, directors, officers, employees, agents, independent contractors and representatives, from and against any and all costs, claims, liabilities, damages, expenses (including reasonable attorneys' fees) causes of action, suits or judgments incurred by or involving any one of the foregoing parties and arising, directly or indirectly, from or in connection with (i) any breach by County of any of its representations, obligations, covenants or warranties contained in this O&M Agreement, or (ii) any negligent or wilful action or omission of County or its officers, employees, agents or subcontractors taken or made in connection with County's performance of its obligations hereunder, provided such action or omission constitutes negligence or wilful misconduct. County further agrees to investigate, handle, respond to and defend any such claim, suit or demand, at its own expense.

Notwithstanding the application of any other statute of limitations, Brown Vence & Associates Lfg's right to such indemnification shall survive the termination of this O&M Agreement for a period of three years. If Brown Vence & Associates Lfg becomes entitled to any amounts as indemnification under Article IV (F) or this Article VII or under any of the Related Agreements, Brown Vence & Associates Lfg may set off such amounts against any sums or payments owed or to be owed by Brown Vence & Associates Lfg to County under this O&M Agreement or any Related Agreement.

ARTICLE VIII - EXTRAORDINARY WORK

A. Improvements. Brown Vence & Associates Lfg shall undertake, build and install all Improvements which are (i) requested by Brown Vence & Associates Lfg and approved by County, or (ii) recommended by County to Brown Vence & Associates Lfg and approved by Brown Vence & Associates LFG as being necessary or desirable to produce and deliver the maximum commercial quantities of Landfill Gas from the Landfill, or (iii) necessary to ensure protection of environmental safeguards installed at the Landfill and compliance with appropriate permits. In the event County declines to undertake, build and install any Improvement requested by Brown Vence & Associates Lfg and a third party can carry out such Improvement at a cost substantially lower than proposed by County, then Brown Vence & Associates Lfg may engage such third party to carry out such Improvement and County shall cooperate with such third party in such undertaking, provided the right to install said improvements shall be exercised only with the consent of County, which consent shall not be unreasonably withheld or delayed.

B. Cost of Improvements. Brown Vence & Associates Lfg shall bear all costs (labor and material) necessary to undertake any and all such approved Improvements, except for the C O S T of:

- (i) any Improvement to the extent it is covered by insurance required under Article IV(G);
- (ii) any Improvement caused, directly or indirectly, by a breach by County of any of its representations, warranties, covenants or obligations under this O&M Agreement;
- (iii) any Improvement for which County is required to indemnify Brown Vence & Associates Lfg under the terms of Article VII;
- (iv) any improvement which is being made primarily to protect environmental safeguards installed at the Landfill and/or compliance with appropriate permits; and
- (v) any addition or expansion to the Gas Collection System for which Brown Vence & Associates Lfg is not required to pay pursuant to the Acquisition and Security Agreement or by mutual agreement of the parties hereto.

C. Standards. County shall design, build and install any and all Improvements (i) in a good and workmanlike manner, able to withstand the normal and usual landfill operations at the Landfill, and (ii) in accordance with Good Engineering Practice, and in conformance with all applicable laws, regulations, ordinances and orders. Such Improvements shall be designed, built and installed so as to be suitable for the operation of the Gas Collection System.

D. Title to Improvements. All approved Improvements shall become the property of Brown Vence & Associates Lfg once installed at the Landfill. County hereby warrants that

Brown Vence & Associates Lfg shall have good title to an improvement upon its installation free and clear of all liens, encumbrances and security interests, and agrees to do all things and execute all documents, at its own expense, necessary for Brown Vence & Associates Lfg to perfect such title (including without limitation, defending such title against the claims of third parties).

ARTICLE IX - TERMINATION

A. Brown Vence & Associates Lfg's Right to Terminate. Brown Vence & Associates Lfg shall have the right to terminate this O&M Agreement only in the event (i) County commits an act or omission which is a material default by County under this O&M Agreement, provided that where Brown Vence & Associates Lfg asserts a material default Brown Vence & Associates Lfg notifies County in writing and allows County a reasonable period of time but not less than 60 days to cure the default and further provided that if such material default is due to an event of Force *Majeure*, such material default shall not be grounds for termination, unless the event of Force *Majeure* could prevent County from performing any of its obligations hereunder for a period of more than 180 days and/or County is not diligently seeking to cure such event of Force *Majeure*, or (ii) the Lease or the Gas Purchase Agreement is terminated for any reason. In the event Brown Vence & Associates Lfg terminates this O&M Agreement due to County's material default, Brown Vence & Associates Lfg agrees to replace County for the balance of the term remaining hereunder with a new operator proposed by County, as long as such operator (i) demonstrates to Brown Vence & Associates Lfg's reasonable satisfaction that it is capable of performing the duties and obligations of County hereunder, (ii) secures and maintains, at its own expense, throughout the remaining term of this O&M Agreement the insurance policies (with the coverages and minimum amounts, insureds and special provisions) identified in Exhibit C attached hereto and made a part hereof; and (iii) such operator consents in writing to assume all of the rights and obligations of County hereunder. Notwithstanding any termination of County as Operator, Brown Vence & Associates Lfg shall remain obligated to pay County the amounts set forth in Article VI hereof based on Landfill Gas produced and sold, less any amounts actually paid by Brown Vence & Associates Lfg for a substitute operator to perform the duties and obligations of County under this O&M Agreement.

B. Operator's Right to Terminate. County shall have the right to terminate this O&M Agreement only in the event Brown Vence & Associates Lfg commits an act or an omission which is a material default under this O&M Agreement, provided that where County asserts a material default County notifies Brown Vence & Associates Lfg in writing and allows Brown Vence & Associates Lfg a reasonable period of time but not less than 60 days to cure the default and further provided that if such material default is due to an event of Force *Majeure*, such material default shall not be grounds for termination, unless such event of *Force Majeure* prevents Brown Vence & Associates Lfg from performing any of its obligations for a period of more than 180 days.

ARTICLE X - SUBCONTRACTING OR ASSIGNMENT

A. No Assignment. No assignment by either party of any or all of its respective rights and duties hereunder shall be permitted, without the consent of the other party, which

consent shall not be unreasonably withheld, and any assignment without such consent shall be null and void, except as specifically permitted in this Article X or as set forth in Article IX(A), above.

B. Brown Vence & Associates Lfg's Limited Rights to Assign Without Further Consent. Notwithstanding the foregoing, County hereby agrees, without any other request for prior consent, to permit Brown Vence & Associates Lfg to assign its interest under this O&M Agreement (a) to an entity owned or controlled by Brown Vence & Associates Lfg, or affiliates thereof, and (b) in the event that Brown Vence & Associates Lfg shall be entitled under Article IX to terminate this O&M Agreement, provided Brown Vence & Associates Lfg shall give County notice of the existence of such assignment, together with the name and address of the assignee, and a copy of the assignment document within 60 days of the execution of such assignment.

ARTICLE XI- MISCELLANEOUS

A. Notices. All notices, demands, requests, consents or other communications required or permitted to be given or made under this O&M Agreement shall be in writing and if to Brown Vence & Associates Lfg to:

Brown Vence & Associates Lfg Corporation
120 Montgomery Street, Suite 100
San Francisco, CA 94104

Tel:
Fax:

if to County:

Santa Cruz County
Engineering Department
Santa Cruz, CA

Tel:
Fax:

Notices hereunder shall be deemed properly served (i) by hand delivery, on the day and at the **time** on which delivered to the intended recipient at the address set forth in this O&M Agreement; (ii) if sent by mail, on the third business day after the day on which deposited in the United States certified or registered mail, postage prepaid, return receipt requested, addressed to the intended recipient at its address set forth in this O&M Agreement; or (iii) if by Federal Express or other reputable express mail service, on the next business day after delivery to such express mail service, addressed to the intended recipient at its address set forth in this O&M

Agreement. Either party may change its address for the purpose of this Article XI (A) by giving the other party prior notice thereof in accordance with this provision.

B. **Successors and Assigns.** Subject to the restrictions on assignment herein contained, the terms and provisions of this O&M Agreement shall be binding upon, and shall inure to the benefit of, the successors, assigns and personal representatives of the respective parties hereto. This O&M Agreement shall not (directly, indirectly, contingently or otherwise) confer or be construed as conferring any rights or benefits on any person or entity not named as a party hereto, except as otherwise provided in Article X.

C. **Applicable Law and Related Matters.** All questions with respect to the construction of this O&M Agreement and the rights and liabilities of the parties hereunder shall be determined in accordance with the laws of the State of California.

In any litigation arising from this O&M Agreement, the prevailing party shall be entitled to receive from the non-prevailing party all reasonable costs and expenses (including reasonable attorneys' fees and expenses) incurred by the prevailing party by reason of the event giving rise to such litigation.

Prior to the initiation of litigation, either party may initiate dispute resolution under this section. Dispute resolution will be initiated by either party delivering notice to the other, setting forth the nature of the dispute. The parties agree to meet or otherwise confer expeditiously to resolve the dispute, and to submit the dispute to nonbinding third party mediation if the dispute cannot be resolved within 15 days following the delivery of the notice. If a notice of default has been issued, the period of time allowed to cure the default shall be stayed pending dispute resolution for a period not to exceed 45 days (including third party mediation) unless otherwise agreed to by the parties hereto. Notwithstanding the foregoing, a party may initiate litigation and shall not be bound by the dispute resolution procedures set forth in this paragraph in case of a situation where such party is seeking temporary or preliminary injunctive relief or where such party certifies, in good faith, that failure to promptly initiate litigation will subject it to the risk of grave harm.

D. **Expenses.** Each party hereto shall pay all expenses incurred by it in connection with its entering into this O&M Agreement, including without limitation, all attorneys' fees and expenses.

E. **Counterparts.** This O&M Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute a single agreement.

F. **Severability.** If any provision of this O&M Agreement or the application thereof to any party or circumstance be invalid or unenforceable to any extent, the remainder of this O&M Agreement and the application of such provision to persons and circumstances other than those to which it has been held invalid or unenforceable shall not be affected thereby and each provision of this O& M Agreement shall be valid and enforceable to the fullest extent permitted bylaw.

G. Interpretation Matters. Except to the extent expressly provided herein, the provisions of this O&M Agreement, and the rights and obligations of the parties hereto, shall be construed so as to be consistent with the provisions of the Lease and the other Related Agreements and the applicable rights and obligations of the parties thereunder. County acknowledges it has received and reviewed the Lease and each of the Related Agreements and is familiar with the terms thereof. The Exhibits hereto are an integral part of this O&M Agreement, however, if there is any inconsistency between any provision in the foregoing Articles and any provision in the Work Scope, including, without limitation, the Operations and Maintenance Manual, if any, the former shall prevail.

H. Entire Agreement; Amendments. This O&M Agreement (including without limitation, the Exhibits hereto and the Operations and Maintenance Manual, if any), constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior oral or written agreements and understandings between the parties relating to the subject matter hereof. This O&M Agreement may only be amended or modified by a written instrument signed by both parties hereto.

I. Waiver. No waiver by either party hereto of any one or more defaults by the other party in the performance of any provision of this O&M Agreement shall operate or be construed as a waiver of any nature, default, whether of alike or different character. No failure on the part of either party hereto to complain of any action or non-action on the part of the other party, no matter how long the same may continue, shall be deemed to be a waiver of any right hereunder by the party so failing. A waiver of any of the provisions of this O&M Agreement shall only be effective if made in writing and signed by the party who is making such waiver.

J. No. Nothing in this O&M Agreement shall be deemed to constitute either party a partner, agent or legal representative of the other party or to create any joint venture or fiduciary relationship between the parties. County is and shall remain an independent contractor in the performance of this O&M Agreement, maintaining complete control of its personnel, workers, subcontractors and operations required for its performance hereunder.

K. Joint Work Product. This Agreement shall be considered the work product of all parties hereto, and, therefore, no rule of strict construction shall be applied against any party hereto.

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

Brown Vease & Associates Lfg
a California corporation

By _____

County of Santa Cruz

By _____

By _____

DRAFT

EXHIBIT B**WORK SCOPE FOR OPERATION, MONITORING AND MAINTENANCE OF THE
LANDFILL GAS COLLECTION SYSTEM AT THE OPERATING SITE****DRAFT - SUBJECT TO DUE DILIGENCE REVIEW**

This scope of work provides for the operation, monitoring, and maintenance services on the Gas Collection System located at the Landfill in Santa Cruz County, California.

I. OPERATION, MONITORING, AND MAINTENANCE

Operation, monitoring, and maintenance consists of activities required to maximize collection of Landfill Gas from the Landfill while maintaining the operating criteria and preventing intrusion of air into the Landfill and “over-pulling” of the wells in a particular area to the detriment of gas production. Specific operating criteria are contained in the Data Gathering statement (see Section II below). Operation, monitoring and maintenance services are divided into the following categories:

Routine Monitoring and Maintenance.

Non-Routine Maintenance.

Unscheduled Emergency Services.

A . Routine Monitoring and Maintenance.

Routine monitoring and maintenance services on the Gas Collection System terminating at the downstream flange of the blowers (as defined in the Landfill Gas Lease), and includes the following:

As-Needed: Coordinate with Brown Vence & Associates Lfg and its agents for smooth operation of the Gas Collection System.

Coordinate with the Landfill Owner to minimize damage to the Gas Collection System as landfill activities proceed.

Prepare and maintain inspection/maintenance logs.

Notify Brown Vence & Associates Lfg of operating problems/issues as they occur.

Pump condensate traps, as needed.

Sample, analyze and dispose of condensate, as appropriate.

Daily: Monitor the Sales Meter(s) and analyze the inlet gas for percent methane and oxygen, flow and vacuum and record information on Form No.2 (see Section V

herein).

Monitor wells on a daily basis and check each well at least once per month for methane content, vacuum, oxygen content, temperature, and wellhead valve position with information being logged on the attached Form No. 1.

Prepare and maintain test data logs using the attached Forms.

Weekly: Monitor the annubar stations and monitoring points, if any, and record flows, Prepare flow reports and operating issues.

Bi-Weekly: Inspect Gas Collection System components and Landfill site surface for surface cracks/settlement or locations in the clay cap for potential points of air intrusion that might adversely affect operation of the system and determine integrity of the Gas Collection-System. Perform minor maintenance, as required, including replacing broken sample lab cock valves, securing loose flexible connections, cleaning fill away from enclosures, repair of clay seal around well, drain condensate from laterals and/or headers, etc.

Prepare and maintain inspection/maintenance logs.

Monitor the Gas Collection System for gas composition, vacuum distribution, and flow (as required); adjustments to be made as necessary (see Section II below).

Prepare and maintain test data/field activity logs.

Monthly: Prepare and submit a report to Brown Vence & Associates Lfg containing the data collected, a trend analysis, summary of the system operation and maintenance, and forecast of anticipated maintenance activities for next month.

Where possible, during the performance of routine services, personnel will perform minor non-routine services, such as tightening bolts, replacement of sample lab cock valves, replacement of flexible connections, etc.

B . Non-Routine Maintenance

Non-routine maintenance consists of corrective repairs or maintenance work identified during the routine visits. This work may include items such as resetting of vaults, repair of broken lateral and header lines, lowering of well heads and localized settlement and regrading of pipes and/or landfill surface to address condensate blockages and surging vacuum, and possible replacement of inoperable wells. This work is essential to the achievement of the Gas Collection System operational goals. However, it is considered the type of work that can generally be scheduled to allow for procurement of materials, equipment, scheduling of personnel, etc., and County will attempt to provide maximum notice to Brown Vence & Associates Lfg prior to such activity. This paragraph is subject to the provisions of Article VIII above.

C. Unscheduled emergency services include events that require immediate response.

These may include, but are not limited to:

Repair of header or lateral line breaks (resulting in **significant** air intrusion or limited gas flow to the gas processing facility).

Repair of broken flexible connections.

Repair of severely settled pipelines restricting gas flow.

Repair/maintenance and trouble shooting of Gas Collection System components.

Responses to the urgent nature of these items are such that they cannot be scheduled. County should respond to these conditions, as needed, 24 hours per day, 7 days per week. Unscheduled emergency services will be performed as required. County will use its best business judgment and Good Engineering Practice to effectuate repairs as soon as possible, especially where the continued operation of the Gas Collection System is concerned. The statements under the above caption are subject to the provisions of Article VIII above.

II. OPERATING CONDITIONS

This work scope has been developed with the following understanding:

1. County will be responsible, on behalf of Brown Vence & Associates Lfg, for the operation, monitoring and maintenance of the Gas Collection System as currently existing and as it may be subsequently expanded or modified. The system currently consists of vertical and horizontal extraction wells, condensate traps, header lines, and lateral lines, the primary condensate system, blowers and flow metering facilities.

2. County will have reasonable access to the wellfield during performance of its services consistent with the terms of the Lease.

3. County will be the only party designated to adjust the extraction wells during the period of its O&M Agreement. Brown Vence & Associates Lfg can request adjustments to the well field, and County shall comply with such requests except where compliance with such request would conflict with its other obligations hereunder.

4. County will employ and provide appropriately skilled persons to adjust, maintain, and troubleshoot the landfill gas collection and monitoring system. This shall include, but not be limited to, the taking of gas samples, and/or analyses vacuum readings, valve adjustments and well field balancing.

5. County will provide general administration and management responsibilities to oversee field personnel.

6. County will manage and coordinate the necessary subcontractors and vendors required to support ongoing operations hereunder.

7. County will maintain the required insurance coverage on its field personnel and any other employees involved with the Gas Collection System on its behalf.

8. County shall be responsible for providing the necessary portable field instrumentation and small hand tools required to support the performance of services covered under this contract.

9. County shall control the vacuum on the wells to optimize recovery while not unduly hindering the anaerobic decomposition of refuse at the Landfill and to maintain a gas content of not less than 45% methane or more than 2% oxygen at the Point of Delivery.

10. County shall be responsible for the engineering and design of any facilities, equipment or system in connection with the operation or expansion of the Gas Collection System.

11. County shall be responsible for the suitability of the Gas Collection System to meet any environmental requirements or operating criteria in the Lease or the other provisions of this O&M Agreement.

12. Any drawings, field notes and specifications developed pursuant to this O&M Agreement shall be provided to Brown Vence & Associates Lfg at no additional cost for the first three copies and at actual cost for additional copies requested by Brown Vence & Associates Lfg.

13. County shall be responsible for training, educating and, if necessary, licensing its own and Subcontractor personnel in general to conform to OSHA and SARA requirements as well as any other local, state and federal requirements applicable to the Gas Collection System and County activities.

14. This scope of work includes purchase of spare parts.

15. This scope of work includes the cost for services of any maintenance required to be performed by the manufacturer of the Sales Meter(s) and monitoring and testing equipment.

16. This scope of work includes reporting and/or analyses that may be required by regulatory bodies.

17. At any time during the term of this O & M Agreement, by mutual agreement of both parties, the Work Scope can be revised.

18. County will meet periodically with Brown Vence & Associates Lfg and/or its designated representatives to review operations of the Gas Collection System, maintenance of performance standards and compliance with this O&M Agreement, and to assist in any inspections of the Gas Collection System and related data.

III. MONITORING

1. Daily readings shall be taken at the Sales Meter(s) and recorded on Form No. 2. In addition, a gas analysis shall be done on the total Landfill Gas flow to determine the following:

methane content;
oxygen content;
temperature; and
blower vacuum.

2. At least monthly the Landfill Gas wells will be tested. Data will be collected, recorded, and stored on County's computer data base, if available; otherwise it shall be recorded manually on the attached Form No. 1. Test parameters will include the following:

methane concentration;
oxygen concentration;
flow rate, if possible;
wellhead vacuum;
lateral vacuum; and
gas temperature at wellhead.

3. At least once each month the wellfield piping and wells will be observed for the following:

vandalism;
malfunctions.

Monitoring report forms on well testing and total flow and gas content are attached.

IV. REPORTING

Once each month, County will prepare a letter report to Brown Vence & Associates Lfg containing the data collected and a summary of all activity performed on the Gas Collection System during the reporting period. Any data maintained in a computer data base to allow tracking of long term trends will be provided on a monthly basis sufficient for Brown Vence & Associates Lfg to determine total gas quantity and Btu content. In addition, any past month's major maintenance and/or operational problems and future major scheduled activities will be described in a cover letter with the monthly data. Monthly reports will also include details of any areas where operations may not have been in compliance with applicable laws and regulations or existing Permits or any areas where such non-compliance may occur in the future or gas flows and/or quality is significantly different than was projected by County. Special attention should be paid to environmental issues in these reports.

Once each year at a mutually agreeable time, County shall provide Brown Vence & Associates Lfg with an annual projection of Landfill Gas expected to be recovered. County shall provide Brown Vence & Associates Lfg on a quarterly basis, by the 15th day of each calendar quarter, estimates of anticipated Landfill Gas flow and quality for the following quarter and such other information as Brown Vence & Associates Lfg may reasonably request.

County shall assist Brown Vence & Associates Lfg in the preparation of all necessary Operating and capital expenditure budgets pertaining to the Gas Collection System at such times as is reasonably requested by Brown Vence & Associates Lfg, and in the collection of data regarding such budgets. County will work with Brown Vence & Associates Lfg in determining the amount of funds to be set aside for future capital expenditures each year based upon such budget.

County shall promptly upon becoming aware notify Brown Vence & Associates Lfg of (i) the loss of any property, plant or equipment essential to the operation of the Gas Collection System either due to destruction or damage which is uneconomical to repair, or other rendering of such property, plant or equipment permanently unfit for normal use for any reason whatsoever; (ii) an event which results in a total loss (constructive or otherwise) or an insurance settlement with respect to the Gas Collection System that is based on a total loss thereof; or (iii) the condemnation, confiscation, seizure or requisition of use of a portion or all of the Gas Collection System.

V. DATA GATHERING

Following data to be gathered at:

- a. The Gas Handling System/Brown Vence & Associates Lfg's Facility (to be done daily) .
 1. Landfill vacuum.
 2. Inlet temperatures of gas prior to blowers.
 3. Methane content.
 4. Oxygen content.
 5. Carbon dioxide content.
 6. Nitrogen content.
 7. Landfill gas flow rates (Sales Meter(s)).
- b. Wells/wellfield (to be done on an ongoing basis)
 1. Gas temperature at wellhead.
 2. Wellhead vacuum.
 3. Line vacuum.

4. Wellhead valve position.
5. Methane percentage.
6. Oxygen percentage.
7. Annubar flow measurements.

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EXHIBIT C

LIST OF INSURANCE REQUIREMENTS FOR OPERATORS WHICH ARE NOT SELF-INSURED

I. Any operator hereunder which is not self-insured shall secure and maintain in full force and effect the following minimum insurance coverages provided by insurers of nationally recognized standing legally qualified to issue insurance:

- (A) comprehensive commercial general liability insurance of not less than \$1,000,000 combined single limit;
- (B) in the event there are any employees, workers' compensation insurance in compliance with all statutory provisions and written with statutory limits;
- (C) comprehensive automobile liability insurance covering bodily injury and property damage for owned (if any), non-owned, leased and hired vehicles, with a limit of not less than \$1,000,000; and
- (D) excess liability insurance providing coverage limits in excess of the comprehensive general liability and comprehensive automobile liability of not less than \$5,000,000.

II. Any insurance carried by such operator in accordance with the provisions above shall be endorsed to provide that:

- (A) Such operator shall be the named insured in respect of all policies issued and Brown Vence & Associates Lfg shall be included as an additional insured as its respective interest may appear; and
- (B) The insurers thereunder waive against Brown Vence & Associates Lfg all rights of subrogation, any right of set off or counter claim, and any other right to deduction, whether by attachment or otherwise.

ELECTRIC GENERATION PLANT LEASE

This Electric Generation Plant Lease ("Lease") is entered into this ___ day of 1998 between County of Santa Cruz, a municipal corporation organized under the laws of the State of California ("Lessor"), and Brown Vence & Associates Genco, a California corporation duly authorized to conduct business in California ("Lessee" or "BVA").

WHEREAS, Lessor desires to lease to Lessee, and Lessee desires to lease from Lessor, certain of Lessor's interests and rights, including without limitation, the exclusive right to operate and maintain the Electric Generation Plant at the Buena Vista Sanitary Landfill ("Landfill") and to sell the electric Power generated by such plant; and

WHEREAS, Lessor understands and acknowledges that Lessee has entered into a Gas Purchase Agreement with Brown, Vence & Associates Lfg, and other related agreements.

NOW THEREFORE, in consideration of the promises and mutual covenants contained herein, Lessor and Lessee do hereby agree as follows:

ARTICLE 1 - DEFINITIONS

Unless the context indicates otherwise, as used herein, the capitalized terms used herein shall have the meanings defined as follows:

A. "Force *Majeure*" means acts of God; winds; hurricanes; tornadoes; fires; epidemics; landslides; earthquakes; floods; other natural catastrophes; strikes; lock-outs or other industrial disturbances; acts of public enemies; acts, failures to act or orders of any kind of any governmental authorities acting in their regulatory or judicial capacity, provided, however, that any such discretionary facts, failures to act or orders of any kind by Lessor may not be asserted as an event of *Force Majeure* by Lessor; insurrections; military action; war, whether or not it is declared; sabotage; riots; civil disturbances; explosions; or any other cause or event, *not reasonably* within the control of the party (and its subcontractors and suppliers) claiming *Force Majeure* (other than the financial inability of such party), which precludes that party from carrying out, in whole or in part, its obligations under this Lease. Nothing in this provision is intended to excuse any party from performing due to any governmental act, failure to act, or order, where it was reasonably within such party's power to prevent, correct, anticipate, or guard against such act, failure to act, or order.

B. "Good Engineering Practice" shall mean any methods and acts which, in the exercise of reasonable judgment in light of the facts known, or which in the exercise of due diligence, should have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with reliability, safety, environmental protection, expedition, project economics, and applicable laws and regulations for similar facilities in the State of California. "Good Engineering Practice" is not intended to be limited to the consideration of any one practice, method or act, to the exclusion of all others, but rather, is intended to require the

consideration of a spectrum of possible practices, methods, or acts.

C. "Premises" means the Electric Power Generation Plant and all areas on which any portion of the Plant is located, **all** as more particularly shown in Exhibit A attached hereto and made a part hereof, plus any necessary easements for construction and location of power lines and other utilities to transmit electric power.

D. Site Rental" **means** the rental payable pursuant to Article IV hereof with respect to the right to use the Premises granted hereunder,

ARTICLE II - LEASE RIGHTS GRANTED

A. Lessee's Rights to Premises and to Sell Electric Power. Lessor hereby leases the Premises to Lessee and grants to Lessee the exclusive right during the term of this Lease to possess, operate **and** maintain the Plant and to generate and sell electric power, including without limitation, the right to conduct all operations necessary or incidental to the generation of electric power using Landfill Gas and to lay electric power transmission lines and to construct and remove related structures and facilities necessitated by such operations.

ARTICLE III - TERM

A. Lease Term. Subject to the other provisions hereof, this Lease **shall** be **effective** immediately **and** shall remain in force for a term of 10 years **after** the execution hereof unless sooner terminated in accordance with Article VII hereof. At BVA option **term** can be extended to 5 additional 1 year periods.

B. Memorandum of Lease. Promptly **after** the execution of this Lease, the parties hereto shall execute a Memorandum of Lease in the **form** of Exhibit B attached hereto and made a part hereof, and Lessor shall immediately thereafter record said Memorandum in the appropriate County Recorder's office for the county in which the Landfill is located. Upon the termination of this Lease, Lessee agrees to execute a quitclaim deed or similar instrument, releasing **all** of its rights granted herein except those rights which expressly survive the termination of this Lease, and to deliver the same to Lessor within 30 days after the effective date of **termination**.

ARTICLE IV - RENT PAYMENTS

A. Site Rental Lessee shall pay for the rights created under this Lease as follows: **[NOTE:** the total rental payments under this agreement and the companion Landfill Gas Lease **shall** provide for the reimbursement to the County over the term of the two leases for (1) the County's debt service on the County's debt financing of the Plant and (2) the County's **equity** investment in the Plant, but without interest on this equity investment. **County's** capital costs **shall** include all costs incurred by the County for the investigation, design and construction of the Plant. These

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Exhibit 3

capital costs are currently estimated to total approximately \$__ million. The rental payments will be secured by a corporate parent guaranty or other security reasonably acceptable to the County.) Rental payments shall be made through equal quarterly payments over 10 years and there shall be no prepayment penalty for early retirement of lease. Payments to County beyond 10 year option period shall be _____

ARTICLE V - ADDITIONAL REPRESENTATIONS AND COVENANTS

A. Title to Premises and Improvements. Lessor represents that it has furnished Lessee with a true and correct copy of all documents evidencing its title to the Premises, Lessor represents and warrants that: (i) it has good and marketable title to the Premises and all real estate, including all easements and rights of way pertaining thereto; (ii) it holds exclusive rights to operate, improve and maintain the Plant and to sell the electric power generated thereby and to exercise and conduct all the other rights and activities to be granted to Lessee pursuant to this Lease; and (iii) all such rights and interests are free from all liens, encumbrances, restrictions or options of any kind whatsoever. Lessor further agrees that; (i) it shall, at its own expense, defend or cause the defense of, the title to the Premises during the term of this Lease, and any extension hereof, and (ii) Lessee's quiet and peaceful enjoyment of the Premises and its rights hereunder shall not be disturbed or interfered with by Lessor or any person or entity claiming by, through or under Lessor. Subject to the provisions of Article VTIT hereof, all improvements and fixtures that are built or installed on, in or under the Premises by or on behalf of Lessee shall remain the property of Lessee once so built or installed.

B. Quiet Enjoyment. Lessor shall not interfere with Lessee's operation or quiet enjoyment of the Premises or of the Plant.

C. Maintenance: Normal Wear and Tear. Lessee shall maintain, but shall not be obligated to improve, the Plant and Premises during the term of this Lease. The Lessee shall perform such normal maintenance of the Premises and Plant, at its own expense, as dictated by Good Engineering Practices. Lessee shall return the premises and Plant to Lessor in the same condition as when received by Lessee at the beginning of this Lease, ordinary wear and tear excepted.

D. Improvements. Neither party shall be obligated during the term of the Lease to improve the Premises or Plant; provided, however, that Lessee may, at its election, improve the Plant or Premises at its expense as Lessee deems desirable or prudent. Lessee shall provide Lessor with thirty (30) days advance notice of any improvements proposed by Lessee, but shall not make such improvements without Lessor's consent; provided, however, that such consent shall not be unreasonably withheld. Similarly, Lessor may wish to make improvements to the Premises or Plant at its expense, and Lessor shall provide Lessee with thirty (30) days advance notice of any improvements proposed by Lessor, but shall not make such improvements without Lessee's consent; provided, however, that such consent shall not be unreasonably withheld.

E. Permits; Compliance with Laws. Lessor represents that it has obtained, or will obtain if required, all material permits, licenses, authorizations or approvals, from any governmental

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Exhibit 3

authority required in order to carry out its obligations hereunder or to allow Lessee to carry out its obligations or exercise its rights hereunder. Each party agrees that its performance of its obligations under this Lease shall be in compliance with all applicable laws, ordinances, rules and regulations, and with any and all applicable orders, decrees and judgments or any governmental or judicial authority. In addition, each party shall not cause, by its acts or failures to act under or in connection with this Lease, the other party to be in violation of any of the foregoing,

F. Insurance. Lessee shall secure and maintain, at its own expense, throughout this Lease comprehensive commercial general liability insurance of at least \$1,000,000 combined single limit and excess liability coverage of at least \$2,000,000, with insurers, coverages and special provisions reasonably satisfactory to the other party. Lessor is, and will continue to be, self-insured in respect to its operations at the Landfill and the Plant at the above noted limits. Each party shall provide the other with evidence, reasonably satisfactory to the other, of such party's insurance hereunder upon the other party's reasonable request therefor, from time to time.

G. No Bankruptcy Filings. Notwithstanding any other provision to the contrary, each party hereby covenants with the other that it shall not file voluntarily for bankruptcy nor permit any assignee or affiliate controlled by or connected with it to file for bankruptcy without first securing all rights granted to the other party under this Lease or any other agreement between the parties relating to the subject matter hereof

H. Disclosure. To the best of Lessor's knowledge, none of the documents or other written or other information furnished by or on behalf of Lessor to Lessee pursuant to this Lease contains any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements contained herein or therein, in the light of circumstances in which they were made, not misleading. Lessor is not aware of any fact peculiar to Lessor or the Premises, which materially adversely affects the Premises, and which has not been set forth in this Lease or in other written material furnished to Lessee by or on behalf of Lessor prior to the date hereof in connection with the transactions contemplated hereby.

ARTICLE VI - TERMINATION

A. Lessor's Right to Terminate. Lessor shall have the right to terminate this Lease only in the event Lessee commits an act or omission which is a material default under this Lease, provided that where Lessor asserts a material default it notifies Lessee in writing and allows Lessee (and any permitted sublessee or assignee hereof) a reasonable period of time but not less than 30 days to cure the default and further provided that if such material default is due to an event of *Force Majeure*, such material default shall not be grounds for termination, unless such event of *Force Majeure* extends for a period in excess of 180 days and/or Lessee is not diligently seeking to cure such event of *Force Majeure*.

B. Lessee's Right to Terminate. Lessee shall have the right to terminate this Lease in the event Lessor commits an act or an omission which is a material default under this Lease, provided that where Lessee asserts a material default it notifies Lessor in writing and allows Lessor a

reasonable period of time but not less than 30 days to cure the default and further provided that if such material default is due to an event of *Force Majeure*, such material default shall not be bounds for termination, unless such event of *Force Majeure* extends for a period in excess of 180 days and/or Lessor is not diligently seeking to cure such event of *Force Majeure*. If the prior written Consent of any third party, including without limitation, any permitted sublessee hereof, is required to be obtained by Lessee prior to its termination of this Lease and Lessor has received written notice of such requirement, then any termination of this Lease by Lessee without such prior consent or without notice of any such consent to Lessor shall not be deemed effective.

C. Stay of Termination. A timely request for dispute resolution under Article XII of this Lease will stay the termination for cause under this Article VII until dispute resolution is concluded and for a reasonable time for cure after the conclusion of such dispute resolution as set forth in Article XII(F).

ARTICLE VII - RIGHTS ON TERMINATION OR EXPIRATION

E. Reversion of Leasehold Rights Upon the termination or expiration of this Lease, Lessee's rights to possession of the Premises, to operate and maintain the Plant and to sell the electric power generated thereby shall terminate, and the same shall revert to Lessor

F. Survival of Certain Covenants. Notwithstanding the termination or expiration of this Lease, the mutual rights and obligations of the parties under the indemnity provisions of Article IX shall survive as provided for therein.

ARTICLE VIII - SUBLETTING AND ASSIGNMENT

A. Lessee's Rights to Sublet and Assign Except as provided in this Article IX(A) or IX(B), the Premises may not be sublet, nor this Lease assigned to any person or entity, without the prior consent of Lessor, which consent shall not be unreasonably withheld or delayed. Notwithstanding any provision contained herein to the contrary, Lessor specifically agrees, without any further request for prior consent, to permit Lessee to assign or sublease its interest in the Lease to an entity owned or controlled by BVA, or affiliates thereof, provided Lessee shall give Lessor notice of the existence of such assignment or sublease, together with the name and address of the assignee or sub lessee, and a copy of the assignment or sublease document within 90 days of the execution of such assignment or sublease. A sale of all or a controlling interest of the stock of Lessee shall not constitute an assignment or subletting within the meaning of this provision.

B. Lessor's Right to Assign. Lessor reserves the right to convey or assign any or all of its interest in the Plant, without the prior consent of Lessee, provided, however, that any such conveyance or assignment shall not jeopardize receipt of REPT's or AB 1890 credit or interfere with or adversely affect Lessee's operation, maintenance, or possession of the Plant or Lessee's rights under this Lease. Lessor shall give Lessee 30 days' prior notice of its intent to convey or assign that interest, which notice shall contain the name and address of the

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proposed grantee or assignee and once executed, a copy of the **conveyance** or assignment document. Any conveyance or assignment of such interest by Lessor, which is not made in accordance with the provisions of this **Article IX (B)**, shall not be permitted and shall be null and void,

ARTICLE IX - INDEMNIFICATION

A. **Lessee's Indemnity.** Lessee shall indemnify, defend and hold harmless Lessor, its officers, officials, employees, agents, representatives, and independent contractors, from and against any and all costs, claims, liabilities, damages, expenses (including reasonable attorneys' fees) **causes of action**, suits or judgments incurred by or involving any of **the foregoing** parties and arising, directly or indirectly, from or in connection with (i) Any breach by Lessee of its obligations, covenants, representations or warranties contained in this Lease, or (ii) Any act or failure to act, at any time prior to or during the term hereof, of Lessee or any other person or entity (a) who is either controlled or affiliated with Lessee or invited onto any part of the Premises by Lessee, provided such act or failure constitutes negligence or willful misconduct,

B. **Lessor's Indemnity.** Lessor shall indemnify, defend and hold harmless Lessee and its partners and Lessee's and each such partner's shareholders, directors, officers, employees, agents, representatives and independent contractors (including without limitation, any subleases hereunder), from and against any and all costs, claims, liabilities, damages, expenses (including reasonable attorneys' fees), causes of action, suits or judgments, (collectively hereinafter "damages") incurred by or involving any of the foregoing parties and arising, directly or indirectly, from or in connection with:

(i) The condition of the Premises at the commencement of the term hereof;

(ii) Any actual or alleged previous agreement involving the Premises, the Plant or the sale of electricity therefrom;

(iii) Any breach by Lessor of its obligations, covenants, representations or warranties contained in this Lease (including without limitation, the failure of Lessor to grant any of the rights provided in Article II, the representations and covenants set forth in Article V), provided, however, that for the purposes of this Article X only any and all qualifications or limitations to such obligations, covenants, representations or warranties based on or related to Lessor's knowledge shall not be applicable;

(iv) Any act or failure to act, at any time prior to or during the term hereof, of Lessor or any other person or entity (a) who is either controlled or affiliated with Lessor or invited onto any part of the Premises by Lessor, and (b) who is neither controlled by nor affiliated with Lessee nor invited onto any part of the Premises by Lessee, provided such act or failure to act constitutes negligence or willful misconduct; or

(v) Any liability arising from prior, existing or future environmental conditions within, on or under

any portion of the Premises, including without limitation, the presence, treatment, transportation, disposal, release, or threat of release, of any Hazardous Material in or from the Premises, and from such costs as any governmental authority may require Lessee to incur in response to such conditions, except to the extent that such conditions are the result of or proximately caused by the action or omission of Lessee.

C. Lessee's Right to Cure Lessor's Breaches. Lessor shall give prompt notice to Lessee and any permitted assignee, subleases, mortgagee or other transferee hereof of any and all breaches or violations by Lessor of this Lease or Related Agreements, any other material agreement to which Lessor is a party and which pertains to the Premises. Lessee and any permitted transferee hereof shall have the right to remedy any such breach or violation (including without limitation, the right to redeem any mortgage, taxes or other liens on the Premises, or any interest or rights relating thereto, and thereafter be subrogated to the rights of the holder thereof), where such breach or violation would have a materially adverse effect, directly or indirectly, on the ownership, possession or operation of the Premises or any part thereof; provided that Lessee or such permitted transferee hereof has given lessor 10 days' prior notice of its intent to perform such remedy and Lessor does not within such 10 days commence and continue to proceed diligently with such remedy. In such case, the cost of remedying such breach or violation shall be paid by Lessor to Lessee promptly after receipt of an invoice therefor.

D. Sublessee's Right to Enforce Lease. Lessor agrees that if it breaches or violates this Lease, any permitted transferee hereof shall have the right to cause Lessor to comply with any and all of its obligations under this Lease to the same extent as Lessee is empowered hereunder to do so, including without limitation, the right to sue Lessor, in its name or Lessee's name, for damages which Lessee or such permitted sublessee hereof incurred or suffered as a result of such breach or violation.

E. Survival: Notwithstanding any provision contained herein, the provisions of this Article X shall survive the termination of this Lease for a period of 3 years, notwithstanding the application of any statute of limitations

ARTICLE X - *FORCE MA JEURE*

If by reason of *Force Majeure* either party is unable to carry out, either in whole or in part, its obligations herein contained, such party shall not be deemed to be in default during the continuation of such inability, provided that: (i) the non-performing party, within two (2) weeks after the occurrence of the *Force Majeure*, gives the other party written notice describing the particulars of the occurrence; (ii) the suspension of performance be of no greater scope and of no longer duration than the *Force Majeure*; (iii) no obligations of either party which arose prior to the occurrence is required by causing the suspension of performance be excused as a result of the occurrence; and (iv) that the non-performing party shall use its best efforts to remedy with all reasonable dispatch the cause or causes preventing it from carrying out its obligations.

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ARTICLE XI • MISCELLANEOUS

A. Notices. All notices, demands, requests, consents or other communications required or permitted to be given or made under this Lease shall be in writing. and

if to Lessor to:

County Of Santa Cruz /Public Works

County of Santa Cruz, CA

Tel:

Fax:

if to Lessee to:

Brown Vence & Associates Genco (BVA)

Address

Tel:

Fax:

Notices hereunder shall be deemed properly served (i) by hand delivery, on the day and at the time on which delivered to the intended recipient at the address set forth in this Lease; (ii) if sent by mail, on the third business day tier the day on which deposited in the United States certified or registered mail, postage prepaid, return receipt requested, addressed to the intended recipient at its address set forth in this Lease Agreement; or (iii) if by Federal Express or other reputable express mail service, on the next business day after delivery to such express mail service, addressed to the intended recipient at its address set forth in this Lease Agreement. Either party may change its address for the purpose of this Article XII(A) by giving the other party prior notice thereof in accordance with this provision,

B. Successors and Assigns. Subject to the restrictions on assignment herein contained, the terms and provisions of this Lease shall be binding upon, and shall inure to the benefit of, the successors, assigns and legal representatives of the respective parties hereto. This Lease shall not (directly, indirectly, contingently or otherwise) confer or be construed as conferring any rights or benefits on any person or entity not named as a party hereto, except as otherwise expressly provided with respect to permitted sublessees hereof.

C. Severability If any term or provision of this Lease or the application thereof to any person or circumstance be invalid or unenforceable to any extent, the remainder of this Lease and the application of such term and provision to persons or circumstances other than those to which it has been held invalid or unenforceable shall not be affected thereby and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law,

D. Headinns. The headings appearing in this Lease are intended for convenience and

Exhibit 3

reference only, and are not to be considered in **construing** this Lease.

E. No Joint Venture. The relationship ~~between~~ the parties hereto shall be that of lessor and lessee alone and nothing herein contained shall be deemed to constitute either party hereto a partner, agent or legal representative of the ~~other~~ party or to create a joint venture, agency or any relationship between the parties hereto other ~~than~~ that of lessor and lessee.

F. Applicable Law and Related Matters. All questions with respect to the construction of this Lease and the rights and liabilities of the parties ~~hereunder~~ shall be determined in accordance with the laws of the State of California. In any litigation arising from this Lease, the prevailing party shall be entitled to receive from the non-previling party **all** reasonable costs and expenses (including reasonable attorneys' fees and **expenses**) incurred by the prevailing party by reason of the event giving rise to such litigation.

G. Dispute Resolution. Prior to the initiation of litigation, either party **may** initiate dispute resolution under this section. Dispute resolution **will** be initiated by either party delivering notice to the other, setting forth the nature of the **dispute**. The parties agree to meet or otherwise confer expeditiously to resolve the dispute, and to **submit** the dispute to non-binding **third** party mediation if the dispute cannot be resolved **within** 15 days following the delivery of the notice. If a notice of default has been issued, the period of time allowed to cure the **default** shall be stayed pending dispute resolution, for a period not to **exceed** 45 days (including third party mediation) unless otherwise agreed to by the parties ~~hereto~~. Notwithstanding the foregoing, a party may initiate litigation and shall not be bound by the **dispute resolution** procedures set forth in this paragraph in case of a situation where such party is seeking temporary or preliminary injunctive relief or where such party certifies, in good **faith**, that failure to promptly initiate litigation **will** subject it to the risk of grave harm.

G. Joint Workproduct. This Agreement shall be considered the **workproduct** of all parties hereto, and, therefore, no rule of strict **construction** shall be applied against any party hereto.

H. Expenses. Each party hereto shall pay **all** expenses incurred by it in connection with its entering into this Lease, including without **limitation**, **all** attorneys' fees and expenses.

I. Waiver. No waiver by either party of **any** one or more defaults by the other in the performance of any provision of this Lease shall **operate** or be construed as a waiver of any **future** default, whether of a like or different character. NO failure on the part of either party to complain of any action or non-action on the part of the ~~other~~ party, no matter how long the same may continue, shall be deemed to be a waiver of any **right** hereunder by the **party** so failing. A waiver of any of the provisions of this Lease shall only **be effective** if made in writing and signed by the party who is making such waiver.

J. Entire Agreement: Amendments. This **Lease** constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes **all** prior oral or written agreements and understandings between the **parties** relating to the subject matter hereof. This Lease may be amended or modified only by a **written** instrument signed by both parties hereto.

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K. Counterparts This Lease may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute a single agreement.

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

LESSOR: COUNT-Y OF SANTA CRUZ, CALIFORNIA

By: _____

By: _____

Tel:

Fax:

LESSEE: Brown Vence & Associates GENCO
a California corporation

By: _____

Name and Title

LEASE EXHIBIT LIST

Exhibit A: Description of Premises

Exhibit B: Memorandum of Lease

AIA Document A191

Standard Form of Agreement Between Owner and Design/Builder

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS USE, COMPLETION OR MODIFICATION.

This document comprises two separate Agreements: Part 1 Agreement and Part 2 Agreement. To the extent referenced in these Agreements, subordinate parallel agreements to A191 consist of AIA Document A491, Standard Form of Agreements Between Design/Builder and Contractor, and AIA Document B901, Standard Form of Agreements Between Design/Builder and Architect.

PART 2 AGREEMENT

1996 EDITION

AGREEMENT

made as of the _____ d a y o f _____ in the year of _____
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name and address)

and the, Design/Builder:
(Name and address)

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Exhibit 4

For the following Project:
(Include Project name, location and a summary description.)

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The architectural services described in Article 3 will be provided by the following person or entity who is lawfully licensed to practice architecture:

(Name and address)

(Registration Number)

(Relationship to Design/Builder)

Normal structural, mechanical and electrical engineering services will be provided contractually through the Architect except as indicated below:

(Name, address and discipline)

(Registration Number)

(Relationship to Design/Builder)

The Owner and the Design/Builder agree as set forth below.



ARTICLE 1**GENERAL PROVISIONS****1.1 BASIC DEFINITIONS**

1.1.1 The Contract Documents consist of the Part 1 Agreement to the extent not modified by this Part 2 Agreement, this Part 2 Agreement, the Design/Builder's Proposal and written addenda to the Proposal identified in Article 14, the Construction Documents approved by the Owner in accordance with Subparagraph 3.2.3 and Modifications issued after execution of this Part 2 Agreement. A Modification is a Change Order or a written amendment to this Part 2 Agreement signed by both parties, or a Construction Change Directive issued by the Owner in accordance with Paragraph 8.3.

1.1.2 The term "Work" means the construction and services provided by the Design/Builder to fulfill the Design/Builder's obligations.

1.2 EXECUTION, CORRELATION AND INTENT

1.2.1 It is the intent of the Owner and the Design/Builder that the Contract Documents include all items necessary for proper execution and completion of the Work. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Design/Builder shall be required only to the extent consistent with and reasonably inferable from the Contract Documents as being necessary to produce the intended results. Words that have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings.

1.2.2 If the Design/Builder believes or is advised by the Architect or by another design professional retained to provide services on the Project that implementation of any instruction received from the Owner would cause a violation of any applicable law, the Design/Builder shall notify the Owner in writing. Neither the Design/Builder nor the Architect shall be obligated to perform any act which either believes will violate any applicable law.

1.2.3 Nothing contained in this Part 2 Agreement shall create a contractual relationship between the Owner and any person or entity other than the Design/Builder.

1.3 OWNERSHIP AND USE OF DOCUMENTS

1.3.1 Drawings, specifications, and other documents and electronic data furnished by the Design/Builder are instruments of service. The Design/Builder's Architect and other providers of professional services shall retain all common law, statutory and other reserved rights, including copyright in those instruments of service furnished by them. Drawings, specifications, and other documents and electronic data are furnished for use solely with respect to this Part 2 Agreement. The Owner shall be permitted to retain copies, including reproducible copies, of the drawings, specifications, and other documents and electronic data furnished by the

Design/Builder for information and reference in connection with the Project except as provided in Subparagraphs 1.3.2 and 1.3.3.

1.3.2 Drawings, specifications, and other documents and electronic data furnished by the Design/Builder shall not be used by the Owner or others on other projects, for additions to this Project or for completion of this Project by others, except by agreement in writing and with appropriate compensation to the Design/Builder, unless the Design/Builder is adjudged to be in default under this Part 2 Agreement or under any other subsequently executed agreement.

1.3.3 If the Design/Builder defaults in the Design/Builder's obligations to the Owner, the Architect shall grant a license to the Owner to use the drawings, specifications, and other documents and electronic data furnished by the Architect to the Design/Builder for the completion of the Project, conditioned upon the Owner's execution of an agreement to cure the Design/Builder's default in payment to the Architect for services previously performed and to indemnify the Architect with regard to claims arising from such reuse without the Architect's professional involvement.

1.3.4 Submission or distribution of the Design/Builder's documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the rights reserved in Subparagraph 1.3.1.

ARTICLE 2**OWNER**

2.1 The Owner shall designate a representative authorized to act on the Owner's behalf with respect to the Project. The Owner or such authorized representative shall examine documents submitted by the Design/Builder and shall render decisions in a timely manner and in accordance with the schedule accepted by the Owner. The Owner may obtain independent review of the Contract Documents by a separate architect, engineer, contractor or cost estimator under contract to or employed by the Owner. Such independent review shall be undertaken at the Owner's expense in a timely manner and shall not delay the orderly progress of the Work.

2.2 The Owner may appoint an on-site project representative to observe the Work and to have such other responsibilities as the Owner and the Design/Builder agree in writing.

2.3 The Owner shall cooperate with the Design/Builder in securing building and other permits, licenses and inspections. The Owner shall not be required to pay the fees for such permits, licenses and inspections unless the cost of such fees is excluded from the Design/Builder's Proposal.

2.4 The Owner shall furnish services of land surveyors,

geotechnical engineers and other consultants for subsurface, air and water conditions, in addition to those provided under the Part 1 Agreement. When such services are deemed necessary by the Design/Builder to properly carry out the design services required by this Part 2 Agreement

2.5 The Owner shall disclose, to the extent known to the Owner, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems: chemical, air and water pollution; hazardous materials; or other environmental and subsurface conditions. The Owner shall disclose all information known to the Owner regarding the presence of pollutants at the Project's site

2.6 The Owner shall furnish all legal, accounting and insurance counseling service as may be necessary at any time for the Project, including such auditing services as the Owner may require to verify the Design/Builder's Applications for Payment.

2.7 Those services, information, surveys and reports required by Paragraphs 1.4 through 2.6 which are within the Owner's control shall be furnished at the Owner's expense, and the Design/Builder shall be entitled to rely upon the accuracy and completeness thereof, except to the extent the Owner advises the Design/Builder to the contrary in writing.

2.8 If the Owner requires the Design/Builder to maintain any special insurance coverage, policy, amendment, or rider, the Owner shall pay the additional cost thereof, except as otherwise stipulated in this Part 2 Agreement.

2.9 If the Owner observes or otherwise becomes aware of a fault or defect in the Work or nonconformity with the Design/Builder's Proposal or the Construction Documents, the Owner shall give prompt written notice thereof to the Design/Builder.

2.10 The Owner shall, at the request of the Design/Builder, prior to execution of this Part 2 Agreement and promptly upon request thereafter, furnish to the Design/Builder reasonable evidence that financial arrangements have been made to fulfill the Owner's obligations under the Contract.

2.11 The Owner shall communicate with persons or entities employed or retained by the Design/Builder through the Design/Builder, unless otherwise directed by the Design/Builder.

ARTICLE 3 DESIGN/BUILDER

3.1 SERVICES AND RESPONSIBILITIES

3.1.1 Design services required by this Part 2 Agreement shall be performed by qualified architects and other design professionals. The contractual obligations of such professional persons or entities are undertaken and performed in the interest of the Design/Builder.

3.1.2 The agreements between the Design/Builder and

the persons or entities identified in this Part 2 Agreement, and any subsequent modifications, shall be in writing. These agreements, including financial arrangements with respect to this Project, shall be promptly and fully disclosed to the Owner upon request.

3.1.3 The Design/Builder shall be responsible to the Owner for acts and omissions of the Design/Builder's employees, subcontractors and their agents and employees, and other persons, including the Architect and other design professionals, performing any portion of the Design/Builder's obligations under this Part 2 Agreement.

3.2 BASIC SERVICES

3.2.1 The Design/Builder's Basic Services are described below and in Article 14.

3.2.2 The Design/Builder shall designate a representative authorized to act on the Design/Builder's behalf with respect to the Project.

3.2.3 The Design/Builder shall submit Construction Documents for review and approval by the Owner. Construction Documents may include drawings, specifications, and other documents and electronic data setting forth in detail the requirements for construction of the Work, and shall:

- 1 be consistent with the intent of the Design/Builder's Proposal;
- 2 provide information for the use of those in the building trades; and
- 3 include documents customarily required for regulatory agency approvals.

3.2.4 The Design/Builder, with the assistance of the Owner, shall file documents required to obtain necessary approvals of governmental authorities having jurisdiction over the Project.

3.2.5 Unless otherwise provided in the Contract Documents, the Design/Builder shall provide or cause to be provided and shall pay for design services, labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation and other facilities and services necessary for proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

3.2.6 The Design/Builder shall be responsible for all construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work under this Part 2 Agreement.

3.2.7 The Design/Builder shall keep the Owner informed of the progress and quality of the Work.

3.2.8 The Design/Builder shall be responsible for correcting Work which does not conform to the Contract Documents.

3.2.9 The Design/Builder warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the construction will be free from faults and defects, and that the construction will conform with the requirements of the

Contract Documents Construction not conforming to these requirements, including substitutions not properly approved by the Owner, shall be corrected in accordance with Article 9.

3.2.10 The Design/Builder shall pay all sales, consumer, use and similar taxes which had been legally enacted at the time the Design/Builder's Proposal was first submitted to the Owner, and shall secure and pay For building and other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work which are either customarily secured after execution of a contract for construction or are legally required at the time the Design/Builder's Proposal was first submitted to the Owner

3.2.11 The Design/Builder shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities relating to the Project.

3.2.12 The Design/Builder shall pay royalties and license fees for patented designs, processes or products. The Design/Builder shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible For such defense or loss when a particular design, process or product of a particular manufacturer is required by the Owner. However, if the Design/Builder has reason to believe the use of a required design, process or product is an infringement of a patent, the Design/Builder shall be responsible for such loss unless such information is promptly furnished to the Owner.

3.2.13 The Design/Builder shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under this Part 2 Agreement. At the completion of the Work, the Design/Builder shall remove from the site waste materials, rubbish, the Design/Builder's tools, construction equipment, machinery, and surplus materials.

3.2.14 The Design/Builder shall notify the Owner when the Design/Builder believes that the Work or an agreed upon portion thereof is substantially completed if the Owner concurs., the Design/Builder shall issue a Certificate of Substantial Completion which shall establish the Date of Substantial Completion, shall state the responsibility of each party for security, maintenance, heat, utilities, damage to the Work and insurance, shall include a list of items to be completed or corrected and shall fix the time within which the Design/Builder shall complete items listed therein. Disputes between the Owner and Design/Builder regarding the Certificate of Substantial Completion shall be resolved in accordance with provisions of Article 10

3.2.15 The Design/Builder shall maintain at the site for the Owner one record copy of the drawings, specifications, product data, samples, shop drawings, Change Orders and other modifications, in good order and regularly updated to record the completed construction. These shall be delivered to the Owner upon completion of construction and prior to final payment.

3.3 ADDITIONAL SERVICES

3.3.1 The services described in the Paragraph 3.3 are

not included in Basic Services unless so identified in Article 14, and they shall be paid for by the Owner as provided in this Part 2 Agreement, in addition to the compensation For Basic Services. The services described in this Paragraph 3.3 shall be provided only if authorized or confirmed in writing by the Owner.

3.3.2 Making revisions in drawings, specifications, and other documents or electronic data when such revisions are required by the enactment or revision of codes, laws or regulations subsequent to the preparation of such documents or electronic data.

3.3.3 Providing consultation concerning replacement of Work damaged by fire or other cause during construction, and furnishing services required in connection with the replacement of such Work

3.3.4 Providing services in connection with a public hearing, arbitration proceeding or legal proceeding, except where the Design/Builder is a party thereto.

3.3.5 Providing coordination of construction performed by the Owner's own forces or separate contractors employed by the Owner, and coordination of services required in connection with construction performed and equipment supplied by the Owner

3.3.6 Preparing a set of reproducible record documents or electronic data showing significant changes in the Work made during construction

3.3.7 Providing assistance in the utilization of equipment or systems such as preparation of operation and maintenance manuals, training personnel for operation and maintenance, and consultation during operation.

ARTICLE 4

TIME

4.1 Unless otherwise indicated, the Owner and the Design/Builder shall perform their respective obligations as expeditiously as is consistent with reasonable skill and care and the orderly progress of the Project.

4.2 Time limits stated in the Contract Documents are of the essence. The Work to be performed under this Part 2 Agreement shall commence upon receipt of a notice to proceed unless otherwise agreed and, subject to authorized Modifications, Substantial Completion shall be achieved on or before the date established in Article 14.

4.3 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use

4.4 Based on the Design/Builder's Proposal, a construction schedule shall be provided consistent with Paragraph 4.2 above.

4.6 If the Design/Builder is delayed at any time in the progress of the Work by an act or neglect of the Owner, Owner's employees, or separate contractors employed by the Owner, or by changes ordered in the Work, or by

labor disputes, fire, unusual delay in deliveries, adverse weather conditions not reasonably anticipatable, unavoidable casualties or other causes beyond the Design/Builder's control, or by delay authorized by the Owner pending arbitration, or by other causes which the Owner and Design/Builder agree may justify delay, then the Contract Time shall be reasonably extended by Change Order

shall become due until the Design/Builder submits to the Owner: (1) an affidavit that payrolls, bills for materials and equipment, and other indebtedness connected with the Work for which the Owner or Owner's property might be responsible or encumbered (less amounts withheld by the Owner;) have been paid or otherwise satisfied; (2) a certificate evidencing that Insurance required by the Contract Documents to remain in force after final payment is currently in effect and will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner; (3) a written statement that the Design/Builder knows of no substantial reason that the insurance will not be renewable to cover the period required by the Contract Documents; (4) consent of surety, if any, to final payment; and (5) if required by the Owner, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests or encumbrances arising out of the Contract, to the extent and in such Form as may be designated by the Owner. If a contractor or other person or entity entitled to assert a lien against the Owner's property refuses to Furnish a release or waiver required by the Owner, the Design/Builder may furnish a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Design/Builder shall indemnify the Owner for all loss and cost, including reasonable attorneys' fees incurred as a result of such lien.

**ARTICLE 5
PAYMENTS**

5.1 PROGRESS PAYMENTS

5.1.1 The Design/Builder shall deliver to the Owner itemized Applications for Payment in such detail as indicated in Article 14.

5.1.2 Within ten (10) days of the Owner's receipt of a properly submitted and correct Application for Payment, the Owner shall make payment to the Design/Builder

5.1.3 The Application for Payment shall constitute a representation by the Design/Builder to the Owner that the design and construction have progressed to the point indicated, the quality of the Work covered by the application is in accordance with the Contract Documents, and the Design/Builder is entitled to payment in the amount requested

5.1.4 Upon receipt of payment from the Owner, the Design/Builder shall promptly pay the Architect, other design professionals and each contractor the amount to which each is entitled in accordance with the terms of their respective contracts

5.1.5 The Owner shall have no obligation under this Part 2 Agreement to pay or to be responsible in any way for payment to the Architect, another design professional or a contractor performing portions of the Work.

5.1.6 Neither progress payment nor partial or entire use or occupancy of the Project by the Owner shall constitute an acceptance of Work not in accordance with the Contract Documents.

5.1.7 The Design/Builder warrants that title to all construction covered by an Application for Payment will pass to the Owner no later than the time of payment. The Design/Builder further warrants that upon submittal of an Application for Payment all construction for which payments have been received from the Owner shall be free and clear of liens, claims, security interests or encumbrances in favor of the Design/Builder or any other person or entity performing construction at the site or furnishing materials or equipment relating to the construction.

5.1.8 At the time of Substantial Completion, the Owner shall pay the Design/Builder the retainage, if any, less the reasonable cost to correct or complete incorrect or incomplete Work. Final payment of such withheld sum shall be made upon correction or completion of such Work

5.2 FINAL PAYMENT

5.2.1 Neither final payment nor amounts retained, if any,

5.2.2 When the Work has been completed and the contract Fully performed, the Design/Builder shall submit a final application for payment to the Owner, who shall make Final payment within 30 days of receipt.

5.2.3 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

- .1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;
- .2 Failure of the Work to comply with the requirements of the Contract Documents; or
- .3 terms of special warranties required by the Contract Documents

5.2.4 Acceptance of final payment shall constitute a waiver of all claims by the Design/Builder except those previously made in writing and identified by the Design/Builder as unsettled at the time of final Application for Payment.

5.3 INTEREST PAYMENTS

5.3.1 Payments due the Design/Builder under this Part 2 Agreement which are not paid when due shall bear interest from the date due at the rate specified in Article 13, or in the absence of a specified rate, at the legal rate prevailing where the Project is located.

ARTICLE 6

PROTECTION OF PERSONS AND PROPERTY

6.1 The Design/Builder shall be responsible for initiating, maintaining and providing supervision of all safety precautions and programs in connection with the performance of this Part 2 Agreement.

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6.2 The Design/Builder shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, **injury or loss to: (1)** employees on the Work and other persons who may be affected thereby; (2) the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody, or control of the Design/Builder or the Design/Builder's contractors; and (3) other property at or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.

6.3 The Design/Builder shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on the safety of persons or property or their protection from damage, injury or loss.

6.4 The Design/Builder shall promptly remedy damage and loss (other than damage or loss insured under property insurance provided or required by the Contract Documents) to property at the site caused in whole or in part by the Design/Builder, a contractor of the Design/Builder or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable.

ARTICLE 7

INSURANCE AND BONDS

7.1 DESIGN/BUILDER'S LIABILITY INSURANCE

7.1.1 The Design/Builder shall purchase from and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, such insurance as will protect the Design/Builder from claims set forth below which may arise out of or result from operations under this Part 2 Agreement by the Design/Builder or by a contractor of the Design/Builder, or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- .1 claims under workers' compensation, disability benefit and other similar employee benefit laws that are applicable to the Work to be performed;
- .2 claims for damages because of bodily injury, occupational sickness or disease, or death of the Design/Builder's employees;
- .3 claims for damages because of bodily injury, sickness or disease, or death of persons other than the Design/Builder's employees;
- .4 claims for damages covered by usual personal injury liability coverage which are sustained (1) by a person as a result of an offense directly or indirectly related to employment of such person by the Design/Builder or (2) by another person;
- .5 claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
- .6 claims for damages because of bodily injury, death of a person or property damage arising out

of ownership, maintenance or use of a motor vehicle; and

- .7 claims involving contractual liability insurance applicable to the Design/Builder's obligations under Paragraph 115

7.1.2 The insurance required by Subparagraph 7.1.1 shall be written for not less than limits of liability specified in this Part 2 Agreement or required by law, whichever coverage is greater. Coverages, whether written on an occurrence or claims-made basis, shall be maintained without interruption from date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

7.1.3 Certificates of insurance acceptable to the Owner shall be delivered to the Owner immediately after execution of this Part 2 Agreement. These certificates and the insurance policies required by this Paragraph 7.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment, an additional certificate evidencing continuation of such coverage shall be submitted with the application for final payment. Information concerning reduction of coverage shall be furnished by the Design/Builder with reasonable promptness in accordance with the Design/Builder's information and belief.

7.2 OWNER'S LIABILITY INSURANCE

7.2.1 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under this Part 2 Agreement. The Design/Builder shall not be responsible for purchasing and maintaining this optional Owner's liability insurance unless specifically required by the Contract Documents

7.3 PROPERTY INSURANCE

7.3.1 Unless otherwise provided under this Part 2 Agreement, the Owner shall purchase and maintain, in a company or companies authorized to do business in the jurisdiction in which the principal improvements are to be located, property insurance upon the Work to the full insurable value thereof on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made or until no person or entity other than the Owner has an insurable interest in the property required by this Paragraph 7.3 to be insured, whichever is earlier. This insurance shall include interests of the Owner, the Design/Builder, and their respective contractors and subcontractors in the Work.

7.3.2 Property insurance shall be on an all-risk policy form and shall insure against the perils of Fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, falsework, temporary buildings and

debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for the services and expenses of the Design/Builder's Architect and other professionals required as a result of such insured loss. Coverage for other perils shall not be required unless otherwise provided in the Contract Documents.

7.3.3 If the Owner does not intend to purchase such property insurance required by this Part 2 Agreement and with all of the coverages in the amount described above, the Owner shall so inform the Design/Builder prior to commencement of the construction. The Design/Builder may then effect insurance which will protect the interests of the Design/Builder and the Design/Builder's contractors in the construction, and by appropriate Change Order the cost thereof shall be charged to the Owner. If the Design/Builder is damaged by the failure or neglect of the Owner to purchase or maintain insurance as described above, then the Owner shall bear all reasonable costs properly attributable thereto.

7.3.4 Unless otherwise provided, the Owner shall purchase and maintain such boiler and machinery insurance required by this Part 2 Agreement or by law, which shall specifically cover such insured objects during installation and until final acceptance by the Owner. This insurance shall include interests of the Owner, the Design/Builder, the Design/Builder's contractors and subcontractors in the Work, and the Design/Builder's Architect and other design professionals. The Owner and the Design/Builder shall be named insureds.

7.3.5 A loss insured under the Owner's property insurance shall be adjusted by the Owner as fiduciary and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to requirements of any applicable mortgagee clause and of Subparagraph 7.3.10. The Design/Builder shall pay contractors their shares of insurance proceeds received by the Design/Builder, and by appropriate agreement, written where legally required for validity, shall require contractors to make payments to their subcontractors in similar manner.

7.3.6 Before an exposure to loss may occur, the Owner shall file with the Design/Builder a copy of each policy that includes insurance coverages required by this Paragraph 7.3. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Design/Builder.

7.3.7 If the Design/Builder requests in writing that insurance for risks other than those described herein or for other special hazards be included in the property insurance policy, the Owner shall, if possible, obtain such insurance, and the cost thereof shall be charged to the Design/Builder by appropriate Change Order.

7.3.8 The Owner and the Design/Builder waive all rights against each other and the Architect and other design

professionals, contractors, subcontractors, agents and employees, each of the other, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 7.3 or other property insurance applicable to the Work, except such rights as they may have to proceeds of such insurance held by the Owner as trustee. The Owner or Design/Builder, as appropriate, shall require from contractors and subcontractors by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated in this Paragraph 7.3. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

7.3.9 If required in writing by a party in interest, the Owner as trustee shall, upon occurrence of an insured loss, give bond for proper performance of the Owner's duties. The cost of required bonds shall be charged against proceeds received as fiduciary. The Owner shall deposit in a separate account proceeds so received, which the Owner shall distribute in accordance with such agreement as the parties in interest may reach, or in accordance with an arbitration award in which case the procedure shall be as provided in Article IO. If after such loss no other special agreement is made, replacement of damaged Work shall be covered by appropriate Change Order.

7.3.10 The Owner as trustee shall have power to adjust and settle a loss with insurers unless one of the parties in interest shall object in writing, within five (5) days after occurrence of loss to the Owner's exercise of this power; if such objection be made, the parties shall enter into dispute resolution under procedures provided in Article 10. If distribution of insurance proceeds by arbitration is required, the arbitrators will direct such distribution.

7.3.11 Partial occupancy or use prior to Substantial Completion shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Design/Builder shall take reasonable steps to obtain consent of the insurance company or companies and shall not, without mutual written consent, take any action with respect to partial occupancy or use that would cause cancellation, lapse or reduction of coverage.

7.4 LOSS OF USE INSURANCE

7.4.1 The Owner, at the Owner's option, may purchase and maintain such insurance as will insure the Owner against loss of use of the Owner's property due to fire or other hazards, however caused. The Owner waives all rights of action against the Design/Builder for loss of use of the Owner's property, including consequential losses due to fire or other hazards, however caused

ARTICLE 8

CHANGES IN THE WORK

8.1 CHANGES

8.1.1 Changes in the Work may be accomplished after execution of this Part 2 Agreement, without invalidating this Part 2 Agreement, by Change Order, Construction Change Directive, or order For a minor change in the Work, subject to the limitations stated in the Contract Documents.

8.1.19 A Change Order shall be based upon agreement between the Owner and the Design/Builder; a Construction Change Directive may be issued by the Owner without the agreement of the Design/Builder; an order for a minor change in the Work may be issued by the Design/Builder alone.

8.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Design/Builder shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive, or order For a minor change in the Work.

8.1.4 If unit prices are stated in the Contract Documents or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or the Design/Builder, the applicable unit prices shall be equitably adjusted.

8.2 CHANGE ORDERS

8.2.1 A Change Order is a written instrument prepared by the Design/Builder and signed by the Owner and the Design/Builder, stating their agreement upon all of the following:

- .1 a change in the Work;
- .2 the amount of the adjustment, if any, in the Contract Sum; and
- .3 the extent of the adjustment, if any, in the Contract Time.

8.2.2 If the Owner requests a proposal For a change in the Work from the Design/Builder and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse the Design/Builder for any costs incurred for estimating services, design services or preparation of proposed revisions to the Contract Documents.

a.3 CONSTRUCTION CHANGE DIRECTIVES

8.3.1 A Construction Change Directive is a written order prepared and signed by the Owner, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both.

8.3.2 Except as otherwise agreed by the Owner and the Design/Builder, the adjustment to the Contract Sum shall be determined on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including the expenditures for

design services and revisions to the Contract Documents. In case of an increase in the Contract Sum, the cost shall include a reasonable allowance for overhead and profit. In such case, the Design/Builder shall keep and present an itemized accounting together with appropriate supporting data for inclusion in a Change Order. Unless otherwise provided in the Contract Documents, costs for these purposes shall be limited to the following:

- .1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 rental costs of machine? and equipment exclusive of hand tools, whether rented from the Design/Builder or others;
- .4 costs of premiums for all bonds and insurance permit fees, and sales, use or similar taxes;
- .5 additional costs of supervision and field office personnel directly attributable to the change; and fees paid to the Architect, engineers and other professionals.

8.3.3 Pending final determination of cost to the Owner, amounts not in dispute may be included in Applications for Payment. The amount of credit to be allowed by the Design/Builder to the Owner for deletion or change which results in a net decrease in the Contract Sum will be actual net cost. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of the net increase, if any, with respect to that change.

8.3.4 When the Owner and the Design/Builder agree upon the adjustments in the Contract Sum and Contract Time, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

8.4 MINOR CHANGES IN THE WORK

8.4.1 The Design/Builder shall have authority to make minor changes in the Construction Documents and construction consistent with the intent of the Contract Documents when such minor changes do not involve adjustment in the Contract Sum or extension of the Contract Time. The Design/Builder shall promptly inform the Owner, in writing, of minor changes in the Construction Documents and construction.

a.5 CONCEALED CONDITIONS

8.5.1 If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents, or (2) unknown physical conditions of an unusual nature which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no

event later than 21 days after first observance of the conditions. The Contract Sum shall be equitably adjusted for such concealed or unknown conditions by Change Order upon claim by either party made within 21 days after the claimant becomes aware of the conditions.

0.6 REGULATORY CHANGES

8.6.1 The Design/Builder shall be compensated for changes in the construction necessitated by the enactment or revision of codes, laws or regulations subsequent to the submission of the Design/Builder's Proposal.

ARTICLE 9

CORRECTION OF WORK

9.1 The Design/Builder shall promptly correct Work rejected by the Owner or known by the Design/Builder to be defective or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, inscald or completed. The Design/Builder shall bear costs of correcting such rejected Work, including additional testing and inspections.

9.2 If, within one (1) year after the date of Substantial Completion of the Work or, after the date for commencement of warranties established in a written agreement between the Owner and the Design/Builder, or by terms of an applicable special warranty required by the Contract Documents, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Design/Builder shall correct it promptly after receipt of a written notice from the Owner to do so unless the Owner has previously given the Design/Builder a written acceptance of such condition.

9.3 Nothing contained in this Article 9 shall be construed to establish a period of limitation with respect to other obligations which the Design/Builder might have under the Contract Documents. Establishment of the time period of one (1) year as described in Subparagraph 9.2 relates only to the specific obligation of the Design/Builder to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought, to be enforced, nor to the time within which proceedings may be commenced to establish the Design/Builder's liability with respect to the Design/Builder's obligations other than specifically to correct the Work.

9.4 If the Design/Builder fails to correct nonconforming Work as required or fails to carry out Work in accordance with the Contract Documents, the Owner, by written order signed personally or by an agent specifically so empowered by the Owner in writing, may order the Design/Builder to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the Owner's right to stop the Work shall not give rise to a duty on the part of the Owner to exercise the right for benefit of the Design/Builder or other persons or entities.

9.5 If the Design/Builder defaults or neglects to carry

out the Work in accordance with the Contract Documents and fails within seven (7) days after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may give a second written notice to the Design/Builder and, seven (7) days following receipt by the Design/Builder of that second written notice and without prejudice to other remedies the Owner may have, correct such deficiencies. In such case an appropriate Change Order shall be issued deducting from payments then or thereafter due the Design/Builder, the costs of correcting such deficiencies. If the payments then or thereafter due the Design/Builder are not sufficient to cover the amount of the deduction, the Design/Builder shall pay the difference to the Owner. Such action by the Owner shall be subject to dispute resolution procedures as provided in Article 10.

ARTICLE 10

DISPUTE RESOLUTION—
MEDIATION AND ARBITRATION

10.1 Claims, disputes or other matters in question between the parties to this Part 2 Agreement arising out of or relating to this Part 2 Agreement or breach thereof shall be subject to and decided by mediation or arbitration. Such mediation or arbitration shall be conducted in accordance with the Construction Industry Mediation or Arbitration Rules of the American Arbitration Association currently in effect.

10.2 In addition to and prior to arbitration, the parties shall endeavor to settle disputes by mediation. Demand for mediation shall be filed in writing with the other party to this Part 2 Agreement and with the American Arbitration Association. A demand for mediation shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for mediation be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of repose or limitations.

10.3 Demand for arbitration shall be filed in writing with the other party to this Part 2 Agreement and with the American Arbitration Association. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of repose or limitations.

10.4 An arbitration pursuant to this Article may be joined with an arbitration involving common issues of law or fact between the Design/Builder and any person or entity with whom the Design/Builder has a contractual obligation to arbitrate disputes. No other arbitration arising out of or relating to this Part 2 Agreement shall include, by consolidation, joinder or in any other manner, an additional person or entity not a party to this Part 2 Agreement or not a party to an agreement with the Design/Builder, except by written consent containing a

specific reference to this Part 2 Agreement signed by the Owner, the Design/Builder and any other person or entities sought to be joined. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of any claim, dispute or other matter in question not described in the written consent or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Part 2 Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

10.5 The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

ARTICLE 11

MISCELLANEOUS PROVISIONS

11.1 Unless otherwise provided, this Part 2 Agreement shall be governed by the law of the place where the Project is located.

11.2 SUBCONTRACTS

11.2.1 The Design/Builder, as soon as practicable after execution of this Part 2 Agreement, shall furnish to the Owner in writing the names of the persons or entities the Design/Builder will engage as contractors for the Project.

11.3 WORK BY OWNER OR OWNER'S CONTRACTORS

11.3.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of insurance and waiver of Subrogation identical to the provisions of this Part 2 Agreement. If the Design/Builder claims that delay or additional cost is involved because of such action by the Owner, the Design/Builder shall assert such claims as provided in Subparagraph 11.4.

11.3.2 The Design/Builder shall afford the Owner's separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities and shall connect and coordinate the Design/Builder's construction and operations with theirs as required by the Contract Documents.

11.3.3 Costs caused by delays or by improperly timed activities or defective construction shall be borne by the party responsible therefor.

11.4 CLAIMS FOR DAMAGES

11.4.1 If either party to this Part 2 Agreement suffers injury or damage to person or property because of an act or omission of the other party, of any of the other party's employees or agents, or of others for whose acts such party is legally liable, written notice of such injury or damage, whether or not insured, shall be given to the

other party within a reasonable time not exceeding 21 days after first observance. The notice shall provide sufficient detail to enable the other party to investigate the matter. If a claim of additional cost or time related to this claim is to be asserted, it shall be filed in writing.

11.5 INDEMNIFICATION

11.5.1 To the fullest extent permitted by law, the Design/Builder shall indemnify and hold harmless the Owner, Owner's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Design/Builder, anyone directly or indirectly employed by the Design/Builder or anyone for whose acts the Design/Builder may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 11.5.

11.5.2 In claims against any person or entity indemnified under this Paragraph 11.5 by an employee of the Design/Builder, anyone directly or indirectly employed by the Design/Builder or anyone for whose acts the Design/Builder may be liable, the indemnification obligation under this Paragraph 11.5 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Design/Builder under workers' compensation acts, disability benefit acts or other employee benefit acts.

11.6 SUCCESSORS AND ASSIGNS

11.6.1 The Owner and Design/Builder, respectively, bind themselves, their partners, successors, assigns and legal representatives to the other party to this Part 2 Agreement and to the partners, successors and assigns of such other party with respect to all covenants of this Part 2 Agreement. Neither the Owner nor the Design/Builder shall assign this Part 2 Agreement without the written consent of the other. The Owner may assign this Part 2 Agreement to any institutional lender providing construction financing, and the Design/Builder agrees to execute all consents reasonably required to facilitate such an assignment. If either party makes such an assignment, that party shall nevertheless remain legally responsible for all obligations under this Part 2 Agreement, unless otherwise agreed by the other party.

11.7 TERMINATION OF PROFESSIONAL DESIGN SERVICES

11.7.1 Prior to termination of the services of the Architect or any other design professional designated in this Part 2 Agreement, the Design/Builder shall identify to the Owner in writing another architect or other design professional with respect to whom the Owner has no reasonable objection, who will provide the services

originally to have been provided by the **Architect** or other design **professional** whose services are being terminated.

11.8 EXTENT OF AGREEMENT

11.8.1 This Part 2 Agreement represents the entire agreement between the Owner and the Design/Builder and supersedes prior negotiations, representations or agreements, either written or oral. This Part 2 Agreement may be amended **only** by written instrument and signed by both the Owner and the Design/Builder.

ARTICLE 12

TERMINATION OF THE AGREEMENT

12.1 TERMINATION BY THE OWNER

12.1.1 This Part 2 Agreement may be terminated by the Owner upon 14 days' written notice to the Design/Builder in the event that the Project is abandoned. If such termination occurs, the Owner shall pay the Design/Builder for Work completed and for proven loss sustained upon materials, equipment, tools, and construction equipment and machinery, including reasonable profit and applicable damages.

12.1.2 If the Design/Builder defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform the provisions of this Part 2 Agreement, the Owner may give written

notice that the Owner intends to terminate this Part 2 Agreement. If the Design/Builder fails to correct the defaults, failure or neglect within seven (7) days after being given notice, the Owner may then give a second written notice and, **after** an additional seven (7) days, **the Owner** may without prejudice to any other remedy **terminate** the employment of the Design/Builder and take possession of the site and of all materials, equipment, tools and construction equipment and machinery thereon **owned by the Design/Builder** and finish the Work by whatever method the Owner may deem expedient. If **the unpaid balance of the Contract Sum** exceeds the expense of finishing the Work and all damages incurred by the Owner, such excess shall be paid to the Design/Builder. If the expense of completing the Work and all damages incurred by the Owner exceeds the unpaid balance, the Design/Builder shall pay the difference to the Owner. This obligation for payment shall survive termination of this Part 2 Agreement.

12.2 TERMINATION BY THE DESIGN/BUILDER

12.2.1 If the Owner fails to make payment when due, the Design/Builder may give written notice of the Design/Builder's intention to terminate this Part 2 Agreement. If the Design/Builder fails to receive payment within seven (7) days after receipt of such notice by the Owner, the Design/Builder may give a second written notice and, seven (7) days after receipt of such second written notice by the Owner, may terminate this Part 2 Agreement and recover from the Owner payment for Work executed and for proven losses sustained upon materials, equipment, tools, and construction equipment and machinery, including reasonable profit and applicable damages

ARTICLE 13

BASIS OF COMPENSATION

The Owner shall compensate the Design/Builder in accordance with Article 5, Payments, and the other provisions of this Part 2 Agreement as described below.

13.1 COMPENSATION

13.1.1 For the Design/Builder's performance of the Work, as described in Paragraph 3.2 and including any other services listed in Article 14 as part of Basic Services, the Owner shall pay the Design/Builder in current funds the Contract Sum as follows:

13.1.2 For Additional Services, as described in Paragraph 3.3 and including any other services listed in Article 14 as Additional Services, compensation shall be as follows:

13.2 REIMBURSABLE EXPENSES

13.2.1 Reimbursable Expenses are in addition to the compensation for Basic and Additional Services, and include actual expenditures made by the Design/Builder and the Design/Builder's employees and contractors in the interest of the Project, as follows:

13.2.2 FOR REIMBURSABLE EXPENSES, compensation shall be a multiple of () times the amounts expended.

13.3 INTEREST PAYMENTS

13.3.1 The rate of interest for past due payments shall be as follows:

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Design/Builder's principal places of business, at the location of the Project and elsewhere may affect the validity of this provision. Specific legal advice should be obtained with respect to deletion, modification or other requirements, such as written disclosures or waivers.)

ARTICLE 14

OTHER CONDITIONS AND SERVICES

14.1 The Basic Services to be performed shall be commenced on and, subject to authorized adjustments and to delays not caused by the Design/Builder, Substantial Completion shall be achieved in the Contract Time of () calendar days.

14.2 The Basic Services beyond those described in Article 3 are as follows:

14.3 Additional Services beyond those described in Article 3 are as follows:

14.4 The Design/Builder shall submit an Application for Payment on the () day of each month.

Exhibit 4

14.5 The Design/Builder's Proposal includes the following documents:
(List the documents by specific title and date, include any required performance and payment bonds.)

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Title Date

This Agreement entered into as of the day and year first written above.

OWNER

DESIGN/BUILDER

(Signature)

(Signature)

(Printed name and title)

(Printed name and title)



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

Exhibit 88

EXHIBIT 5
CAPITAL COST ESTIMATES

Capital Costs
Jenbacher Engine Modules (320)
Cost for two modules

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Cost Item

Engineering fees/Construction mgt.	100,000
Project management	10,000
Contracts	20,000
Permits	20,000
Interconnect	150,000
Concrete	40,000
Fencing	15,000
Site Preparation	20,000
Storage Module (40' ISO container)	11,000
Oil, Coolant ,Lube	4,000
Gas processing/blowers	75,000
Gas piping	20,000
Condensate management/piping	3,500
Jenbacher Modules (2)	1,300,000
Cranes on site including mobe/demobe.	13,000
Engine module erection	10,000
Transportation	6,000
Jenbacher spare parts	85,000
Site electrical work/ conduits	80,000
Additional Electrical equipment	45,000
Transformer	70,000
Subtotal	2,097,500
Misc/ contingency (10%)	209,750
Subtotal	2,307,250
Financing Costs	5,000
Total	2,312,250

Assumptions:

1. Single Stand alone Jenbacher containerized units. Containing motor controls, switchgear.
All equipment UL approved, Utility grade. Jenbacher pricing FOB West Coast
2. Oil storage as provided by Jenbacher inside module.
3. Single storage module (Standard ISO 40' container).
4. Condensate knockout only. Pricing does not include off site storage of condensate or piping to off site storage.
5. All equipment 480 volt with stepup transformers
6. Interconnect costs estimates only. These can vary extensively site to site.
7. Federal import tax assumed on Jenbacher/ No state sales taxes.

Fixed Costs

Due Diligence	5000
Lender Counsel	0
Variable Costs (% of capital cost)	0 %



**BUENA VISTA LANDFILL GAS POWER PROJECT
PUBLIC/PRIVATE VENTURE WITH BROWN, VENCE AND ASSOCIATES LFG, INC.**

FINANCIAL FLOW OF FUNDS

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- The County will pay BVA Lfg., Inc. for turn-key construction of the power generation facilities and assist the County with selection of the electrical generating equipment. All County turn-key expenses will be reimbursed through the lease payment described below.
- BVA Lfg., Inc. will pay the County a guaranteed quarterly lease payment for use of the Gas Collection/Treatment System and Power Plant Facilities sufficient to cover the County's projected debt service, project equity, and development costs over the term of the lease (10 years).
- The County will purchase all gas produced by BVA at a market rate subject to annual CPI inflation.
- BVA Lfg., Inc. will pay the County a fee for operating and maintaining the gas collection system and flare which is roughly equal to the amount paid by the County to BVA for purchase of gas.
- The County will collect and pass through the proceeds from the sale of electricity to BVA Lfg., Inc..
- The County will collect and pass the proceeds from the CEC Renewable Energy Program through to BVA Lfg., Inc..
- The County and BVA Lfg., Inc. will share all payments received from the U.S. Department of Energy's Renewable Energy Incentive Program in accordance with a mutually agreed upon formula.