

FOR BOARD ACTION

Agenda Item # 4.a.

Meeting Date:

5/30/06

SUBJECT:

Novaspect Inc. System Performance Agreement

PREPARED BY:

Wally Schlink, Director of Power Resources

ITEM DESCRIPTION:

For the past four years the RPU Board has approved a purchase order agreement with Novaspect Inc. for the maintenance and improvement of the SLP Boiler Control System. The boiler control system continues to expand with the addition of an Operator's station and the addition of Delta V controls for the steam project and the water treatment system.

The original System Performance Agreement initiated in 2002 was a three year agreement with an annual approval. Last year, 2005, the Board approved a new three year agreement and we have completed the first year. The request before you is for the second year expenditure of the three year agreement.

The System Performance Agreement provides several key elements to keep the system at a peak operating condition. It includes an extended warranty and express module replacement program that will allow us to avoid the cost of keeping inventory spares on the shelf also avoiding obsolescence of the parts. It provides a scheduled replacement of all operator workstations to maintain the latest technology. It provides foundation and application engineering support to maintain and upgrade the system as needed, and we receive a substantially discounted rate for the services by scheduling them ahead of time.

Staff is satisfied that this is the superior and most economical method for meeting our needs for maintenance and support of the boiler control system.

The agreement has a schedule of services and charges based on an annual service period. The schedule of charges is submitted, along with the service periods on Appendix I which is attached.

This item is an approved budgeted item in the 2006 operating budget.

UTILITY BOARD ACTION REQUESTED:

Staff recommends that the Utility Board approve a purchase order agreement with Novaspect, Inc. for the schedule of services and charges under the terms of the System Performance Agreement. The cost of the purchase order is \$111,635.20


General Manager


Date

ROCHESTER PUBLIC UTILITIES

**Rochester Public Utilities
Systems Performance Agreement**

**Novaspect Inc.
System Performance Agreement
Prepared For:**

**Rochester Public Utilities
Silver Lake Plant
Rochester Minnesota
Novaspect Contract #: 5090
April 7, 2006**



Date	Rev. No.	Description	Issued By	Checked By
4-7-2006	0	Renewal Proposal	JCT	LAL



**Novaspect, Inc.
7565 Corporate Way
Eden Prairie, MN 55344**

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Systems Performance Agreement**

APPENDIX I – SCHEDULE OF SERVICES AND CHARGES

The following Services are to be provided by Novaspect in accordance with this Agreement and are subject to the charges as set out below:

Delta V System ID: 0001-0001-6369, 2000 DST

AMS System ID: 0002-0003-1478, 300 Tag

Schedule of Services and Pricing Summary: Delta V Systems – Boiler Controls System

2006 Renewal

Service Description	2006 Fixed Annual	Service Period	
PC Replacement Program (PC's without Monitors)– Note 2	11,206.00	05/01/06	04/30/07
DeltaV Foundation Support (Normal Hours Response)	18,085.00	05/01/06	04/30/07
DeltaV Express Module Replacement	5,874.00	05/01/06	04/30/07
DeltaV Guardian Support (Add-on to Foundation Support)	3,843.00	05/01/06	04/30/07
AMS Foundation Support	730.20	05/01/06	04/30/07
Application Engineering Support 60 On-site days total – (see Appendix II for details)	75,960.00	05/01/06	04/30/07
Total Agreement (Annual Charge)	\$116,248.20	\$111,635.20	
Available on a Monthly Payment	\$9,604.02	\$ 9,302.94	

1. Invoice to occur on or around May 1, 2006.
2. Pricing is based on a 3-Year Agreement to be reviewed annually for scope changes.
3. Primary Contacts for each party are as follows:

Novaspect, Inc.
1776 Commerce Drive
Elk Grove Village, IL 60007
Attn: David Manecke
Phone: (847) 709-8934
FAX: (847) 956-8588

Rochester Public Utilities
4000 East River Road, NE
Rochester, MN 55906
Attn: Walter Schlink
Phone: (507) 280-1650
FAX: (507) 280-1651

APPENDIX II – DESCRIPTION OF SERVICES

DeltaV Express Module Replacement

Under this Service, the Customer has access to Emerson Process Management's stock of spares held at Emerson Process Management's premises. Should an assembly require replacement, Express Module Replacement provides replacement assemblies shipped within one business day.

Customer Responsibilities

Each Exchange Replacement provided under this Service is supplied on the understanding that the faulty unit is returned to Emerson Process Management within 7 days of dispatch of the Exchange Replacement and that the faulty item is, in Emerson Process Management's opinion, acceptable for repair. Units which have been mechanically damaged, immersed in liquid, corroded or damaged by fire or lightning will be automatically deemed unacceptable and rejected from the Plan. If on receipt by Emerson Process Management the item is found to be unacceptable, it will be returned at the Customer's expense and an invoice for the Exchange Replacement will be issued at 100% of the prevailing list price. Each item returned must be accompanied by sufficient documentation to identify the item as the property of the Customer (including return address for redelivery of the item in case found to be unrepairable). Documentation should include the following: System ID Number, DeltaV Part Number, Serial Number, item description, symptom of problem, Service Agreement PO number (supplied by Novaspect), Customer contact name, phone and FAX number. Emerson Process Management cannot be held responsible for the loss of any item that is insufficiently identified. Novaspect will supply preprinted shipping labels and provide you with a Returned Goods Authorization number for returned shipments. Items not returned to Emerson Process Management within the allotted 7-day period will be subject to invoicing at 100% of the prevailing list price.

Service Details

Next business day replacement for DeltaV failed modules. Faulty items shall be returned freight prepaid, using the packing list and address information supplied by Novaspect.

DeltaV Foundation Support

Foundation Support provides DeltaV users with the essential support needed to achieve peak system utilization and reduce the risk of lost production with around the clock access to crucial information, timely advice and problem diagnosis by product experts plus the latest software releases and access to on-line information services.

This Service provides:

- Consultation for DeltaV system software and hardware topics, i.e. technical product support. Consultation requests are directed to the Emerson Process Management Response Center. Emerson Process Management will work closely with the Customer's system manager to provide an effective problem-resolution process, including remote system diagnosis where authorized by the Customer and an automatic escalation process for inquiries or problems requiring advanced expertise.
- CD media and documentation for software releases to Programs as and when issued by Emerson Process Management. Software releases may include new and improved features.
- Access to system technical articles via fax information service and Internet WEB site, (<http://emersonprocess.com/support>). This site provides technical articles with downloadable files and an E: Mail facility for requesting technical assistance or specific software updates.

Customer Responsibilities

To request service the Customer should contact the **Emerson Process Management Response Center at (800) 833-8314**. Upon contacting Emerson Process Management, you must provide the **DeltaV System Identification**

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Number (See System Identification Numbers listed in Appendix I) and the fullest possible explanation of the problem for which assistance is required.

When Remote Diagnosis is necessary, the Customer will make available and switch-on a Emerson Process Management supplied modem, run the *pcANYWHERE* software and provide a suitable telephone connection.

The Customer shall have a trained engineer available to provide the fullest details available on the problem(s) to be investigated and shall provide any local technical assistance required during the remote log-on and diagnosis session.

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DeltaV PC Refresh Program

The DeltaV PC Refresh Program is designed to keep your Dell Workstations and Servers on the DeltaV system "evergreen." This service requires a continual 3-year contract. Around the 30th month of this 3-year contract Novaspect will replace the main CPU boxes of the computers defined below. The replacement PC will be the PC recommended by Emerson at the point in time of purchase for the application being served. With the general trend in technology, it is expected that the replacement PC will be one of increased specifications (i.e. CPU speed, memory, hard disk, etc.). The replacement PC will provide as a minimum equivalent specifications of the PC being replaced. All labor and expenses associated with the delivery and setup of the new PCs is included. Novaspect will retain possession of replaced PCs.

This agreement covers the PCs listed below. As systems change throughout the life of this contract PCs may need to added or removed from coverage of this program. PCs that are added will be evaluated on a case-by-case basis to determine the cost to include them in the rotation. The fees that are associated with PCs that are removed from this program are eligible for a prorated credit towards other services.

Areas Covered in Program

- Replacement of main CPU boxes (i.e. tower or desktop module).
- New PCs will carry Dell Standard Warranty.

Areas NOT Covered in Program

- Attached computer peripherals (i.e. monitors, printers, etc.).
- Operating System or Software Licenses.
- PCs not defined below in Service Details.
- All required labor and expenses for Novaspect personnel to deliver and install the new PCs. The Labor and Expenses can be covered with the Application Engineering module of this agreement.

PCs Covered under the PC Refresh Program:

1. **RPU Description:** Fireman Station 1
Type of Station: Operator Station
Model: Precision 370
Dell Tag: 264YX51

2. **RPU Description:** Fireman Station 2
Type of Station: Operator Station
Model: Precision 370
Dell Tag: 764YX51

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- 3. RPU Description:** Fireman Station 3
Type of Station: Operator Station
Model: Precision 370
Dell Tag: 854YX51

- 4. RPU Description:** Fireman Station 4
Type of Station: Operator Station
Model: Precision 370
Dell Tag: G54YX51

- 5. RPU Description:** Operator Station 5
Type of Station: Operator Station
Model: Precision 360
Dell Tag: 3BG2W41

- 6. RPU Description:** Water Plant Station 6
Type of Station: Operator Station
Model: Optiplex
Dell Tag: Unknown, installed in 2005

- 7. RPU Description:** ProPlus
Type of Station: ProPlus
Model: Power Edge 700
Dell Tag: G729Y51

- 8. RPU Description:** Application Station
Type of Station: Application
Model: Power Edge 2500
Dell Tag: GNXTR01

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Application Engineering Support

Service Details

Under the terms of this agreement Novaspect will provide twenty four (24) planned application engineering visits per year for a total of 60 days. One visit per month for three days, typically the first week of the month and one visit per month for two days, typically the third week of the month. Novaspect will finalize the scheduling of such visits, at the mutual convenience of both parties.

This Service provides a Specialist on-site to carry out application engineering tasks in order to help maintain and improve the DeltaV system's operational performance and reliability. The on-site services may include any of the following items.

System Maintenance

- System Backups – including configuration database, graphic displays, and historian
- NT Administration – updating accounts, disk drive defragmentation, installation of service packs
- System Upgrades – installation of DeltaV system upgrades

Application Support

- Application Trouble shooting

System Improvements

- Display Modifications – changes to existing displays
- New Displays – graphic or tabular format
- I/O Range Changes – for Fieldbus transmitters or traditional I/O
- Alarm Limit Changes – new limits or adjustments of existing limits
- Alarm Management – definition of new plant areas, conditional alarms
- Addition Of New Points – either monitor or new for control
- Changes to Control Functionality – modify existing control strategies
- Addition Of New Control – new control functionality either discrete, sequential, or continuous control
- Control Loop Tuning – tuning with the auto tuner and other advanced methods
- Process Optimization – The addition of higher level control for process optimization

Training

- Operator Training – supplemental training to enhance the operators use of the system
- Instrumentation Training – including configuration and system trouble shooting

System General Maintenance

- Review on-site maintenance logs and alarm logs for system problem identification
- Verify AC and DC voltages, power distribution, grounding systems and UPS operation

Operator Workstations, Professional, ProfessionalPLUS Workstations and Application Stations

- Verify proper operation, clean as necessary
- Review diagnostic event log, CPU and memory usage
- Check operator input/output devices including keyboard, mouse and monitors
- Ensure proper operation of CPU cooling fans

Controllers, Input/Output Modules

- Verify status and operation of controller redundancy where applicable
- Verify operation of all I/O redundancy where applicable

DeltaV Control Network

- Check diagnostic status of network communications
- Verify control network traffic and loading

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Customer Responsibilities

The Customer shall be responsible for making the System available for the Specialist at the scheduled time for the Planned on-site visit.

Service Details

Under the terms of this agreement Novaspect will provide Twelve (12) planned application engineering visits per year. Novaspect will initiate the scheduling of such visits, at the mutual convenience of both parties.

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APPENDIX III – SCHEDULE OF EQUIPMENT AND SOFTWARE

DeltaV Equipment

ITEM #	DESCRIPTION	QTY
DeltaV Consoles		
	Professional Plus Engineering Workstations	1
	Professional Workstation	0
	Operator Workstations	6
	Application Workstations	1
DeltaV Controllers		
VE3004	MD Simplex Controllers	2
VE3004	MD Redundant Controllers	9
VE3004	MD Simplex Controllers	
VE3004	MD Redundant Controllers	
VE600X	DeltaV Communications Hardware	8
DeltaV System Software		
	DeltaV System Software – Revision v6.3.4 – 2000 DST System Database	1

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APPENDIX IV – SERVICES RATE SCHEDULE

<u>SERVICE DESCRIPTION</u>	<u>Hourly Rate</u>
Loop Performance Consulting / Control Loop Analysis / Control Loop Optimization	\$150.00
Lead Project Engineer / Project Manager / Specification Development	\$140.00
Demand On-Site Control System Service	\$140.00
Valve Asset Manager / Valve Diagnostic Engineer	\$135.00
Control System Engineering / Configuration Support	\$130.00
Instrumentation Engineering	\$135.00
Valve Service Technician	\$115.00
Drawing Services / Database Entry	\$80.00
Project Support Services	\$52.00

Primetype – Hourly Rate times 1 (Straight time)
Monday - Friday, 7:00 AM to 6:00 PM (8 hour maximum)

Overtime - Hourly Rate times 1.5 (Time and one-half)
Monday - Friday hours exceeding 8 hours but less than 12 hours
Saturday

Premium Overtime - Hourly Rate times 2 (Double time)
Monday - Friday hours exceeding 12 hours
Saturday hours exceeding 8 hours
Sundays and Novaspect scheduled holidays

Shift Premium - Hourly Rate times the following multipliers will be charged for work performed on non-standard shift. Overtime premiums will be charged in addition to the shift premium rate where appropriate.

Hourly Rate times 1.10 for second shift (3:00 PM - 11:00 PM)
Hourly Rate times 1.15 for third shift (11:00 PM - 7:00 AM)

- * Note 1 - A four (4) hour minimum charge applies to demand services.
- * Note 2 - A four (4) hour minimum charge will be applied for calls canceled or re-scheduled with less than 24 hours prior notification.
- * Note 3 – Rates are subject to discount for large projects and Service Agreements based upon project size or services committed under a Service Agreement.

TRAVEL AND EXPENSE CHARGES

- Customer will be invoiced for travel time at the prevailing rate and all travel and living expenses will be invoiced at cost as incurred by Novaspect.
- Travel time is calculated portal to portal.
- Auto mileage will be invoiced at 44.5 cents per mile, Fisher Service Company pickup truck and van mileage will be invoiced at 44.5 cents per mile and on-site service truck will be invoiced at 60 cents per mile.

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APPENDIX V – STANDARD TERMS & CONDITIONS OF SALE

The proposal to which these Terms and Conditions are attached (the "Proposal"), these Terms and Conditions and any Change Orders (as defined herein) shall constitute the entire agreement between the parties and shall collectively be referred to herein as the "Agreement."

1. **ACCEPTANCE.** ACCEPTANCE OF THIS AGREEMENT BY BUYER WITHIN 30 DAYS OF THE DATE HEREOF (OR SUCH LONGER PERIOD AS NOVASPECT, INC. (NOVASPECT) SHALL, IN ITS SOLE DISCRETION, AGREE TO IN WRITING) CREATE A CONTRACT BETWEEN NOVASPECT AND BUYER FOR THE PERFORMANCE OF SERVICES ("SERVICES") AND THE SALE OF HARDWARE, SOFTWARE, FIRMWARE AND/OR OTHER PRODUCTS ("GOODS"), EACH AS PARTICULARLY DESCRIBED IN THE PROPOSAL. BY ACCEPTING THIS AGREEMENT WITHIN THE REQUISITE TIME PERIOD, BUYER AGREES TO ACCEPT ALL OF THE TERMS AND CONDITIONS OF THIS AGREEMENT. TO THE EXTENT BUYERS PURCHASE ORDER OR ANY OTHER STATEMENT OF BUYER CONTAINS ANY TERMS OR CONDITIONS IN ADDITION TO OR DIFFERENT FROM THE TERMS OF THIS AGREEMENT, SUCH TERMS AND CONDITIONS ARE HEREBY REJECTED BY NOVASPECT AND HEREBY WAIVED BY BUYER AND SUCH TERMS AND CONDITIONS SHALL NOT AFFECT THIS AGREEMENT NOR BE BINDING UPON NOVASPECT ABSENT AN EXPRESS WRITTEN STATEMENT BY NOVASPECT TO THE CONTRARY. THIS AGREEMENT CONSTITUTES THE ENTIRE AGREEMENT AND UNDERSTANDING BETWEEN THE PARTIES WITH RESPECT TO THE SERVICES AND THE DELIVERY OF THE GOODS AND SUPERSEDES ANY OTHER NEGOTIATIONS, AGREEMENTS AND REPRESENTATIONS BETWEEN THE PARTIES, WRITTEN OR ORAL. NO MODIFICATION OF THIS AGREEMENT SHALL BE OF ANY FORCE OR EFFECT UNLESS IN WRITING AND SIGNED BY NOVASPECT. IN THE EVENT OF ANY CONFLICT BETWEEN THESE TERMS AND CONDITIONS AND THE PROPOSAL, THE TERMS OF THE PROPOSAL SHALL GOVERN. IN THE EVENT OF ANY CONFLICT BETWEEN ANY CHANGE ORDER AND THESE TERMS AND CONDITIONS OR THE PROPOSAL, THE TERMS OF THE CHANGE ORDER SHALL GOVERN.
2. **AGREEMENT TO MAKE PAYMENT.** Buyer shall pay to Novaspect the fees and purchase prices set forth in the Proposal, as increased or decreased pursuant to any adjustments set forth in any Change Orders (the "Payments"). Any Goods ordered other than those specifically set forth in the Proposal, including additional copies of data/documentation or non-standard data/documentation, shall be priced at Novaspect's prices then in effect.
3. **INVOICES; METHOD OF PAYMENT.** Novaspect shall issue an invoice to Buyer (an "Invoice") each month for the amount due Novaspect, as determined pursuant to the terms of the Proposal. Buyer shall pay to Novaspect the amount set forth in each Invoice within 30 days of receipt of such Invoice. Any amount, which is not paid when due shall bear interest at the rate of 1.5% per month or portion thereof from the date such amount, became due through the date on which payment is received by Novaspect. All payments shall be made without deduction or setoff to Novaspect at the address set forth in the Proposal.
4. **SECURITY.** As security for the purchase price of the Goods, Buyer hereby grants and conveys to Novaspect a purchase money security interest in the Goods. Buyer shall, upon request of Novaspect, sign any financing statements and other instruments requested by Novaspect and shall otherwise cooperate with Novaspect in any manner deemed necessary to evidence, perfect or continue such security interest. The security interest granted to Novaspect shall be terminated only upon payment in full for the Goods.
5. **SCHEDULING.** Buyer understands that any product design services to be performed by Novaspect are unique, extremely complex and involve a great degree of Buyer/Novaspect interaction. The schedule for completion of the Services and delivery of the Goods set forth in the Proposal is a good faith estimate of Novaspect. The time actually required to complete the Services and deliver the Goods will be subject to Buyer availability, Buyer's timely delivery of information described in the Proposal or otherwise requested by Novaspect, the accuracy of such information, unforeseen design issues, design changes and modifications requested by Buyer pursuant to Change Orders, and other matters which generally effect product choice or product design services. Novaspect shall use all commercially reasonable efforts to meet all schedules set forth in the Proposal. Novaspect shall have no liability to Buyer or any other party for any loss or damage arising out of any Service or Good, which is provided later than designated in the Proposal.
6. **DELIVERIES.** Novaspect shall deliver to Buyer the Goods described in the Proposal. All deliveries from Novaspect to Buyer shall be F.O.B. shipping point and title and risk of loss with respect to such deliveries shall pass to Buyer upon delivery to Buyer or representatives of Buyer including, but not limited to, any common or contract carrier, bailee, agent, or employee of Buyer. If Buyer does not accept such F.O.B. delivery, Buyer shall be responsible for all storage charges and other expenses incurred in handling and moving the Goods. Buyer shall pay transit insurance, packaging, handling, shipping and carrier costs associated with the Goods and all sales, use, excise and other taxes levied upon the Goods. Buyer's sole remedy for lost Goods, damage caused during shipment or any delay attributable to shipment shall be an action against the carrier. Buyer agrees to hold Novaspect harmless against any and all penalties, claims, demands, losses, causes of action, suits, judgments, costs and expenses, including reasonable attorneys' and paralegals' fees, of whatever nature arising out of or in connection with the shipment or storage of Goods. Novaspect reserves the right to withhold any and all deliveries in the event Buyer fails to pay any invoice in accordance with its terms or in the event Novaspect has reason to believe Buyer does not have the financial ability to pay any future invoice when due.
7. **CHANGE ORDERS.** In the event that Buyer requests any modifications to the Services or to the type or number of Goods, Novaspect shall, if commercially reasonable, prepare and deliver to Buyer a Change Order Proposal describing such modifications and the changes in the Services and/or Goods necessary to effect such modifications (a "Change Order"). The Change Order will also set forth the additional Payments, if any, and the basis upon which additional Payments will be computed and an estimate of the revised schedule for completion of the Services and delivery of the Goods. After receipt of a Buyer

request, verbal or written, for modifications to the Services or to the type or number of Goods, Novaspect may elect not to continue or complete the Services or deliver Goods until Novaspect receives a written authorization to proceed with the additional scope of work. The execution of the written authorization required hereunder by Buyer shall constitute authorization from Buyer for Novaspect to proceed with the Services and delivery of the Goods as modified by the Change Order and Buyer's consent to the increase or decrease in the Payments and the revised schedule set forth in the Change Order.

8. **TERMINATION.** Buyer may, by written notice to Novaspect (a "Termination Notice"), terminate its order for Goods and Services or any portion thereof at any time. Notwithstanding the "Notice" provision hereof, a Termination Notice shall not be effective until actually received by Novaspect (the "Termination Date"). Novaspect shall cease performance of the Services and delivery of the Goods as soon as is reasonably possible following receipt of a Termination Notice. Within 15 days after receipt of a final invoice, Buyer shall pay to Novaspect that portion of the Payments allocated to Services performed through the Termination Date, as determined by Novaspect, plus all expenses and non-cancelable commitments incurred by Novaspect prior to or in connection with such termination including, without limitation, the cost of all Goods and all processing, handling and fabrication costs incurred in connection with the Goods (collectively, the "Termination Payment"). Novaspect shall prepare a final invoice with respect to the Termination Payment as soon as is practicable following receipt of a Termination Notice.

9. **INDEMNIFICATION.**

- (a) Novaspect hereby agrees to indemnify and hold Buyer harmless from and against penalties, claims, demands, losses, causes of action, suits, judgments, costs and expenses, including reasonable attorneys' and paralegals' fees from (i) the injury or death of any employee, contractor, subcontractor, agent of or other person acting on behalf of or otherwise engaged by Novaspect (a "Novaspect Representative") caused by the negligent act or omission of a Novaspect Representative and (ii) the injury or death of any person other than a Novaspect Representative caused by the negligent act or omission of a Novaspect Representative; provided however, Novaspect's liability set forth in the preceding clause (i) shall be limited to the proportional share of liability caused by the Novaspect Representative vis-a-vis all other parties contributing to the cause of such injury, sickness or death. In no event shall Novaspect's liability under this paragraph exceed the amount of \$1,000,000.00.
- (b) Novaspect hereby agrees to indemnify and hold Buyer harmless from and against penalties, claims, demands, losses, causes of action, suits, judgments, costs and expenses, including reasonable attorneys' and paralegals' fees from the damage to or destruction of property caused by the negligent act or omission of a Novaspect Representative in providing the Services. In no event shall Novaspect's liability under this paragraph exceed the amount of \$1,000,000.00.
- (c) NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, BUYER AGREES THAT NOVASPECT SHALL NOT BE LIABLE TO BUYER FOR ANY DELAY IN PERFORMANCE (UNLESS SPECIFICALLY DEFINED IN THE PURCHASE ORDER'S SCOPE OF WORK SECTION) NOR SHALL NOVASPECT'S LIABILITY IN ANY EVENT EXTEND TO INCLUDE INCIDENTAL, SPECIAL, EXEMPLARY, CONSEQUENTIAL OR PUNITIVE DAMAGES WHETHER OR NOT NOVASPECT HAS BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH CLAIM INCLUDING, WITHOUT LIMITATION, LOSS OF TIME, LOSS OF USE, OR LOSS OF ANTICIPATED PROFITS OR REVENUE.
- (d) Buyer hereby agrees to indemnify and hold Novaspect harmless from and against any and all penalties, claims, demands, losses, causes of action, suits, judgments, costs and expenses, including reasonable attorneys' and paralegals' fees, of whatever nature arising from (i) the failure of Buyer to keep, perform and observe its obligations hereunder; (ii) any injury, sickness or death of a person other than a Novaspect Representative or damage to property to the extent not caused by the negligent act or omission of a Novaspect Representative; (iii) any injury, sickness or death of a Novaspect Representative not caused by the negligent act or omission of a Novaspect Representative; (iv) the failure of Buyer to comply with and observe all present and future laws, orders, codes, regulations, ordinances, rules and decrees of each governmental agency or instrumentality which may be applicable to the Goods or Buyer's business; (v) any actual or alleged infringement of any third party's intellectual property rights to the extent arising from designs, design information, specifications, processes or formulas supplied by Buyer; and (vi) specifications, design information, processes or other information or representation supplied or made by Buyer which proves to be inaccurate or which was not supplied by Buyer but should have been under the circumstances.

10. **LIMITED WARRANTY.**

- (a) Novaspect warrants that the Goods shall be fit for the purpose intended provided such purpose has been communicated to Novaspect by Buyer and provided (i) Novaspect has not indicated in a writing delivered to Buyer that it disagrees with Buyer's selection of any such Goods or (ii) the purpose intended has not been affected by (A) improper handling, storage or installation by a person other than a Novaspect Representative, (B) deterioration, corrosion or other adverse effect to the Goods arising from exposure to chemicals, fumes or other environmental variants not known to Novaspect, (C) specifications, design information, under the circumstances, (D) any alterations or repairs not approved by Novaspect or any accident affecting the Goods not caused by a Novaspect Representative or (E) abuse or improper use or maintenance of the Goods. Novaspect's Representatives' oral statements do not constitute warranties and should not be relied upon by Buyer as such. All warranty claims for the particular purpose intended shall be deemed unconditionally waived by Buyer unless Buyer shall notify Novaspect in writing of such alleged breach within one year of delivery of the Goods. Buyer shall afford Novaspect prompt and reasonable opportunity to inspect all Goods as to which any breach of warranty claim is made hereunder. If the requisite notice is provided and the Goods are not fit for Buyer's intended purpose, Novaspect will either replace or repair the Goods or adjust the matter fairly and promptly, but under no circumstances shall Novaspect be liable for any delay in performance nor shall Novaspect's liability in any event extend to include incidental, special, exemplary, consequential or punitive damages whether or not Novaspect has been previously advised of the possibility of such claim including, without limitation, loss of time, loss of use, or loss of

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anticipated profits or revenues. In no event shall Novaspect's liability under this paragraph exceed the amount of \$1,000,000.00.

(b) EXCEPT AS EXPRESSLY SET FORTH IN PARAGRAPH (A) ABOVE, (i) NOVASPECT MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY; AND (ii) BUYER'S SOLE AND EXCLUSIVE REMEDY HEREUNDER SHALL BE LIMITED TO THE WARRANTIES, IF ANY, OF THE ORIGINAL EQUIPMENT MANUFACTURER(S) OF THE GOODS.

11. **DEFAULTS.** In the event that Buyer fails to pay all or any portion of the Payments when the same is due and payable or is otherwise in default of any of its covenants hereunder or fails to comply with any of the terms or conditions hereof, or, in Novaspect's reasonable opinion, Buyer's ability to make timely Payments hereunder is impaired, or Buyer becomes insolvent or bankrupt or admits in writing its inability to pay its debts as they mature, or makes an assignment for the benefit of creditors, or bankruptcy, reorganization, arrangement or insolvency proceeding or other proceedings for any relief under any bankruptcy or similar law for the relief of debts are instituted by or against Buyer, then in any such event Novaspect may, (a) terminate and cancel this Agreement forthwith upon written notice to Buyer, (b) require cash payment, satisfactory security, and/or other assurances before providing further Services and Goods, (c) declare the Termination Payment and all other sums payable to Novaspect hereunder to be immediately due and payable whereupon such amount shall forthwith become immediately due and payable to Novaspect, (d) if full payment for the Goods has not been received, enter upon Buyer's premises or any other place where the Goods are located and repossess all of the Goods without notice, hearing, court order or further process of law and otherwise exercise any rights as a secured party under the Uniform Commercial Code and/or (e) pursue any other remedy available to Novaspect at law or in equity.

12. **RETURN.** Novaspect shall not accept return of the Goods unless it notifies Buyer in writing to the contrary. In the event Novaspect accepts return of the Goods, neither transportation charges for the return of Goods nor any other costs or charges incurred in connection therewith shall be paid by Novaspect unless otherwise authorized in advance by Novaspect.

13. **SAFETY WARNINGS/COMPLIANCE WITH LAWS.** Buyer accepts and assumes all liability and responsibility for all safety warnings in connection with the Goods and for compliance of the Goods with all federal, state and local laws.

14. **INSTALLATION.** Buyer shall be responsible for receiving, storing, installing, starting up and maintaining the Goods (unless specifically defined in the purchase order's scope of work section). If requested by Buyer, Novaspect shall provide a quotation for services to assist Buyer in these functions.

15. **BUYER SUPPLIED DATA.** Notwithstanding anything contained herein, to the extent that Novaspect has relied upon any specifications, information or representation of Buyer, whether relating to the operating conditions of Buyer or any other state of affairs impacting the selection or design of the Goods, the provision of the Services or the preparation of the Proposal, which specification, information or representation proves to be inaccurate, Novaspect shall have no liability to Buyer or persons claiming under Buyer resulting from such inaccuracy. In the event of such inaccuracy, Novaspect and Buyer shall modify the Services and/or the selection of the Goods to accommodate the true state of affairs and shall modify the Proposal accordingly including, without limitation, adjusting the Payments and re-establishing time deadlines.

16. **SOFTWARE AND COMPUTER PROGRAMS.** Buyer acknowledges and agrees that Buyer's right to use any software or firmware constituting part of the Goods shall be governed by, and subject to the conditions of, a separate software license agreement. Buyer acknowledges and agrees that all title to the software or firmware constituting part of the Goods shall remain vested in the manufacturer of such software or firmware or the licensor thereof and shall be furnished to and used by Buyer only after execution of, and subject to, such separate license agreement. Buyer's sole and exclusive remedy with respect to any software or firmware provided hereunder shall be limited to the warranties, if any, of the manufacturer or licensor of such software or firmware. Buyer shall have no right to alter, modify, copy or prepare derivative works of any software or firmware except in accordance with such license agreement.

17. **NON-SOLICITATION:** Buyer agrees that during the execution of the Services by Novaspect, and for a period of twelve (12) months after performance of the Services, it will not hire any employee(s) of Novaspect or its project team and will not entice or counsel any such employee(s) to leave Novaspect employ. Buyer agrees that this covenant shall extend to its agents and affiliates. In the event that an employee of Novaspect is hired or leaves the employ of Novaspect in such circumstances, the buyer shall pay Novaspect, as compensation for the cost incurred by Novaspect in recruiting and training the employee, the sum equivalent to six (6) months salary for each employee hired from or leaving the employment of Novaspect.

18. **FORCE MAJEURE.** Novaspect shall not be liable for any failure to perform resulting from acts of God, war, riot, fire, explosion, accident, flood, sabotage, the shortage of or inability to obtain from anticipated sources adequate materials, components, parts or Goods, or transportation facilities, compliance with governmental requests, law, regulations, orders or actions, the breakage or failure of machinery or apparatus, national defense requirements or any other event beyond the reasonable control of Novaspect; or in the event of labor trouble, strikes, lockout or injunction affecting Novaspect or its supplies, suppliers or transporters which event makes impractical the provision of the Services or the manufacture, procurement, transportation, delivery, acceptance or use of the Goods. Novaspect shall give written notice to Buyer with reasonable promptness after the occurrence of any such event.

19. **RELATIONSHIP OF PARTIES.** The relationship of the parties shall be that of independent contractors and not as partners or joint ventures. Each party is, and is intended to be, engaged in its own and entirely separate business.

20. **NOTICES.** All notices and other communications given hereunder shall be in writing and deemed to have been given when (i) personally delivered, (ii) one business day after delivery to a nationally recognized overnight courier service, (iii) upon the written confirmation of receipt following the transmission of a telecopy or (iv) three days after being

mailed by certified mail, postage prepaid, to the addresses of Novaspect or Buyer as set forth in the Proposal or to such other addresses as either party may request by notice given in accordance with this paragraph.

21. **GOVERNING LAW; JURISDICTION AND VENUE/LIMITATION PERIOD.** This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota. NOVASPECT AND BUYER IRREVOCABLY AGREE THAT ALL ACTIONS OR PROCEEDINGS IN ANY WAY, MANNER OR RESPECT, ARISING OUT OF OR FROM OR RELATED TO THIS AGREEMENT OR ANY DOCUMENT, INSTRUMENT OR TRANSACTION IN CONNECTION HERewith SHALL BE HEARD OR LITIGATED EXCLUSIVELY IN COURTS HAVING SITUS WITHIN THE CITY OF CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS. NOVASPECT AND BUYER CONSENT AND SUBMIT TO THE PERSONAL JURISDICTION OF ANY LOCAL, STATE OR FEDERAL COURT LOCATED WITHIN SAID CITY, COUNTY AND STATE AND IRREVOCABLY WAIVE ANY RIGHT TO TRANSFER OR CHANGE VENUE OF ANY SUCH ACTION OR PROCEEDING OR OBJECT TO THE JURISDICTION OF ANY SUCH COURT OVER THE PARTIES HERETO. NO ACTION OTHER THAN AN ACTION FOR UNPAID PAYMENTS UNDER THIS AGREEMENT MAY BE BROUGHT BY EITHER PARTY MORE THAN TWO YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED.

22. **COLLECTION/ENFORCEMENT EXPENSES.** In addition to any other amounts due hereunder, Buyer shall reimburse Novaspect for all costs and expenses (including reasonable attorneys' and paralegals' fees and expenses) incurred by Novaspect in collecting any amount due to Novaspect or enforcing any provision of this Agreement. Novaspect shall reimburse Buyer for all costs and expenses (including reasonable attorneys' and paralegals' fees and expenses) incurred by Buyer in collecting any amount due to Buyer or enforcing any provision of this Agreement.

23. **GENERAL PROVISIONS.** Except as expressly set forth herein, any waiver by any party of its rights under this Agreement shall be in writing and signed by the party waiving such right. The failure of either party to enforce any of the provisions of this Agreement or any rights in respect thereto, or to exercise any election herein provided, shall not waive such provisions, rights or elections or subsequent breaches thereof. No course of dealing shall be deemed to constitute a continuing waiver of any breach or default or right or remedy hereunder. Buyer shall not assign its rights or obligations under this Agreement to any party without Novaspect's prior written consent. This Agreement shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and permitted assigns. Except as otherwise stated herein, termination of this Agreement shall not release either party from any liability or obligation which has theretofore accrued and remains to be performed as of the date of such termination. Novaspect shall not assign its rights or obligations under this Agreement to any party without Buyer's prior written consent.



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve a purchase order agreement with Novaspect, Inc., for

System Performance Agreement
Novaspect Contract # 5090
SLP Boiler Control System

The amount of the agreement to be ONE HUNDRED ELEVEN THOUSAND SIX HUNDRED THIRTY-FIVE DOLLARS AND 20/100 (\$111,635.20).

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 30th day of May, 2006.

President

Secretary