

FOR BOARD ACTION

Agenda Item # 5.b.

Meeting Date:

12/14/06

SUBJECT: Emissions Reduction Project
Approval to Purchase Scrubber / Baghouse Equipment

PREPARED BY: Wally Schlink, Director of Power Resources

ITEM DESCRIPTION:

Starting in 2003, a team of RPU staff and consultants have been working on an emission reduction program that would result in significantly reducing both the rate and the total amount of emissions from Silver Lake Power Plant Unit 4.

We are now ready to make our first purchase of major equipment that will be installed to fulfill the commitments that we have made to provide major reductions in SO₂ and particulate emissions in our community. The decision was made, based on delivery schedules, performance efficiencies and to take advantage of economies of scale, to purchase the scrubber, baghouse, booster fan, ductwork and support structure as a single package. The request before you meets that criteria as well as the most important requirement which is the removal of SO₂ and particulate emissions to meet our emission reduction targets.

Through our engineers, Utility Engineering, a specification was distributed to 7 suppliers and only one bidder eventually chose to bid on the project. Currently there is a boom in the building of coal fired power plants world wide and the installation of emission reduction equipment domestically that has the suppliers of equipment being very selective in their choice of project participation. In reality, the RPU project is very small on the scale of projects on the drawing board and participation by the bidders reflected that fact.

On a more positive note we are very pleased that the bidder that did respond, Clyde Bergemann Environmental Elements Corporation, met all the criteria of the Request for Bid and is a reputable supplier of emission reduction equipment with a track record of successful installations on units equivalent in size to SLP Unit 4.

We request that the Board approve the purchase of the scrubber / baghouse as defined in the RFB. Included in the request is the detailed base bid (\$8,373,000), Performance Bond (\$2,520,000), option upgrades (\$334,000) and an escalation allowance (\$200,000) for a total approved amount of \$11,427,000. This is a budgeted project in the 2007 capital budget request.

Attached is a recommendation from Utility Engineering, as well as a copy of the purchasing contract agreement. Staff and a representative from Utility Engineering will be at the Board meeting to answer any questions on this request.


General Manager


Date

ROCHESTER PUBLIC UTILITIES

FOR BOARD ACTION

Agenda Item # 5.b.

Meeting Date:

12/14/06

UTILITY BOARD ACTION REQUESTED:

Staff recommends that the Board approve and request that the Common Council approve the purchase and the execution of a contract for the supply of the scrubber baghouse package per the bid specification from Clyde Bergemann Environmental Elements Corporation for an amount not to exceed \$11,427,000.

General Manager

Date



901 Marquette Avenue, Suite 2900, Minneapolis, MN 55402
612.215.1300 • Fax 612.766.0960 • Web: www.ue-corp.com

December 7, 2006

Mr. Walter Schlink, P.E.
Director of Power Production
Rochester Public Utilities
4000 East River Road NE
Rochester, MN 55906-2813

Subject: Silver Lake Plant Unit 4 Emissions Reduction Project
UE Project No. 012668
Recommendation to Purchase Scrubber/Baghouse from CBEEC

Dear Mr. Schlink:

Utility Engineering Corporation (UE) recommends award of the scrubber/baghouse bid package to Clyde Bergemann Environmental Elements Corporation (CBEEC). We have worked closely with RPU and have followed RPU bid protocol while conducting the competitive bid process. We received one bid from CBEEC, which included a base bid and a bid for an optional arrangement. UE has studied the CBEEC bid package in detail, and conducted a day and a half meeting with RPU and CBEEC. We believe that the CBEEC package will provide RPU with a high quality, well engineered scrubber, baghouse, booster fan and ductwork from the boiler outlet to the chimney. Also, CBEEC's proposal will meet SO₂ and particulate removal requirements as well as deliver equipment to match the project schedule. CBEEC will provide performance guarantees and liquidated damages for delivery dates. Awarding this contract in January 2007 will allow RPU to maintain project schedule, and take another major step toward a successful project.

Bidding Process

On September 26, 2006, a Request for Bid (RFB) for scrubber/baghouse equipment was issued to the following seven (7) suppliers:

Alstom Power Inc. (Alstom)
Babcock Power Environmental Inc. (BPEI)
The Babcock & Wilcox Company (B&W)
Clyde Bergemann Environmental Elements Corporation (CBEEC)
Hamon - Research Cottrell (Hamon)
Wheelabrator Air Pollution Control, Inc. (WAPC)
MobotecUSA (Mobotec)

Mobotec declined to bid since they are focused on NO_x control. Alstom, B&W and WAPC declined due to the large volume present with larger projects.

A pre-bid meeting was conducted on October 12, 2006, and attended by BPEI, CBEEC and Hamon. Following the pre-bid meeting, SP Environmental (SPE) later requested a RFB.

BPEI declined to bid, also due to the market opportunities for larger projects. Hamon declined due to the cost for a Performance Bond. SPE declined due to time constraints.

CBEEC Bid

CBEEC was the only company to submit a bid. They submitted a detailed proposal for a price of \$10,893,000, including \$2,520,000 for the Performance Bond and \$300,000 for a contingency. UE believes that the CBEEC bid is responsive to the specification with the exception of the baghouse upper area access. The alternate access provision proposed is acceptable to UE and RPU. Vendor design work will be minimal, since the offering is identical to an existing baghouse recently supplied for a Manitowoc, WI power plant. Use of the same design will result in cost savings in engineering, modeling and escalation and provide an improved project schedule.

UE's estimated cost for the scrubber/baghouse was \$7,890,000 including a \$300,000 contingency and exclusive of Performance Bond costs. The CBEEC bid amount less the Performance Bond (\$10,893,000 - \$2,520,000) equals \$8,373,000 which compares closely with the UE estimate. (Bid price is 6% higher than the estimate). This 6% deviation can be attributed to the volatile steel market and an upturn in the sale of power industry equipment experienced in the past year.

UE considers the CBEEC equipment to be of high quality based on a thorough evaluation of this proposal. As the CBEEC Base Bid price is favorable in light of current market conditions and since the equipment proposed is of high quality, UE recommends that RPU proceed with contract negotiations to purchase the scrubber/baghouse equipment from CBEEC.

CBEEC Options

UE recommends that RPU accept the following CBEEC optional upgrades and deducts:

Allowance for Booster Fan Variable Frequency Drive (VFD)	\$ 245,000
Delta V controls in Lieu of Allen Bradley controls	115,000
Increased Lime Storage (5 Days vs. 2 Days)	68,000
Allowance for NEMA 4X Enclosures in Wet Areas	20,000
Elimination of Baghouse Bypass	(18,000)
Reduce Construction Advisor Time (11 Mo. in Lieu of 14 Mo.)	(54,000)
CFD Modeling of Scrubber Only in Lieu of Physical Flow Modeling of System	(42,000)
Net Cost for CBEEC Recommended Options	\$ 334,000
Base Bid Price	<u>10,893,000</u>
Recommended Purchase Order Price	\$ 11,227,000
Estimated Escalation	\$ 200,000

Mr. Walter Schlink, P.E.
Rochester Public Utilities
December 7, 2006
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The purchase of the booster fan VFD and DeltaV controls from CBEEC rather than from other suppliers is expected to minimize potential coordination and start-up problems.

Escalation

It is common in today's market for equipment suppliers to include escalation provisions for steel since neither CBEEC or the City have control over short term pricing. CBEEC has indicated that the scrubber vessel, ductwork and support steel are subject to escalation as these items cannot be purchased until third quarter of 2007. Execution of a purchase order agreement by January 10, 2007 will eliminate escalation provisions for the remaining equipment such as the baghouse, lime slurry preparation system, scrubber rotary atomizers and the flue gas booster fan.

Based upon escalation trends for power industry equipment over the past two (2) years, UE has estimated the escalation associated with the CBEEC proposal to be \$200,000 if a purchase order agreement is executed by January 10, 2007.

Recommended Contract Price

Including the equipment options recommended by UE, Performance Bond costs and the Contingency Amount, UE recommends the issuance of a purchase order to CBEEC for a lump sum price of \$11,227,000 subject to escalation that is limited to the SDA and ductwork related commodities discussed above. To ensure that the majority of the equipment furnished under this contract is protected from price escalation, UE furthermore recommends that a purchase order agreement for the scrubber vessel equipment be executed by January 10, 2007.

Sincerely,



Roger B. Anderson, P.E.
Senior Project Manager



Luther M. Rantikka, P.E.
Senior Design Consultant, Mechanical

LMR/dlk

**SILVER LAKE POWER PLANT
UNIT 4 EMISSIONS REDUCTION PROJECT
PURCHASE AGREEMENT
FOR
SCRUBBER/BAGHOUSE SYSTEM**

**SITE LOCATION:
Rochester Public Utilities
Silver Lake Plant
425 West Silver Lake Dr NE
Rochester, MN 55906-3675**

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PURCHASE AGREEMENT

This is an Agreement dated as of December 14, 2006 ("Effective Date"), between the City of Rochester, Minnesota, a Minnesota municipal corporation, acting through its Public Utility Board, hereinafter called "City" and CLYDE BERGEMANN EEC, a Delaware Corporation with principal offices at 3700 Koppers Street Baltimore, Maryland, _____ (ZIP CODE) ("Seller").

RECITALS

- A. The Work is for Unit 4 Emissions Reduction Project ("Project") for Rochester Public Utilities ("RPU") at the power generation facility known to be the Silver Lake Power Plant ("Site"), as more fully described herein, in accordance with all applicable federal, state, and local laws, ordinances and regulations, and the standards included in this Agreement.

Silver Lake Power Plant is an existing four unit electric generating station located at 425 West Silver Lake Drive NE, Rochester, Minnesota 55906-3675, owned and operated by RPU. The Plant has a nominal generating capacity of approximately 109 MW. The boilers are fired on lower sulfur fuel (bituminous coal).

- B. City and Seller wish to enter into an agreement in which Seller will furnish certain Work and material in connection with the Project.

NOW, THEREFORE, in consideration of the mutual agreements set forth in the Agreement Documents, the parties agree as follows:

ARTICLE 1. SCOPE OF SUPPLY

Seller shall furnish a Scrubber/Baghouse System as described in the Specifications and/or Exhibits, and shall carry out all obligations, duties and responsibilities imposed on Seller by the Agreement Documents. Seller's Work shall include the following:

- a) All materials and Work specified herein.
- b) Documentation. Seller agrees to provide, at no additional cost, copies of all documentation. Documentation shall be furnished in both electronic (to the extent available) and hard copy form.
- c) Technical Services. Seller shall provide technical services to City, at no additional cost, in accordance with the Specifications. This work includes typical Supplier Engineering and Drawing preparation as described in the technical specifications. The provision of such service shall be scheduled to correspond to the Schedule for the Project. Technical service work hours spent in connection with defects or deficiencies in the Work shall be for the account of Seller and shall not accrue as technical service time to be furnished by Seller under this Agreement.
- d) Training. Seller shall provide a familiarization training program on the use, operation, technical and maintenance aspects of the Work sufficient for City's personnel to use, operate and maintain the Work. The extent and timing of such familiarization training is described in the Specifications.
- e) Spare Parts. Seller shall, at City's request, provide to City the spare parts described in the Specifications at pricing listed on the spare parts list.

ARTICLE 2. AGREEMENT PRICE

City agrees to pay Contractor the sum of \$ELEVEN MILLION TWO HUNDRED TWENTY-SEVEN THOUSAND and NO/100 (\$11,227,000.00) for the Work described herein ("Agreement Price").

The Seller's Agreement Price shall include a contingency fund of Three Hundred Thousand Dollars and no/100 dollars (\$300,000.00) to be drawn upon as required for possible additions or changes in the Work. No work shall be done to be paid

for out of this fund unless an order is issued in writing by the Engineer and countersigned by a representative of the Seller. The unused portion of this contingency fund shall remain the property of the City and shall be deducted from the contract amount at the time of final payment.

The Seller shall submit invoices to the City in the manner provided in the Agreement Documents and shall be paid the invoiced amount until the project is completed. Payment shall be in accordance with City procedures. All payment requests (including invoices) must be signed and notarized.

The final payment shall not become due until the Seller has delivered to the City a complete release of all liens arising out of the Work or receipts in lieu thereof, and in either case, an affidavit stating that so far as he has knowledge or information, the release and receipts include the payment in full for all the labor and material for which a lien could be filed. The Seller shall deliver an executed copy of a Release and Indemnity Agreement and a signed copy of an affidavit for obtaining final settlement of contract with the State of Minnesota and any of its political or governmental subdivisions, State of Minnesota Department of Taxation Form IC134.

City shall pay to Seller for the Work and Seller shall accept a sum of money computed at the rates set forth in Exhibit A, Scope of Work. Seller shall accept as full compensation therefore, a sum NOT TO EXCEED ELEVEN MILLION TWO HUNDRED TWENTY-SEVEN THOUSAND Dollars (\$11,227,000.00). Seller shall be paid for actual Work performed, as authorized and measured in the field by his duly authorized representative.

ARTICLE 3. DELIVERY

Seller shall, at Seller's expense, arrange for shipment and Delivery of all Work by normal transportation, F.O.B. destination, Site. Delivery of the Equipment to the Site shall be completed in accordance with the Schedule. Unless otherwise agreed in writing, City shall not be required to accept Delivery of any Equipment earlier than thirty (30) Days prior to the scheduled Delivery date for such Equipment. Seller acknowledges that the timely delivery of the Equipment is essential to the timely completion of the Project.

ARTICLE 4. INDEMNITY

4.1 **INDEMNIFICATION.** In consideration of Ten Dollars (\$10.00) and other good and valuable consideration, the amount of which is included in the Agreement Price, Seller agrees to the following indemnification obligations to the fullest extent permitted by Laws.

4.2.1 **GENERAL INDEMNITY.** SELLER SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS EACH INDEMNIFIED PARTY FROM AND AGAINST ALL CLAIMS ARISING OUT OF OR RELATING TO THE WORK TO THE EXTENT CAUSED OR ALLEGED TO BE CAUSED BY THE FAULT OR NEGLIGENT ACTS OR OMISSIONS OF SELLER, ANY OF ITS SUBCONTRACTORS, ANY PERSON DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM TO PERFORM OR FURNISH ANY OF THE WORK, OR ANY PERSON FOR WHOSE ACTS ANY OF THEM MAY BE LIABLE, OR BY THE FAILURE OF ANY OF THEM TO OBSERVE ANY LAWS OR BY THE FAILURE OF ANY OF THEM TO COMPLY WITH SELLER'S OBLIGATIONS UNDER THIS AGREEMENT. Further, Seller's defense obligations shall apply to each Claim for which indemnification is or may be available under this Section, and shall continue until the Claim is established by final judgment to have been caused, in whole or in part, by the negligent acts or omissions or willful misconduct of the Indemnified Party seeking indemnification, in which event such Indemnified Party (or insurers on the Indemnified Party's behalf) shall either pay the claimant directly in satisfaction of Indemnified Party's share of liability or reimburse Seller the amounts so paid by Seller to the claimant in satisfaction of Indemnified Party's liability. An Indemnified Party shall have no other obligation to reimburse Seller in connection with Claims.

4.2.2 This indemnification obligation shall not be limited in any way by any limitation on the amount or type of insurance coverage, if any, provided by City, Seller, or any of its Subcontractors. In any and all Claims against an Indemnified Party by any employee of Seller, any of its Subcontractors, any person, or organization, directly or indirectly, employed by any of them to perform or furnish any of the Work, or anyone for whose acts any of them may be liable, this indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Seller, or any such Subcontractor, or other person or organization under workers' compensation acts, disability benefit acts, or other employee benefit acts.

4.2.3 **TO THE FULLEST EXTENT PERMITTED BY LAW, EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, THE INDEMNITIES EXPRESSED IN THIS AGREEMENT SHALL APPLY EVEN IN THE EVENT OF THE FAULT, NEGLIGENCE (IN WHOLE OR PART), STRICT LIABILITY, OR BREACH OF CONTRACT OF THE PARTY WHO IS INDEMNIFIED BY SUCH PROVISIONS. SUCH PROVISIONS SHALL**

CONTINUE IN FORCE AND EFFECT NOTWITHSTANDING THE COMPLETION, TERMINATION, OR SUSPENSION OF THE WORK UNDER THIS AGREEMENT.

4.3 PATENT INDEMNITY. Seller shall defend, indemnify, and hold harmless each Indemnified Party from and against any and all Claims arising out of any claim of infringement or improper use of any patent, trade secret, proprietary right, copyright or other intellectual property right in connection with the Work. If any claim materially impairs performance of the Work, then Seller, at its sole expense, shall timely procure the right to continue its performance of the Work in accordance with the approved schedule. Further, if an Indemnified Party should be enjoined from the use of any Materials, combination or process covered by this Agreement, then Seller shall promptly either: (1) secure termination of the injunction and procure for the affected Indemnified Party the right to use such Material, combination or process, without obligation or liability, or (2) replace such Materials, combination or process, or modify the same to become non-infringing, all at Seller's sole expense, but subject to all the requirements of the Agreement. Notwithstanding the foregoing, Seller shall have no obligation or liability under this patent indemnity provision with respect to Work manufactured in accordance with designs, processes, or methods specifically required by City.

ARTICLE 5. INSURANCE

5.1 GENERAL INSURANCE REQUIREMENTS. Seller shall provide and maintain, during the term of this Agreement (including all warranty periods), occurrence-based insurance with coverages, and limits of liability not less than those shown herein. Seller shall require each Subcontractor to provide and maintain, during the term of their respective agreements (including all warranty periods), the insurance coverages specified as follows, with any limits of liability determined appropriate by the Seller. All such insurance shall be primary to any insurance maintained by City. Limits may be arranged through any combination of underlying and excess or umbrella policies. Seller shall pay all deductible amounts associated with the required insurance.

Prior to commencement of the Work, Seller shall furnish City either insurance certificate(s) on the form attached as Attachment A (or equivalent form satisfactory to City) executed by an authorized representative of Seller's insurer or, if required by City, certified copies of insurance policies or certified copies of insurance summaries, with endorsements, evidencing the applicable policies, coverages, and limits. Upon City's request, Seller shall also furnish City such evidence of Subcontractors' policies, coverages, and limits. City's receipt of or failure to object to any insurance certificates or policies submitted by Seller does not release or diminish in any manner the liability or obligations of Seller, or constitute a waiver of any of the insurance requirements under this Agreement. Replacement certificates of insurance evidencing continuation of Seller's coverage shall be furnished to City at least thirty (30) days prior to the expiration of the current policies. The limits of liability shown for each type of insurance coverage to be provided by the Seller pursuant hereto are minimum limits only and do not limit Seller's liability or obligations hereunder or otherwise.

Each such policy, other than Workers' Compensation, shall name Indemnified Parties as additional insureds, on the form of endorsement attached as Attachment A for liability arising out of the Work, and shall include a cross-liability and severability of interests' clause. No policy may contain any limitation on the scope of protection afforded any of the additional insureds. Each Seller and Subcontractor policy shall provide a minimum of thirty (30) days written notice by the insurer to City prior to the cancellation, non-renewal, or material change of any insurance referred to herein. Seller's insurance shall provide coverage whether Seller's liability arises out of the operations of Seller or any Subcontractor in connection with the Work.

Unless otherwise agreed in writing by City, all of Seller's and Subcontractor's insurance shall be written with insurers licensed in the jurisdiction where the Work is to be performed, and such insurers shall maintain a current A.M. Best rating of at least "B +."

Failure of Seller to comply with the requirements of this Article, including the failure to furnish and maintain evidence of Seller's or any Subcontractor's insurance as required herein, shall be a material breach of this Agreement. If Seller fails to comply with requirements of this Article, then in addition to its other remedies, City may direct Seller to suspend performance of the Work at the Site until Seller demonstrates compliance.

5.2 **REQUIRED COVERAGE.** Insurance policies shall contain at a minimum the following coverages and limits:

<u>COVERAGE PROVISIONS</u> <i>(in addition to 5.1 above)</i>	<u>LIMITS</u>		
	AGREEMENTS UNDER \$150,000	AGREEMENTS IN EXCESS OF \$150,000	AGREEMENT S IN EXCESS OF \$1MM

<u>WORKERS' COMPENSATION (WC)</u>	Statutory	Statutory	Statutory
Coverage shall include USL&H, Jones Act, Outer Continental Shelf Land Act, Maritime & Federal Employers Liability Act coverage & Defense Base Act, if applicable.			

Coverage shall include all Partners, Proprietors, and Executive Officers.
Coverage shall include All States coverage.

EMPLOYER'S LIABILITY (EL)

Each Accident	\$500,000	\$1,000,000	\$1,000,000
Disease – Policy Limit	\$500,000	\$1,000,000	\$1,000,000
Disease – Each Employee	\$500,000	\$1,000,000	\$1,000,000

Coverage shall include all Partners, Proprietors, and Executive Officers.

COMMERCIAL GENERAL LIABILITY (CGL)

General Aggregate	\$1,000,000	\$2,000,000	\$2,000,000
Products/Comp-Op Aggregate	\$1,000,000	\$2,000,000	\$2,000,000
Personal/Advertising Injury	\$ 500,000	\$1,000,000	\$1,000,000
Each Occurrence	\$ 500,000	\$1,000,000	\$1,000,000
Fire Damage (any one fire)	\$ 50,000	\$ 50,000	\$ 50,000
Medical Expense (any one person)	\$ 5,000	\$ 5,000	\$ 5,000

Policy must be endorsed to provide that aggregate limits apply on a per project basis.

Coverage shall include:

Broad form property damage, product/completed operations (minimum 3 years past completion of project), independent contractor's liability, blanket contractual liability covering Seller's indemnity obligations under the Indemnity article herein, coverage for hazards commonly referred to as XCU.

BUSINESS AUTOMOBILE LIABILITY (AL)

Bodily Injury (per person)	\$ 250,000	\$ 250,000	\$ 250,000
Bodily Injury (per accident)	\$ 500,000	\$ 500,000	\$ 500,000
Property Damage	\$ 250,000	\$ 250,000	\$ 250,000
or			
Combined Single Limit	\$1,000,000	\$1,000,000	\$1,000,000

Coverage shall include all owned, non-owned and hired vehicles.

EXCESS (UMBRELLA) LIABILITY

In excess of WC, CGL, & AL above	N/A	\$1,000,000	\$5,000,000
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OCEAN CARGO Covering cargo warehouse to warehouse Value of cargo + freight + 10% (cargo + freight)
City shall be named as a loss payee under such policy.

CONTRACTOR'S EQUIPMENT

Covering all tools and construction equipment owned, leased, or borrowed by Seller, Subcontractors and their respective employees

Full replacement value of tools and equipment

City shall be named as a loss payee under such policy if such equipment is owned by, leased by or borrowed from City, as shown on Attachment A – Certificate of Insurance.

ARTICLE 6. AGREEMENT DOCUMENTS

The Agreement Documents identified below comprise the entire agreement between City and Seller. All oral agreements and representations have been reduced to writing and are included in the Agreement Documents. The following are the Agreement Documents: this Agreement, Final Signed Bid Form and Data Sheets, Specifications, Technical Documentation, Agreed Exceptions, Change Orders, documents and data furnished by Seller after the Effective Date that are approved and accepted in writing by City's representative, and EEO Compliance Certificate, if applicable. All Agreement Documents, whether or not presently in existence, are incorporated herein by reference and are binding on the Parties as if fully set forth at length.

Should anything necessary for a clear understanding of the Work be omitted from the Agreement Documents, or should the requirements appear to be in conflict, the Seller shall secure written instructions from City before furnishing the Work affected thereby. It is understood and agreed that the Work shall be furnished according to the true and highest intent of the Agreement Documents.

Any conflict within the Agreement Documents shall be resolved by reference to the Agreement Document with the highest precedence in the following order: Amendments, Change Orders, Agreed Exceptions, Agreement, Seller's Proposal No. ACS-06-11-20083-F1, Revision No. _____, (dated _____, 2006), Specifications, Documentation, and documents and data furnished by Seller after the Effective Date that are approved and accepted in writing by City's representative.

ARTICLE 7. SECURITY FOR PERFORMANCE

Performance, Payment, or Supply Bond. - The Seller shall furnish the City a bond executed by the Seller as principal and with such corporate surety as the City shall approve in an amount equal to 100% of the Agreement Price, conditioned upon the full performance of all the and full payment of all charges for labor and material or other charges or services rendered on, for, or in connection with the Work, in accordance with Minnesota Statutes 574.26 and guaranteeing performance of the contract in accordance with its terms (Attachment I).

ARTICLE 8. LIQUIDATED DAMAGES

8.1 **LIQUIDATED DAMAGES FOR DELAY.** If Seller fails to complete specified Work activities by the Schedule and/or Milestone Dates specified or by any approved time extension thereof, damage will be sustained by City; and, as it is and will be impracticable to ascertain and determine the actual damage that City will sustain by reason of such delay, it is agreed that Seller shall pay to City as fixed, agreed, and liquidated damages, and not as a penalty, in the amount(s) indicated below for each activity for failure to complete the corresponding Work activity listed on or before the Schedule and/or Milestone Dates included in this Agreement.

Milestone Schedule	City Scheduled Date	Seller Committed Date	LDs Apply:
Bids Due	Nov. 14, 2006	Nov. 14, 2006	N/A
Signed Purchase Agreement	Jan. 10, 2007	Jan. 10, 2007	N/A
Certified Outline Drawings and Foundation Load Drawings Submitted	Mar. 16, 2007	April 20, 2007	\$700/day
General Vendor Design Submitted For Review (Model Study only)	Apr. 13, 2007	June 15, 2007	N/A

Certified Vendor / Fabrication Drawings Completed and Submitted	May 11, 2007	Sept. 1, 2007 Supt stl, access fab	\$700/day
Shop Fabrication Complete, SDA vessel/supp 't steel and Lime System	Dec. 14, 2007	Feb. 14, 2008	N/A
Delivery Complete, SDA gas disperser (model study dependent) and Lime System	Jan. 14, 2008	Feb. 14, 2008	\$1,000/day
Shop Fabrication Complete, Air Heater to SDA ductwork and supports	Dec. 14, 2007	March 14, 2008	N/A
Delivery Complete, Air Heater to SDA ductwork and supports	Jan. 14, 2008	April 14, 2008	\$1,000/day
Shop Fabrication Complete, Fabric Filter	Mar. 21, 2008	March 21, 2008	N/A
Delivery Complete, Fabric Filter (Except bags and cages)	Apr. 4, 2008	April 30, 2008	\$1,000/day
Shop Fabrication Complete, SDA to Fabric Filter ductwork and supports	Mar. 21, 2008	March 21, 2008	N/A
Delivery Complete, SDA to Fabric Filter ductwork and supports	Apr. 4, 2008	April 30, 2008	\$1,000/day
Shop Fabrication Complete, Booster Fan	Aug. 22, 2008	Aug. 22, 2008	N/A
Delivery Complete, Booster Fan	Sep. 5, 2008	Sep. 5, 2008	\$4,000/day
Shop Fabrication Complete, Fabric Filter to Booster Fan and Booster Fan to Chimney Ductwork	Aug. 22, 2008	Aug. 22, 2008	N/A
Delivery of all Equipment Complete, including Fabric Filter to Booster Fan and Booster Fan to Chimney Ductwork	Sep. 5, 2008	Sep. 5, 2008	\$4,000/day
Final Acceptance	April 27, 2009	April 27, 2009	N/A

Seller shall demonstrate completion of a Work activity by obtaining City's inspection of such activity and City's written certification stating that such Work activity has been completed and stating the date of completion.

Seller agrees to pay the liquidated damages as herein provided monthly as they accrue.

8.2 LIQUIDATED DAMAGES FOR FAILURE TO MEET PERFORMANCE GUARANTEES. If the Work fails to meet any Performance Guarantee as provided herein, damages will be sustained by City and, as it is and will be impracticable to ascertain and determine the actual damage City will sustain by reason of such failure, it is agreed that Seller shall pay to City as fixed, agreed, and liquidated damages, and not as a penalty, the dollar amounts listed below for failure to meet the corresponding Performance Guarantee. Performance Guarantee(s) are specified in Specifications. The achievement of Performance Guarantee will be demonstrated during performance tests as described in the Specifications.

If the Work fails to meet each Performance Guarantee, then Seller shall take all necessary steps to correct the failure as soon as practicable, but in any event within the Correction Period. City will repeat failed performance tests, at Seller's cost, when Seller believes the failure has been corrected. If the Work again fails to meet each Performance Guarantee, Seller will again be afforded an opportunity for correction, providing the Correction Period has not lapsed. If Seller fails to meet all Performance Guarantees by the end of the Correction Period, then Seller shall pay the liquidated damages in the amount of Seven Thousand Two Hundred Dollars (\$7,200.00) per day for each and every performance guarantee that Seller failed to complete for the corresponding performance guarantee activity listed in the Agreement and Specifications. Seller agrees to pay the liquidated damages as herein provided monthly as they accrue.

8.3 FAILURE TO MEET PERFORMANCE GUARANTEES. Seller hereby guarantees that the Work furnished under this contract shall provide a complete and operating system designed to perform as defined in the specifications. Should the Work not meet the required performance, Seller shall repair or replace any/or all components/parts to achieve the required level of performance. The Seller shall bear the cost of all components, parts, materials, labor, supplies, tools and consumables to accomplish the required performance. Seller hereby agrees that final payment shall not be made and Acceptance shall not take place until all operating systems meet the required design and performance Specifications. The total amount of Liquidated Damages under the Agreement shall not exceed, in the aggregate, 10% of the Agreement Price.

Liquidated Damages shall not be due and payable unless the city has incurred actual damages in excess of nominal damages, solely as a result of Seller."

ARTICLE 9. PERFORMANCE OF THE WORK

9.1 **SCHEDULING THE WORK.** Seller shall begin performance of the Work on the Effective Date, and shall abide by each Schedule as established by City. Seller shall cooperate with City in scheduling and performing Seller's Work to avoid conflict, delay in or interference with the work of City, and/or other subcontractors. Seller shall coordinate its activities with City and other subcontractors so as to promote the general progress of the entire Project. Seller shall adhere to City's work week, unless otherwise approved by City. Seller shall promptly Notify City of potential conflicts between Seller's Work and that of City or others. Seller shall provide City its current plan or schedule for performance of the Work when, and in such detail, as City may request from time to time. Seller shall Notify City within two days if any change in City's Schedule may adversely affect Seller's performance of the Work. Seller's Notice shall identify with particularity the effect of such change on Seller's Work. City and Seller shall promptly meet for the purpose of agreeing to a plan to mitigate such adverse impact. If Seller believes it is entitled to a Change Order, then Seller shall comply with the requirements of Article 11.

9.2 **TIMELINESS.** Seller shall perform the Work in a prompt, efficient, safe, and diligent manner. If Seller has reason to believe that the Work will not be performed or completed in accordance with the Schedule, then, within two (2) days, Seller shall provide Notice to City, specifying in its Notice the causes therefore, the corrective action planned by Seller and, if applicable, other information required by Article 11. If Seller's course of action is not acceptable to City, then City shall so Notify Seller and Seller shall have three (3) days to correct its failure. If Seller has not corrected its failure or made arrangements acceptable to City to do so within such time period or if Seller fails to perform in accordance with an acceptable plan for corrective action, then, in addition to its other rights and remedies, City may require Seller to increase its Work and workers, increase working hours or otherwise accelerate its performance until the Work is back on Schedule, all without additional cost to City. City reserves the right to perform some or all of the Work with its own forces and to contract with others for same. Upon request, Seller shall promptly provide City with adequate assurance satisfactory to City of Seller's ability to fully perform its obligations under the Agreement Documents in the time and manner provided.

9.3 **PROGRESS REPORTS.** Seller shall furnish City monthly progress reports, and such other reports as City may reasonably request to verify actual progress and to predict future progress. Reports shall consist of a narrative and a progress update on engineering, fabrication, and delivery of all significant components, to include: SDA, PJFF, ductwork, booster fans, engineering drawings and calculations.

9.4 – 9.5 (RESERVED)

9.6 **COMPLIANCE WITH LAWS.** Seller shall fully comply with all Laws applicable to Seller and to the Work.

9.7 **HAZARDOUS SUBSTANCES.** Seller shall safely and properly handle, treat and dispose of all Hazardous Substances with which it deals in connection with the Work. Seller shall immediately Notify City if Seller encounters unanticipated Hazardous Substances at the Site.

9.8 – 9.9 (RESERVED)

9.10 **INSPECTION OF THE WORK.** Seller alone is responsible for the quality of its Work and for the proper inspection of its Work. City shall have the right to inspect all or any portion of the Work designated by City, whether such work is on or off the Site and in whatever phase of fabrication or manufacture. Seller will give City reasonable advance Notice when any portion of the Work is ready for inspection. If adequate Notice is not provided or if Work is covered before City performs its requested inspection, then Seller shall, when requested by City, uncover its Work at Seller's cost for inspection by City. Seller will furnish adequate facilities for inspecting Work at the Site, and where any Work is being prepared, performed, processed, manufactured or treated. Neither inspection nor failure to inspect by City shall be considered acceptance of the Work. Seller will promptly report to City any apparent discrepancies or defects in the work of others at the Project that would render it unsuitable for proper execution of Seller's Work. Failure to promptly report such discrepancies or defects will constitute acceptance of the other work.

9.10.1 **FACTORY TESTS.** All factory tests described in the Technical Specifications shall successfully be completed by Seller prior to shipment. Seller and City shall mutually agree on a specific list of such factory tests which City wishes to witness. Seller shall advise City as to the schedule for testing and City will be given an opportunity to observe testing during regular working hours. City shall be notified at least ten (10) business days prior to the commencement of all factory tests.

However, provided such notice has been given, neither completion of production work nor shipment of any part of the Work will be delayed to accommodate City's inspectors.

9.11 (RESERVED)

9.12 TAXES, LICENSES, PERMITS AND FEES. Except as otherwise provided in the Agreement Documents, Seller shall obtain and pay for all required licenses, certificates, permits, fees and inspections necessary and/or required to perform the Seller's scope of work. Except as otherwise provided herein, the Agreement Price includes all the "end user" taxes the Seller is responsible for, including and not limited to Minnesota State Tax, Personal Property Taxes, Payroll Taxes, licenses, certificates, permits, inspections, and fees of every nature which may be imposed on Seller or on the materials, labor, construction transaction between City and Seller. Seller agrees to defend, indemnify and hold City harmless against all claims, demands, fines or causes of action by any regulatory body or governmental agency arising out of any violation for Seller's failure to have appropriate authority to perform the Work. The Seller's "end user" taxes does not include Minnesota Sales and Use Tax, Gross Receipts Tax, Excise Tax or any Tax of a similar nature. If Seller is required to collect and/or pay such taxes, City shall reimburse Seller for the full amount.

9.13 (RESERVED)

9.14 REPRESENTATIVES. City shall appoint a representative who shall be authorized with whom Seller may consult at reasonable times and whose instructions, requests and decisions will be binding upon City as to matters pertaining to the Agreement Documents and the Work. City shall Notify Seller in writing of the identity of its representative. City may change the identity of its representative by giving Notice to Seller. Seller shall appoint a representative who shall supervise performance of the Work at the Site, who shall be authorized to act on behalf of Seller, who shall be reasonably acceptable to City, with whom City may consult at reasonable times and whose instructions, requests and decisions will be binding upon Seller as to matters pertaining to the Agreement Documents and the Work. Within ten (10) days after execution of the Agreement by the parties, Seller shall Notify City in writing of the identity of its proposed representative and shall request City's approval of same. City shall advise Seller within ten (10) days thereafter whether City disapproves of the proposed representative. If City fails to respond within such ten (10) days, Seller's proposed representative shall be deemed approved. Seller may not change Seller's representative without the prior written consent of City's representative, which consent will not be unreasonably withheld or delayed.

9.15 STOP WORK ORDERS. If Seller fails to comply with any requirement of this Agreement, including safety and insurance requirements, City shall have the right, but not the duty, to order Seller to stop any portion of the Work affected by such failure. Seller shall immediately comply with any such order and shall not resume the affected Work until such failure is remedied to the satisfaction of City. Seller shall not be entitled to any Change Order on account of such Work stoppage.

9.16 QUALITY ASSURANCE / QUALITY CONTROL. Seller shall inspect all Work and shall conduct a continuous program of quality assurance and quality control ("QA/QC") for all of the Work under this Agreement. No later than thirty (30) days of after signing this Agreement, Seller shall submit its written QA/QC program and inspection procedures to City for review. The objective of the QA/QC Program shall be to prevent Defects before they occur and, if Defects nonetheless occur, to ensure their prompt identification, reporting, and correction. The QA/QC program shall be specific for this Agreement and shall be in sufficient detail to delineate those items to be inspected and the manner in which they are to be inspected. The program shall describe all Sellers QA/QC activities contemplated, including provisions for adequate documentation of Seller's performance of its QA/QC and Seller's schedule for inspection activities. Seller shall similarly require its Subcontractors to provide and maintain approved quality control systems where applicable. Seller's quality system shall provide for controlling its Subcontractors and for assuring that their quality control systems are appropriate for the scope of their work and are in compliance with the requirements of this Agreement. Throughout performance of the Work, including warranty Work, Seller shall maintain QA/QC in accordance with their QA/QC Program and other requirements of this Agreement.

ARTICLE 10. PAYMENT

10.1.1 PAYMENT. By the tenth (10th) day of each month, Seller shall submit to City its application for payment as defined below ("Application for Payment"). Each Application for Payment shall include each Milestone event completed in the previous month as defined in the Milestone Payment Schedule (Attachment H).

Seller's pay request shall state when each milestone was accomplished and shall include such supporting data as are necessary and acceptable to City and Owner to substantiate Seller's right to payment. Seller's pay request shall also include statements of the current Price (including approved Change Orders) and the amounts invoiced and received by Seller prior to the pay request in question. Terms of Payment are Net 30 Days." Seller's Application for Payment shall include:

- a) Seller's Waiver of Release of Lien, completed and executed in accordance with the form attached hereto as Attachment F;
- b) Affidavit, completed and executed in accordance with the form attached hereto as Attachment J;
- c) All payment requests must be signed and notarized.
- d) All payment requests must specifically state: original agreement amount, change order amounts, payment request amount (if linked Schedule and/or Milestone), amount previously invoiced, amount previously paid to the Seller under this Purchase Agreement, balance of agreement yet to be invoiced, and calculation of retention amount.
- e) Satisfaction of close-out procedures required by Agreement Documents;
- f) Other data in the form and to the extent reasonably required by City; and
- g) Three (3) copies of Seller's invoice shall be addressed to City, and mailed to the following address:

**Rochester Public Utilities
C/O Utility Engineering Corporation
Attn: Roger Anderson, Project Manager
901 Marquette Ave Suite 2900
Minneapolis, MN 55402**

10.1.2 PAYMENT NOT ACCEPTANCE. No payment made to Seller shall be construed as an acceptance or approval of any of Seller's Work or constitutes a waiver of any claim or right that City may then or thereafter have against Seller.

10.1.3 PAYMENTS WITHHELD. The City may withhold, or on account of subsequently discovered evidence, nullify, the whole or any part of any Application for Payment to such extent as may be necessary to protect the City from loss on account of:

- a. Defective work not remedied by Seller
- b. Non compliance with the Agreement.
- c. Failure of the Seller to make payments to subcontractors for material or labor.
- d. A reasonable doubt that the Agreement can be completed for the balance then unpaid.
- e. Failure to complete the Agreement within the time specified.
- f. Failure of the Seller to provide drawings or deliverables as required herein.
- g. Failure to submit with the request for final payment the certificate with M.S.A. 290.92 State of Minnesota Department of Taxation Form IC134 in duplicate.

When the above grounds are removed or satisfactory adjustment made, payment of the balance due shall be made from the amounts withheld because of them.

10.1.4 PAYMENT OFFSET. City shall be entitled to offset from any sum due Seller hereunder against any past due obligation Seller may owe to City or any Affiliate of City under any other Agreement with Seller.

Notwithstanding any provision to the contrary, City shall have no obligation to make any payment to Seller at any time, after Notice to Seller when (1) Seller is in material breach of this Agreement or (2) Seller fails to furnish and maintain evidence of current insurance in accordance with the requirements of the Agreement Documents.

10.2 FINAL PAYMENT. City shall make the final payment of all sums due and owing to Seller, subject to withholding permitted hereunder, within sixty (60) days after (1) complete performance of Seller's Work on the Project in accordance with the requirements of this Agreement, (2) final approval and Acceptance of Seller's Work by City, and (3) City's receipt from Seller of the following along with Seller's application for final payment:

10.3

- (a) Seller's State of Minnesota Department of Taxation Form IC134, completed and executed in accordance with the form attached hereto as Attachment G;
- (b) Surety's consent, if required;
- (c) Certified payrolls, if required by the Agreement Documents;
- (d) Satisfaction of close-out procedures required by Agreement Documents;
- (e) Other data in the form and to the extent reasonably required by City;
- (f) Three (3) copies of Seller's invoice issued to City.
- (g) Affidavit, completed and executed in accordance with the form attached hereto as Attachment J; and
- (h) Three (3) copies of Seller's invoice shall be addressed to City, and mailed to the following address:

**Rochester Public Utilities
C/O Utility Engineering Corporation
Attn: Roger Anderson, Project Manager**

901 Marquette Ave Suite 2900
Minneapolis, MN 55402

ARTICLE 11. CHANGES AND DELAY

11.1 **CHANGE ORDERS.** A Change Order may be requested by the City, UE, or Seller in accordance with the terms of this Section. Agreement by both parties to any Change Order request shall constitute a final settlement of all matters arising out of or relating to the Change, including all direct and indirect costs related to such Change and all adjustments to the Agreement Price and Schedule. "Total Cost Method" will never be used under any circumstances. Except for Changes approved by Change Order, Seller hereby waives all rights to and releases City from, any claim of additional compensation or any extension of time to the Schedule and all other change to the Agreement Documents.

11.2 **CITY'S RIGHT TO MAKE CHANGES.** City shall have the right from time to time to make a Change. City shall Notify Seller of any requested Change. Seller shall Notify City of the effect of such Change as provided below, and shall take all reasonable steps to minimize the impact on the cost of and time for performance of the Work.

11.3 **SELLER'S CHANGE ORDER REQUEST.** If Seller believes that any act or omission by City is or may become a Change, then within two (2) days after such act or omission, Seller shall Notify City of the particular act or omission which it believes may require a Change, and Seller's actions to minimize the impact on the cost of and time for performance of the Work.

11.4 **CHANGE ORDER REQUEST PROCEDURE.** Within five (5) days after receipt of a Change Order Request by either City or Seller, Seller shall Notify City using the Change Order Request form (Attachment E-1), of the effect, if any, of the Change (or alleged Change) on the Agreement Price, Schedule or any right or obligation of Seller under the Agreement. Seller's Change Order Request Form shall include a detailed cost impact and schedule impact analysis identifying each impact item and its effect on the Agreement Price, Schedule and any other rights and obligations of Seller under the Agreement. As soon as possible after Seller's Change Order Request Form is delivered, City and Seller shall meet and negotiate in good faith whether a Change has occurred and, if so, an equitable adjustment to the Agreement Price, Schedule and any other rights and obligations of Seller under the Agreement. The final change order with agreed to Statement of Work, Price, and Schedule Changes will be documented on the Change Order Form (Attachment E-2). When so directed by City, Seller shall perform the Work as described in the Change Order Request, with reservation of its right to claim an adjustment to the Agreement as set forth in Seller's Change Impact Notice to City, pursuant to the Dispute Resolution article. In no event shall Seller refuse to perform the Work described in a Change Order Request, if so directed by City. However, if Seller fails to issue a Change Order Request Form within five days, as provided herein, then Seller shall be deemed to have agreed to the Change Order Request and to have waived any claim for adjustment to the Agreement Price, Schedule, or any other Agreement provision.

11.5 **EXCUSABLE DELAYS (FORCE MAJEURE).** If Seller is delayed at any time during the progress of the Work by any Excusable Delay Event, then Seller may be entitled to an extension of additional time to the Schedule. If Seller experiences an Excusable Delay Event, then Seller shall within two (2) days after such event give City Notice of the delay and any impact by the delay upon the Schedule. If Seller provides City with the foregoing Notice, then Seller shall be entitled to a day for day extension to the Schedule corresponding to the number of days of delay demonstrated by Seller to be directly caused by the Excusable Delay Event.

11.6 **NON-EXCUSABLE DELAYS.** If Seller is delayed by any Non-Excusable Delay Event, then Seller shall not be entitled to any extension to the Schedule. Seller shall overcome such Non-Excusable Delay Event or events at no additional cost to City.

11.7 **NO DAMAGES FOR DELAY.** In no event shall Seller be entitled to any monetary compensation for any delay, whether or not excusable, and Seller hereby waives and releases City from any and all loss, cost, expense, or damages incurred by Seller which arise out of any Excusable Delay Event or any Non-Excusable Delay Event.

11.8 **RECORD KEEPING.** The cost of a Change Order shall be determined on the basis of reasonable direct costs and savings of performing the Work attributable to the Change. Seller shall keep and present, in such form as City may prescribe, an itemized accounting of such costs and savings with appropriate supporting documentation.

ARTICLE 12. WARRANTY

12.1 WARRANTY. Seller shall furnish the Work:

- (a) in compliance with Laws;
- (b) in accordance with all applicable manufacturer's requirements;
- (c) in accordance with all applicable standards and codes;
- (d) in accordance with the provisions of this Agreement including but not limited to the Specifications and Drawings, whether expressly or by reference incorporated into this Agreement;
- (e) by providing Materials which are new, unused and undamaged when delivered to the Site, of good and merchantable quality suitable for their specified use, and free of defects in design, materials and workmanship and which are in conformity with the requirements of clauses (b), (c), (d) and (e) above;
- (f) by providing any required engineering certifications by professional engineers, properly licensed in the applicable jurisdictions and that any design or engineering performed or otherwise provided by Seller as a part of the Work shall be done in a professional and workmanlike manner by conforming to practice customary in the engineering profession then in effect for services of a similar nature; and
- (g) such that the completed Work and portions thereof shall operate and perform satisfactorily as specified in this Subcontract and shall remain free of any weakness, deficiency, defect, failure, break down, or deterioration during testing, startup, and commercial operation and for the full Warranty Period.

12.2.1 REMEDY. Seller agrees to remedy in the time and manner provided herein and without cost to City, any Defective Work of which it receives Notice twelve (12) months after Acceptance of Seller's Work, except for baghouse bags, which shall be guaranteed for three years (36 months). The term "Defective Work" shall not be construed to include breakdown or damage arising from City's negligence or willful misconduct, any failure to operate or maintain the Work in accordance with applicable operations and maintenance manuals, any alteration or modification without Seller's consent or from the effects of normal wear and tear. Upon such Notice, Seller shall promptly commence and proceed to perform Warranty Work. Seller shall conduct such Warranty Work on an overtime schedule basis if City or City reasonably determines such a schedule is necessary to avoid or minimize any delay in connection with the Project or any reduction in output of the Project. The cost of access to and uncovering of Defective Work are the responsibility of Seller. Seller shall bear the expense of making good all other property destroyed or damaged by its Defective Work or as a result of its Warranty Work. Seller shall, at its expense, perform such inspections and tests as City may reasonably require that are normal construction industry practice to demonstrate that the corrected Work complies with this Agreement. The warranty set forth in this Article shall apply to all repairs or replacement materials and Work to the same extent as it applies to the original Work and the warranty period for same shall extend for a period of twelve (12) months beyond the date the repair or replacement Work is complete or to the end of the original twelve (12) month warranty period, whichever occurs later.

12.2.2 If City, has given written notice to Seller of the required date for correction of the Defective Work and afforded Seller the opportunity to redesign, repair, or replace the Defective Work within the required time and if:

- a) Seller fails to begin redesign, repair, or replacement promptly within two (2) days after receipt of written notice of any Defective Work; or
- b) Seller commences redesign, repair, or replacement within the two (2) day period but, in the reasonable judgment of City, fails to diligently and without interruption prosecute same; or
- c) In the case of emergency, where in the reasonable judgment of City, delay could result in serious loss or damage to persons or property; or
- d) City, at its sole discretion, determines that the requirements of the Project schedule would be adversely affected if the redesign, repair, or replacement is not performed prior to the expiration of the two (2) day period; or
- e) City determines that correction of the Defective Work must be accomplished immediately.

Then City may redesign, repair, or replacement the Defective Work at Seller's expense, which may include the cost of a field service representative, repair materials, parts, labor, transportation, supervision, special tools, and supplies.

12.3 MANUFACTURER'S WARRANTIES. When called for in the Agreement Documents, Seller shall exercise reasonable efforts to obtain warranties against defects in design, materials and workmanship from every manufacturer or supplier furnishing Material for the Work. All such manufacturer or supplier warranties, which extend beyond Seller's remedy period, shall be assigned to the City at the expiration of the remedy period. Such warranty provisions shall be submitted to City with other compliance submittals. Seller shall be responsible for enforcement of all manufacturer and supplier warranties for the benefit of the City during Seller's remedy period. The existence and terms of such manufacturer's and supplier's warranties shall in no way limit the Seller's obligations with respect to warranties hereunder, which the parties recognize to be independent, and on which City fully relies. At the request of City during the Seller's remedy period, Seller shall cooperate with City in establishing working relationships between City and manufacturers and suppliers who furnished

Material for the Work.

12.4 **SELLER'S WARRANTY OF TITLE.** Seller warrants to City that title to all Work and Materials and the right to use computer software, shall be free and clear of all liens, claims, security interests, encumbrances, or other defects of title.

12.5 **EXCLUSIVE WARRANTIES.** The warranties set forth in this Agreement are exclusive and in lieu of all other warranties, whether written, oral, implied or statutory. NO IMPLIED OR STATUTORY WARRANTY OF EITHER MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE SHALL APPLY.

ARTICLE 13. PASSAGE OF TITLE AND RISK OF LOSS

13.1 **PASSAGE OF TITLE.** Title to the Work and any portion thereof, shall pass to City at the time of payment or delivery, whichever is earlier. At any time after transfer of title to City, Seller shall, upon the written request of City, execute and deliver to City a bill of sale and such other good and sufficient instruments of conveyance, assignment and transfer, which shall be effective to vest in City good and marketable title to the Work, free and clear of all liens, claims, security interests, encumbrances, or other defects of title.

13.2 **RISK OF LOSS.** Irrespective of the passage of title, Seller shall bear the risk of loss and shall repair or replace, at Seller's cost, any portion or all of the Work which is lost, damaged or destroyed prior to Delivery, irrespective of how such loss or damage shall have occurred, including the fault or negligence of any Indemnified Party. Upon Delivery, risk of loss of the Work shall pass to City thereafter shall be responsible for loss or damage to the Work, except such loss or damage as results from Defective Work or the fault or negligence of Seller, in which case Seller shall repair or replace the Work at Seller's cost.

13.3 – 13.4 (RESERVED)

13.5 **SECURITY INTEREST.** Seller grants to City a security interest in its inventory of raw materials used to manufacture or fabricate the Work and in partially fabricated components of the Work, wherever the same may be located, to secure (1) the Seller's obligations to perform in accordance with the Agreement Documents; (2) future advances evidenced by City's payments according to the terms of the Agreement; (3) all liabilities of Seller to City now existing or later incurred, matured or unmatured, direct or contingent. Seller shall mark and identify such raw materials and partially fabricated components, shall keep the same separate and identifiable and will not remove the same without City's prior written consent. At City's request, Seller will join in executing all necessary financing statements in form satisfactory to City and will further execute all other instruments necessary for City to perfect its security interest.

ARTICLE 14. LIENS

Unless City is in default of its payment obligations under this Agreement, Seller shall not permit or suffer to exist any lien or other encumbrance upon the Site or any Work or other property of City or City by any person claiming by, through or under Seller, its Subcontractors or any Affiliates of either. If any such lien or encumbrance is imposed, Seller shall immediately cause such lien to be discharged or provision therefore to be made by a bond or other security acceptable to City.

ARTICLE 15. CONFIDENTIALITY

15.1 **NONDISCLOSURE.** Seller shall not disclose to any third party any proprietary or confidential information regarding the Work, the Project or City's business affairs, finances, technology or processes without City's prior written consent

15.2 **DISCLOSURE REQUIRED IN LEGAL ACTION.** If Seller is required by Law to disclose information that is otherwise required to be maintained in confidence pursuant to this Article, or if disclosure is required in connection with legal proceedings, then Seller may disclose such information notwithstanding the provisions of this Article provided, however, that Seller shall immediately notify City of the requirement to disclose and the terms thereof prior to the actual disclosure, and shall minimize the disclosure of the information to the extent allowable under Law. If disclosure is required, then Seller shall use its best efforts to obtain proprietary or confidential treatment of the information by the third party to whom the information is disclosed, and will, to the extent such remedies are available, seek protective orders limiting the dissemination and use of the information. Nothing herein diminishes City's right to challenge any Law or legal proceeding requiring the disclosure.

15.3 **NO ADVERTISING.** Seller shall not, without City's prior written consent, advertise or publish any information concerning the Project, the Work, City, or the fact that Seller has entered into this Agreement with City, or agreed to perform the Work required hereunder.

15.4 **DURATION OF OBLIGATION.** Seller's obligations pursuant to this Article shall remain in full force and effect for a period of ten (10) years after (1) the final project completion date, or (2) termination of the Work.

ARTICLE 16. TERMINATION; SUSPENSION

16.1 TERMINATION FOR CAUSE

16.1.1 **INSOLVENCY OF SELLER.** If any proceeding is instituted against Seller seeking to adjudicate Seller as a bankrupt or insolvent, or if Seller makes a general assignment for the benefit of its creditors, or if a receiver is appointed on account of the insolvency of Seller, or if Seller files a petition seeking to take advantage of any Law relating to bankruptcy, insolvency, reorganization, winding up, or composition or readjustment of debts and, in the case of any such proceeding instituted against Seller but not by Seller, such proceeding is not dismissed within sixty (60) days after such filing, then, without prejudice to any other rights or remedies available under the Agreement Documents, or at law or in equity, City may terminate Seller's right to perform all or any part of the Work. Notwithstanding the foregoing, if an order for relief under Chapter 11 of the Bankruptcy Code is entered with respect to Seller during the term of the Agreement, Seller acknowledges and agrees that it will, subject to Bankruptcy Court approval, formally assume or reject, subject to the requirements of 11 U.S.C. § 365, the Agreement within seven (7) days of delivery of Notice for such action by City. If Seller fails to timely move for approval or rejection of the Agreement, it acknowledges and agrees that (1) it will not contest or in any way otherwise take any action to oppose such a motion filed by City or the lifting of the automatic stay of 11 U.S.C. § 362 to permit City to enforce its rights under the Agreement (the "Lift Stay Order"); (2) it waives all rights it may have under 11 U.S.C. § 362(f); (3) it hereby consents to the ex-parte entry of the Lift Stay Order pursuant to 11 U.S.C. § 362(f); and (4) at the option of City, it hereby agrees that it will execute an agreed Lift Stay Order on forty-eight (48) hours Notice. Each Party acknowledges and represents to each other and agrees that (1) each is familiar with the Agreement and the importance of completing the Agreement on time and within its term; and (2) based upon such familiarity, it is critical to performance of the Agreement that City have prompt and immediate access to its contractual remedies under the Agreement in the event of a default hereunder by Seller.

16.1.2 **DEFAULT.** Seller shall be in default of its obligations under this Agreement if Seller refuses or fails to:

- (a) furnish and Deliver the Work in accordance with the requirements of the Agreement Documents;
- (b) – (d) (Reserved)
- (e) provide adequate assurance satisfactory to City of Seller's present and future ability to perform its obligations under the Agreement Documents when due; or
- (f) if Seller otherwise is in material default of its obligations under this Agreement.

In addition, if such refusal, failure, or default continues for forty-eight (48) hours after receipt of Notice from City thereof, then, without prejudice to any other rights or remedies available under the Agreement Documents or at law or in equity, City may terminate Seller's right to perform all or any part of the Work.

16.1.3 **PAYMENT OBLIGATIONS.** If City terminates Seller's right to perform, then:

- (a) as soon as practicable after completion of the Work, City shall determine the Cost to Complete;
- (b) if the Cost to Complete exceeds the balance of the Agreement Price unpaid at the time of termination, Seller shall pay to City the amount of such excess within ten (10) Days following receipt of City's Notice setting out a demand for such payment;
- (c) if the Cost to Complete is less than the balance of the Agreement Price unpaid at the time of termination, City shall pay to Seller the amount of such excess within ten (10) Days following determination of the Cost to Complete; and
- (d) Seller shall not be entitled to receive any further payments under this Agreement except that, in the case of a partial termination of Seller's right to perform, City shall pay Seller for Work which is not terminated pursuant to the terms of the Agreement Price article of the Agreement.

16.2 **TERMINATION FOR CONVENIENCE.** City reserves the right to terminate this Agreement at any time it deems to be in the best interest of City to do so, upon the giving of seven (7) days written notice to Seller, issued after conferring with Seller and Seller shall terminate the Work as instructed by City. Notice shall be effective upon depositing such notice

in the U.S. mail by registered mail addressed to Seller and cancellation shall take effect seven (7) days thereafter. City may terminate this Agreement for its convenience in whole or in part at any time without cause by its Notice of such termination, issued after conferring with Seller and Seller shall terminate the Work as instructed by City. Upon termination pursuant hereto, City shall pay to Seller, in full satisfaction and discharge of all liabilities and obligations owed to Seller with respect to the Work so terminated, an amount equal to the sum of:

- (a) all amounts due pursuant to the Agreement Price article of the Agreement to the termination date; and
- (b) all Seller's actual, verifiable reasonable and necessary costs of such termination (including any costs reasonably incurred by Seller in performing services under this Article), but not any amounts for unabsorbed overhead, anticipated profits or lost opportunity, nor shall liability for termination expenses exceed the remaining unpaid Agreement Price.

16.3 **CITY'S RIGHTS.** If City elects to terminate Seller's right to perform for cause or for convenience, then City shall so Notify Seller and Seller shall discontinue performance of the Work as directed by City. Without prejudice to any other rights or remedies available under the Agreement Documents or at law or in equity, at City's request and at Seller's expense, Seller shall:

- (a) assist City in preparing an inventory of all Work Delivered or in storage, whether on or off the Site;
- (b) (Reserved)
- (c) assign to City (or to any replacement seller or contractor designated by City) all subcontracts, purchase orders, warranties, and other contractual agreements as may be designated by City and make available all issued permits, licenses, authorizations, and approvals then held by Seller pertaining to the Project;
- (d) remove from the Site all Work as City may request;
- (e) deliver to City all information reasonably requested by City for the completion of the Work; and
- (f) deliver or make available to City all Work provided by Seller as City may request.

16.4 **WRONGFUL TERMINATION.** If Seller disputes City's termination of Seller's right to perform, and if it is determined or agreed that such termination was improper or wrongful, then the parties agree that such termination shall be deemed Termination for Convenience, the provisions of which shall apply.

16.5 **SUSPENSION.** City may direct Seller to suspend performance of the Work in whole or in part, at any time and from time to time, by City's Notice of suspension. Seller shall suspend the Work as instructed by City, and shall resume the suspended Work as promptly as practicable following City's Notice of resumption. In the event of a suspension pursuant to this Article, the schedule shall be extended to take into account any delay resulting from such suspension. The Agreement Price shall be increased by the amount of increase, if any, in the substantiated direct costs actually incurred by Seller and demonstrated by Seller to be over and above those in the Agreement Price, but only to the extent such costs are reasonable and necessary and result directly from City's suspensions of Work; provided however, the schedule shall not be extended and the Agreement Price shall not be increased if the suspension is determined by City to be necessary due to Seller's failure to perform the Work as required under the Agreement Documents.

ARTICLE 17. DISPUTE RESOLUTION

17.1 **DISPUTE RESOLUTION** The parties commit to first try to settle any dispute arising out of or related to this Agreement through direct discussions of their management representatives, then by direct discussions of their senior officers, if necessary. If the parties' senior officers cannot resolve the dispute within thirty (30) days after a party delivers written notice of such dispute then the parties shall proceed to mediation. The International Institute for Conflict Prevention and Resolution ("CPR") rules for non-administered mediations shall apply to the initiation and conduct of the mediation. Either party may deliver a request for mediation to the other party and to CPR [at <http://www.cpradr.org>]. Upon mediation being invoked, the parties shall have five (5) working days to agree on a mediator or, if agreement cannot be reached, return a ranked list of mediators to CPR. Mediation proceedings shall take place in Rochester, Minnesota and must be concluded within sixty (60) days after the date CPR receives the request for mediation. Each party will pay its own costs and an equal share of other costs of the mediation.

If the parties cannot resolve the dispute by mediation, a party may pursue their own legal remedies.

17.2 **NO INTERRUPTION OF WORK.** There shall be no interruption of the Work during the pendency of any dispute that may arise between the Parties; provided however, this Article does not limit or restrict the effectiveness of City's orders suspending or terminating Seller's performance under this Agreement.

ARTICLE 18. SAFETY; DRUG AND ALCOHOL POLICY

18.1 **SAFETY.** Seller shall develop, adopt, implement and enforce, with respect to Seller's Work at the Site, comprehensive safety policies and programs which, at a minimum, comply with all Laws and satisfy City's Safety Requirements, included in this Agreement by reference and summarized in Attachment C. The full safety requirements will be made available upon request.

18.2 **DRUG AND ALCOHOL PROGRAM REQUIREMENTS.** Seller shall develop, adopt, implement and enforce, with respect to Seller's Work at the Site, comprehensive drug and alcohol policies and programs which, at a minimum, satisfy City's Drug and Alcohol Program Requirements, included in this Agreement by reference and summarized in Attachment D. The full Drug and Alcohol policy of City will be made available upon requests.

ARTICLE 19. MISCELLANEOUS PROVISIONS

19.1 **NOTICE PROVISION.** Any notice, demand, offer, or other written instrument required or permitted to be given pursuant to this Agreement shall be in writing signed by the Party giving such notice and shall be hand delivered or sent by overnight courier, messenger, facsimile (with proof of receipt) or certified mail, return receipt requested, to the other Party at the address set forth below.

If delivered to City:

Utility Engineering Corporation
Attn: Roger Anderson, Project Manager
901 Marquette Avenue, Suite 2900
Minneapolis, MN 55402
Phone: 612-215-1336
Fax: 612-766-0360
Email: Roger.B.Anderson@ue-corp.com

If delivered to Seller:

Clyde Bergemann EEC
Attn: David Surak, VP Engineering & Technology
3700 Koppers St
Baltimore, MD 21227
Phone: 410-368-6740
Fax: 410-368-6795
Email: dsurak@clydebergemanneec.com

19.2 **INDEPENDENT CONTRACTOR.** Seller and its Subcontractors shall be independent contractors with respect to the Work, and neither Seller nor its Subcontractors, nor any person employed by any of them shall be deemed to be City's employees, servants, or agents in any respect. Nothing in this Agreement shall be construed as creating a joint venture or partnership between City and Seller. Seller, as an independent contractor under this Agreement, shall assume all of the rights, obligations and liabilities, applicable to it as such independent contractor hereunder and any provisions in this Agreement which may appear to give City the right to direct Seller as to details of doing the work herein covered or to exercise a measure of control over the work shall be deemed to mean that Seller shall follow the desires of City in the results of the work only.

19.3 **ASSIGNMENT.** Seller may neither assign this Agreement, in whole or in part, nor any money payable under this Agreement without City's prior written consent. Any such assignment without City's written consent shall be null, void and of no force and effect whatsoever. City reserves the right to assign this Agreement to City or to an Affiliate of City at any time at the sole discretion of City upon Notice to Seller. City also may require that Seller provide directly to City the warranties and remedies hereunder; provided however, the foregoing shall not change City's or Seller's rights and obligations under this Agreement, other than providing to City the right to directly enforce against Seller such warranties and remedies.

19.4 **GOVERNING LAW.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws in effect in the State of Minnesota.

19.5 **SEVERABILITY.** If any provision, or any part thereof, of this Agreement is found by any court or governmental agency of competent jurisdiction to be invalid or unenforceable for any reason whatsoever, such invalidity or unenforceability shall not affect the remainder of such provision or any other provision hereof which shall remain in full force and effect.

19.6 **NO WAIVER OF PERFORMANCE.** The failure of either Party hereto to insist, in any one or more instances, upon the performance of any of the terms, covenants or conditions of this Agreement, or to exercise any right herein, shall not be construed as a waiver or relinquishment of such term, covenant or right as to further performance. Any waiver by either Party of any breach of any provision of this Agreement shall be in writing signed by the waiving party; provided, however, no such waiver shall be construed as a waiver of any continuing or succeeding breach of such provisions, a waiver or modification of the provision itself, or a waiver or modification of any right under this Agreement, unless the instrument constituting the waiver so states.

19.7 **TITLES OF PROVISIONS.** The titles given to the articles, sections or subsections of this Agreement are for ease of reference only and shall not be used in the construction or interpretation of this Agreement, or relied upon or cited for any other purpose.

19.8 **AUDITING RIGHTS.** Seller shall keep accurate and complete accounting records in support of all Change Order Requests and invoices to City, in accordance with generally recognized accounting principles and practices consistently applied. City and its audit representatives shall have the right at any reasonable time to examine, audit, and reproduce the records, vouchers, and their source documents which serve as the basis for any claim or for compensation, other than compensation which is fixed in amount by this Agreement. Such documents shall be available for examination, audit, and reproduction by City and its representatives for three (3) years after final project completion or earlier termination of this Agreement.

19.9 **AMENDMENTS.** Except as provided herein, no amendment, modification, limitation or supplement of or to this Agreement or any provision hereof shall bind either Party unless it is in writing and signed by an officer or authorized agent of Seller and City.

19.10 **EQUAL EMPLOYMENT OPPORTUNITY.** During performance of this Agreement, Seller shall remain in compliance with all applicable federal and state equal employment opportunity laws and executive orders. A Certificate of Compliance is attached as Attachment K. Seller shall require an equivalent certification of compliance in all of its agreements with Subcontractors.

19.11 **DEFINED TERMS.** Each term that is defined in one article, section or subsection of this Agreement shall have the same meaning in every other article, section or subsection of this Agreement.

Affiliate shall mean in relation to any Person, any other Person: (i) which directly or indirectly controls, or is controlled by, or is under common control with, such Person; or (ii) which directly or indirectly beneficially owns or holds fifty percent (50%) or more of any class of voting stock or other equity interests of such Person; or (iii) which has fifty percent (50%) or more of any class of voting stock or other equity interests that is directly or indirectly beneficially owned or held by such Person, or (iv) who either holds a partnership interest in such Person or such Person holds a partnership interest in the other Person. For purposes of this definition, the word "controls" means possession, directly or indirectly of the power to direct or cause the direction of the management or policies of a Person, whether through the Buyership of voting securities or otherwise. The term "Affiliate" includes Subsidiaries or Parents.

Acceptance of the Equipment and all the other goods and services shall occur when:

- Seller' Equipment has achieved Successful Start-up.
- Seller has delivered final lien releases in the form attached hereto as Exhibits N-1/N-2 and M-1/M-2.
- Commercial Operation has occurred.
- Seller has delivered to Buyer all documentation required under the terms of this P.O. and the Documents, including, but not limited to, installation manuals, operation manuals, maintenance manuals, and Record Drawings.
- Seller has completed all punch list items.
- Seller has completed all other obligations under the terms of this P.O.
- Acceptance shall occur no later than 270 days after Seller's substantial completion of delivery should Acceptance be delayed through no fault of Seller.

Agreement or Agreement Documents shall mean those documents identified in Article 6 of this Agreement

Agreement Price shall mean the price stated in Article 2

Application for Payment shall have the meaning set forth in Article 10

Change shall mean an addition, deletion or revision in the Work

Change Impact Notice shall mean the effect, if any, of a Change (or alleged Change) on the Agreement Price, Schedule or any right or obligation of Seller under the Agreement

Change Order shall mean an agreement in writing (using the Change Order Form, Attachment E-2) entered into after the execution of this Agreement and pursuant to the Agreement Documents, signed by City and Seller, authorizing and approving a Change, adjustments in the Agreement Price or Schedule, adjustments in guarantees and warranties or in scheduling or other matters which change the Agreement

Change Order Request shall mean notification by Seller to City (using the Change Order Request form, Attachment E) of a particular act or omission of City, which Seller believes, is or may become a Change

City shall mean the City of Rochester as identified in paragraph A of the Recitals in this Agreement

Claims shall mean as used in Article 4 shall mean all claims, damages, losses, liabilities, costs, and expenses of every kind (including judgments, fines, penalties, interest, legal, and experts' costs and expenses, court and arbitration costs, and other costs of defense)

Commercial Operation shall mean the Project has met all Performance Guarantees in accordance with this Agreement and is operating commercially. Additionally the City has agreed in writing to the 'Commercial' designation.

Contract shall mean Agreement or Agreement Documents.

Correction Period shall mean within thirty (30) days after a Notice of a failure to meet Performance Guarantees

Cost to Complete shall mean total expense incurred and accrued by City in completing the Work, including, without limitation, additional overhead incurred and accrued by City to affect such takeover and to cause the Work to be completed

Days shall mean normal business days (Monday through Friday) excluding City holidays.

Defective Work shall mean Work, which fails to satisfy the requirements of Article 12, Warranty

Delivery shall mean shall be deemed to have occurred when all of the Work (provided such Work substantially conforms to the Specifications and requirements of this Agreement) has been delivered, with no apparent damage which would impact City's ability to install the Work, to the Delivery Point as evidenced by a bill of lading signed by the carrier

Direct Materials shall mean materials, supplies and Work to be incorporated as a permanent part of the Project, excluding any sales or use tax thereon

Documentation shall mean for the Work as described in the Specifications

Drawings shall mean (a) drawings furnished by City as a basis for bids, (b) supplementary drawings furnished by City to clarify and to define in greater detail the intent of the Agreement, (c) drawings submitted by Seller with its bid, provided such drawings are acceptable to City, (d) drawings furnished by City to Seller during the progress of the Work, and (e) drawings and engineering data submitted by Seller during the progress of the Work, provided such drawings and data are acceptable to City

Effective Date shall mean the date given in paragraph one of this Agreement

Engineer is defined as Utility Engineering Corporation (UE) who is acting as the Owner's Engineer for this project

Excusable Delay Events (Force Majeure) with respect to Seller's timely performance of the Work shall mean acts of God, fire, unanticipated weather events that are unavoidable and unusually severe for the Work location, war, and any act or

omission of City, or any separate subcontractor employed by City, that prevents the Seller from completing critical path Work according to the Schedule

Hazardous Substances shall mean any substances, the release of which into, or the presence of which in, the environment gives rise to any liability or obligation to remove, clean-up, encapsulate or otherwise remediate such release or presence thereof under any Laws

Indemnified Party shall mean City, its subsidiaries and Affiliates and their officers, directors, partners, consultants, agents, and employees

Laws shall mean any law, code, statute, regulation, rule, ordinance, judgment, injunction, or other court order, or other requirement of a governmental authority having jurisdiction over the Work, or the Project or the construction or operation thereof or party, and which is valid and applicable thereto

Materials shall mean all materials, supplies, goods, and equipment, which are to be incorporated as a permanent part of the Project

Milestone Dates shall mean those dates stated in Section 8.1 or elsewhere in the Agreement

Non-Excusable Delay Events shall mean any act or neglect of Seller or its Subcontractors or any other event or occurrence that may interfere with or delay the Work that is not specified as an Excusable Delay Event

Notice or Notify shall mean a notice in writing given to the Party's designated representative deemed duly given on the date of receipt

Party(ies) shall mean City and Seller, as defined in paragraph one and Recitals of this Agreement

Person shall mean an individual, partnership, corporation, limited liability company, company, business trust, joint stock company, trust, unincorporated association, joint venture, Government Authority or other entity of whatever nature

Performance Guarantees shall mean those guarantees stated in the Technical Specification and Signed Bid Form.

Project shall mean the work described in Paragraph A of the Recitals of this Agreement, which Seller will perform for the City

Schedule shall mean schedule of milestones applicable to the Work as revised from time to time pursuant to the provisions of the Agreement Documents

Schedule of Values shall mean schedule of Seller's work activities and milestones, which serve as a basis for computing partial payments

Seller shall mean the entity identified in paragraph one of this Agreement

Site shall mean the physical location of the Project identified in paragraph A of the Recitals of this Agreement

Specifications shall mean those documents attached to this Agreement which specify the general, supplemental, and technical requirements that the Work must meet which consist of technical descriptions of the Work and cover administrative details applicable thereto

Subcontractor shall mean any licensor, subcontractor, employee leasing company, supplier, or vendor, of any tier, who supplies Material, construction equipment, tools, goods, personnel, labor or services used in connection with the performance by Seller of its obligations under the Agreement

Warranty Work shall mean all needed adjustments, repairs, additions, corrections, or replacements, which arise out of or are necessitated by such Defective Work

Work shall mean all Equipment, Documentation and/or Services Seller will furnish as described in the Exhibit A and the specifications, and all obligations, duties and responsibilities imposed on Seller by the Agreement Documents

ARTICLE 20 – LIMIT OF LIABILITY

Under no circumstances shall Seller’s liability in the aggregate to the City on breach of contract or warranty exceed 100% of the Agreement Price. *Neither party shall be liable for special, consequential or indirect damages.*

The Parties have caused this Agreement to be executed and delivered by their duly authorized officers or agents effective as of the Effective Date.

CITY OF ROCHESTER

CLYDE BERGEMANN EEC

By: _____
City Mayor

By: _____
(Signature)

(Printed Name)

(Printed Name)

City Attorney

Printed Name

Date: _____

Title: _____

Attest: _____
City Clerk

Date: _____

ROCHESTER PUBLIC UTILITIES

By: _____
City General Manager

NOTE: If Seller executes this Agreement through anyone other than an officer, then attach a properly executed power of attorney from Seller as evidence of the agent’s authority.

EXHIBIT A**SCOPE OF WORK**

Seller shall provide all materials, labor, and equipment to furnish a Scrubber/Baghouse system as defined in the terms and condition of this Agreement and Specifications incorporated in this Agreement as follows:

001	Lime Handling/Slurry System	\$646,000
002a	Fabric Filter System, including support steel, enclosure	\$1,906,000
002b	SDA System including support steel, enclosure	\$1,043,000
002c	Atomizer Systems, including VFD's, controls	\$608,000
003	Ductwork, Supports, Expansion Jts. Per UE layout	\$830,000
004	Booster Fan	\$498,000
005	Flow Model Testing (Physical)	\$87,000
006	Supplier Engineering and Project Mgmt & Services	\$1,105,000
007	Field Support – (Const/Startup/Training)	\$464,000
008	Freight	\$485,000
009	Taxes	As req'd by MN.
010	Other (Define) 100% Performance Bond / Bid Bond*	\$2,520,000
011	Performance Testing	\$45,000
012	Contingency Amount	\$300,000
Subtotal	Scrubber/Baghouse System Base Bid	\$10,893,000
	Adders/Deducts	
013	Allowance for Booster Fan Variable Frequency Drive (VFD)	\$245,000
014	Delta V Controls in Lieu of Allen Bradley Controls	\$115,000
015	Increased Lime Storage (5 Days vs. 2 Days)	\$68,000
016	Allowance for NEMA 4X Enclosures in Wet Areas	\$20,000
017	Elimination of Baghouse Bypass	(\$18,000)
018	Reduce Construction Advisor Time (11 Months In Lieu of 14 Months)	(\$54,000)
019	CFD Modeling of Scrubber Only in Lieu of Physical Flow Modeling of System	(\$42,000)
Subtotal		334,000
TOTAL FIRM LUMP SUM PRICE	Eleven million two hundred twenty-seven thousand dollars and no/100	\$11,227,000

EXHIBIT A1

SELLER PREPARED DRAWINGS AND DATA

EXHIBIT A2

REFERENCE DOCUMENTS & SPECIFICATIONS

Seller's performance must be in strict accordance with all of the following:

REFERENCE DOCUMENTS & SPECIFICATIONS		
Section 15863	Rev .0	Scrubber/Baghouse System

EXHIBIT A3

DRAWINGS, DATA AND STANDARDS

The following drawings are included for use and/or reference for this Work:

The following data sheets and lists are included for use and/or reference for this Work:

The following design standards and details are provided for use and/or reference for this Work:

EXHIBIT A4

SCHEDULE OF THE WORK

EXHIBIT A5

FIELD AND SERVICE ENGINEER SERVICE RATES

ATTACHMENT A

CERTIFICATE OF INSURANCE		Certificate Number:			
PRODUCER CONTACT NAME: PHONE NO.: INSURED CONTACT NAME: PHONE NO.:	IN CONSIDERATION OF THE PREMIUM CHARGED FOR THE INSURANCE POLICIES SHOWN BELOW, THIS CERTIFICATE OF INSURANCE IS ISSUED TO THE CERTIFICATE HOLDER IDENTIFIED BELOW. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES EXCEPT AS SHOWN BELOW.				
		COMPANIES AFFORDING COVERAGE			
		COMPANY			
		LETTER	A		
		COMPANY			
		LETTER	B		
		COMPANY			
		LETTER	C		
		COMPANY			
		LETTER	D		
THIS IS TO CERTIFY THAT POLICIES LISTED HEREIN HAVE BEEN ISSUED TO THE INSURED NAMED HEREIN FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OR ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THE CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES LISTED HEREIN IS SUBJECT TO ALL THE TERMS, CONDITIONS AND EXCLUSIONS OF SUCH POLICIES.					
CO LTR	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YYYY)	POLICY EFFECTIVE DATE (MM/DD/YYYY)	LIMITS
	GENERAL LIABILITY <input type="checkbox"/> COMMERCIAL GENERAL LIABILITY <input type="checkbox"/> CLAIMS MADE <input type="checkbox"/> OCCUR <input type="checkbox"/> OWNER'S CONTRACTOR'S PROT <input type="checkbox"/> EXPLOSION, COLLAPSE AND UNDERGROUND HAZARD <input type="checkbox"/> CERT. HOLDER AS ADDL INSURED PER CONTRACT TERMS (ENDORSEMENT ATTACHED) <input type="checkbox"/> WAIVER OF SUBROGATION PER CONTRACT TERMS <input type="checkbox"/> INSURING INSURED'S INDEMNITY OBLIGATION PER CONTRACT TERMS				GENERAL LIABILITY \$ PRODUCTS LIABILITY \$ CONTRACTORS LIABILITY \$ FIDELITY AND BONDING (Contractor's Fire) \$ MED. EXP. (one person) \$ COMBINED \$ BODILY INJURY \$ BODILY INJURY (one person) \$ PROPERTY DAMAGE \$
	AUTOMOBILE LIABILITY <input type="checkbox"/> ANY AUTO <input type="checkbox"/> ALL OWNED AUTOS <input type="checkbox"/> SCHEDULED AUTOS <input type="checkbox"/> HIRED AUTOS <input type="checkbox"/> NON-OWNED AUTOS <input type="checkbox"/> CERT. HOLDER AS ADDL INSURED PER CONTRACT TERMS (ENDORSEMENT ATTACHED) <input type="checkbox"/> WAIVER OF SUBROGATION PER CONTRACT TERMS <input type="checkbox"/> BLANKET CONTRACTUAL LIABILITY INSURING INSURED'S INDEMNITY OBLIGATION PER CONTRACT TERMS				EACH OCCURRENCE \$ ** AGGREGATE \$ ** ** AMOUNT SUFFICIENT TO COVER TOTAL INSURANCE LIMITS REQUIRED BY CONTRACT
	EXCESS LIABILITY <input type="checkbox"/> UMBRELLA FORM <input type="checkbox"/> OTHER THAN UMBRELLA FORM <input type="checkbox"/> CERT. HOLDER AS ADDL INSURED PER CONTRACT TERMS (ENDORSEMENT ATTACHED) <input type="checkbox"/> WAIVER OF SUBROGATION PER CONTRACT TERMS <input type="checkbox"/> BLANKET CONTRACTUAL LIABILITY INSURING INSURED'S INDEMNITY OBLIGATION PER CONTRACT TERMS				STATUTORY LIMITS XXXXXXXXX EACH ACCIDENT \$ DISEASE-POLICY LIMIT \$ DISEASE-EACH EMPLOYEE \$
	WORKERS COMPENSATION <input type="checkbox"/> INCLUDES EMPLOYERS, PART-TIME AND SEASONAL EMPLOYEES <input type="checkbox"/> WAIVER OF SUBROGATION <input type="checkbox"/> CONTR. LIABILITY <input type="checkbox"/> U.S. LIABILITY <input type="checkbox"/> COVERED STATES <input type="checkbox"/> ALL STATES <input type="checkbox"/> IF NO, LIST STATES				
DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLES/SPECIAL ITEMS					
CERTIFICATE HOLDER			CANCELLATION SHOULD ANY OF THE POLICIES LISTED HEREIN BE MATERIALLY CHANGED OR CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL MAIL 30 DAYS PRIOR WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN. BROKER/AGENT (MUST BE AUTHORIZED REPRESENTATIVE OF INSURER(S) PROVIDING INSURANCE EVIDENCED HEREIN BY: HBZ (007) VALID AS OF:		

ATTACHMENT A
CERTIFICATE OF INSURANCE (Continued)

In the block entitled "DESCRIPTION OF OPERATIONS/LOCATIONS/VEHICLE/SPECIAL ITEMS", the following terminology must be used:

Regarding Rochester Public Utilities Silver Lake Unit 4 Emissions Reduction Project, the City of Rochester, acting through its Public Utility Board, is listed as additional insured on a primary and non-contributory as respect to general liability coverages for this project.

When there is umbrella coverage, add this sentence: Umbrella is following form.

Under "CERTIFICATE HOLDER" enter:

City of Rochester
Rochester Public Utilities
4000 East River Rd NE
Rochester, MN 55906-2813

Under "CANCELLATION", make the following changes:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT.

ATTACHMENT B - RESERVED

ATTACHMENT C

CITY'S SUPPLEMENTAL SAFETY REQUIREMENTS

- A. Seller warrants and represents to City that it has the supervision necessary to, and shall train, manage, supervise, monitor, and inspect the activities of its forces for the purpose of enforcing compliance with these safety requirements in connection with Seller's Work. Seller acknowledges and agrees that City does not undertake any duty toward Seller's employees to train, manage, supervise, monitor, and inspect Seller's work activities for the purpose of enforcing compliance with these safety requirements.
- B. Seller shall be familiar with and shall abide by the safety rules and regulations of City, and any governmental body having the authority to control the manner or method of carrying out the Work, including, but not limited to the Occupational Safety and Health Act of 1970 (OSHA) and Minnesota OSHA Statutes and Rules, all rules and regulations established pursuant thereto, and all amendments and supplements thereto. Seller further agrees to require all of its employees, subcontractors and suppliers to comply with these requirements.
- C. Seller shall be responsible without limitation for complying with the provisions of OSHA Standard 1926.59, Minnesota Employee Right-to-Know Statute and/or other Laws relating to hazard communications or "right-to-know." Seller shall ensure that City is furnished with a copy of all current Material Safety Data Sheets (MSDS) required by the Hazardous Communication Standards for all Hazardous Substances which Seller will introduce to any work location. To the extent that MSDS must be posted in work locations where Seller uses, or stores Hazardous Substances on any work location subject to this Agreement, Seller shall see that such MSDS are prepared and posted as required by Laws. Seller hereby warrants that any chemical or substance used or stored on any work location subject to this Agreement that is unaccompanied by a MSDS as required by OSHA is not hazardous.
- D. Seller shall observe and comply with all Laws with respect to environmental protection applicable to the Site and to Seller's Work, including those Laws relating to the use of water, the release, discharge or disposal of wastes, the control of drainage, and the protection of vegetation, wildlife, habitats, or surroundings. Seller shall also observe and comply with any environmental commitments made by City in securing any permit or authorization for the Project.
- E. Without limiting the foregoing, Seller specifically shall require all its Subcontractors, employees, visitors, suppliers, and agents under its direction to:
1. Ensure the use of required and approved appropriate personal protective equipment including but not limited to hardhats, safety glasses with side shields, proper clothing, work shoes, fall protection devices, respiratory protection and other equipment that may be necessary based on existing or anticipated hazards.
 2. Ensure that platforms and scaffolding conform to OSHA specifications and have decking, toe boards, mid- and top-rail, cross bracing, level pads and/or wheels and appropriate ladders for platform access. Their construction and maintenance shall be supervised by a designated competent person. They shall be designed by a registered engineer when appropriate.
 3. Provide for and ensure the use of continuous fall protection equipment when activities take place above 6'0" with a potential fall exposure or such lower elevations as may be established for the Site.
 4. Provide competent persons designated in accordance with OSHA CFR29 Part 1910 and 1926 for all applications that require that designation.
- F. Without limiting the foregoing, Seller and its Subcontractors shall:
1. Provide for and ensure the use of safety equipment in its work in accordance with City's safety requirements, to the extent these may be stricter than federal, state, or local standards, or generally recognized industry applicable standards.
 2. Conduct a weekly safety meeting with its employees and list the topics discussed with signatures of attendees. Such a list shall be made available to City upon request. Seller and Seller's Subcontractors are invited to attend City's safety meetings in lieu of their own but attendance at these weekly safety meetings is not intended to and shall not relieve Seller of its duty to provide safety training to its

employees in accordance with safety requirements of generally recognized industry standards, and any applicable Laws.

3. Provide City's on-site management with an "Emergency List" showing Seller's designated medical doctor, hospital, insurance company, and any other health service providers, such list to be updated within twenty-four (24) hours of any change in the information provided. Seller shall furnish its employees first aid or send first aid injuries to Seller's designated doctor.
4. Within eight (8) hours from the time of accident (or such shorter period as Laws may require), advise City of any accident resulting in injury to any person or damage to any equipment or facility. Upon request, Seller shall promptly furnish City with a written report of any such accident as well as a copy of all Insurance and Workers' Compensation Claims involving this Project.
5. Maintain clean work areas and secure and protect all work materials in accordance with safety requirements of generally recognized industry standards.
6. If it becomes necessary to have access to any openings or shafts or to remove handrails, Seller shall ensure that the openings or shafts are protected in accordance with generally accepted practices and any applicable federal, state or local standards while the work is in progress, and that any covers or handrails removed by the Seller are replaced before leaving the area.
7. Dig and maintain all excavations in a manner consistent with OSHA guidelines under the supervision of a competent person.
8. Maintain and inspect all construction equipment, including cranes and other lifting equipment prior to each use. Seller warrants that all equipment operators shall be qualified for each piece of construction equipment they intend to operate. Documentation of specific training (e.g., forklift training, scaffold training) is the responsibility of the Seller.
9. Implement and coordinate Lock Out/Tag Out (LOTO) and confined space procedures that are consistent with City's procedures. If Seller's employees are not train in LOTO or confined space entry, training will be required prior to entering a situation where LOTO or confined space entry is required.
10. Coordinate Work adjacent to stored energy devices (e.g., overhead power lines or underground utilities) with the appropriate authorities.

G. Seller agrees and acknowledges that the failure to perform or comply with any of the requirements set out in this Attachment shall constitute a default of Seller's obligations under this Agreement.

ATTACHMENT D

DRUG AND ALCOHOL PROGRAM REQUIREMENTS

1. Seller agrees that as a condition of the work, the Seller is subject to the following provisions:

A. Seller agrees that as a condition of entry on to the City worksite, Seller's employees and agents may be required to consent to a drug and/or alcohol screen test to verify compliance with the Drug and Alcohol Policy of City of the worksite. Seller warrants and agrees that Seller's employees have been informed of and have agreed to comply with this requirement as a condition of their entry on to the worksite.

B. Seller warrants and represents that it has read and understood the drug and alcohol policy requirements of City and that the provisions of such policies also apply to Seller, its employees and subcontractors.

C. Seller warrants and agrees that it shall have a Drug and Alcohol Program to test to the same level as City and to implement the drug and alcohol policy requirements of City to include pre-employment/pre-access, random, and post-accident drug and/or alcohol screen test being required of all subcontractor's employees on a City worksite.

D. Specifically, Seller warrants and agrees that it has advised its employees that:

- 1) The use, possession, sale, manufacture, distribution or dispensation of prohibited drugs and/or unauthorized alcoholic beverages on the project worksite by any employee, Seller employee, or agent is prohibited by City policy.
- 2) Entry on to a City worksite by a Seller employee constitutes agreement to abide by the terms of the Drug and Alcohol Policy of City.
- 3) Entry on to a City worksite constitutes consent to a vehicle and/or personal property search when entering, leaving, or at the worksite.
- 4) Seller's employees and agents, as a condition of entry on to the City worksite, may be required to consent to a drug and/or alcohol screen test.
- 5) Anyone found in violation of this Policy or who refuses to consent to a search, or drug or alcohol screen test, or who is found in violation of the Drug and Alcohol Policy requirements of City will be asked to leave and will be barred from the property at the discretion of City.

2. Seller further warrants that it will in all respects comply with the requirements of the Drug Free Workplace Act of 1988 P.L. 41 USC 701, et. seq.

Accordingly, Seller warrants that it has required its employees to notify the Seller of any conviction for a workplace violation of a criminal drug statute no later than five (5) days following such conviction, and Seller agrees to notify the appropriate federal granting agency within ten (10) days after receiving such notice with a copy of such notice to City.

3. Seller acknowledges and agrees that City has a valid property right and interest in the project, the preservation of safety on the project, and the protection of both the work and the worksite from and against persons entering the same in violation of the Drug and Alcohol Policy requirements of City. Accordingly, to the maximum extent permitted by applicable law, Seller agrees to defend and hold City harmless from and against any loss, expense or cost (including, but not limited to, attorney fees and costs of defense) arising out of or in any way related to any demand, claim, or cause of action asserted against them, or either of them, by reason of City's enforcement of the Drug and Alcohol Policy.

ATTACHMENT E-1

SELLER'S CHANGE ORDER REQUEST

**SCRUBBER/BAGHOUSE
LOCATION
JOB #**

PURCHASE AGREEMENT #
CHANGE ORDER REQUEST #
DATE:

SELLER:

AGREEMENT FOR: *[Original Scope of Work]*

SELLER SHALL COMPLETE THE FOLLOWING WITHIN _____ DAYS AFTER ABOVE DATE:
[List all drawings, specs, etc., that are included with this Change Order]

All other terms and conditions, specifications and requirements of the original Agreement remain unchanged.

EFFECT OF CHANGE ON AGREEMENT PRICE AND SCHEDULE (detailed analysis and supporting documents attached)

Original Agreement Price	\$
Amount of Prior Change Orders	\$
Amount of this Change Order (Increase or Decrease)	\$ _____
Revised Agreement Price	\$

By: _____
(Signature)

(Printed Name)

Title: _____

Date: _____

NOTE: If Seller executes this Agreement through anyone other than an officer, then attach a properly executed power of attorney from Seller as evidence of the agent's authority.

ATTACHMENT E-2

CHANGE ORDER FORM

Project:
Change Order Number ____
To:
Date:
Gentlemen:

Pursuant to the provisions of the Purchase Agreement dated, _____ you are hereby directed to proceed with the work covered by this Change Order. The Agreement Price will be *(increased/reduced)* by the sum of _____ Dollars (\$ ____). The performance of this Change Order is to be in strict accordance with the terms and conditions of the Purchase Agreement except as may be identified herein. The Schedule will be *(increased/decreased)* by [____] days.

SCOPE OF CHANGE ORDER:

(Insert here the exact scope of change or attach Exhibit A)

CONDITIONS OF CHANGE: *Except as may be otherwise provided in the Scope of this change order, the undersigned agrees to furnish all labor, equipment and materials and perform all work required to complete the above described work change in accordance with the requirements of the Purchase Contract for the stated consideration. All additional work is to be completed in accordance with the Project Schedule with no additional time adjustment or extension of the completion date, except as otherwise provided in this Change Order. The lump sum amount and any all applicable taxes, are payable in accordance with the Purchase Contract.*

Total Amount Payable under this Change Order	\$
Total Amount of Previous Change Orders	\$
Base Contract Price	\$
<u>Revised Contract Price</u>	\$

The parties have caused this Agreement to be executed and delivered by their duly authorized officers or agents effective as of the Effective Date.

UTILITY ENGINEERING CORPORATION



By: _____

By: _____

(Signature)

(Printed Name)

(Printed Name)

NOTE: If Seller executes this Agreement through anyone other than an officer, then attach a properly executed power of attorney from Seller as evidence of the agent's authority.

ATTACHMENT F

WAIVER AND RELEASE OF LIEN

WHEREAS, the undersigned,

NAME OF SELLER, MANUFACTURER, MATERIALMAN OR SUBSUPPLIER

has furnished to _____ the following:

NAME OF BUYER

_____ for use in the construction of a project

KIND OF MATERIAL AND SERVICES FURNISHED

belonging to _____,

as designated by the City of Rochester, Minnesota, as _____.

PROJECT DESIGNATION

NOW, THEREFORE, the undersigned,

(NAME OF SELLER MANUFACTURER, MATERIALMAN OR SUBSUPPLIER)

has furnished for and in consideration of \$ _____ and other good and valuable consideration, the receipt whereof is hereby acknowledged, do(es) hereby waive and any and all liens, or right to or claim of lien, on the above described project and premises, under any law, common or statutory, on account of labor or materials, or both, heretofore or hereafter furnished by the undersigned to or for the account of said _____ (NAME OF BUYER) for said project.

Given under my (our) hand(s) and seal(s) this ___ day of _____, 20 _____.

NAME OF SELLER, MANUFACTURER, MATERIALMAN OR SUBSUPPLIER

By _____

PRESIDENT, VICE PRESIDENT, PARTNER OR OWNER, OR, IF SIGNED BY OTHER THAN ONE OF FOREGOING, ACCOMPANIED BY POWER OF ATTORNEY SIGNED BY ONE OF THE FOREGOING IN FAVOR OF THE SIGNER. (USE DESIGNATION APPLICABLE)

ATTACHMENT G

State of Minnesota Department of Taxation Form IC134 Needs to be attached.

ATTACHMENT H

MILESTONE PAYMENT SCHEDULE

ATTACHMENT I

PERFORMANCE BOND

1. Know all men that we, _____, as Principal, and _____, as Surety, are held and firmly bound unto the City of Rochester, Minnesota, a Minnesota municipal corporation, acting through its Public Utility Board, hereinafter called "City", and unto all persons, firms and corporations who or which may furnish equipment for Silver Lake Unit 4 Emissions Reduction Project ("Project") and to their successors and assigns, in the penal sum of _____ dollars (\$ _____), as hereinafter set forth and for the payment of which sum well and truly to be made we bind ourselves, our executors, administrators, successors and assigns jointly and severally by these presents. Said Equipment is described in a certain Purchase Agreement (hereinafter called "Agreement") between the City and the Principal, dated _____.
2. The condition of this obligation is such that if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of the Agreement and any amendments thereto, whether such amendments are for additions, decreases, or changes in materials, their quantity, kind or price, labor costs, mileage, routing, or any other purpose whatsoever, and whether such amendments are made with or without notice to the Surety, and shall fully indemnify and save harmless the City from all costs and damages which they shall suffer or incur by reason of any failure so to do, and shall fully reimburse and repay the City for all outlay and expense which they shall incur in making good any such failure of performance on the part of the Principal, and shall promptly make payment to all persons working on or supplying labor or materials for use in the construction of the Equipment contemplated in the Agreement and any amendments thereto, in respect of such labor or materials furnished and used therein, to the full extent thereof, and in respect of such labor or materials furnished but not so used, to the extent of the quantities estimated in the Agreement and any amendments thereto to be required for the Equipment, and shall well and truly reimburse the City for any excess in cost of said Equipment over the cost of such Equipment as provided in the Agreement and any amendments thereto, occasioned by any default of the Principal under the Agreement and any amendments thereto, then this obligation shall be null and void, but otherwise shall remain in full force and effect.
3. It is expressly agreed that this bond shall be deemed amended automatically and immediately, without formal and separate amendments hereto, upon any amendment to the Agreement so as to bind the Principal and the Surety to the full and faithful performance of the Agreement as so amended, provided only that the total amount of all increases in the cost of equipment shall not exceed twenty percent (20%) of the amount of the maximum price set forth in the Agreement. The term "Amendment," wherever used in this bond, and whether referring to this bond or the Agreement, shall include any alterations, addition, extension, modification, amendment, rescission, waiver, release or annulment, of any character whatsoever.
4. It is expressly agreed that any amendment which may be made by agreement or otherwise between the Principal and the City in the terms, provisions, covenants, and conditions of the Agreement, shall not in any way release the Principal and the Surety, or either of them or their respective executors, administrators, successors, or assigns, from liability hereunder. The Surety hereby acknowledges receipt of notice of any amendment, indulgence or forbearance, made, granted, or permitted.
5. This bond is made for the benefit of all persons, firms and corporations who or which may furnish any materials or perform any labor for or on account of the construction to be performed under the Agreement and any amendments thereto, and they, and each of them, are hereby made obligees hereunder with the same force and effect as if their names were written herein as such, and they and each of them may sue hereon.

Signatures:

The Performance Bond must be signed with the full name of the Seller. If the Seller is a partnership the Performance Bond must be signed in the partnership name by a partner. If the Seller is a corporation the Performance Bond must be signed in the corporate name by a duly authorized officer and the corporate seal affixed and attested by the Secretary of the corporation. A typewritten copy of all such names and signatures shall be appended.

Power of Attorney:

The Performance Bond must be accompanied by a power of attorney authorizing execution on behalf of the Surety and, in jurisdictions so requiring should be countersigned by a duly authorized resident agent of the Surety.

In witness whereof the undersigned have caused this instrument to be executed and their respective corporate seals to be affixed and attested by their duly authorized representatives this _____ day of _____, 20__.

(Principal) (SEAL)

ATTEST:

By _____

(Surety) (SEAL)

ATTEST:

By _____

(Secretary)

(Address of Surety's Home Office)

By _____
(Resident Agent of Surety)

ATTACHMENT J

AFFIDAVIT

STATE OF _____

COUNTY _____

I, _____, the undersigned affiant, now being duly sworn, state on my oath that I am familiar with all the statements contained in this affidavit and that all of the statements are true.

I am employed at _____ (hereinafter referred to as "Seller") in the position of _____ and further state that I am qualified and duly authorized by the Seller to make and affirm the following statements:

That Seller caused labor to be performed and materials and/or equipment to be furnished for construction and/or erection for the City of Rochester, MN, Public Utilities (hereinafter referred to as "City") at the project site in Rochester, Minnesota.

That in the affiant's opinion and to the best of the affiant's knowledge, all labor performed and all materials and/or equipment furnished was in full compliance with the requirements of the contract entitled _____.

That the final amount of the contract is \$ _____.

That the City has previously paid the Seller \$ _____.

That the amount of the present and final application to the City, for payment of labor, materials and/or equipment furnished is \$ _____.

That Seller has offset, by payment in full, all of its liabilities incurred in connection with the above noted contract, due to any and all labor, material and/or equipment furnished.

That Seller has requested, received and has in its possession written verification from each vendor and each subcontractor that it has offset, by payment in full, al of its liabilities incurred in connection with the above noted contract, due to any and all labor, material and/or equipment furnished.

That due to the preceding affirmations and due to the verifications received, the Seller will defend the City for all liens, from any source, against any and all labor, services, material and/or equipment furnished in connection with the referenced contract and covered by the present and/or any preceding request for contract payment.

Subscribed and sworn to before me this

_____ day of _____, 20_____

(Affiant's Signature)

Notary Public: _____

(Date)

My commission expires _____, 20_____

ATTACHMENT K

CERTIFICATE OF COMPLIANCE FOR GOVERNMENT CONTRACT

To the extent the following clauses are applicable under Laws, they are hereby incorporated by reference into this Agreement, and Seller represents and certifies that it is and shall remain during the performance of this Agreement in compliance with the following:

EQUAL OPPORTUNITY CLAUSE (41 CFR 60-1.4; 48 CFR 52.222-26; prescribed in 22.810(e))

AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS FOR CONSTRUCTION (48 CFR 52.222-27; prescribed in 22.810(f))

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY IN CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246) (41 CFR 60-4.3)

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246) (48 CFR 52.222-23; prescribed in 22.810(b))

CERTIFICATION OF NON-SEGREGATED FACILITIES (48 CFR 52.222-21; prescribed in 22.810(a)(1))

AFFIRMATIVE ACTION FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA (41 CFR 60-250.4)

UTILIZATION OF SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED SMALL BUSINESS CONCERNS (48 CFR 52.219-8; prescribed in 19.708(a))

SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED SMALL BUSINESS SUBCONTRACTING PLAN (48 CFR 52.219-9; prescribed in 19.708(b))

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS (48 CFR 52.222-36; prescribed in 22.1408 (a))

EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES (41 CFR 60-741.5)

ALL APPLICABLE STATE AND LOCAL LAWS APPLICABLE TO THIS WORK

ATTACHMENT M

SHIPPING AND MATERIAL CONTROL INSTRUCTIONS

Shipping Instructions

- A. Truck shipments shall be addressed as listed in the Recitals of this Agreement. Shipper shall contact the Project Material Manager (to be determined) obtaining clearance for the delivery twenty-four (24) hours in advance of arrival at the designated location. Shipper shall supply: Name of Carrier, number of pieces in the shipment, length, width, height and weight of any large individual pieces, and gross weight of shipment along with Expected Date and Time of Arrival. This information is needed in order to have equipment available to off-load material. The Project mailing address is listed below under Material Control Instructions.
- B. All Shipping containers and loose items shall have City's name, purchase agreement number, item number, tag number, shop order, sequence, spool number, etc. as appropriate for the material, and Project name clearly marked on each separate item. Bulk materials and large loose items should be shipped banded to pallets, boxed, bagged, or bundled.
- C. Receiving hours are 7:30 a.m. to 3:00 p.m., Local Time, Monday through Friday. For shipments to be received at times other than above, advance notice and approval is required no later than forty-eight (48) hours prior to departure from the Suppliers Ship Point. Driver's attempting to deliver without advance notice and clearance to deliver will not be given special consideration for off loading of their material. City shall not be held responsible for parking, lodging or demurrage associated with off-loading delays.
- D. Each shipment shall contain a complete Packing List of items shipped, listing all items and associated parts contained in the shipment. And associated detail drawing(s) for each item contained in the packing list.
- E. Material Safety Data Sheets (MSDS) must be affixed to/accompany each product being delivered. If at all possible a copy of the MSDS sheet shall be faxed or emailed to the Project prior to delivery of the product.
- F. If special tools or lifting devices are required for off loading, Seller shall provide such tools or lifting devices for City's use, including return transportation.
- G. Preparation: The Seller shall provide protection for equipment and materials during the period between completion of manufacture and placement into service. Protection shall include, but not be limited to, the following:
 1. Prepare in a manner to facilitate rigging and handling, including lifting lugs where appropriate. Visibly display special handling instructions.
 2. Load plate, tubular products, formed shapes and sheet metal work, equipment and materials so as to prevent permanent deformities or crimps in material during transit or unloading.
 3. Adequately crate, block, bolt, or otherwise restrain movement of internal parts and anchor as required to prevent damage and loss during transit unloading and erection.
 4. Affix durable metal or wood covers to openings to keep pipe, vessels, and machinery closed after final shop inspection to prevent corrosion, moisture damage, mechanical injury, and accumulation of dirt, dust or other foreign matter.
 5. Protect surfaces subject to damage from oxidation, permanent staining or other attack caused by the normal atmospheric elements.
 6. Provide suitable rust-preventative compound for outdoor storage on exposed machined surfaces and unpainted iron and steel.
 7. Provide grease packing or oil lubrication in all bearings and similar items.
 8. Provide enclosure and/or moisture absorbing compound to protect equipment subject to internal moisture deterioration in a saturated or high moisture atmosphere.
 9. Pack separately all spare parts, special tools, and Installation, Operation and Maintenance Manuals.

H. Material Control Documents

Seller shall provide an Electronic Material List for their entire contract scope of work by means of an electronic file in the Excel spreadsheet format provided. Supplier shall furnish the Electronic Material List 5 days PRIOR to shipment, via email to [Job site Material Manager]. Scanned files or documents are not acceptable.

The Excel spreadsheet must list all "receivables", which are items to be shipped as separate components, assemblies, sub-assemblies or spares. Additionally, for the purpose of receipt and payment, the material list should be a mirror image of the packing slip.

Change Orders/Revisions: The entire original Electronic File does NOT need to be re-sent, only the Changes need to be provided.

Electronic data to be sent to the following individual:

1. Original to [Email Address].
2. One copy to Job Site Material Manager (to be assigned) at:

LOCATION:

Rochester Public Utilities

Attn:

425 West Silver Lake Drive NE

Minneapolis, MN 55906-3675

Phone -

Fax -

Email -

ATTACHMENT N

MAP(S) /DIRECTIONS

ATTACHMENT O

TAX CERTIFICATES

Is this attachment a duplication of Attachment G, the State of Minnesota Department of Taxation Form IC134? Should this attachment be deleted?



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, that the Common Council of the said City is requested to approve a contract agreement with Clyde Bergemann Environmental Elements Corporation and that the Common Council authorize the Mayor and the City Clerk to execute the agreement for

Purchase of Scrubber/Baghouse Equipment
Silver Lake Power Plant Unit 4

The amount of the contract agreement not to exceed ELEVEN MILLION FOUR HUNDRED TWENTY-SEVEN THOUSAND AND 00/100 DOLLARS (\$11,427,000.00) and Clyde Bergemann Environmental Elements Corporation being sole bidder.

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 14th day of December, 2006.

President

Secretary