

CITY COUNCIL

For City Clerk's Use:

☐

APPROVED

☐

DENIED

Reso No. _____

File No. _____

Ord No. _____

Agenda Item No.: 5

Date: December 8, 2010

TO: Honorable Mayor and Members of the City Council

FROM: Lori Vereker, Director of Utilities

SUBJECT: HARRF Secondary Clarifiers Rehabilitation

RECOMMENDATION:

It is requested that the City Council:

1. Adopt Resolution No. 2010-178 authorizing the Mayor and City Clerk to authorize the Utilities Department to enter into a purchase agreement with Ovivo USA, LLC. in the amount of \$406,516 for the procurement of specific equipment for the HARRF Secondary Clarifiers Rehabilitation. This will be replacement equipment to match existing equipment in other clarifiers.
2. Approve a budget adjustment in the amount of \$200,000.

FISCAL ANALYSIS:

Funds are available in the Sewer Fund Balance.

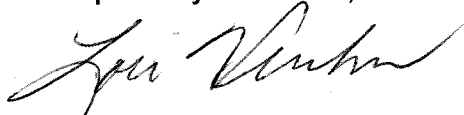
PREVIOUS ACTION:

N/A

BACKGROUND:

The HARRF currently operates with four Secondary Clarifiers, two built in 1984 and two built in 2002. The mechanical equipment in the two 1984 clarifiers have reached the end of their useful life. To standardize the maintenance and reduce spare parts inventory the Utilities Department desires to do a sole source equipment purchase of identical equipment to that in the newer 2002 clarifiers. Due to the specialized nature of the equipment it will take approximately six months from the time of the order to delivery. A separate contract will be administered with a qualified contractor for the installation in the spring/summer of 2011.

Respectfully submitted,



Lori Vereker
Director of Utilities



For Finance Use Only

Log # _____

Fiscal Year _____

_____ Budget Balances

_____ General Fund Accts

_____ Revenue

_____ Interfund Transfers

_____ Fund Balance

[illegible]

To fund purchase of replacement mechanical equipment for the two Secondary Clarifiers built in 1984. To standardize maintenance, equipment shall be identical to the two newer clarifiers.

FM\105 (Rev.11/06)

RESOLUTION NO. 2010-178

A RESOLUTION OF THE CITY COUNCIL OF
THE CITY OF ESCONDIDO, CALIFORNIA,
AUTHORIZING THE DIRECTOR OF
UTILITIES TO EXECUTE, ON BEHALF OF
THE CITY, THE PURCHASE OF
SECONDARY CLARIFIER EQUIPMENT AT
THE HARRF

WHEREAS, the City desires to replace the mechanical equipment which has reached the end of its useful life in two Secondary Clarifiers at HARRF; and

WHEREAS, the HARRF operates two additional newer Secondary Clarifiers;
and

WHEREAS, the staff must operate and maintain all four Secondary Clarifiers to stay within regulatory compliance; and

WHEREAS, it would be most efficient for maintenance and spare parts inventory purposes to standardize the equipment; and

WHEREAS, to standardize the equipment it will require the sole source purchase of said equipment; and

WHEREAS, the City Council desires at this time and deems it to be in the best public interest to approve said purchase from Ovivo USA, LLC. in an amount not to exceed \$406,516.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Escondido, California, as follows:

1. That the above recitations are true.

2. That the Mayor and the City Council authorizes the Director of Utilities or her designee to purchase, on behalf of the City, mechanical equipment necessary for the support and the use of the HARRF Secondary Clarifiers, subject to the terms and conditions detailed in the Proposal attached as Exhibit "1," incorporated by this reference, and subject to approval as to form by the City Attorney.



Proposal No: 1-06-0110A
Bid Date: 10/14/2010
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DATE: October 12, 2010

TO: Escondido, CA

BID DATE: October 14, 2010

Ovivo USA, LLC is pleased to submit a proposal for the following equipment (the "Products") on the project indicated above (the "Project"). This proposal, either in its original form or in its "as sold" format, constitutes Ovivo's contractual offer of goods and services in connection with the Project. Please contact Ovivo's sales representative in your area for any questions or comments you may have in connection with this proposal. The address is:

Attention: Craig Whittemore
Telephone: 760 839 4038
Facsimile: 760 738 5168
Email: cwhittemore@ci.escondido.ca.us

BID PRICING

<u>ITEM</u>	<u>EQUIPMENT</u>	<u>ESTIMATED SHIP DATE*</u>	<u>PRICE</u>
I	Secondary clarifiers	June 2011	\$ 347,900.00
	8.750% Taxes		\$ 30,411.00
	Freight and services		\$ 28,175.00
		TOTAL	\$ 406,516.00

PROPOSAL



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DELIVERY

- * Ovivo will submit drawings for approval within 8 weeks after Purchaser's receipt of Ovivo's written acknowledgement of an approved purchase order. Ovivo intends to ship all Products 24 weeks after receipt of approved drawings from Purchaser. However, the dates of drawing submission and shipment of the Products represents Ovivo's best estimate, but is not guaranteed, and Ovivo shall not be liable for any damages due to late delivery. The Products shall be delivered to the delivery point or points in accordance with the delivery terms stated in this proposal. If such delivery is prevented or postponed by reason of Force Majeure, as defined in Ovivo's standard terms and conditions of sale, Ovivo shall be entitled at its option to tender delivery to Purchaser at the point or points of manufacture, and in default of Purchaser's acceptance of delivery, to cause the Products to be stored at such a point or points of manufacture at Purchaser's expense. Such tender, if accepted, or such storage, shall constitute delivery for all purposes of this proposal. If shipment is postponed at request of Purchaser, or due to delay in receipt of shipping instructions, payment of the purchase price shall be due on notice from Ovivo that the Products are ready for shipment. Handling, moving, storage, insurance and other charges thereafter incurred by Ovivo with respect to the Products shall be for the account of Purchaser and shall be paid by Purchaser when invoiced.

PROPOSAL

ITEM I- SECONDARY CLARIFIERS

Ovivo proposes to supply two (2) Ovivo type C4 Clarifier Mechanisms each suitable for installation in 80' diameter existing concrete tank. The design of the proposed mechanisms is based upon our standard engineering practices and details which will meet the intent of the attached specifications.

ITEMS INCLUDED Per Clarifier:

- Complete Ovivo drive assembly C40HT, with gear motor and weatherproof drive torque control. Drive unit is completely factory assembled, calibrated and tested.
- Walkway: structural steel truss extending from the center operating platform to the outside of the launder wall, with 1-1/4" aluminum I-bar grating. Concrete steps at the end of bridge provided by contractor.
- Platform, steel frame, 8' square, with 1-1/4" aluminum I-bar grating.
- Aluminum handrail around platform only, 1-1/2" diameter 3-rail with 4" toe channel, sub-assembled system. Truss sides will serve as handrail.
- Cage, square box truss design, steel.
- Rake arms, two full radius square box truss design with spiral shaped rake blades and 304 SS squeegees, blades tapered from 8" at tank wall to 24" in the center.
- Rotating sludge collection drum.
- CMD adapter to convert existing organ pipe into spiral blade scraper.
- Center column 36" diameter, flanged with influent ports, steel.
- Feedwell 20' diameter x 4.5' deep with steel frame, FRP No 10 panels and steel supports.
- Equaflo360 Energy Dissipating Inlet, 6' diameter x 4.5' deep with discharge vanes and bottom plate.
- Two (2) scum skimmers with neoprene wipers and one 6' wide scum box with supports and stub nozzle.
- One (1) Ford Hall Brush Cleaning System. Installation by contractor.
- Effluent weirs, 9" x 1/4", and scum baffles, 12" x 1/4", with washers and brackets (L shaped brackets for baffles), all in FRP, with anchors and fasteners in stainless steel.
- Density Current Baffles, all in FRP, with anchors and fasteners in stainless steel.
- Spare parts as specified.
- Epoxy Anchors, 304 Stainless Steel.
- Assembly fasteners, 304 Stainless Steel.
- Operation and Maintenance manuals.
- Service as noted in the "Field Service" section of this proposal.
- Surface preparation and paint as noted in the "Surface Preparation and Paint" section of this proposal.
- Freight, F.O.B. factory, freight allowed to jobsite.

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ITEMS NOT INCLUDED (But not limited to the following):

Any items not specifically included above, such as:

- Local control panel.
- VFD controller.
- Field welding. Minimal field welding will be necessary at cage/arms connections and at arms/skimmer support connections. Field welding will be coordinated with contractor.
- Anchor templates and grout shield. Ovivo provides bolt circle dimensions for the center column and anchor positions.
- Demolition or erection services.
- Coating: priming and finish painting. See Surface preparation and Paint section.
- Lubricants. Type and quantity of lubricant needed will be provided to contractor during submittal.
- Electrical controls, mounting plates or brackets, conduit, wiring, mounting channels, photocells, etc.
- Lamp posts.
- Stairways, access walkways, interconnecting walkways, gratings, etc., outside tank.
- Handrail around tank.
- Scum spray systems, spray water piping or spray nozzles.
- Scum piping below or flexible connector to scum box stub nozzle.
- Dissimilar metals protection (bituminous paint or isolation tape) for aluminum handrail and grating mounted to steel walkway members. Mastic/sealant/packing is also by others.
- Tank, platform or feedwell covers of any kind.
- Cut of bridge concrete supports by contractor.
- Grout repair by contractor.
- See general items not included.

**APPROXIMATE TOTAL WEIGHT OF ONE (1)
MECHANISM**

26,000 Lbs.

**APPROXIMATE WEIGHT OF THE HEAVIEST
SINGLE COMPONENT**

3,000 Lbs.

PROPOSAL

Ovivo USA, LLC

4255 Lake Park Blvd., Suite 100 • Salt Lake City, Utah 84120 USA

www.ovivowater.com



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FIELD SERVICE

Our proposal includes the service of a qualified service engineer for the following:

2 Days / 2 Trips

at the site to assist in adjusting, servicing, and checking out these mechanisms, and in training the operators in maintenance, troubleshooting, and repair of the equipment. Static torque testing is included in these services. Additional service days can be purchased at the current rate.

SURFACE PREPARATION AND PAINT

Ovivo's drive unit will receive a surface preparation of SSPC-SP-06 and will be coated with two (2) coats of Tnemec N69F. Gearmotors are coated by the manufacturer.

Submerged and non-submerged fabricated steel will be shipped bare to jobsite. Coating will be provided by contractor.

PRICING TERMS

The prices quoted are based upon Purchaser's acceptance of this proposal, through the submission of a purchase order or other written acceptance, being placed no later than 90 days after date of bid opening. After expiration of the pricing effectivity period, prices will be subject to review and adjustment. Prices quoted are FOB surface point of shipment, with freight included to an accessible point nearest the jobsite. Federal, state or local sales, use or other taxes are not included in the sales price.

PAYMENT TERMS

Payment terms are: Ninety percent (90%) net cash upon shipment of major Product items; and Ten percent (10%) upon the earlier of (a) Product startup and (b) one hundred eighty (180) days after completion of shipment. Credit is subject to acceptance by the Ovivo Credit Department.

Purchaser shall remit payment for proper invoices received from Ovivo in accordance with the payment terms stated above even if the Purchaser has not been paid by the Purchaser's customer (the "Owner"), if Purchaser is not the end-user of the Products. Payments are due within thirty (30) days after Purchaser's receipt of invoice. Overdue and unpaid invoices are subject to a service charge of 2% per month until paid.

If Purchaser requests or causes cancellation, suspension or delay of Ovivo's work, Purchaser shall accept transfer of title and pay Ovivo all appropriate charges incurred up to date of such event plus Ovivo's overhead and reasonable profit. Additionally, all charges related to and risks incidental to storage, disposition and/or resumption of work shall be borne solely by Purchaser. Full payment for all work shall be due and payable thirty (30) days from the date work is placed into storage.

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TAXES

Federal, State or local sales, use or other taxes are not included in the sales price. Such taxes, if applicable, shall be for Purchaser's account.

BACKCHARGES

In no event shall Purchaser/Owner do or cause to be done any work, purchase any services or material or incur any expense for the account of Ovivo, nor shall Ovivo be responsible for such work or expenses, until after Purchaser/Owner has provided Ovivo's PROJECT MANAGER full details (including estimate of material cost and amount and rate of labor required) of the work, services, material or expenses, and Ovivo has approved the same in writing. Ovivo will not accept Products returned by Purchaser/Owner unless Ovivo has previously accepted the return in writing and provided Purchaser/Owner with shipping instructions.



In an effort to ensure all purchase orders are processed timely and efficiently, please submit all purchase order documentation to the following department and address:

Attn: Order Entry Administrator
Ovivo USA, LLC
4255 Lake Park Blvd., Suite 100,
Salt Lake City, Utah 84120

Fax #: 801-931-3080
Tel. #: 801-931-3000

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ADDITIONAL FIELD SERVICE

When included and noted in the Product pricing of each proposal item, Ovivo will supply the service of a competent field representative to inspect the completed installation and adjustment of equipment, supervise initial operation, and instruct Owner's personnel in the operation and maintenance of each proposal item for the number of eight (8) hour days. Notwithstanding Ovivo's performance of the above-referenced services, Ovivo shall not be held liable for any faulty workmanship or other defects in the Products' installation, or for other goods and/or services, performed by third parties unless such goods and/or services are expressly included under Ovivo's scope of work.

If additional service is required, it will be furnished to the Purchaser and billed to him at the current rate for each additional day required, plus travel and lodging expenses incurred by the service personnel during the additional service days.

It shall be the Purchaser's responsibility to provide for all necessary lubrication of all equipment prior to placing equipment in operation. All equipment must be in operating condition and ready for the Field Service Engineer when called to the project location. Should the Purchaser/Owner not be ready when the Field Service Engineer is requested or if additional service is requested, the Ovivo current service rates will apply for each additional day required, plus travel and lodging expenses incurred by the service personnel during the additional service days.

SURFACE PREPARATION AND PAINTING GENERAL INFORMATION

If painting the Products is included under Ovivo's scope of work, such Products shall be painted in accordance with Ovivo's standard practice. Shop primer paint is intended to serve only as minimal protective finish. Ovivo will not be responsible for condition of primed or finished painted surfaces after equipment leaves its shops. Purchasers are invited to inspect painting in our shops for proper preparation and application prior to shipment. Ovivo assumes no responsibility for field service preparation or touch-up of shipping damage to paint. Painting of fasteners and other touch-up to painted surfaces will be by Purchaser's painting contractor after mechanism erection.

Clarifier motors, gear motors and center drives shall be cleaned and painted with manufacturer's standard primer paint only.

It is our intention to ship major steel components as soon as fabricated, often before drives, motors and other manufactured components. Unless you can insure that shop primed steel shall be field painted within thirty (30) days after arrival at the jobsite, we encourage you to purchase these components in the bare metal (no surface prep or primer) condition.

Ovivo cannot accept responsibility for rusting or deterioration of shop applied prime coatings on delivered equipment if the primed surfaces have not been field painted within thirty (30) days of arrival at the jobsite using manufacturers' standard primers. Other primers may have less durability.

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PRICE ESCALATION

The prices submitted are based upon Purchaser's acceptance of this proposal by January, 15, 2011.

If the above indicated order date is exceeded, prices and shipping dates are subject to review and adjustment. Should shipment dates be exceeded because of actions of parties other than by Ovivo, escalation of the selling prices at the rate of 1.5% per month for each month or partial month of delay will be applied. This escalation will be applied only if shipment is delayed by actions of parties other than by Ovivo.

GENERAL ITEMS NOT INCLUDED

Unless specifically and expressly included above, prices quoted by Ovivo do not include unloading, hauling, erection, installation, piping, valves, fittings, stairways, ladders, walkways, grating, wall spools, concrete, grout, sealant, dissimilar metal protection, oakum, mastic, field painting, oil or grease, electrical controls, wiring, mounting hardware, welding, weld rod, shims, leveling plates, protection against corrosion due to unprotected storage, special engineering, or overall plant or system operating instructions or any other products or services.

MANUALS

The content of any and all installation, operation and maintenance or other manuals or documents pertaining to the Products are copyrighted and shall not be modified without the express prior written consent of Ovivo. Ovivo disclaims any liability for claims resulting from unauthorized modifications to any such manuals or other documents provided by Ovivo in connection with the Project.

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WARRANTY AND CONDITIONS

Ovivo standard Terms and Conditions of Sale, QFORMEWT 0115-02031 is attached and made an essential part of this proposal. These terms and conditions are an integral part of Ovivo's offer of Products and related services and replace and supersede any terms and conditions or warranty included in Purchaser or Owner requests for quotation or specifications and cannot be changed without written approval from an authorized representative of Ovivo.

CONFIDENTIALITY

The contents of this proposal are confidential and shall be used by Purchaser and/or Owner only for the purpose of evaluating Ovivo's offer of goods and services in connection with the Project. Purchaser/Owner shall not disclose the contents of this proposal to any third party without the prior written consent of Ovivo.

Very truly yours,

Ovivo USA, LLC



Carla Wirth
Proposal Coordinator

Attachment:

Ovivo USA, LLC General Terms and Conditions

PROPOSAL

OVIVO

Bringing water to life

Terms & Conditions of Sale

1. ACCEPTANCE. The proposal of Ovivo USA, LLC ("SELLER"), as well as these terms and conditions of sale (collectively the "Agreement"), constitutes SELLER's contractual offer of goods and associated services, and PURCHASER's acceptance of this offer is expressly limited to the terms of the Agreement. The scope and terms and conditions of this Agreement represent the entire offer by SELLER and supersede all prior solicitations, discussions, agreements, understandings and representations between the parties. Any scope or terms and conditions included in PURCHASER's acceptance/purchase order that are in addition to or different from this Agreement are hereby rejected.

2. DELIVERY. Any statements relating to the date of shipment of the Products (as defined below) represent SELLER's best estimate, but is not guaranteed, and SELLER shall not be liable for any damages due to late delivery. The Products shall be delivered to the delivery point or points in accordance with the delivery terms stated in SELLER's proposal. If such delivery is prevented or postponed by reason of Force Majeure (as defined below), SELLER shall be entitled at its option to tender delivery to PURCHASER at the point or points of manufacture, and in default of PURCHASER's acceptance of delivery to cause the Products to be stored at such a point or points of manufacture at PURCHASER's expense. Such tender, if accepted, or such storage, shall constitute delivery for all purposes of this agreement. If shipment is postponed at request of PURCHASER, or due to delay in receipt of shipping instructions, payment of the purchase price shall be due on notice from SELLER that the Products are ready for shipment. Handling, moving, storage, insurance and other charges thereafter incurred by SELLER with respect to the Products shall be for the account of PURCHASER and shall be paid by PURCHASER when invoiced.

3. TITLE AND RISK OF LOSS. SELLER shall retain the fullest right, title, and interest in the Products to the extent permitted by applicable law, including a security interest in the Products, until the full purchase price has been paid to SELLER. The giving and accepting of drafts, notes and/or trade acceptances to evidence the payments due shall not constitute or be construed as payment so as to pass SELLER's interests until said drafts, notes and/or trade acceptances are paid in full. Risk of loss shall pass to PURCHASER at the delivery point.

4. PAYMENT TERMS. SELLER reserves the right to ship the Products and be paid for such on a pro rata basis, as shipped. If payments are not made by the due date, interest at a rate of two percent (2%) per month, calculated daily, shall apply from the due date for payment. PURCHASER is liable to pay SELLER's legal fees and all other expenses in respect of enforcing or attempting to enforce any of SELLER's rights relating to a breach or threatened breach of the payment terms by PURCHASER.

5. TAXES. Unless otherwise specifically provided in SELLER's quotation/proposal, PURCHASER shall pay and/or reimburse SELLER, in addition to the price, for all sales, use and other taxes, excises and charges which SELLER may pay or be required to pay to any government directly or indirectly in connection with the production, sale, transportation, and/or use by SELLER or PURCHASER, of any of the Products or services dealt with herein (whether the same may be regarded as personal or real property). PURCHASER agrees to pay all property and other taxes which may be levied, assessed or charged against or upon any of the Products on or after the date of actual shipment, or placing into storage for PURCHASER's account.

6. MECHANICAL WARRANTY. Solely for the benefit of PURCHASER, SELLER warrants that new equipment and parts manufactured by it and provided to PURCHASER (collectively, "Products") shall be free from defects in material and workmanship. The warranty period shall be twelve (12) months from startup of the equipment not to exceed eighteen (18) months from shipment. If any of SELLER's Products fail to comply with the foregoing warranty, SELLER shall repair or replace free of charge to PURCHASER, EX WORKS SELLER'S FACTORIES or other location that SELLER designates, any Product or parts thereof returned to SELLER, which examination shall show to have failed under normal use and service operation by PURCHASER within the Warranty Period; provided, that if it would be impracticable for the Product or part thereof to be returned to SELLER, SELLER will send a representative to PURCHASER's job site to inspect the Product. If it is determined after inspection that SELLER is liable under this warranty to repair or replace the Product or part thereof, SELLER shall bear the transportation costs of (a) returning the Product to SELLER for inspection or sending its representative to the job site and (b) returning the repaired or replaced Products to PURCHASER; however, if it is determined after inspection that SELLER is not liable under this warranty, PURCHASER shall pay those costs. For SELLER to be liable with respect to this warranty, PURCHASER must make its claim to SELLER with respect to this warranty in writing no later than thirty (30) days after the date PURCHASER discovers the basis for its warranty claim and in no event more than thirty (30) days after the expiration of the Warranty Period. In addition to any other limitation or disclaimer with respect to this warranty, SELLER shall have no liability with respect to any of the following: (i) failure of the Products, or damages to them, due to PURCHASER's negligence or willful misconduct, abuse or improper storage, installation, application or maintenance (as specified in any manuals or written instructions that SELLER provides to the PURCHASER); (ii) any Products that have been altered or repaired in any way without SELLER's prior written authorization; (iii) The costs of dismantling and reinstallation of the Products; (iv) any Products damaged while in transit or otherwise by accident; (v) decomposition of Products by chemical action, erosion or corrosion or wear to Products or due to conditions of temperature, moisture and dirt; or (vi) claims with respect to parts that are consumable and normally replaced during maintenance such as filter media, filter drainage belts and the like, except where such parts are not performing to SELLER's estimate of normal service life, in which case, SELLER shall only be liable for the pro rata cost of replacement of those parts based on SELLER's estimate of what the remaining service life of those parts should have been; provided, that failure of those parts did not result from any of the matters listed in clauses (i) through (v) above. With regard to third-party parts, equipment, accessories or components not of SELLER's design, SELLER's liability shall be limited solely to the assignment of available third-party warranties. THE PARTIES AGREE THAT ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND MERCHANTABILITY, WHETHER WRITTEN, ORAL OR STATUTORY, ARE EXCLUDED TO THE FULLEST EXTENT PERMISSIBLE BY LAW. All warranties and obligations of SELLER shall terminate if PURCHASER fails to perform its obligations under this Agreement including but not limited to any failure to pay any charges due to SELLER. SELLER's quoted price for the Products is based upon this warranty. Any increase in warranty obligation may be subject to an increase in price.

7. CONFIDENTIAL INFORMATION. All nonpublic information and data furnished to PURCHASER hereunder, including but not limited to price, size, type and design of the Products is the sole property of SELLER and submitted for PURCHASER's own confidential use solely in connection with this Agreement and is not to be made known or available to any third party without SELLER's prior written consent.

8. PAINTING. The Products shall be painted in accordance with SELLER's standard practice, and purchased items such as motors, controls, speed reducers, pumps, etc., will be painted in accordance with manufacturers' standard practices, unless otherwise agreed in writing.

9. DRAWINGS AND TECHNICAL DOCUMENTATION. When PURCHASER requests approval of drawings before commencement of manufacture, shipment may be delayed if approved drawings are not returned to SELLER within fourteen (14) days of receipt by PURCHASER of such drawings for approval. SELLER will furnish only general arrangement, general assembly, and if required, wiring diagrams, erection drawings, installation and operation-maintenance manuals for SELLER's equipment (in English language). SELLER will supply six (6) complete sets of drawings and operating instructions. Additional sets will be paid for by PURCHASER. Electronic files, if requested from SELLER, will be provided in pdf, jpg or tif format only.

10. SET OFF. This Agreement shall be completely independent of all other contracts between the parties and all payments due to SELLER hereunder shall be paid when due and shall not be set off or applied against any money due or claimed to be due from SELLER to PURCHASER on account of any other transaction or claim.

11. SOFTWARE. PURCHASER shall have a nonexclusive and nontransferable license to use any information processing program supplied by SELLER with the Products. PURCHASER acknowledges that such programs and the information contained therein is Confidential Information and agrees: a) not to copy or duplicate the program except for archival or security purposes; b) not to use the program on any computer other than the computer with which it is supplied; and c) to limit access to the program to those of its

12. PATENT INDEMNITY. SELLER will defend at its own expense any suit instituted against PURCHASER based upon claims that SELLER's Product hereunder in and of itself constitutes an infringement of any valid apparatus claims of any United States patent issued and existing as of the date of this Agreement, if notified promptly in writing and given all information, assistance, and sole authority to defend and settle the same, and SELLER shall indemnify the PURCHASER against such claims of infringement. Furthermore, in case the use of the Products is enjoined in such suit or in case SELLER otherwise deems it advisable, SELLER shall, at its own expense and discretion, (a) procure for the PURCHASER the right to continue using the Products, (b) replace the same with non-infringing Products, (c) modify the Product so it becomes non-infringing, or (d) remove the Products and refund the purchase price less freight charges and depreciation. SELLER shall not be liable for, and PURCHASER shall indemnify SELLER for, any claim of infringement related to (a) the use of the Products for any purpose other than that for which it was furnished by SELLER, (b) compliance with equipment designs not furnished by SELLER or (c) use of the Products in combination with any other equipment. The foregoing states the sole liability of SELLER for patent infringement with respect to the Products.

13. GENERAL INDEMNITY. Subject to the rights, obligations and limitations of liabilities of the parties set forth in this Agreement, PURCHASER shall protect and indemnify SELLER, its ultimate parent, its ultimate parent's subsidiaries and each of their respective officers, directors, employees and agents, from and against all claims, demands and causes of action asserted by any entity to the extent of PURCHASER's negligence or willful misconduct in connection with this Agreement.

14. DEFAULT, TERMINATION. In the event that PURCHASER becomes insolvent, commits an act of bankruptcy or defaults in the performance of any term or condition of this Agreement, the entire unpaid portion of the purchase price shall, without notice or demand, become immediately due and payable. SELLER at its option, without notice or demand, shall be entitled to sue for said balance and for reasonable legal fees, plus out-of-pocket expenses and interest; and/or to enter any place where the Products are located and to take immediate possession of and remove the Products, with or without legal process; and/or retain all payments made as compensation for the use of the Products; and/or resell the Products, without notice or demand, for and on behalf of the PURCHASER, and to apply the net proceeds from such sale (after deduction from the sale price of all expenses of such sale and all expenses of retaking possession, repairs necessary to put the Products in saleable condition, storage charges, taxes, liens, collection and legal fees and all other expenses in connection therewith) to the balance then due to SELLER for the Products and to receive from the PURCHASER the deficiency between such net proceeds of sale and such balance. PURCHASER hereby waives all trespass, damage and claims resulting from any such entry, repossession, removal, retention, repair, alteration and sale. The remedies provided in this paragraph are in addition to and not limitations of any other rights of SELLER.

15. CANCELLATION. PURCHASER may terminate this Agreement for convenience upon giving SELLER thirty (30) days prior written notice of such fact and paying SELLER for all costs and expenses (including overhead) incurred by it in performing its work and closing out the same plus a reasonable profit thereon. All such costs and expenses shall be paid to SELLER within ten (10) days of the termination of the Agreement, or be subject to an additional late payment penalty of five percent (5%) of the total amount of costs and expenses owed.

16. REMEDIES. The rights and remedies of the PURCHASER in connection with the goods and services provided by SELLER hereunder are exclusive and limited to the rights and remedies expressly stated in this Agreement.

17. INSPECTION. PURCHASER is entitled to make reasonable inspection of Products at SELLER's facility. SELLER reserves the right to determine the reasonableness of the request and to select an appropriate time for such inspection. All costs of inspections not expressly included as an itemized part of the quoted price of the Products in this Agreement shall be paid by PURCHASER.

18. WAIVER. Any failure by SELLER to enforce PURCHASER's strict performance of any provision of this Agreement will not constitute a waiver of its right to subsequently enforce such provision or any other provision of this Agreement.

19. COMPLIANCE WITH LAWS. If applicable laws, ordinances, regulations or conditions require anything different from, or in addition to, that called for by this Agreement, SELLER will satisfy such requirements at PURCHASER's written request and expense.

20. FORCE MAJEURE. If SELLER is rendered unable, wholly or in material part, by reason of Force Majeure to carry out any of its obligations hereunder, then on SELLER's notice in writing to PURCHASER within a reasonable time after the occurrence of the cause relied upon, such obligations shall be suspended. "Force Majeure" shall include, but not be limited to, acts of God, laws and regulations, strikes, civil disobedience or unrest, lightning, fire, flood, washout, storm, communication lines failure, delays of the PURCHASER or PURCHASER's subcontractors, breakage or accident to equipment or machinery, wars, police actions, terrorism, embargos, and any other causes that are not reasonably within the control of the SELLER. If the delay is the result of PURCHASER's action or inaction, then in addition to an adjustment in time, SELLER shall be entitled to reimbursement of costs incurred to maintain its schedule.

21. INDEPENDENT CONTRACTOR. It is expressly understood that SELLER is an independent contractor, and that neither SELLER nor its principals, partners, parents, subsidiaries, affiliates, employees or subcontractors are servants, agents, partners, joint ventures or employees of PURCHASER in any way whatsoever.

22. SEVERABILITY. Should any portion of this Agreement, be held to be invalid or unenforceable under applicable law then the validity of the remaining portions thereof shall not be affected by such invalidity or unenforceability and shall remain in full force and effect. Furthermore, any invalid or unenforceable provision shall be modified accordingly within the confines of applicable law, giving maximum permissible effect to the parties' intentions expressed herein.

23. CHOICE OF LAW, CHOICE OF VENUE. This Agreement shall be governed and construed in accordance with the laws of the State of Utah, without regard to its rules regarding conflicts of choice of law. The parties submit to the jurisdiction and venue of the state and federal courts located in Salt Lake City, Utah.

24. ASSIGNMENT. PURCHASER shall not assign or transfer this Agreement without the prior written consent of the SELLER. Any attempt to make such an assignment or transfer shall be null and void. SELLER shall have the authority to assign, or otherwise transfer, its rights and obligations in connection with this Agreement, in whole or in part, upon prior written notice to PURCHASER.

25. LIMITATION ON LIABILITY. TO THE EXTENT PERMISSIBLE BY LAW, SELLER SHALL HAVE NO FURTHER LIABILITY IN CONNECTION WITH THIS AGREEMENT IN EXCESS OF THE COST OF CORRECTING ANY DEFECTS, OR IN THE ABSENCE OF ANY DEFECT, IN EXCESS OF THE VALUE OF THE PRODUCTS SOLD HEREUNDER. NOTWITHSTANDING ANY LIABILITIES OR RESPONSIBILITIES ASSUMED BY SELLER HEREUNDER, SELLER SHALL IN NO EVENT BE RESPONSIBLE TO PURCHASER OR ANY THIRD PARTY, WHETHER ARISING UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OR OTHERWISE, FOR LOSS OF ANTICIPATED PROFITS, LOSS BY REASON OF PLANT SHUTDOWN, NON-OPERATION OR INCREASED EXPENSE OF OPERATION, SERVICE INTERRUPTIONS, COST OF PURCHASED OR REPLACEMENT POWER, COST OF MONEY, LOSS OF USE OF CAPITAL OR REVENUE OR ANY OTHER INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL LOSS OR DAMAGE, WHETHER ARISING FROM DEFECTS, DELAY, OR FROM ANY OTHER CAUSE WHATSOEVER.