

# DESIGN/BUILD CONTRACT

THIS CONTRACT is made and entered into effective \_\_\_\_\_, 2015 by and between the City of Fresno, a California municipal corporation ("City"), and **MD Energy, Incorporated, a California Corporation**, ("Design/Builder").

City requested proposals for a Design-Build 2 Megawatt Photovoltaic System at the Fresno/Clovis Regional Wastewater Reclamation Facility and Design/Builder has responded to City's request. The Design/Builder represents Design/Builder is experienced, well qualified and a specialist in the field of design/build construction of Solar Renewable Energy Projects.

City desires to employ Design/Builder to Design and Build the 2 Megawatt Photovoltaic System ("Work"), as set forth herein, on a design/build basis, (collectively, "Project"), and, Design/Builder represents it is an entity that lawfully combines the roles of construction and professional design, into a single operating unit.

THE PARTIES THEREFORE, agree as follows:

1. **SCOPE OF WORK** The Work to be performed consists, in general, of the design and construction of a 2 Megawatt Solar Photovoltaic system, and Site Work. The scope of Work shall include all items and procedures necessary to properly complete the task in accordance with all of the terms set forth in this Contract, whether specifically included in the scope of Work/services, or not. The scope of Work shall include all items contained in Design/Builder's Proposal including any document modifying the response if accepted by City, and Scope of Work.
2. **CONTRACT DOCUMENTS AND DEFINITIONS**
  - 2.1 The "Notice Inviting Proposals," "Instructions to Proposers," "Proposal," "Scope of Work" and the "Specifications" including "General Conditions", "Special Conditions", "Project Technical Requirements", and "City Standard Specifications" for the following: DESIGN-BUILD 2 MEGAWATT PHOTOVOLTAIC SYSTEM AT THE FRESNO/CLOVIS WASTEWATER RECLAMATION FACILITY - RFP NO. 3380 copies of which are annexed hereto, together with all the drawings, plans, and documents specifically referred to in said annexed documents, including Performance and Payment Bonds, if required, are hereby incorporated into and made a part of this as Contract, and shall be known as the Contract Documents.
  - 2.2 Wherever used in this Contract, the words defined in Article 1 of the GENERAL CONDITIONS (DIVISION II OF THE CONTRACT DOCUMENTS) shall have the meaning therein given, unless the context requires a different meaning.
3. **COMPENSATION AND CONTRACT PRICE**
  - 3.1 For the monetary consideration of an amount not to exceed TEN MILLION, TWENTY FOUR THOUSAND, FOUR HUNDRED TWENTY SIX DOLLARS AND TWENTY FOUR CENTS (\$10,024,426.24), "GMP" (GMP), as set forth in the Proposal, Design/Builder promises and agrees to perform or cause to be performed, in a good and workmanlike manner, under the direction and to the

satisfaction of the City, and in strict accordance with the Specifications, all of the work (design and construction) as set forth in the Contract Documents. Design/Builder further guarantees that the Work shall be designed and constructed for a total price not to exceed GMP. This GMP shall not, under any circumstances, be exceeded without the consent of the City evidenced by a written Contract amendment approved by the City Council and signed by both Parties to this Contract.

- 3.2** The compensation set forth in this Contract shall be the maximum compensation which Design/Builder may receive under this Contract including, but not limited to, all out-of-pocket costs and taxes. If scope changes to the Work impact the Design/Builder's actual costs incurred and cause the costs to be less than the GMP for design and construction of the Work, then compensation by City will be limited to such lesser amount as agreed to in writing by both parties. City shall pay nothing above the compensation listed unless otherwise agreed to in writing by the Parties. Unless otherwise required by State law, a five percent (5%) retention shall be withheld from payments of the Contract Price to Design/Builder by City. The five percent (5%) retention shall be released after the appropriate statutes have expired and all liens and stop payment notices have been released or otherwise cleared to the satisfaction of City.
- 3.3** Design/Builder shall complete the Work (Final Completion) within 204 working days from the date of the Notice to Proceed.
- 3.4** City accepts Design/Builder's Proposal as stated and agrees to pay the consideration stated, at the times, in the amounts, and under the conditions specified in the Contract Documents.
- 4. CONTRACTOR DEFINED** For the purposes of this Contract, "Design/Builder" means a design/build entity as defined in Article 5, Chapter 4 of the Fresno Municipal Code and includes legal entities that are able to provide appropriately licensed contracting, architectural and engineering services as needed for construction of the Work.
- 5. PAYMENT PROCEDURE** Design/Builder shall be paid for Work (design and construction services) rendered in accordance with the General Conditions.
- 6. CONTROL OF SITE** The care, custody, and control of the Site shall be with Design/Builder until Substantial Completion or termination of this Contract and shall pass from Design/Builder to City upon Substantial Completion or termination, but subject to the warranties, performance and any other continuing obligations of Design/Builder hereunder. From and after Substantial Completion or termination, City shall assume the risk of physical damage to the Site. Design/Builder shall be responsible for and obligated to replace, repair, and reconstruct any portion or all of the Work which is lost, damaged or destroyed prior to the transfer of care, custody, and control of the Work to City, however such loss or damage or destruction shall have occurred. City assumes responsibility for such loss, damage, or destruction after Substantial Completion or termination.

7. **SITE CONDITIONS** Design/Builder agrees to fully assume all risks, and costs associated with such risks, in performing the Work and meeting the obligations under this Contract, except for costs associated with materially differing Project Site conditions from those reasonably anticipated after completion of design services which are assumed by City in accordance with the terms set forth herein.
8. **NO WAIVER OF DEFAULT** The failure of any Party to enforce against another Party any provision of this Contract shall not constitute a waiver of that Party's right to enforce such a provision at a later time, and shall not serve to vary the terms of this Contract.
9. **LICENSES** Design/Builder shall, at its sole cost and expense, keep in effect or obtain, and have possession of, at all times during the term of this Contract any and all licenses, permits, approvals and credentials which are legally required for Design/Builder to practice its profession and design, construct and maintain the Project.
10. **MERGER AND MODIFICATION** All prior agreements between the Parties are incorporated in this Contract which constitutes the entire agreement. Its terms are intended by the Parties as a final expression of their agreement with respect to such terms as are included herein and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. The Parties further intend this Contract constitutes the complete and exclusive statement of its terms and no extrinsic evidence whatsoever may be introduced in any judicial or arbitration proceeding involving this Contract. This Contract may be modified only in a writing approved by the City Council and signed by all the Parties.
11. **COMMUNICATIONS** All communications between City and Design/Builder concerning the Project shall be in writing.
12. **EXHIBITS** All exhibits and attachments to which reference is made in this Contract are deemed incorporated in this Contract, whether or not actually attached.
13. **COMPLIANCE WITH ALL LAWS**
  - 13.1 Design/Builder shall, at Design/Builder's sole cost, comply with all of the requirements of Municipal, State, and Federal authorities now in force, or which may hereafter be in force, pertaining to this Contract, and shall faithfully observe in all activities relating to or growing out of this Contract all Municipal ordinances and State and Federal statutes, rules or regulations, and permitting requirements now in force or which may hereafter be in force including, without limitation, obtaining a City of Fresno business license where required.
  - 13.2 Design/Builder, its Subcontractors, sub-consultants and their employees, in the performance of Design/Builder's work under this Contract shall be responsible for exercising the degree of skill and care required by customarily accepted good professional practices and procedures used in the Design/Builder's field. Any costs for failure to meet the forgoing standard or to correct otherwise Defective

Work that requires re-performance of the Work, as directed by City shall be borne in total by Design/Builder and not the City. In the event that Design/Builder fails to perform in accordance with the above standard, Design/Builder will re-perform any task which was not performed to the reasonable satisfaction of City. Any Work re-performed shall be completed within the time limitations originally set forth for the specific task involved. Design/Builder shall work any overtime required to meet the deadline for the task at no additional cost to City. If the re-performance of any task is not feasible within the original time limitations, then Design/Builder shall perform such task within the new schedule for re-performance provided to and accepted by City. The City shall have the option to direct Design/Builder not to re-perform any task which was not performed to the reasonable satisfaction of the City. In the event Design/Builder is so directed, the City and Design/Builder shall negotiate a reasonable settlement for satisfactory Work performed. No previous payment shall be considered a waiver of the City's right to reimbursement. Nothing contained in this clause is intended to limit any of the rights or remedies which City may have under law.

**13.2.1** City and its designees may make visits to the Project Site, Suppliers, Subcontractors, and/or demonstration sites as frequently as necessary to review Project accomplishments and management control systems.

**13.2.2** Design/Builder and its Subcontractors and sub-consultants shall comply with Title VI of the Civil Rights Act of 1964 (42 United States Codes Section 2000d, et seq.)

**13.2.3**

During the performance of this Contract, Design/Builder and its Subcontractors and subconsultants shall not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, disability (including HIV and AIDS), medical condition (cancer), age, marital status, and denial of family care leave. Design/Builder and its Subcontractors and sub-consultants shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination and harassment. Design/Builder and its Subcontractors and sub-consultants shall comply with the provisions of the Fair Employment and Housing Act (Government Code Sections 12990 et seq.) And the applicable regulations promulgated there under (California Code of Regulations, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code Section 12990(a-f), set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this Contract by reference and made a part of it as if set forth in full. Design/Builder and its Subcontractors and sub-consultants shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement. Design/Builder shall include this clause in all subcontracts to perform work under this Contract.

**13.2.4** Upon written request of City, Design/Builder shall provide detailed documentation of all expenses at any time throughout the Project. In addition, Design/Builder agrees to allow City, upon written request, to have reasonable access to and the right of inspection of all records that pertain to the Project during the term of this Contract and for a period of five (5) years after final payment. Further, Design/Builder agrees to incorporate an audit of this Project within any scheduled audits, when specifically requested by City. Design/Builder shall include a similar right to audit clause in any subcontract.

### **13.3 INDEPENDENT CONTRACTOR**

This Contract calls for the performance of the services of Design/Builder as an independent contractor. Design/Builder retains the right to control the manner in which the services described herein are performed and Design/Builder will supply all equipment, tools, materials and supplies necessary to perform the services set forth in this Contract. In the furnishing of the work provided for herein, the Design/Builder is acting as an independent contractor. Neither the Design/Builder, nor any of its officers, associates, agents or employees shall be deemed an employee, joint venture, partner or agent of the City for any purpose. However, the City shall retain the right to verify that the Design/Builder is performing its respective obligations in accordance with the terms of the Contract. Because of its status as an independent contractor, Design/Builder and its officers, agents and employees shall have absolutely no right to employment rights and benefits available to City employees. Design/Builder shall be solely liable and responsible for all payroll and tax withholding and for providing to, or on behalf of, its employees all employee benefits including, without limitation, health, welfare and retirement benefits. In addition, together with its other obligations under this Contract, Design/Builder shall be solely responsible, indemnify, defend and save City harmless from all matters relating to employment and tax withholding for and payment of Design/Builder's employees, including, without limitation, (i) compliance with Social Security and unemployment insurance withholding, payment of workers compensation benefits, and all other laws and regulations governing matters of employee withholding, taxes and payment; and (ii) any claim of right or interest in City employment benefits, entitlements, programs and/or funds offered employees of City whether arising by reason of any common law, de facto, leased, or co-employee rights or other theory. It is acknowledged that during the term of this Contract, Design/Builder may be providing services to others unrelated to City or to this Contract.

## **14. PAYMENT AND PERFORMANCE BONDS**

**14.1** Prior to City's execution of the Contract Design/Builder shall provide the following bonds on forms prescribed by City with the name of the obligee in the amount set forth below as security for the faithful performance and payment of all Design/Builder's obligations hereunder for completing the Project:

- 14.1.1** A "Payment Bond" shall be for not less than 100% of the Contract Price (the Base Proposal plus any Add Alternate awarded), to satisfy claims of material suppliers and of mechanics and laborers employed on the Work. The bond shall be maintained by Design/Builder in full force and effect until the completed Work is accepted by City and until all claims for materials and labor are paid, and shall otherwise comply with Chapter 5, Title III, part 6, Division 4 of the California Civil Code.
- 14.1.2** A Performance Bond for 100% of the Contract Price ( the Base Proposal plus any Add Alternate awarded) to guarantee faithful performance of the Work, within the time prescribed, in a manner satisfactory to the City, and all materials and workmanship shall be free from original and developed defects. The Bond shall be maintained by Design/Builder in full force and effect until the Work is accepted by City and until all claims for materials and labor are paid. (See also paragraph 6.22C(3) of the General Conditions)
- 14.2** Each bond shall be signed by both Design/Builder and the Surety and the signature of the authorized agent of the Surety shall be notarized.
- 14.3** Should any bond become insufficient, Design/Builder shall renew the bond within ten (10) Days after receiving notice from City.
- 14.4** Changes in the Work or services, or extensions of time, made pursuant to this Contract, shall in no way release Design/Builder or Surety from their obligations. Notice of such changes or extensions shall be waived by the Surety.
- 14.5** All bonds shall be sufficient surety bonds in the form prescribed by City and shall be issued by such Sureties which are admitted insurers (a corporate surety), admitted by the California Insurance Commissioner to do business in the State of California and acceptable to City. All bonds shall satisfy the requirements stated in Section 995.660 of the California Code of Civil Procedure, except as provided otherwise by law or regulation. All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act. Should any Surety at any time fail to meet these requirements notice will be given to City by Design/Builder to that effect. Design/Builder shall require Surety to provide such notice to Design/Builder and City immediately upon Surety's failure to meet the requirements of a corporate surety in the State of California. No further payments shall be deemed due or shall be made under the Contract until a new Surety shall qualify and be accepted by City.
- 14.6** If the Surety on any bond furnished by Design/Builder is declared bankrupt or becomes insolvent or its right to do business is terminated in California, Design/Builder shall within seven (7) Days thereafter substitute another bond and Surety, which must be acceptable to City.

**14.7** Design/Builder shall obtain City's written acceptance of all such security instruments at the time the bond(s) are provided.

**15. INDEMNIFICATION**

**15.1** To the furthest extent allowed by law including California Civil Code Section 2782, the Design/Builder shall indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including, but not limited to personal injury, death at any time and property damage) incurred by City, the Design/Builder or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Contract. Design/Builder's obligations under the preceding sentence shall apply regardless of whether the City or any of its officers, officials, employees, agents or volunteers are passively negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused by the sole or active negligence, or willful misconduct, of the City or any of its officers, officials, employees, agents or volunteers.

**15.2** Notwithstanding paragraph 15.1 above, to the extent that Design/Builder or any subcontractor is a “design professional” as defined in Section 2782.8 of the California Civil Code and performing Work hereunder as a “design professional” shall, in lieu of paragraph 15.1, be required to indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers to the furthest extent allowed by law, from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort, or strict liability, including but not limited to personal injury, death at any time and property damage), and from any and all claims, demands and actions in law or equity (including reasonable attorney’s fees and litigation expenses) that arise out of, pertain to, or relate to the negligence, recklessness or willful misconduct of the design professional, its principals, officers, employees, agents or volunteers in the performance of this Contract.

**15.3** If the Design/Builder should subcontract all or any portion of the work to be performed under this Contract, the Design/Builder shall require each subcontractor to indemnify, hold harmless and defend City and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the provisions of this Section 15.

**15.4** This Section 15 shall survive termination or expiration of this Contract.

**16. TERMINATION** This Contract may be terminated as set forth in the General Conditions for this Project.

**16.1** In the event of termination by City as set forth above, Design/Builder shall remain fully liable for any Work not completed, liquidated damages, delays to other contractors, materials and equipment provided, designs commenced through the date of termination, consequential damages and any remaining warranty period. If it has not already done so, Design/Builder will immediately deliver to City possession of the Work including all designs, engineering, Project records, cost data, drawings, specifications and contracts, and construction supplies and aids dedicated solely to performing the Work. Design/Builder shall assign all subcontracts to City, however, City may accept or reject said subcontracts at its sole discretion.

**16.2** City and Design/Builder agree that should City’s termination for cause be determined by a court of law to be wrongful or without cause, such termination will be treated as a termination for convenience entitling Design/Builder to an equitable settlement for claims and liabilities outstanding at the date of termination and reasonable compensation for work actually performed to the date of termination. No other compensation shall be due Design/Builder for termination for convenience.



- 16.3** In the event of termination with cause, City may withhold an amount that would otherwise be payable as an offset to, but not in excess of, City's damages caused by default of Design/Builder.
- 16.4** In the event City terminates the Contract with cause, City may exercise any right, remedy (in law or equity), or privilege which may be available to it under applicable laws of the State of California or any other applicable law, or proceed by appropriate court action to enforce the terms of the Contract, or to recover direct, indirect, consequential or incidental damages for the breach of the Contract. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.
- 17. STOP NOTICES OR LIENS** Design/Builder shall not allow any stop notices or liens to be filed on the Project herein, and shall pay all costs and fees to City, including without limitation attorney's fees, incurred by City because of the filing of any such stop notice, lien or legal action relating thereto. Design/Builder agrees City may withhold from any funds held by City concerning the Project herein 125% of the amount of the stop notice, lien or legal action and any additional amounts sufficient to cover costs and fees, including without limitation attorney's fees, incurred by City because of the filing of any stop notice, lien, or legal action relating thereto.
- 18. EXECUTION** This Contract is effective upon execution. All Parties are equally responsible for authorship of this Contract. Section 1654 of the California Civil Code shall not apply to the interpretation of this Contract.
- 19. NOTICES** Any notice required or intended to be given to either party under terms of this Contract shall be in writing and shall be deemed to be duly given if delivered personally or sent by United States registered or certified mail, with postage prepaid, return receipt requested, addressed to the party to which notice is to be given at the party's address set forth on the signature page of the Bid Proposal in the case of the Design/Builder and at the address set forth on the signature page of the Contract in the case of the City, or at such other address as the parties may from time to time designate by written notice. Notices served by United States mail in the manner above described shall be deemed sufficiently served or given at the time of the mailing thereof.
- 20. ASSIGNMENT** The Contract is personal to the Design/Builder and there shall be no assignment, transfer, sale, or subcontracting by the Design/Builder of its rights or obligations under the Contract without the prior written approval of the City. Any attempted assignment, transfer, sale or subcontracting by the Design/Builder, its successors or assigns, shall be null and void unless approved in writing by the City.
- 21. BINDING EFFECT** Subject to the foregoing section, the rights and obligations of this Contract shall inure to the benefit of, and be binding upon, the Parties to the Contract

and their heirs, administrators, executors, personal representatives, successors and assigns.

- 22. TITLE TO DOCUMENTS AND LICENSE TO SOFTWARE** All documents, plans, and drawings, maps, photographs, and other papers, (including, but not limited to, computer or electronic data) or copies thereof prepared by Design/Builder pursuant to the terms of this Contract, shall, upon preparation, become the property of City and may be used by City for any purpose without further compensation or authorization of Design/Builder. Additionally, the complete right or perpetual license of all system and maintenance software, if any, shall be transferred to City.
- 23. ACCOUNTING RECORDS** Design/Builder shall maintain accurate accounting records and other written documentation pertaining to all costs incurred in performance of this Contract. Such records and documentation shall be kept at Design/Builder's office during the term of this Contract, and for the longer of a period of five (5) years from the date of expiration or termination of the Contract, during any period of litigation or longer if required by law, and said records shall be made available to City representatives upon request at any time during regular business hours. This section shall survive expiration or termination of this Contract.
- 24. SITE INSPECTION** City shall be allowed to inspect the Site at any time and Design/Builder shall make all areas of the Site available to inspection including, without limitation, any construction trailers or offices at the Site and all plans, drawings, schedules, documents, photographs and other documentation relating to the Project.
- 25. CORPORATE AUTHORITY** Each individual signing this Contract on behalf of Design/Builder represents and warrants that they are, respectively, duly authorized to sign on behalf of the Design/Builder and to bind the Design/Builder fully to each and all of the obligations set forth in this Contract.
- 26. NON-INTEREST** No officer or employee of City shall hold any interest in this Contract (California Government Code Section 1090).
- 27. CUMULATIVE REMEDIES** All City's remedies provided in this Contract are cumulative; that is, in addition to each and every other remedy herein or otherwise provided by law, and City shall have any and all equitable and legal remedies which it would have according to law other than damages for failure to complete the Project within the Contract Time, which damages are covered by the liquidated damages provision herein.

IN WITNESS WHEREOF, the Parties execute this Contract which after execution by all parties shall become binding and effective on the Effective Date.

MD Energy, Inc.  
A California Corporation

CITY OF FRESNO,  
a California municipal corporation

By: \_\_\_\_\_

By: \_\_\_\_\_

\_\_\_\_\_  
(Type or Print Name)

Thomas C. Esqueda, Director -  
Department of Public Utilities

Title: \_\_\_\_\_  
(If corporation or LLC, Board Chair, Pres.  
Or Vice Pres.)

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

By: \_\_\_\_\_

ATTEST:  
CITY CLERK  
Yvonne Spence, CMC

\_\_\_\_\_  
(Type or Print Name)

Title: \_\_\_\_\_  
(If corporation or LLC, CFO, Treasurer,  
Secretary or Assistant Secretary)

By: \_\_\_\_\_  
Deputy Date

Dated: \_\_\_\_\_

APPROVED AS TO FORM:  
CITY ATTORNEY  
Douglas T. Sloan

By: \_\_\_\_\_  
Brandon Collet Date  
Deputy

Address:  
City of Fresno  
5607 West Jensen  
Fresno, CA 93706