

ENERGY SERVICES CONTRACT

This **ENERGY SERVICES CONTRACT** (this "Contract") is made and entered into as of 18 April 2017 (the "Contract Effective Date") by and between **OpTerra Energy Services, Inc.**, a Delaware corporation, with California State Contractor's License Number 995037 ("OpTerra Energy Services"), and **Banning Unified School District**, a public school district organized and existing under California law ("District") and together with OpTerra Energy Services the "Parties" and each of District and OpTerra Energy Services a "Party").

CONTRACT RECITALS

WHEREAS, District owns and/or operates certain public educational and administrative facilities specifically described in Attachment A (the "Facilities") and District wishes to reduce the Facilities' energy consumption and costs and improve the Facilities' energy quality and reliability; and

WHEREAS, on October 26, 2015, the District advertised in RFQ for Proposition 39 Energy Planning Services (the "RFP") for a qualified provider of energy services to provide and install energy efficiency projects at the District's Facilities; and

WHEREAS, OpTerra Energy Services is a full-service energy services company with the technical capabilities to provide services to District including identifying supply-side and/or demand-side energy conservation measures ("ECMs"), and related engineering, procurement, construction management, installation, construction and training; and

WHEREAS, the Parties entered into that certain Project Development Agreement, dated as of 29 April 2016 (the "Project Development Agreement"), pursuant to which OpTerra Energy Services agreed to perform an integrated energy assessment and present District with recommendations (the "Recommendations") for the implementation of certain ECMs; and

WHEREAS, in the Recommendations, OpTerra Energy Services identified potential energy and operational savings opportunities at District's Facilities and estimated program costs to implement the recommended ECMs and presented an overall potential energy cost and consumption savings for implementing the ECM recommendations; and

WHEREAS, OpTerra Energy Services delivered the Recommendations, on an arms' length basis, to personnel of District with requisite technical training and experience, for those personnel to make judgments and determinations as to the desired scope of work; and

WHEREAS, District has accepted the recommended ECMs, including the design, installation, and maintenance of energy generating solar projects at the District's Facilities; and

WHEREAS, the District has determined that the anticipated cost to District to implement the recommended ECMs will be less than the anticipated cost to District for thermal, electrical, and other energy, together with anticipated operational, maintenance and other costs, that would have been consumed by District in the absence of the recommended ECMs in compliance with California Government Code §§ 4217.10 *et seq.*; and

WHEREAS, pursuant to California Government Code § 4217.12, District held a regularly scheduled public hearing on April 6, 2017, of which two weeks advance public notice was given regarding this Contract and its subject matter; and

WHEREAS, District has determined that entering into this energy services contract to implement the ECM recommendations is in the best interests of District and that California Government Code § 4217.10 *et seq.* allows District to enter into this Contract; and

WHEREAS, by adoption of Resolution No. 16-17-12 at the above-referenced meeting, the District's Governing Board has made the findings under California Government Code § 4217.12 *et seq.* concerning the cost effectiveness of the ECMs, and has approved this Contract and authorized its execution.

NOW, THEREFORE, District and OpTerra Energy Services hereby agree as follows:

ARTICLE 1. DEFINITIONS

For purposes of this Contract and its Attachments, defined terms will have the following meanings:

“Abnormally Severe Weather Conditions” means typhoons, hurricanes, tornadoes, lightning storms and other climatic and weather conditions that are abnormally severe for the period of time when, and the area where, such storms or conditions occur, in each case occurring at a property, the access roads to a property, or any other location where Work or Professional Services are then being performed. The term “Abnormally Severe Weather Conditions” specifically includes rain, snow or sleet in excess of one hundred fifty percent (150%) of the median level over the preceding ten (10) year period for the local geographic area and time of year in which such rain, snow or sleet accumulates.

“Affiliate” means any Person that directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the Person specified. For purposes of this definition, control of a Person means the power, direct or indirect, to direct or cause the direction of the management and policies of such Person whether by contract or otherwise; ownership of fifty percent (50%) or more of the voting securities of another Person creates a rebuttable presumption that such Person controls such other Person.

“Applicable Law” means any statute, law, treaty, building code, rule, regulation, ordinance, code, enactment, injunction, writ, order, decision, authorization, judgment, decree, protocol, procedure or other legal or regulatory determination or restriction by a court or Governmental Authority of competent jurisdiction, as may be in effect at the time the Work or Professional Services are undertaken.

“Applicable Permits” means all permits, approvals, inspections and certifications required to be issued by any Governmental Authority in connection with the Professional Services or the building, installation and start-up of the Work or as of the Contract Effective Date.

“Application for Payment” means a monthly progress payment as described in Section 8.01 or an invoice for materials stored off-site as described in Section 8.01.

“Arbitral Panel” is defined in Section 17.06(ii).

“Arbitration Rules” is defined in Section 17.06(ii).

“Attachment” means the following attachments to this Contract, each of which is an “Attachment:”

Attachment A	District’s Facilities and Existing Equipment
Attachment B	Project Schedule
Attachment C	Scope of Work
Attachment D	Monitoring Installation Scope of Work
Attachment E	M&V Services
Attachment F	Maintenance Services
Attachment G	Solar Array Layouts

“Business Day” means any calendar day, excluding any District scheduled holiday, on which the District is open for business.

“CEQA” means the California Environmental Quality Act, codified at California Public Resource Code § 21000 *et seq.*, and the applicable state and local guidelines promulgated thereunder.

“Certificate of Final Completion” means the certificate issued by OpTerra Energy Services to District, in accordance with Section 6.03. A Certificate of Final Completion may be executed for an individual subcontract, a specific building, a portion of the Work, or the entire Work.

“Certificate of Substantial Completion” means the certificate issued by OpTerra Energy Services to District, in accordance with Section 6.02. A Certificate of Substantial Completion may be executed for an individual subcontract, a specific building, a portion of the Work, or the entire Work.

“Change” means any addition to, deletion from, suspension of, or other modification to the quality, function, or intent of the Work or Professional Services.

“Change in Law” means any of the following events or circumstances occurring after the Contract Effective Date:

(i) an amendment, modification, interpretation, construction, enforcement standard, supplement or other change in or repeal of an existing Applicable Law; or (ii) an enactment or making of a new Applicable Law (excluding a change in any income or franchise tax law, worker’s compensation, payroll or withholding tax law).

“Change Order” means a written document, signed by both OpTerra Energy Services and District, authorizing OpTerra Energy Services to perform a Change. The Change Order modifies the Scope of Work and should identify: (i) the applicable Change; (ii) any additional compensation to be paid to OpTerra Energy Services to perform such Change; and (iii) any extension of time to complete the Project.

“Construction” means any and all Work to be performed that involves construction, alteration, repair, installation or removal of equipment, addition to, subtraction from, improving, moving, wrecking or demolishing any building, parking facility, excavation, or other structure or improvement, or any part thereof.

“Construction Documents” means the final designs, drawings, specifications and submittals that are submitted to DSA and used for Construction, and any Change Orders affecting those documents, that describe the technical requirements for the installation of all the materials and equipment pursuant to this Contract.

“Construction Period” means the period beginning with the first day of the month in which material or equipment is first installed at the Facilities and continuing until the M&V Commencement Date.

“Contract” is defined in the Preamble, and includes all Attachments hereto (all of which are incorporated herein by this reference), as well as all Change Orders, amendments, restatements, supplements and other modifications hereto.

“Contract Amount” means Seven Million Eight Hundred Seven Thousand Three Hundred Sixty Three Dollars (\$7,807,363.00), which is inclusive of: (1) the assessment fee for the Recommendations and the mobilization payment, as set forth in Section 8.01, (2) all DSA permitting, bonding, Project Contingency Amount (as defined below), legal and consultant fees, and ADA compliance described in Attachment C. The Contract Amount is exclusive of fees for OpTerra Energy Services’s Maintenance Services and M&V Services (defined below).

“Contract Bonds” is defined in Section 11.04.

“Contract Effective Date” is defined in the Preamble.

“CREBs” means California Renewable Energy Bonds.

“CREBs Bond Allocation” means Seven Million Nine Hundred and Sixty Thousand (\$7,960,000) and includes the Contract Amount and the CREBs cost of issuance.

“Delay” means any circumstances involving delay, disruption, hindrance or interference affecting the time of performance of the Work or the Professional Services.

“Dispute” is defined in Section 17.024.

“District” is defined in the Preamble.

“District Persons” means District, its agents, employees, subcontractors, architects, general contractors, lease/leaseback contractors or other Persons acting on behalf of District or for whom District is responsible.

“District’s Project Manager” means a single-point representative authorized to act on District’s behalf with respect to Project construction and/or equipment installation. District may from time to time change the designated representative and will provide written notice to OpTerra Energy Services of such change.

“DOE Guidelines” is defined in Section 12.01.

“DSA” means the California Division of the State Architect.

“ECM” is defined in the Recitals.

“Emergency” has the meaning set forth in California Public Contract Code §1102.

“Energy Delivery Point” means, for each Generating Facility, the point at which Utility meter energy is being delivered, as designated in the Interconnection Agreement.

“Energy Usage Data” is defined in Section 2.06.

“Event of Default” is defined in ARTICLE 14.

“Excusable Event” means an act, event, occurrence, condition or cause which negatively affects the project schedule or the Work and which is beyond the control of OpTerra Energy Services, including, but not limited to, the following: (i) any act, or failure to act where the District was obligated to act under this Contract, caused by any District Person; (ii) Delays caused by Changes and/or modifications to the Scope of Work required by a Governmental Authority or the Utility, but not a failure or delay caused by the failure to act of OpTerra Energy Services (where OpTerra Energy Services was obligated to act under this Contract); (iii) changes in the design, scope or schedule of the Work required by any Governmental Authority, the Utility or District Person after commencement of the Work; (iv) undisclosed or unforeseen conditions encountered at the Project Location, including discovery or existence of Hazardous Substances; (v) the failure by District to obtain, or delay in obtaining,

approval of any Governmental Authority or the Utility for design and installation of any portion of the Work, including any further or subsequent approval required with respect to any Change, that District was obligated to obtain, but not a failure or delay caused by the failure to act of OpTerra Energy Services (where OpTerra Energy Services was obligated to act under this Contract); (vi) information provided to OpTerra Energy Services by any District Person or Utility is later found to be inaccurate or incomplete; (vii) any Change in Law that negatively impacts the Project; (viii) Delay caused by pending arbitration related to this Contract; or (ix) Force Majeure.

“Facilities” is defined in the Recitals.

“Final Completion” means the stage in the progress of the Work at which the Construction Work as identified in the Scope of Work, or a designated portion thereof, has been completed and commissioned, including completion of all Punch List items, completion of all required training, and delivery to District of the final documentation (as-built drawings, operation and maintenance manuals, warranty documentation and final DSA submittals). Administrative closeout by the DSA is a condition to achieving Final Completion only for those parts of the Project requiring DSA approval, and then only if the failure to obtain DSA administrative closeout is due to the fault of OpTerra Energy Services.

“Force Majeure” means acts or events that are beyond the reasonable control of the affected Party and not caused by the negligence or fault of the other Party, which have a detrimental impact on the affected Party’s ability to make reasonable progress in fulfilling its obligations, which impact cannot be mitigated by the affected Party’s exercise of reasonable efforts, including but not limited to any of the following: (i) acts of God; (ii) acts of the public enemy or terrorist acts; (iii) relocation or construction of transmission facilities or the shutdown of such facilities for the purpose of necessary repairs; (iv) work by local Utility that interferes with the Project; (v) flood, earthquake, tornado, storm, fire, explosions, lightning, landslide or similar cataclysmic occurrence; (vi) theft, sabotage, vandalism, riots or civil disobedience; (vii) labor disputes or strikes; (viii) labor or material shortages, delay in manufacturing and deliveries of equipment not caused by OpTerra Energy Services failing to order equipment on time; (ix) restraint by court order or Governmental Authority (whether valid or invalid); (x) inability to obtain or keep in force any Applicable Permit; (xi) Abnormally Severe Weather Conditions; (xii) any action by a Governmental Authority or the Utility that prevents or inhibits the Parties from carrying out their respective obligations under this Contract; or (xiii) any Utility power outage at any Facility. Economic hardship shall not constitute an event of Force Majeure under this Contract.

“Governmental Authority” means any federal, state, regional, town, county, city, municipal or local government agency, department or regulatory body (including DSA) having jurisdiction under Applicable Law over the matter in question.

“Greenhouse Gas” is defined in Section 12.01.

“Hazardous Substances” means (i) any hazardous, toxic, or dangerous wastes, substances, chemicals, constituents, contaminants, pollutants, and materials and any other carcinogenic, liquids, corrosive, ignitable, radioactive, reactive, toxic, or otherwise hazardous substances or mixtures (whether solids, liquids, gases) now or at any time subject to regulation, control, remediation, or otherwise addressed under Applicable Laws; (ii) any “hazardous substance” as defined by the Resource, Conservation and Recovery Act of 1976 (42 U.S.C. §6901 *et seq.*), as amended, and regulations promulgated thereunder; (iii) any “hazardous, toxic or dangerous waste, substance or material” specifically defined as such in 42 U.S.C. §9601 *et seq.*, as amended and regulations promulgated thereunder; and (iv) any hazardous, toxic or dangerous waste, substance, or material as defined in any so-called “superfund” or “superlien” law.

“Incentive Funds” is defined in Section 8.06.

“Inspector of Record” means the project inspector required by the DSA and hired by the District, with notification to OpTerra Energy Services, to inspect and make necessary approvals of the Project.

“Installation” means the setting up, construction, and placement of any equipment or materials in the manner it will be operated, in accordance with the Scope of Work and in accordance with all Applicable Laws.

“Instruments of Service” is defined in Section 10.01(c).

“Interconnection Agreement” means the Interconnection Agreement to be entered into between District and the Utility with respect to the Generating Facilities.

“Interconnection Facilities” is defined in Section 16.02.

“Interest” means interest calculated at the lesser of (i) the prime rate plus two percent (2%) or (ii) the maximum rate permitted by Applicable Law. The “prime rate” will be the “Prime Rate” of interest per annum for domestic banks as published in The Wall Street Journal in the “Money Rates” section.

“Losses” is defined in Section 11.01.

"M&V Commencement Date" means the first day of the month immediately following the later of (i) OpTerra Energy Services' receipt of the fully signed Certificate of Final Completion, and (ii) OpTerra Energy Services' receipt of the final Contract Amount.

"M&V Services" (if any) are defined in Attachment E.

"Maintenance Services" (if any) are defined in Attachment F.

"Measurement Period" means each one-year period following the M&V Commencement Date.

"NEC" means the National Electric Code.

"Notice to Proceed" is defined in Section 2.05.

"OpTerra Energy Services" is defined in the Preamble.

"OpTerra Energy Services Warranty" is defined in Article 9.

"Party" and **"Parties"** are defined in the Preamble.

"Person" means any natural person, corporation, general partnership, limited partnership, limited liability company, proprietorship, other business organization, trust, union, association or Governmental Authority.

"Professional Services" means professional services (such as Maintenance Services and M&V Services, if any) provided by OpTerra Energy Services to District under this Contract.

"Project" means the entirety of Work to be performed by OpTerra Energy Services pursuant to the Scope of Work, and any Change Orders.

"Project Location" means the area or areas where the Project materials and equipment and any other energy related equipment, as described in the Scope of Work, are installed, and the general area where the Work is performed.

"Project Manager" is defined in Section 3.07.

"Project Contingency Amount" means a percentage of the Contract Amount equal to Three Hundred Seventy-Two Thousand Dollars (\$372,000.00) to allow for unforeseeable conditions encountered during the course of the Work.

"Master Project Schedule" is defined in Section 2.04.

"Punch List" means, with respect to any portion of the Work, a list of minor corrective items which need to be completed or corrected in order to complete such portion of the Work, but do not impair District's ability to beneficially operate and utilize such portion of the Work.

"Recommendations" is defined in the Recitals.

"Retained Items" is defined in Section 10.02.

"Retention" is defined in Section 8.03.

"Schedule of Values" is defined in Section 8.01.

"Scope of Work" means the Work set forth in Attachment C, as modified by any Change Order.

"Substantial Completion" means the stage in the progress of the Work at which the Work, or a designated portion thereof, is sufficiently complete, in conformance with the Scope of Work, the Construction Documents and any Change Orders, so that District can take beneficial use thereof.

"Surety" means the surety supplying the Contract Bonds, which must be an "admitted surety insurer," as defined by California Code of Civil Procedure §995.120, authorized to do business in the State of California, and reasonably satisfactory to District.

"Utility" means Southern California Edison and Banning Electric Utility, as applicable.

"Work" means the Work to be done by OpTerra Energy Services pursuant to the Scope of Work, subject to any Change Orders.

ARTICLE 2. TERM; PERFORMANCE OF THE WORK

Section 2.01 Contract Term. The term of this Contract commences on the Contract Effective Date and ends on the last day on which Professional Services are provided, unless terminated earlier as provided in this Contract, and except for provisions that by their terms survive the termination of this Contract.

Section 2.02 Performance of Work.

- (a) The Work consists of Generating Facilities. OpTerra Energy Services shall furnish to District, for a total price equal to the Contract Amount, the engineering, design, procurement, construction management, installation, construction, commissioning, and training, of the Generating Facilities, as set forth in this Contract.
- (b) The Work to be performed hereunder will be provided in accordance with the terms of this Contract and the applicable standard of care. OpTerra Energy Services will perform its obligations under this Contract (i) using the degree of skill and care that is required by current, good and sound professional procedures and practices, and (ii) in conformance with (x) generally accepted professional standards prevailing at the time the Work is performed, (y) the covenants, terms and conditions of this Contract, and (z) applicable laws, codes, rules and regulations.
- (c) OpTerra Energy Services represents and warrants that (i) it is fully experienced in projects of the nature and scope of the Work and Professional Services, and (ii) it is properly qualified, licensed and equipped to supply and perform the Work and Professional Services. OpTerra Energy Services and its employees, agents, and subcontractors, shall secure and maintain in force, without cost to the District, all licenses as are required by law for the furnishing of materials, supplies, or services listed in this Contract.
- (d) The Work completed herein must meet the approval of District, such approval to be granted or denied in accordance with the requirements set forth in this Contract, and will be subject to District's general right of inspection and supervision to secure the satisfactory completion thereof in accordance with this Contract.

Section 2.03 Scope of Work.

- (a) The Scope of Work may not exceed that set forth in Attachments C and D, except pursuant to a Change Order.
- (b) The Professional Services may not exceed those set forth in Attachments E and F, except pursuant to a Change Order.

Section 2.04 Project Schedule. The preliminary, estimated project schedule is attached hereto as Attachment B. Within thirty (30) days following receipt of the Notice to Proceed, OpTerra Energy Services shall develop, with input from District, a master project schedule using Microsoft Project® (Master "Project Schedule"). The Master Project Schedule, once agreed to by both Parties, shall replace the preliminary, estimated schedule as Attachment B to this Contract and incorporated by reference. The Master Project Schedule shall include a date for final completion of the Work (the "Final Completion Date") as further defined in Section 6.04. OpTerra Energy Services will establish a weekly construction meeting at which time the Work of the previous week will be reviewed and a two-week look ahead will be coordinated. The project schedule will be updated monthly.

Section 2.05 Notice to Proceed.

- (a) The following are conditions precedent to District's issuing to OpTerra Energy Services a written Notice to Proceed ("Notice to Proceed"):
 - (i) District must have closed the financing referenced in Section 2.07;
 - (ii) District must have registered the Project with the California Department of Industrial Relations, using Form PWC-100;
 - (iii) OpTerra Energy Services must have submitted, and District must have approved, the endorsement(s) of insurance required by this Contract.
 - (iv) OpTerra Energy Services must have submitted, and District must have approved, the Contract Bonds; and
 - (v) OpTerra Energy Services must have completed and submitted the following documents, as required by District: Prevailing Wage Certification, Workers' Compensation Certification, Fingerprinting / Criminal Background Investigation Certification, Drug-Free Workplace / Tobacco-Free Environment Certification.
- (b) OpTerra Energy Services will begin Work within thirty (30) calendar days after OpTerra Energy Services' receipt of the Notice to Proceed. If District unreasonably fails to issue the Notice to Proceed within twenty (20) calendar days after the financing referenced in Section 2.07 has closed, OpTerra Energy Services will be entitled to an equitable extension of time and/or an equitable adjustment in the Contract Amount as a result of such delay.

Section 2.06 District's Energy and Operational Records and Data. If OpTerra Energy Services requests, District will provide to OpTerra Energy Services, within thirty (30) calendar days after such request, District's Energy Usage Data for the twelve (12) months preceding the Contract Effective Date, and will make commercially reasonable efforts to provide the Energy Usage Data for the thirty-six (36) months preceding the Contract Effective Date. "Energy Usage Data" means all of District's records and data, to the extent such documents are in District's possession or readily obtainable, concerning energy usage, energy-related maintenance, and other related costs for the Facilities, and including, without limitation, utility records; occupancy information; descriptions of any past, present or anticipated

changes in a building's structure or its heating, cooling, lighting or other systems or energy requirements; descriptions of all energy consuming or saving equipment used in the Facilities; applicable building drawings, specifications, existing AutoCAD files, operation and maintenance manuals, and as-builts; bills and records relating to operation and maintenance of systems and equipment within the Facilities, and a description of operation and management procedures currently utilized. District agrees that OpTerra Energy Services may reasonably rely on the foregoing data as being accurate. If OpTerra Energy Services requests, District will also provide to OpTerra Energy Services, within thirty (30) calendar days after such request, any prior energy audits of the Facilities, and copies of District's financial statements and records related to energy usage and operational costs for said time period at the Facilities, to the extent such documents are in District's possession or readily obtainable, and will authorize its agents and employees to provide and freely discuss such records and to make themselves available for consultations and discussions with authorized representatives, employees, subcontractors, and agents of OpTerra Energy Services.

Section 2.07 Funding Contingency. It is acknowledged and agreed by the Parties that the continued existence of this Contract is expressly contingent upon District determining that funding for the Work, including any and all funding through the use of Clean Renewable Energy Bonds ("CREBs"), is available that will allow the District to make the payments to OpTerra Energy Services required by this Contract. Upon execution of this Contract, District will have sixty (60) calendar days to make this determination. If the funding is not determined within this time, for any reason, either Party may by written notice to the other, subject to extension by written consent of both Parties, declare this Contract to be null and void; and the Contract will be null and void as of the other Party's receipt of this notice. It is acknowledged and agreed that OpTerra Energy Services will have no obligation to commence performance of the Work unless and until the funding has been determined.

Section 2.08 Proof of Financial Arrangements. Prior to the commencement of the Work, District will provide OpTerra Energy Services proof that financial arrangements have been made to fulfill District's obligations under this Contract. District's requirement to furnish such proof to OpTerra Energy Services is a condition precedent to commencement of the Work. After commencement of the Work, OpTerra Energy Services may request such proof if a Change in the Work materially changes the Contract Amount. District will furnish such proof as a condition precedent to commencement or continuation of the Work or the portion of the Work affected by a material change. If District fails to provide OpTerra Energy Services with such proof within ten (10) calendar days of receiving a demand from OpTerra Energy Services, OpTerra Energy Services will be entitled to suspend its performance under this Contract until such proof is received.

Section 2.09 District's Legal Fees. Within sixty (60) calendar days following the receipt of invoice and written documentation demonstrating payment of such costs from District, Seller shall reimburse District for District's reasonable and documented attorney's fees and third party (Sage Renewables) review costs incurred in connection with the negotiation of this Contract, up to a maximum amount of Eighty Thousand Dollars (\$80,000).

ARTICLE 3. PROJECT IMPLEMENTATION - GENERAL

Section 3.01 Registrations, Permits and Approvals.

- (a) District will cooperate fully with and assist OpTerra Energy Services in obtaining all Applicable Permits required under this Contract.
- (b) District will be responsible for filing notices of categorical exemption in compliance with CEQA and paying any costs required for CEQA approval.
- (c) Except as set forth in Section 3.02 below, OpTerra Energy Services is responsible for obtaining Applicable Permits, including DSA approval, and for obtaining and paying for all other permits or approvals that may be required, including annual operating permits, if any.

Section 3.02 DSA Inspections and Approval. OpTerra Energy Services is responsible for obtaining DSA approval. OpTerra Energy Services shall have the right to approve all inspection companies, including the Inspector of Record, required in connection with the approval of the Generating Facilities by the DSA. District shall contract directly with and pay for DSA inspectors but, following Final Completion, OpTerra Energy Services shall be responsible for reimbursing District for payments made pursuant to any such contract up to a maximum amount of One Hundred Fifty-Four Thousand Dollars (\$154,000), within sixty (60) days of receipt of invoice and written documentation of payment of such costs from District. The rights and obligations of District and OpTerra Energy Services under this Section 3.02 shall be subject to the following guidelines:

- (a) District shall use an agreement approved by OpTerra Energy Services in its reasonable discretion; provided that at a minimum such agreement shall include, where requested by OpTerra Energy Services, provisions granting OpTerra Energy Services the right to (a) coordinate with and participate in the management of the entire scope of services to be performed by such inspector, (b) communicate directly with such inspectors and, where necessary, (c) direct the inspector pursuant to such agreement; and
- (b) District shall fully cooperate with OpTerra Energy Services to complete and submit all paperwork and forms required for DSA approval.

Section 3.03 Coordination. District and OpTerra Energy Services shall work together to coordinate their respective activities. OpTerra Energy Services shall be responsible for ensuring that its subcontractors and suppliers cooperate with District's Project Manager.

Section 3.04 Project Meetings/Status Updates. During the course of the Work, OpTerra Energy Services will meet with District: (1) on a weekly basis during the Design Phase and Construction Phase, and (2) on a regular basis during all other time periods, as agreed to by the Parties and as outlined in Section 2.04, to report on the general status and progress of the Work.

Section 3.05 Project Location Access. District hereby grants to OpTerra Energy Services, without cost to OpTerra Energy Services, all rights of ingress and egress at the Project Location, necessary for OpTerra Energy Services to perform the Work and provide all services contemplated by this Contract. OpTerra Energy Services will provide twenty-four-hour advance notice to District for access to any District Facilities. All persons entering the Project Location, including District and its employees and agents, must follow OpTerra Energy Services' safety procedures as well as the District's safety and security requirements.

Section 3.06 Consents; Cooperation. Whenever a Party's consent, approval, satisfaction, or determination will be required or permitted under this Contract, and this Contract does not expressly state that the Party may act in its sole discretion, such consent, approval, satisfaction, or determination will not be unreasonably withheld, qualified, conditioned, or delayed, whether or not such a "reasonableness" standard is expressly stated in this Contract. Whenever a Party's cooperation is required for the other Party to carry out its obligations hereunder, each Party agrees that it will act in good faith and reasonably in so cooperating with the other Party or its designated representatives or assignees or subcontractors. Each Party will furnish decisions, information, and approvals required by this Contract in a timely manner so as not to delay the other Party's performance under this Contract.

Section 3.07 Project Manager. District will assign a project manager for the Work performed under this Contract ("Project Manager"). The Project Manager is authorized to give OpTerra Energy Services instructions and authorizations and issue written approvals and the Notice to Proceed on behalf of District. District reserves the right to designate a different Project Manager at any time. District shall provide forty-eight (48) hours' advance written notice to OpTerra Energy Services if District designates a different Project Manager. Any task, including, but not limited to, reviews or approvals that District may perform pursuant to this Contract may be performed by the Project Manager, unless that task requires it be approved by the District's Board. The Project Manager will render decisions in a timely manner with regard to any documents submitted by OpTerra Energy Services and to other requests made by OpTerra Energy Services in order to avoid delay in the orderly and sequential progress of OpTerra Energy Services' design services, Project construction and/or equipment installation.

Section 3.08 Independent Contractor. The Parties hereto agree that OpTerra Energy Services, and any agents and employees of OpTerra Energy Services, its subcontractors and/or consultants, are acting in an independent capacity in the performance of this Contract, and not as public officials, officers, employees, consultants, or agents of District for purposes of conflict of interest laws or any other Applicable Law.

ARTICLE 4. FINAL DESIGN PHASE – CONSTRUCTION DOCUMENTS / EQUIPMENT PROCUREMENT

Section 4.01 General Provisions.

- (a) After receipt of the Notice to Proceed, OpTerra Energy Services will proceed with the preparation of any necessary designs, drawings, and specifications related to the Scope of Work.
- (b) After completion of the design phase and approval of the final plans and specifications by DSA and District, OpTerra Energy Services will order the equipment identified in the Scope of Work, and any other necessary materials and supplies in order to meet the project schedule. Delay by DSA in approving OpTerra Energy Services' Construction Documents for reasons attributable to District, such as open A-numbers, that prevent OpTerra Energy Services from proceeding with Construction, will constitute a valid basis for a Change Order. OpTerra Energy Services will be compensated, and receive an extension of time for performance, if necessary, to the extent District approves in the relevant Change Order. Delay by DSA in approving OpTerra Energy Services' Construction Documents for reasons attributable to OpTerra Energy Services, such as failure to timely submit applications or documents to DSA and other Governmental Authorities or failure to meet the applicable standards of such Governmental Authorities, will not constitute a valid basis for a Change Order.
- (c) OpTerra Energy Services hereby acknowledges that the DSA and the Inspector of Record have authority to approve and/or stop Work if the Work does not comply with the Construction Documents, the requirements of Title 24 of the California Code of Regulations, and Applicable Law. OpTerra Energy Services shall be liable for any Delay and extra work to the extent caused by its non-compliant Work. OpTerra Energy Services shall not be liable for Delay to the extent caused by District, the Inspector of Record or the DSA, provided that OpTerra Energy Services' submittals to DSA and other Governmental Authorities comply with the applicable standards of such Governmental Authorities.
- (d) Within fifteen (15) Business Days after OpTerra Energy Services' request, District will:

- (i) furnish all surveys or other information in District's possession that describe the physical characteristics, legal limitations, and utility locations in and around the Project Location;
 - (ii) disclose any prior environmental review documentation and all information in its possession concerning subsurface conditions, including without limitation the existence of any known Hazardous Substances, in or around the general area of the Project Location;
 - (iii) supply OpTerra Energy Services with all relevant information in District's possession, including any as-built drawings and photographs, of prior construction undertaken at the Project Location;
 - (iv) obtain any and all title reports for those Project Locations reasonably requested by OpTerra Energy Services.
- (e) All information furnished pursuant to this Section 4.01 will be supplied at District's expense. District provides such information pursuant to this Section 4.01 "as is" and does not guarantee its accuracy. However, absent any inaccuracies or incomplete information that OpTerra Energy Services reasonably should have discovered, OpTerra Energy Services will be entitled to rely upon the information in its performance of the Work. If OpTerra Energy Services is adversely affected by the District's failure to provide, or delay in providing, the information specified in Section 4.01(d), OpTerra Energy Services will be entitled to an equitable extension of time and/or an equitable adjustment in the Contract Amount.
- (f) If any information disclosed under this Section 4.01 gives rise to a Change to the Work or an Excusable Event, OpTerra Energy Services will notify District. The Parties will meet and confer with respect to those Changes, and if the Parties agree, OpTerra Energy Services will be entitled to an equitable extension of time and/or an equitable adjustment in the Contract Amount. If the Parties, however, are unable to agree on whether District's disclosed information gives rise to a Change to the Work or an Excusable Event, those disputes are to be resolved in accordance with Section 16.01.
- (g) OpTerra Energy Services contemplates that it will not encounter any Hazardous Substances at the Project Location, except what has been disclosed as a pre-existing condition by District prior to the execution of this Contract. However, any disclosure of Hazardous Substances that will affect the performance of the Work after the execution of this Contract will constitute a valid basis for a Change Order.

Section 4.02 Review of Construction Documents. OpTerra Energy Services will prepare and submit all drawings and specifications to District for review pursuant to the Master Project Schedule. District will review the documents and provide any comments in writing to OpTerra Energy Services within fifteen (15) Business Days after receipt of the documents. OpTerra Energy Services will incorporate appropriate District comments into the applicable drawings and specifications. OpTerra Energy Services reserves the right to issue the drawings and specifications in phases to allow Construction to be performed in phases.

Section 4.03 Permits. The respective obligations of the Parties in obtaining permits are as specified in Section 3.01. District and OpTerra Energy Services will reasonably agree to any minor, nonmaterial changes to the designs, drawings, and specifications required by any Governmental Authority provided that such changes do not increase the Contract Amount or the time required to achieve Final Completion.

Section 4.04 Changes During Final Design Phase. If during the design phase the Project Manager requests Changes and/or modifications to the Work and/or an Excusable Event occurs, OpTerra Energy Services will be entitled to an equitable extension of time and/or an equitable adjustment in the Contract Amount. Valid bases for additional compensation and/or time extension include, but are not limited to: (i) the Project Manager authorizes or requests changes and/or modifications to the Project Scope of Work during the Project design phase; (ii) any Banning USD Person causes delays during OpTerra Energy Services' design work; (iii) the discovery of subsurface or other site conditions that were not reasonably anticipated following reasonable due diligence by OpTerra Energy Services as of the Contract Effective Date; (iv) the discovery of Hazardous Substances at or impacting the Project Location; (v) changes to the Scope of Work required to obtain Applicable Permits; (vi) damage to any equipment or other Work installed by OpTerra Energy Services caused by the act or omission of any District Person; (vii) changes and/or modifications to Scope of Work ordered by any Governmental Authority; and (viii) any other condition that would not have been anticipated by OpTerra Energy Services, following reasonable due diligence, that modifies and/or changes the Scope of Work, that increases the agreed-upon Contract Amount or increases the time needed to complete the Work.

ARTICLE 5. CONSTRUCTION PHASE

Section 5.01 General Provisions. Upon securing the requisite Applicable Permits pursuant to Section 3.01, and completion of Construction Documents, OpTerra Energy Services will commence the construction of the Project in accordance with the Construction Documents. The construction will be performed in accordance with all Applicable Laws and Applicable Permits, by OpTerra Energy Services and/or one or more licensed subcontractors qualified to perform the Work.

Section 5.02 OpTerra Energy Services' Responsibilities during Construction Phase.

- (a) As an independent contractor to District, OpTerra Energy Services will provide, or cause to be provided by its subcontractor(s), all labor, materials, equipment, tools, transportation, and other facilities and services necessary for the proper execution, construction, and completion of the Work. OpTerra Energy Services will purchase in advance all necessary materials and supplies for the construction of the Project in order to assure the prompt and timely delivery of the completed Work pursuant to the project schedule. OpTerra Energy Services will also be responsible for all means, methods, techniques, sequences, and procedures required by the Construction Documents.
- (b) OpTerra Energy Services will make commercially reasonable efforts to coordinate construction activities and perform the Work to minimize disruption to District's operations at the Project Location. OpTerra Energy Services will provide at least thirty (30) calendar days' written notice to District of any planned power outages that will be necessary for the construction. OpTerra Energy Services will cooperate with District in scheduling such outages, and District agrees to provide its reasonable approval of any scheduled outage.
- (c) OpTerra Energy Services will initiate and maintain a safety program in connection with its Construction of the Project. OpTerra Energy Services will take reasonable precautions for the safety of, and will provide reasonable protection to prevent damage, injury, or loss to: (i) employees of OpTerra Energy Services and subcontractors performing Work under this Contract; (ii) OpTerra Energy Services' property and other materials to be incorporated into the Project, under the care, custody, and control of OpTerra Energy Services or its subcontractors; and (iii) other property at or adjacent to the Project Location not designated for removal, relocation, or replacement during the course of construction. OpTerra Energy Services will not be responsible for District's employees' safety unless OpTerra Energy Services' negligence in the performance of its Work is the proximate cause of the employee's injury.
- (d) OpTerra Energy Services will provide notice to District of scheduled test(s) of installed equipment, if any, and District and/or its designees will have the right to be present at any or all such tests conducted by OpTerra Energy Services, any subcontractor, and/or manufacturers of the equipment.
- (e) Pursuant to California Labor Code §6705, if the Work is a public work involving an estimated expenditure in excess of \$25,000 and includes the excavation of any trench or trenches five (5) feet or more in depth, OpTerra Energy Services will, in advance of excavation, submit to District and/or a registered civil or structural engineer, employed by District, to whom authority to accept has been delegated, a detailed plan showing the design of shoring, bracing, sloping, or other provisions to be made for worker protection from the hazard of caving ground during the excavation of such trench or trenches, which provisions will be no less effective than the current and applicable CAL-OSHA Construction Safety Orders. If such plan varies from the shoring system standards, the plan shall be prepared by a registered civil or structural engineer. No excavation of such trench or trenches may be commenced until this detailed plan has been accepted by District or by the person to whom authority to accept has been delegated by District. Pursuant to California Labor Code §6705, nothing in this Section 5.02(e) imposes tort liability on District or any of its employees.
- (f) Pursuant to California Public Contract Code §7104, if the Work is a public work involving digging trenches or other excavations that extend deeper than four (4) feet below the surface of the ground:
 - (i) OpTerra Energy Services will promptly, and before the following conditions are disturbed, notify District, in writing, of any:
 - 1) Material that OpTerra Energy Services believes may be material that is hazardous waste, as defined in California Health and Safety Code §25117, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with provisions of existing law;
 - 2) Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to OpTerra Energy Services before the Contract Effective Date;
 - 3) Unknown physical conditions at the site of any unusual nature, different materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract.
 - (ii) District will promptly investigate the conditions and, if it finds that the conditions do materially so differ or do involve hazardous waste, and cause a decrease or increase in OpTerra Energy Services' cost of, or the time required for, performance of any part of the Work will issue a Change Order under the procedures described in this Contract.
 - (iii) If a dispute arises between District and OpTerra Energy Services, whether the conditions materially differ, or involve hazardous waste, or cause a decrease or increase in OpTerra Energy Services' cost of, or time required for, performance of any part of the Work, OpTerra Energy Services will not be excused from any scheduled completion date provided for by this Contract but will proceed with all Work to be performed under this Contract. OpTerra Energy Services will retain any and all rights

provided either by contract or by law which pertain to the resolution of disputes and protests between the Parties.

- (g) Pursuant to California Education Code §32244, no lead-based paint, lead plumbing and solders, or other potential sources of lead contamination will be utilized on this Project. District acknowledges and agrees that actions to abate existing risk factors for lead are expressly excluded from the Scope of Work, and OpTerra Energy Services will have no obligation to take any such abatement action.
- (h) OpTerra Energy Services shall at all times enforce strict discipline and good order among its employees and the employees of its subcontractors and shall not employ any unfit person or anyone not skilled in work assigned to him or her. Any person in the employ of OpTerra Energy Services or a subcontractor whom the District may reasonably deem incompetent or unfit shall be dismissed from the Project Location and shall not again be employed at any Project Location without written consent from District.
- (i) OpTerra Energy Services shall perform, at its own cost and expense and without reimbursement from District, any work necessary to correct errors or omissions which are caused by OpTerra Energy Services' failure to comply with the Contract requirements and the standard of care required in this Contract, as reasonably determined by District.
- (j) No substitutions of material from those specified in Construction Documents shall be made without the prior written approval of the District, which shall not be unreasonably withheld.
- (k) OpTerra Energy Services shall provide competent supervision of personnel employed on the Project Location, use of equipment, and quality of workmanship.
- (l) Debris shall be removed from the Project Location in a timely manner by OpTerra Energy Services. The Project Location shall be in order at all times when Work is not actually being performed and shall be maintained in a reasonably clean condition.
- (m) OpTerra Energy Services shall erect and properly maintain at all times, as required by conditions and progress of the Work, all necessary safeguards, signs, barriers, lights, and security persons for protection of workers and the public, and shall post danger signs warning against hazards created by the Work. In an emergency affecting life and safety of life or of Work or of adjoining property, OpTerra Energy Services, without special instruction or authorization from District, is permitted to act at its discretion to prevent such threatened loss or injury.
- (n) OpTerra Energy Services has examined the Facilities to determine the general condition of the Project Locations and their accessibility for materials, workers and utilities. Notwithstanding the foregoing, should OpTerra Energy Services discover any latent or undisclosed conditions which will materially affect the performance of the Work hereunder, OpTerra Energy Services shall immediately inform the Project Manager of such fact in writing and shall not proceed with the affected portion of the Work until written instructions are received from the Project Manager.

Section 5.03 District's Responsibilities during Construction Phase.

- (a) Inspection and acceptance of the Work shall be performed by the Inspector of Record and District's Project Manager or designee.
- (b) District will use commercially reasonable efforts to provide a temporary staging area for OpTerra Energy Services, or its subcontractors, to use during Construction to store and assemble equipment for completion of the Work, if needed. District will use commercially reasonable efforts to provide sufficient space at the Facilities for the performance of the Work and the storage, installation, and operation of any equipment and materials. OpTerra Energy Services acknowledges that District has limited security available and OpTerra Energy Services will take commercially reasonable steps to protect any such equipment and materials from harm, theft and misuse. District will provide access to the Facilities for OpTerra Energy Services and subcontractors to perform the Work during regular business hours, or such other reasonable hours as may be requested by OpTerra Energy Services and acceptable to District. District will also either provide a set or sets of keys to OpTerra Energy Services and its subcontractors (signed out per District policy) or provide a readily available security escort to unlock and lock doors. District will not unreasonably restrict OpTerra Energy Services' access to Facilities to make emergency repairs or corrections as OpTerra Energy Services may determine are needed.
- (c) District will maintain the portion of the Project Location that is not directly affected by OpTerra Energy Services' Work. To the extent within the control of the District, the District will keep the designated Project Location and staging area for the Project free of obstructions, waste, and materials.
- (d) District will obtain any environmental clearance required under CEQA, prior to scheduled construction start date.
- (e) OpTerra will prepare the Project Location for construction, including, but not limited to, clearance of all above and below ground obstructions, such as vegetation and utilities, except the District shall be responsible for

removing any buildings, appurtenances, and equipment that could interfere with performance of the Work by OpTerra Energy Services. Subsurface conditions and obstacles (buried pipe, utilities, etc.) that are not otherwise previously and accurately documented by District and such documentation made available to OpTerra Energy Services are the responsibility of District. If OpTerra Energy Services encounters such unforeseen conditions in the performance of the Work, OpTerra Energy Services will immediately notify the Project Manager and will not proceed with Construction until given notice to do so. If appropriate, OpTerra Energy Services shall be entitled to an equitable extension of time and/or an equitable adjustment in the Contract Amount.

- (f) District will remove any Hazardous Substances either known to District prior to the commencement of the Work or encountered by OpTerra Energy Services during the construction of the Project, if necessary in order for the Work to progress safely, so long as the Hazardous Substances were not brought to the Project Location or knowingly released by OpTerra Energy Services. OpTerra Energy Services will respond to the discovery of Hazardous Substances at or around the Project Location during the course of OpTerra Energy Services' construction in accordance with Section 5.06.
- (g) District will collaborate with OpTerra Energy Services to coordinate the Work to be performed by OpTerra Energy Services with work being performed by the District at or around the Project Location.
- (h) District will coordinate the Interconnection Facilities work, if any, which will be performed by the Utility.
- (i) District will allow, and will cause District Persons to allow, OpTerra Energy Services and its subcontractors access to and reasonable use of necessary quantities of District's water and other utilities, including electrical power, as needed for the construction of the Work, at no cost to OpTerra Energy Services.
- (j) District will provide, and will cause District Persons to provide, OpTerra Energy Services and/or its subcontractors with reasonable access to the Project Location to perform the Work, including without limitation and at no extra cost to OpTerra Energy Services, access to perform Work on Saturdays, Sundays, legal holidays, and non-regular working hours.
- (k) District will also do the following:
 - (i) Attend the regularly scheduled progress meetings. Participate as needed regarding scheduling of the Work.
 - (ii) When requested by OpTerra Energy Services, participate in the job inspection walk-through with OpTerra Energy Services to determine Substantial Completion of major equipment, and, if District so determines, will sign the Certificate(s) of Substantial Completion.
 - (iii) Perform a final walk-through of the Project and, upon satisfaction of any outstanding items on the Punch List, and receipt of the operation and maintenance manuals and as-built drawings, sign the Certificate of Final Completion for the related Work.
 - (iv) Upon the completion of the entire Scope of Work listed in Attachment B, including training, if any, and submission of close-out documents, sign a Certificate of Final Completion for the entire Project.

Section 5.04 Changes. Changes and/or modifications to the Work will be authorized only if documented in a written Change Order, accepted by the Project Manager as herein provided, and executed by the District and OpTerra Energy Services. District shall not be liable for the cost of any extra work or any substitutions, changes, additions, omissions, or deviations unless the Project Manager has authorized the scope and the cost thereof and a Change Order has been executed by the Parties. No extension of time for performance of the Work shall be allowed hereunder unless such time is duly included in the Change Order.

- (a) Change Orders Generally. The Change Order should state the change and/or modification to the Scope of Work, any additional compensation to be paid, and any applicable extension of time. OpTerra Energy Services may, at its election, suspend performance of that portion of the Work affected by any proposed Change until a written Change Order with respect to the Changed or modified Work has been signed by both District and OpTerra Energy Services. OpTerra Energy Services will use its reasonable efforts to continue other portions of the Work not affected or impacted by such proposed Change until such time as the applicable Change Order is resolved. In addition, if the Project Manager requests a proposal from OpTerra Energy Services for a Change and District subsequently elects to not proceed with such Change, District agrees that a Change Order will be issued to reimburse OpTerra Energy Services for any costs reasonably incurred for estimating services, design services, and/or preparation of the proposal requested by the Project Manager.
- (b) Change Orders Requiring Additional Compensation. If the District's Project Manager requests changes and/or modifications to the Work, and/or there are Excusable Events, OpTerra Energy Services shall first evaluate whether the Change Order cost can be absorbed by the Project Contingency Amount. If the Project Contingency Amount is not available or does not satisfy the full costs of the Change Order, the District, upon written cost estimate from OpTerra Energy Services may agree to pay the extra costs caused by such modifications and/or changes and/or Excusable Event. Subject to any available offset from the Project

Contingency Amount, OpTerra Energy Services will be entitled to additional compensation for the following reasons that include but are not limited to: (i) the Project Manager requests changes and/or modifications to the Scope of Work during the construction phase of the Project; (ii) any District Person causes delays during OpTerra Energy Services' construction work; (iii) discovery of subsurface or other site conditions that were not reasonably anticipated or disclosed prior to the commencement of the Work; (iv) discovery of Hazardous Substances at or impacting the Project Location; (v) changes and/or modifications to the Scope of Work required to obtain required permits and approvals as required by any Governmental Authority; (vi) damage to any equipment or other Work installed by OpTerra Energy Services caused by the act or omission of any District Person; (vii) changes and/or modifications to Scope of Work ordered by any Governmental Authority; and (viii) any other condition that would not reasonably have been anticipated by OpTerra Energy Services, that modifies and/or changes the Scope of Work or the Contract Amount.

- (c) Change Orders Requiring Additional Time. If the District's Project Manager requests changes and/or modifications to the Scope of Work and/or an Excusable Event occurs, the Parties agree that an equitable extension of time to complete the Work may be necessary. Prior to any extension of time, OpTerra Energy Services will use commercially reasonable efforts to make up such delays, including authorizing overtime payments; *provided* that District has issued a Change Order authorizing any such overtime payment and has specifically agreed to pay all costs, including administrative charges and expenses, associated therewith.
- (d) Method for Adjustment. An increase or decrease in the Contract Amount and/or time resulting from a Change in the Work and/or Excusable Event must be determined by one or more of the following methods:
 - (i) unit prices set forth in this Contract or as subsequently agreed;
 - (ii) a mutually accepted, itemized lump sum; or
 - (iii) costs calculated on a basis agreed upon by District and OpTerra Energy Services plus a fee (either a lump sum or a fee based on a percentage of cost) to which the Parties agree.
- (e) Disagreements. If there is a disagreement between District and OpTerra Energy Services as to whether OpTerra Energy Services is entitled to an equitable extension of time and/or an equitable adjustment in the Contract Amount, those disputes are to be resolved in accordance with the provisions of Section 16.01. Pending the resolution of any such dispute, OpTerra Energy Services may suspend the Work impacted by such disagreement but shall use reasonable efforts to continue with other portions of the Work not affected or impacted by the disagreement.

Section 5.05 Minor Changes to Scope of Work. OpTerra Energy Services has the authority to make minor changes that do not change the total Contract Amount and are consistent with the intent of the Construction Documents, without prior notice to District. OpTerra Energy Services will either promptly inform District, in writing, of any minor changes made during the implementation of the Project, or make available to District at the site a set of as-built drawings that will be kept current to show those minor changes.

Section 5.06 Hazardous Substances.

- (a) OpTerra Energy Services will promptly provide written notice to District if OpTerra Energy Services observes any Hazardous Substance, as defined herein, at or around the Facilities during the course of construction or installation of any equipment which have not been addressed as part of the Scope of Work. OpTerra Energy Services will have a reasonable obligation to investigate the Facilities for the presence of Hazardous Substances prior to commencement of the Work unless otherwise specified in the Scope of Work. District will be solely responsible for investigating Hazardous Substances and determining the appropriate removal and remediation measures with respect to the Hazardous Substances. District will comply with all Applicable Laws with respect to the identification, removal and proper disposal of any Hazardous Substances known or discovered at or around the Facilities, and in such connection will execute all generator manifests with respect thereto. OpTerra Energy Services will comply with all Applicable Laws in connection with the use, handling, and disposal of any Hazardous Substances in the performance of its Work. In connection with the foregoing, District will provide OpTerra Energy Services, within fifteen (15) Business Days of the execution of this Contract, a written statement that represents and warrants (i) whether or not, to its knowledge, there are Hazardous Substances either on or within the walls, ceiling or other structural components, or otherwise located in the Project Location, including, but not limited to, asbestos-containing materials; (ii) whether or not, to its knowledge, conditions or situations exist at the Facilities which are subject to special precautions or equipment required by federal, state, or local health or safety regulations; and (iii) whether or not, to its knowledge, there are unsafe working conditions at the Facilities.
- (b) District will indemnify, defend, and hold OpTerra Energy Services harmless from and against any and all Losses that in any way result from, or arise under, such District owned or generated Hazardous Substances, except for liabilities due to the negligence or willful misconduct of OpTerra Energy Services, or its subcontractors, agents or representatives, in the handling, disturbance or release of Hazardous Substances. This indemnification will survive any termination of this Contract.

Section 5.07 Pre-Existing Conditions. Certain pre-existing conditions may be present within the Facilities that (i) are non-compliant with applicable codes, (ii) may become non-compliant with applicable codes upon completion of OpTerra Energy Services' Work, (iii) may cause OpTerra Energy Services' completed Work to be non-compliant with applicable codes, (iv) may prevent District from realizing the full benefits of OpTerra Energy Services' Work, (v) may present a safety or equipment hazard, or (vi) are otherwise outside the scope of OpTerra Energy Services' Work. Regardless of whether or not such conditions may have been readily identifiable prior to the commencement of Work, OpTerra Energy Services will not be responsible for repairing such pre-existing conditions unless such responsibility is expressly provided for in the Scope of Work or an approved Change Order. OpTerra Energy Services, in its sole discretion, may determine whether it will bring said pre-existing conditions into compliance by agreeing to execute a Change Order with District for additional compensation and, if appropriate, an extension of time.

ARTICLE 6. PROJECT COMPLETION

Section 6.01 Occupancy or Use of Work. District may take occupancy or use of any completed or partially completed portion of the Work at any stage, whether or not such portion is Substantially Complete, *provided* that such occupancy or use is authorized by Governmental Authority and, *provided further*, that District assumes responsibility for the security of, insurance coverage for, maintenance, utilities for, and damage to or destruction of such portion of the Work. If Substantial Completion of a portion of the Construction Work is not yet achieved, occupancy or use of such portion of the Work will not commence until District's insurance company has consented to such occupancy or use. When occupancy or use of a portion of the Work occurs before Substantial Completion of such portion, District and OpTerra Energy Services will accept in writing the responsibilities assigned to each of them for title to materials and equipment, payments and Retention with respect to such portion.

Section 6.02 Substantial Completion. When OpTerra Energy Services considers the Work, or any portion thereof, to be Substantially Complete, OpTerra Energy Services will supply to District a written Certificate of Substantial Completion with respect to such portion of the Work, including a Punch List of items and the time for their completion or correction. District will within fifteen (15) Business Days of receipt of the Certificate of Substantial Completion, review such portion of the Work for the sole purpose of determining that it is Substantially Complete, and sign and return the Certificate of Substantial Completion to OpTerra Energy Services acknowledging and agreeing: (i) that such portion of the Work is Substantially Complete; (ii) the date of such Substantial Completion; (iii) that from the date of Substantial Completion District will assume responsibility for the security of, insurance coverage for, maintenance, utilities for, and damage to or destruction of such portion of the Work. District agrees that approval of a Certificate of Substantial Completion will not be unreasonably withheld, delayed or conditioned.

Section 6.03 Final Completion. When OpTerra Energy Services considers the entirety of the Work to be Finally Complete, OpTerra Energy Services will notify District that the Work is fully complete and ready for final inspection. Administrative closeout by the DSA is a condition to achieving Final Completion only for those parts of the Project requiring DSA approval, and then only if the failure to obtain DSA administrative closeout is due to the fault of OpTerra Energy Services. District will inspect the Work to verify the status of Final Completion within fifteen (15) Business Days after its receipt of OpTerra Energy Services' certification that the Work is complete. When District agrees that the Work is fully completed, OpTerra Energy Services will issue a Certificate of Final Completion, for District to countersign. District agrees that its signing of the Certificate of Final Completion will not be unreasonably withheld, delayed or conditioned. At that time, District will pay OpTerra Energy Services any remaining Contract Amount due and any outstanding Retention being withheld by District, in accordance with Section 8.03. District may give OpTerra Energy Services written notice of acceptance of the Work and will promptly record a notice of completion or notice of acceptance in the office of the county recorder in accordance with California Civil Code §9204.

Section 6.04 Delay Damages. Time is of the essence for all Work under this Contract. It is hereby understood and agreed that it is and will be difficult and/or impossible to ascertain and determine the actual damage that the District will sustain in the event of and by reason of OpTerra Energy Services' delay. Therefore, OpTerra Energy Services agrees that it shall pay to the District the sum of One Thousand Dollars (\$1,000.00) per day as liquidated damages for each and every business day delay in completion of the Work beyond the Final Completion Date, as such date may be extended by agreement of the Parties or as otherwise permitted by the terms of this Contract. It is hereby understood and agreed that this amount is not a penalty but is a reasonable estimate of damages the District would incur in the event of such delays.

Section 6.05 Special Timing, Special Delay Damages and Additional Requirements for Cabazon ES Site. One of the District's Facilities, Cabazon ES is in SCE territory and is therefore subject to the CPUC ruling on January 19, 2017, that set requirements for TOU period grandfathering for schools, including the following: 1) interconnection applications need to be submitted by 1/31/17 and 2) the Work at Cabazon ES must reach Substantial Completion by 12/31/17. As such, OpTerra Energy Services must complete Work on the Cabazon ES project in compliance with all applicable SCE requirements and timelines as described above. OpTerra Energy Services shall submit all necessary paperwork to SCE in compliance with the TOU period grandfathering deadline of 12/31/17. Should OpTerra Energy Services fail to meet the required deadline to obtain TOU period grandfathering at Cabazon ES for any reason within OpTerra Energy Services' control, OpTerra Energy Services shall reduce the Contract Amount by an amount equal to the

10-year total of estimated losses in project savings to the District that will result from the Cabazon ES failing to obtain TOU period grandfathering ("Special Delay Damages").

Section 6.06 Transfer of Title; Risk of Loss. Title to all or a portion of the Project equipment, supplies and other components of the Construction Work will pass to District upon the earlier of (i) the date payment for such Project equipment, supplies or components is made by District or (ii) the date any such items are incorporated into the Project Location. OpTerra Energy Services will retain care, custody and control and risk of loss of such Project equipment, supplies and components until Substantial Completion. Transfer of title to District will in no way affect District's and OpTerra Energy Services' rights and obligations as set forth in other provisions of this Contract.

ARTICLE 7. SUBCONTRACTORS

Section 7.01 Authority to Subcontract. OpTerra Energy Services may delegate its duties and performance under this Contract, and has the right to enter into agreements with any subcontractors and other service or material providers as OpTerra Energy Services may select in its discretion to perform the Work. OpTerra Energy Services will not be required to enter into any subcontracts with parties whom OpTerra Energy Services has not selected or subcontractors whom OpTerra Energy Services has objection to using. OpTerra Energy Services shall select its subcontractors by a competitive process of its own choosing, which may include evaluation by the "best value" criteria defined in former California Public Contract Code §20133(c)(1) as a value determined by objective criteria related to price, features, functions, and life-cycles costs. OpTerra Energy Services shall provide District with a description of the criteria employed to select its subcontractors.

Section 7.02 Prompt Payment of Subcontractors. OpTerra Energy Services will promptly pay, when due, all amounts payable for labor and materials furnished in the performance of this Contract and will endeavor to prevent any lien or other claim under any provision of Applicable Law from arising against any District property, against OpTerra Energy Services' rights to payments hereunder, or against District.

Section 7.03 Relationship. Nothing in this Contract constitutes or will be deemed to constitute a contractual relationship between any of OpTerra Energy Services' subcontractors and District, or any obligation on the part of District to pay any sums to any of OpTerra Energy Services' subcontractors.

Section 7.04 Designation of Subcontractors; Subcontracts. Unless otherwise stated in this Contract, OpTerra Energy Services shall, prior to the start of Work, furnish in writing to District the names, licenses, addresses and contact information of the subcontractors to whom OpTerra Energy Services plans to award Work. Contracts between OpTerra Energy Services and its subcontractors shall provide that, to the extent the terms of this Contract apply to the Work to be performed by the subcontractor, (i) OpTerra Energy Services will assume toward the subcontractor all the obligations, rights, duties and redress which District, by this Contract, assumes toward OpTerra Energy Services and (ii) subcontractor will assume toward OpTerra Energy Services all the obligations, rights, duties and redress which OpTerra Energy Services, by this Contract, assumes toward District.

Section 7.05 Prevailing Wages. To the extent required by California Labor Code §1771 or other Applicable Law, all employees of OpTerra Energy Services and OpTerra Energy Services' subcontractors performing Work at the Project Location will be paid the per diem prevailing wages for the employee's job classification in the locality in which the Work is performed. In accordance with California Labor Code §§1773 and 1773.2, District will obtain from the Director of Industrial Relations the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work, in the locality in which the Work is to be performed, for each craft, classification or type of worker needed to execute the Work at the Project Location, and will cause copies of such determinations to be kept on file at its principal office and posted at each Project Location.

ARTICLE 8. PAYMENTS

Section 8.01 Monthly Progress Payments. Upon execution of this Contract, OpTerra Energy Services will invoice District for a mobilization payment in the amount of One Million One Hundred Seventy One Thousand One Hundred Four Dollars (\$1,171,104). Upon approval by the District of the invoice, this amount shall be paid to OpTerra Energy Services within thirty (30) calendar days after District's receipt of an invoice for such amount. In addition, as the Work progresses, OpTerra Energy Services will submit to District its applications for monthly payments based on the progress made on the Project through the date on which OpTerra Energy Services submits such Application for Payment. The amounts invoiced shall be paid to OpTerra Energy Services within thirty (30) calendar days of District's receipt of the invoice.

Section 8.02 Materials Stored Off-Site. In addition to the monthly progress payments specified in Section 8.01, OpTerra Energy Services may invoice District for materials purchased in advance and not stored at the Project Location. Each such Application for Payment will be accompanied by proof of off-site material purchases, evidence that the materials have been delivered to a warehouse reasonably acceptable to District and evidence of appropriate insurance coverage. OpTerra Energy Services will furnish to District written consent from the Surety approving the advance payment for materials stored off site. District will pre-pay one hundred percent (100%) of OpTerra Energy Services' Application for Payment for the materials delivered, less Retention as indicated in Section 8.03. OpTerra

Energy Services will protect stored materials from damage. Damaged materials, even though paid for, will not be incorporated into the Work.

Section 8.03 Retention. District, or its designee, must approve and pay each Application for Payment, less a retention amount ("Retention") of five percent (5%) in accordance with California Public Contract Code §7201, within thirty (30) calendar days after its receipt of the Application for Payment; *provided, however*, that there is to be no Retention with respect to the assessment fee or the mobilization payment. A failure to approve and pay an Application for Payment in a timely manner is a material default by District under this Contract. District may make progress payments in full without Retention at any time after fifty percent (50%) of the Work has been completed, as permitted pursuant to California Public Contract Code §9203. In lieu of Retention being held by District, OpTerra Energy Services may request that securities be substituted or Retention be held in an escrow account pursuant to California Public Contract Code §22300.

Section 8.04 Final Payment. The final Application for Payment may be submitted after Final Completion. The final payment amount must also include payment to OpTerra Energy Services for any remaining Retention withheld by District.

Section 8.05 Disputed Invoices/Late Payments. District may in good faith dispute any Application for Payment, or part thereof, within fifteen (15) calendar days after the date the Application for Payment was received by District. If District disputes all or a portion of any Application for Payment, District will pay the undisputed portion when due and provide OpTerra Energy Services a written notice and explanation of the basis for the dispute and the amount of the Application for Payment being withheld related to the dispute. District will be deemed to have waived and released any dispute known to it with respect to a bill if such notice and written explanation is not provided within fifteen (15) calendar days after the date the Application for Payment was received by District. If any amount disputed by District is finally determined to be due to OpTerra Energy Services, either by agreement between the Parties or as a result of dispute resolution pursuant to Section 16.01 below, it will be paid to OpTerra Energy Services within fifteen (15) Business Days after such final determination, plus Interest from the date billed or claimed until such amount is paid.

Section 8.06 Rebate Programs. OpTerra Energy Services will assist District in the preparation and submission to the applicable agencies of applications and documentation necessary for energy generation rebate(s), incentive, and/or loan program(s). OpTerra Energy Services makes no guarantee that District will receive funding from any energy generation rebate, incentive, and/or loan program(s) (collectively, "Incentive Funds"), or any portion thereof; OpTerra Energy Services expressly disclaims any liability for District's failure to receive any portion of the Incentive Funds, unless such failure is due solely to the negligence or manifest error of OpTerra Energy Services, and District acknowledges and agrees that OpTerra Energy Services will have no liability for any failure to receive all or any portion of the Incentive Funds, unless such failure is due solely to the negligence or manifest error of OpTerra Energy Services. Procurement, or lack thereof, of the Incentive Funds will not alter the Contract Amount of this Contract or the payment timeline associated with payment of the Contract Amount.

ARTICLE 9. WARRANTY / LIMITATION OF LIABILITY

Section 9.01 OpTerra Energy Services warrants to District that material and equipment furnished under this Contract will be of good quality and new. OpTerra Energy Services further warrants that its workmanship provided hereunder, including its subcontractors' workmanship, will be free of material defects for a period of ten (10) years from the date of Substantial Completion as indicated on the executed Certificate of Substantial Completion ("OpTerra Energy Services Warranty"). Notwithstanding the preceding sentence, the date the OpTerra Energy Services Warranty commences with respect to a specific piece or pieces of equipment may be further defined in Attachment B.

Section 9.02 Equipment and material warranties that exceed the OpTerra Energy Services Warranty period will be provided directly by the equipment and/or material manufacturers and such warranties will be assigned directly to District, after the ten (10) year period. During the OpTerra Energy Services Warranty period, OpTerra Energy Services will be District's agent in working with the equipment and material manufacturers in resolving any equipment or material warranty issues. If any material defects are discovered within the OpTerra Energy Services Warranty period, OpTerra Energy Services, or OpTerra Energy Services' subcontractors, will correct its defects, and/or OpTerra Energy Services will work with the equipment or material manufacturer as District's agent to facilitate the manufacturer's correction of the equipment or material defect. Such warranty services will be performed in a timely manner and at the reasonable convenience of District. If a warranty issue arises on any equipment or material installed after the OpTerra Energy Services Warranty period, and the equipment or material has a warranty period that exceeds ten (10) years, District will contact the manufacturer directly to resolve such warranty issues and District acknowledges that the manufacturer will have sole responsibility for such issues.

Section 9.03 The warranties in this ARTICLE 9 expressly exclude any remedy for damage or defect caused by improper or inadequate maintenance of the installed equipment by service providers other than OpTerra Energy Services or its subcontractors, corrosion, erosion, deterioration, abuse, modifications or repairs not performed by an authorized OpTerra Energy Services subcontractor, improper use or operation, or normal wear and tear under normal usage.

ARTICLE 10. OWNERSHIP OF CERTAIN PROPERTY AND EXISTING EQUIPMENT

Section 10.01 Ownership of Certain Proprietary Property Rights.

- (a) Ownership: Except as expressly provided in this Contract, District will not acquire, by virtue of this Contract, any rights or interest in any formulas, patterns, devices, software, inventions or processes, copyrights, patents, trade secrets, other intellectual property rights, or similar items of property which are or may be used in connection with the Work. OpTerra Energy Services will own all inventions, technical data, models, processes, methods, and information and all other work products developed or used in connection with the Work, including all intellectual property rights therein.
- (b) License: Solely in connection with the Facilities, OpTerra Energy Services grants to District a limited, perpetual, royalty-free, non-transferrable license for any OpTerra Energy Services intellectual property rights necessary for District to operate, maintain, and repair any modifications or additions to Facilities, or equipment delivered, as a part of the Work.
- (c) Ownership and Use of Instruments of Service. All data, reports, proposals, plans, specifications, flow sheets, drawings, and other products of the Work (the "Instruments of Service") furnished directly or indirectly, in writing or otherwise, to District by OpTerra Energy Services under this Contract will remain OpTerra Energy Services' property and may be used by District only for the Work. OpTerra Energy Services will be deemed the author and owner of such Instruments of Service and will retain all common law, statutory and other reserved rights, including copyrights. The Instruments of Service may not be used by District or any District Person for future additions or alterations to the Project or for other projects, without the prior written agreement of OpTerra Energy Services. Any unauthorized use of the Instruments of Service will be at District's sole risk and without liability to OpTerra Energy Services. If District uses the Instruments of Service for implementation purposes, including additions to or completion of the Project, without the written permission of OpTerra Energy Services, District agrees to waive and release, and indemnify and hold harmless, OpTerra Energy Services, its subcontractors, and their directors, employees, subcontractors, and agents from any and all Losses associated with or resulting from such use.

Section 10.02 Ownership of any Existing Equipment. Ownership of any equipment and materials presently existing at the Facilities at the time of execution of this Contract will remain the property of District even if such equipment or materials are replaced or their operation made unnecessary by work performed by OpTerra Energy Services. If applicable, OpTerra Energy Services will advise District in writing of all equipment and materials that will be replaced at the Facilities and District will, within fifteen (15) Business Days of OpTerra Energy Services' notice, designate in writing to OpTerra Energy Services which replaced equipment and materials should not be disposed of off-site by OpTerra Energy Services (the "Retained Items"). District will be responsible for and designate the location and storage for the Retained Items. OpTerra Energy Services will be responsible for the disposal of replaced equipment and materials, except for the Retained Items. OpTerra Energy Services will use commercially reasonable efforts to remove the Retained Items in such a manner as to avoid damage thereto, or if it is unreasonable to avoid damage altogether, to minimize the damage done. OpTerra Energy Services will not be responsible for the removal and/or disposal of any Hazardous Substances except as required by the Scope of Work.

ARTICLE 11. INDEMNIFICATION / INSURANCE / BONDS

Section 11.01 Indemnification. To the full extent permitted by Applicable Laws, each Party will indemnify, hold harmless, release and defend the other Party, its officers, employees, and agents from and against any and all actions, claims, demands, damages, disabilities, fines, penalties, losses, costs, expenses (including consultants' and attorneys' fees and other defense expenses) and liabilities of any nature ("Losses") that may be asserted by any person or entity, to the extent arising out of that Party's performance or activities hereunder, including the performance or activities of other persons employed or utilized by that Party in the performance of this Contract, excepting liabilities to the extent due to the negligence or willful misconduct of the indemnified party. This indemnification obligation will continue to bind the Parties after the termination of this Contract.

Section 11.02 Waiver of Consequential Damages and Limitation of Liability. The liability of a defaulting Party will be limited to direct, actual damages. Neither Party shall be liable to the other Party for any special, indirect, incidental or consequential damages whatsoever, whether in contract, tort (including negligence) or strict liability, including, but not limited to, operational losses in the performance of business such as lost profits or revenues or any increase in operating expense.

Section 11.03 OpTerra Energy Services Insurance. OpTerra Energy Services will maintain, or cause to be maintained, for the duration of this Contract, the insurance coverage outlined in (a) through (f) below, and all such other insurance as required by Applicable Law. Evidence of coverage will be provided to District via an insurance certificate.

- (a) Workers' Compensation/Employers Liability for states in which OpTerra Energy Services is not a qualified self-insured. Limits as follows:

* Workers' Compensation: Statutory

- * Employers Liability: Bodily Injury by accident \$1,000,000 each accident
Bodily Injury by disease \$1,000,000 each employee
Bodily Injury by disease \$1,000,000 policy limit

(b) Commercial General Liability insurance with limits of:

- * \$2,000,000 each occurrence for Bodily Injury and Property Damage
- * \$4,000,000 General Aggregate - other than Products/Completed Operations
- * \$4,000,000 Products/Completed Operations Aggregate
- * \$2,000,000 Personal and Advertising Injury
- * \$ 100,000 Damage to premises rented to OpTerra Energy Services

Coverage to be written on an occurrence form. Coverage to be at least as broad as ISO form CG 0001 (04/13) or its equivalent forms, without endorsements that limit the policy terms with respect to: (1) provisions for severability of interest or (2) explosion, collapse, underground hazard.

(c) Auto Liability insurance for owned, hired and non-owned vehicles with limits of \$1,000,000 per accident. Coverage to be written on an occurrence form.

(d) Professional Liability insurance with limits of:

- * \$1,000,000 per occurrence
- * \$1,000,000 aggregate

Coverage to be written on a claims-made form.

(e) Umbrella/Excess Liability Insurance. Limits as follows:

- * \$1,000,000 each occurrence
- * \$1,000,000 aggregate

Coverage terms and limits to apply excess of the per occurrence and/or aggregate limits provided for Commercial General Liability and Professional Liability written on a claims made form. Coverage terms and limits also to apply in excess of those required for Employers Liability and Auto Liability written on an occurrence form.

(f) Policy Endorsements.

- * The insurance provided for Workers' Compensation and Employers' Liability above will contain waivers of subrogation rights against District, but only to the extent of the indemnity obligations contained in this Contract.
- * The insurance provided for Commercial General Liability and Auto Liability above will:
 - (i) include District as an additional insured with respect to Work performed under this Contract, but only to the extent of the indemnity obligations contained in this Contract, and
 - (ii) provide that the insurance is primary coverage with respect to all insureds, but only to the extent of the indemnity obligations contained in this Contract.

Section 11.04 Performance and Payment Bonds. Prior to commencing Work under this Contract, OpTerra Energy Services will furnish a performance bond, in an amount equal to one hundred percent (100%) of the Contract Amount, and a payment bond to guarantee payment of all claims for labor and materials furnished, in an amount equal to one hundred percent (100%) of the Contract Amount (collectively, the "Contract Bonds"). The Contract Bonds are not being furnished to cover the performance of any Professional Services, including any energy guaranty or guaranteed savings under this Contract, nor to cover any equipment and/or material manufacturer's warranty or other third-party warranty being assigned to District.

Section 11.05 District's Insurance. District will maintain, or cause to be maintained, for the duration of this Contract, the insurance coverage outlined below, and all such other insurance as required by Applicable Law. Evidence of coverage will be provided to OpTerra Energy Services via an insurance certificate. The insurance may be provided through self-insurance.

(a) Commercial General Liability insurance, written on an occurrence form, with limits of:

- * \$2,000,000 each occurrence for Bodily Injury and Property Damage; and
- * \$4,000,000 General Aggregate

(b) The insurance provided for above will contain waivers of subrogation rights against OpTerra Energy Services, will include OpTerra Energy Services as an additional insured, and will provide that the insurance is primary coverage with respect to all insureds.

ARTICLE 12. DOE GUIDELINES; ENERGY POLICY ACT

Section 12.01 As authorized by §1605(b) of the Energy Policy Act of 1992 (Pub. L. No. 102-486) the U.S. Department of Energy has issued, and may issue in the future, guidelines for the voluntary reporting of Greenhouse Gas emissions ("DOE Guidelines"). "Greenhouse Gases" means those gases and other particles as defined in the DOE Guidelines.

Section 12.02 As authorized by §1331 of the Energy Policy Act of 2005 (Pub. L. No. 109-58) District agrees that for the Work, OpTerra Energy Services will be the "designer" as that term is identified in Internal Revenue Bulletin 2008-14, Notice 2008-40, and OpTerra Energy Services will have the exclusive right to report to any federal, state, or local agency, authority or other party any tax benefit associated with the Work. Upon Final Completion, District agrees to execute a written allocation including a declaration related to Internal Revenue Code §179D. OpTerra Energy Services will prepare the declaration and all accompanying documentation. OpTerra Energy Services will be designated the §179D beneficiary.

ARTICLE 13. MUNICIPAL ADVISOR

Section 13.01 THE PARTIES ACKNOWLEDGE AND AGREE THAT OPTERRA ENERGY SERVICES IS NOT A MUNICIPAL ADVISOR AND CANNOT GIVE ADVICE TO DISTRICT WITH RESPECT TO MUNICIPAL SECURITIES OR MUNICIPAL FINANCIAL PRODUCTS ABSENT DISTRICT BEING REPRESENTED BY, AND RELYING UPON THE ADVICE OF, AN INDEPENDENT REGISTERED MUNICIPAL ADVISOR. OPTERRA ENERGY SERVICES IS NOT SUBJECT TO A FIDUCIARY DUTY WITH REGARD TO DISTRICT OR THE PROVISION OF INFORMATION TO DISTRICT. DISTRICT WILL CONSULT WITH AN INDEPENDENT REGISTERED MUNICIPAL ADVISOR ABOUT THE FINANCING OPTION APPROPRIATE FOR DISTRICT'S SITUATION.

ARTICLE 14. EVENTS OF DEFAULT

Section 14.01 Events of Default by OpTerra Energy Services. Each of the following events or conditions will constitute an "Event of Default" by OpTerra Energy Services:

- (i) any substantial failure by OpTerra Energy Services to perform or comply with this Contract, including a material breach of any covenant contained herein, and such failure continues for thirty (30) calendar days after notice to OpTerra Energy Services demanding that such failure to perform be cured; *provided that* (y) such failure to perform will not be deemed a default hereunder if it is excused by a provision of this Contract, and (z) if such cure cannot be effected in thirty (30) calendar days, OpTerra Energy Services will be deemed to have cured the default upon the commencement of a cure within thirty (30) calendar days and diligent subsequent completion thereof; or
- (ii) any representation or warranty furnished by OpTerra Energy Services in this Contract which was false or misleading in any material respect when made.

Section 14.02 Events of Default by District. Each of the following events or conditions will constitute an "Event of Default" by District:

- (i) any substantial failure by District to perform or comply with this Contract, including a material breach of any covenant contained herein, and such failure continues for thirty (30) calendar days after notice to District demanding that such failure to perform be cured; *provided that* (y) such failure to perform will not be deemed a default hereunder if it is excused by a provision of this Contract; and (z) if such cure cannot be effected in thirty (30) calendar days, District will be deemed to have cured the default upon the commencement of a cure within thirty (30) calendar days and diligent subsequent completion thereof; or
- (ii) any representation or warranty furnished by District in this Contract which was false or misleading in any material respect when made, unless otherwise excused by a provision of this Contract; or
- (iii) any failure by District to pay any amount to OpTerra Energy Services which is not paid within thirty (30) calendar days after written notice from OpTerra Energy Services that the amount is past due.

ARTICLE 15. REMEDIES UPON DEFAULT

Section 15.01 Termination for Cause. If there is an Event of Default by either Party under this Contract, unless such Event of Default has been cured within the applicable time periods for a cure set forth in ARTICLE 14, the non-defaulting Party may terminate this Contract by providing five (5) Business Days' written notice to the defaulting Party in the case of a monetary default and fifteen (15) Business Days' written notice to the defaulting Party in the case of a non-monetary default. Upon termination of this Contract, each Party will promptly return to the other all papers, materials, and property of the other held by such Party in connection with this Contract. Each Party will also assist the other in the orderly termination of this Contract and the transfer of all aspects hereof, tangible and intangible, as may be necessary for the orderly, non-disrupted business continuation of each Party. If this Contract is so terminated, OpTerra

Energy Services will be entitled to payment for Work satisfactorily performed, earned profit and overhead, and costs incurred in accordance with this Contract up to the date of termination.

Section 15.02 Remedies upon Default by OpTerra Energy Services. If an Event of Default by OpTerra Energy Services occurs, District will be entitled to obtain any available legal or equitable remedies through arbitration proceedings instituted pursuant to Section 16.01, including, without limitation, terminating this Contract, or recovering amounts due and unpaid by OpTerra Energy Services and/or damages, which will include District's reasonable, actual, direct out-of-pocket losses incurred by reason of such Event of Default and any cost of funding; loss of anticipated payment obligations; and any payment or delivery required to have been made on or before the date of the Event of Default and not made, including interest on any sums due, and losses and costs incurred as a result of terminating this Contract and all costs and expenses reasonably incurred in exercising the foregoing remedies.

Section 15.03 Remedies upon Default by District. If an Event of Default by District occurs, OpTerra Energy Services will be entitled to obtain any available legal or equitable remedies through arbitration proceedings instituted pursuant to Section 16.01 including, without limitation, terminating this Contract or recovering amounts due and unpaid by District, and/or damages which will include OpTerra Energy Services' reasonable, actual, direct out-of-pocket losses incurred by reason of such Event of Default and any cost of funding; loss of anticipated payment obligations; and any payment or delivery required to have been made on or before the date of the Event of Default and not made.

ARTICLE 16. CONDITIONS BEYOND CONTROL OF THE PARTIES

Section 16.01 Force Majeure Events. In the event that any Party is delayed in, or prevented from, performing or carrying out its obligations under this Contract by reason of any event of Force Majeure, such circumstance will not constitute an Event of Default, and such Party will be excused from performance hereunder and will not be liable to any other Party for or on account of any loss, damage, injury or expense resulting from, or arising out of, such delay or prevention. Notwithstanding the foregoing, no Party will be excused from any payment obligations under this Contract as a result of an event of Force Majeure.

Section 16.02 Utility Work. District expressly understands and agrees that Excusable Event may occur due to Interconnection Facilities work that may need to be performed by the local electric utility ("Utility") in order for OpTerra Energy Services to fully implement the Project. "Interconnection Facilities" means any distribution or transmission lines and other facilities that may be required to connect equipment supplied under this Contract to an electrical distribution/transmission system owned and maintained by the Utility. Any Interconnection Facilities work that may be required will be performed by the Utility under the Interconnection Agreement.

ARTICLE 17. GOVERNING LAW AND RESOLUTION OF DISPUTES

Section 17.01 Governing Law. This Contract is governed by and must be interpreted under the laws of the State where the Work is performed, without regard to the jurisdiction's choice of law rules.

Section 17.02 Claims Resolution. Notwithstanding any other language in the Contract, claims between the District and OpTerra Energy Services shall be resolved in accordance with the procedures established at Public Contract Code §9204. "Claims" are defined, pursuant to California Public Contract Code §9204, as a separate demand by OpTerra Energy Services for one of the following: a time extension for relief from penalties for delay; payment of money or damages arising from Work done; or payment of an amount disputed by the District.

Section 17.03 Initial Dispute Resolution. Upon receiving a claim sent by registered or certified mail, the District must review and provide a written response within forty-five (45) days that identifies the disputed and undisputed portions of the claim. The forty-five (45) day period to respond may be extended by mutual agreement. The claim is deemed rejected in its entirety if the District does not issue a response. Any payment due on an undisputed portion of the claim must be processed within sixty (60) days after the District's response. If a claimant disputes the District's response or lack thereof, the claimant may demand to meet and confer for settlement of the issues in dispute. Any portion of a claim that remains in dispute after a meet and confer conference will be subject to nonbinding mediation process, as described in California Public Contract Code §9204. Undisputed and unpaid claims accrue interest at seven percent (7%) per annum. A subcontractor or lower tier subcontractor may make a claim to the District through OpTerra Energy Services, as specified in California Public Contract Code §9204. However, the procedures in this section shall not supersede the requirements of the Contract with respect to OpTerra Energy Services' notification to the District of such claim or extend the time for the giving of such notice as provided in the Contract.

Section 17.04 If a dispute that is not settled pursuant to the California Public Contract Code §9204 procedures arises out of or relates to this Contract, the transaction contemplated by this Contract, or the breach of this Contract (a "Dispute"), either Party may initiate the dispute resolution process set forth in this Section 16.01 by giving notice to the other Party. The Parties will endeavor to settle the Dispute as follows:

- (i) *Field Representatives' Meeting:* Within fifteen (15) Business Days after notice of the Dispute, OpTerra Energy Services' senior project management personnel will meet with District's project representative in a good faith attempt to resolve the Dispute.

- (ii) *Management Representatives' Meeting*: If OpTerra Energy Services' and District's project representatives fail to meet, or if they are unable to resolve the Dispute, senior executives for OpTerra Energy Services and for District, neither of whom have had day-to-day management responsibilities for the Project, will meet, within thirty (30) calendar days after notice of the Dispute, in an attempt to resolve the Dispute and any other identified disputes or any unresolved issues that may lead to a dispute. If the senior executives of OpTerra Energy Services and District are unable to resolve a Dispute or if a senior management conference is not held within the time provided herein, either Party may submit the Dispute to mediation in accordance with Section 17.05.

Section 17.05 Mediation. If the Dispute is not settled pursuant to Section 17.02, the Parties will endeavor to settle the Dispute by mediation under the Commercial Mediation Procedures of the American Arbitration Association. Mediation is a condition precedent to arbitration or the institution of legal or equitable proceedings by either Party. Once one Party files a request for mediation with the other Party and with the American Arbitration Association, the Parties agree to conclude the mediation within sixty (60) calendar days after filing the request. Either Party may terminate the mediation at any time after the first session, but the decision to terminate must be delivered in person by the Party's representative to the other Party's representative and the mediator. If the Dispute is not resolved by mediation within sixty (60) calendar days after the date of filing of the request for mediation, then the exclusive means to resolve the Dispute is final and binding arbitration, as described in Section 17.06. Either Party may initiate arbitration proceedings by notice to the other Party and the American Arbitration Association.

Section 17.06 Arbitration Proceedings. The following provisions apply to all arbitration proceedings pursuant to this Section 16.01:

- (i) The place of arbitration will be the American Arbitration Association office closest to where the Work was performed.
- (ii) One arbitrator (or three arbitrators if the monetary value of the Dispute is more than \$2,000,000) (the "Arbitral Panel") will conduct the arbitral proceedings in accordance with the Commercial Arbitration Rules and Mediation Procedures (Excluding the Procedures for Large, Complex Commercial Disputes) of the American Arbitration Association currently in effect ("Arbitration Rules"). To the extent of any conflicts between the Arbitration Rules and the provisions of this Contract, the provisions of this Contract prevail.
- (iii) The Parties will submit true copies of all documents considered relevant with their respective statement of claim or defense, and any counterclaim or reply. In the discretion of the Arbitral Panel, the production of additional documents that are relevant and material to the determination of the Dispute may be required.
- (iv) The Arbitral Panel does not have the power to award, and may not award, any punitive, indirect or consequential damages (however denominated). All arbitration fees and costs are to be shared equally by the parties, regardless of which Party prevails. Each Party will pay its own costs of legal representation and witness expenses.
- (v) The award must be in the form of a reasoned award.
- (vi) The Dispute will be resolved as quickly as possible. The Arbitral Panel will endeavor to issue the arbitration award within six (6) months after the date on which the arbitration proceedings were commenced.
- (vii) The award will be final and binding and subject to confirmation and enforcement proceedings in any court of competent jurisdiction.

Section 17.07 Multiparty Proceeding. Either Party may join third parties whose joinder would facilitate complete resolution of the Dispute and matters arising from the resolution of the Dispute.

Section 17.08 Lien Rights. Nothing in this Section 16.01 limits any rights or remedies not expressly waived by OpTerra Energy Services that OpTerra Energy Services may have under any lien laws or stop notice laws.

ARTICLE 18. REPRESENTATIONS AND WARRANTIES

Section 18.01 Each Party warrants and represents to the other that:

- (i) it has all requisite power and authority to enter into this Contract, to perform its obligations hereunder and to consummate the transactions contemplated hereby;
- (ii) the execution, delivery, and performance of this Contract have been duly authorized by its governing body, or are in accordance with its organizational documents, and this Contract has been duly executed and delivered for it by the signatories so authorized, and constitutes its legal, valid, and binding obligation;

- (iii) the execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under, its organizational documents or any contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; and
- (iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any Applicable Laws, awards or permits which would materially and adversely affect its ability to perform hereunder.

ARTICLE 19. NOTICE

Any notice required or permitted hereunder will be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail, return receipt requested, postage prepaid, or delivered to a nationally recognized express mail service, charges prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice.

TO OPTERRA ENERGY SERVICES: OpTerra Energy Services, Inc.
150 East Colorado Boulevard, Suite 360
Pasadena, CA 91105-3711
Tel: 626-377-4948
Attention: Jonathan Brown, Senior Project Director

WITH A COPY TO: Legal Department
OpTerra Energy Services, Inc.
150 East Colorado Boulevard, Suite 360
Pasadena, CA 91105-3711
Tel: 626-377-4948
Attention: Contract Administrator

TO DISTRICT: Banning Unified School District
161 West Williams Street
Banning, CA 92220
Tel: (951) 922-2706
Attention: Superintendent

WITH A COPY TO: Fagen Friedman & Fulfrost LLP
1525 Faraday Avenue, Suite 300
Carlsbad, CA 92008
Tel: (760) 304-6000
Attention: Luke Boughen

ARTICLE 20. CONSTRUCTION OF CONTRACT

This Contract is the result of arms-length negotiations between two sophisticated parties and ambiguities or uncertainties in it will not be construed for or against either Party, but will be construed in a manner that most accurately reflects the intent of the Parties as of the Contract Effective Date. Each of the Parties acknowledges and agrees that neither Party has provided the other with any legal, accounting, regulatory, financial, or tax advice with respect to any of the transactions contemplated hereby, and each Party has consulted its own legal, accounting, regulatory, financial and tax advisors to the extent it has deemed appropriate.

ARTICLE 21. BINDING EFFECT

Except as otherwise provided herein, the terms and provisions of this Contract will apply to, be binding upon, and inure to the benefit of the Parties hereto and their respective heirs, legal representatives, successors, and permitted assigns.

ARTICLE 22. NO WAIVER

The failure of OpTerra Energy Services or District to insist upon the strict performance of this Contract will not constitute or be construed as a waiver or relinquishment of either Party's right to thereafter enforce the same in accordance with this Contract in the event of a continuing or subsequent default on the part of OpTerra Energy Services or District.

ARTICLE 23. SEVERABILITY

If any clause or provision of this Contract or any part thereof becomes or is declared by a court of competent jurisdiction invalid, illegal, void, or unenforceable, this Contract will continue in full force and effect without said provisions; *provided that* no such severability will be effective if it materially changes the benefits or obligations of either Party hereunder.

ARTICLE 24. HEADINGS

Headings and subtitles used throughout this Contract are for the purpose of convenience only, and no heading or subtitle will modify or be used to interpret the text of any section.

ARTICLE 25. COUNTERPARTS; INTEGRATION

This Contract may be executed in counterparts (and by different Parties hereto in different counterparts), each of which will constitute an original, but all of which when taken together will constitute a single contract. This Contract constitutes the entire contract among the Parties relating to the subject matter hereof and supersedes any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Delivery of an executed counterpart of a signature page of this Contract by email or fax will be effective as delivery of a manually executed counterpart of this Contract.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this Contract by their duly authorized officers as of the Contract Effective Date.

OPTERRA ENERGY SERVICES:

OpTerra Energy Services, Inc.

DISTRICT:

Banning Unified School District

By: _____
Name:
Title:

By: _____
Name:
Title:

ATTACHMENT A

DISTRICT'S FACILITIES and EXISTING EQUIPMENT

The following District Facilities are included under the Scope of Work as listed below:

Facility	Address	Square Feet
Banning High School)	100 Westward Avenue, Banning, CA 92220	252,584
Cabazon Elementary School	50575 Carmen Ave, Cabazon, CA 92230	31,388
Central Elementary School	295 North San Gorgonio Ave, Banning, CA 92220	49,572
Coombs Intermediate School	1151 W Wilson St, Banning, CA 92220	44,900
District Administration	161 W Williams St, Banning, CA 92220	13,835
Florida Street Discovery Center	671 North Florida St., Banning, CA 92220-	10,522
Hemmerling Elementary School	1928 W Nicolet St, Banning, CA 92220	43,069
Hoffer Elementary School	1115 East Hoffer St, Banning, CA 92220	52,054
Nicolet Middle School	101 East Nicolet St, Banning, CA 92220	117,396
	Total	637,555

**ATTACHMENT B
 PROJECT SCHEDULE**

Preliminary Design-Build Schedule

Task (by Site)	Completion Date
Notice to Proceed (all sites)	05/01/17
Banning HS	
Engineering / DSA	11/15/17
Construction	08/15/18
Commissioning	09/02/18
Interconnect / Closeout	10/20/18
Cabazon ES	
Engineering / DSA	07/01/17
Construction	11/01/17
Commissioning	11/20/17
Interconnect / Closeout	12/27/17
Central ES	
Engineering / DSA	11/15/17
Construction	05/16/18
Commissioning	06/10/18
Interconnect / Closeout	07/30/18
Coombs IS	
Engineering / DSA	11/15/17
Construction	02/28/18
Commissioning	03/20/18
Interconnect / Closeout	05/10/18
District Office	
Engineering / DSA	11/15/17
Construction	04/25/18
Commissioning	05/15/18
Interconnect / Closeout	07/05/18

Florida St Discovery Center	
Engineering / DSA	11/15/17
Construction	04/25/18
Commissioning	05/15/18
Interconnect / Closeout	07/05/18
Hemmerling ES	
Engineering / DSA	11/15/17
Construction	08/15/18
Commissioning	09/02/18
Interconnect / Closeout	10/20/18
Hoffer ES	
Engineering / DSA	11/15/17
Construction	08/15/18
Commissioning	09/02/18
Interconnect / Closeout	10/20/18
Nicolet MS	
Engineering / DSA	11/15/17
Construction	08/15/18
Commissioning	09/02/18
Interconnect / Closeout	10/20/18
Project Completion	11/01/18

ATTACHMENT C

SCOPE OF WORK

California State Contractor's License Number 995037

Scope of Work Details

ECM RE-01: Photovoltaic Power Generation

Photovoltaic Power (PV)

OpTerra Energy Services will design, engineer, and install Solar PV (photovoltaic) Generating Facilities on shade structures, ground mounts and roof top solar systems at nine (9) Banning USD locations as listed in the table below.

Basis of Design for Roof Top PV systems:

The basis of design for the rooftop PV systems is to utilize the existing structural system located on the roof of the Central Elementary School ("Central ES") and the Hoffer Elementary School ("Hoffer ES"). These designs are subject to change upon further due diligence by OpTerra of the roof structural systems located at Central ES and Hoffer ES.

OpTerra Energy Services has factored the age and condition of the building at Central Elementary School ("Central ES"), which was built in 1929, into consideration when designing the proposed rooftop PV systems, as depicted in Attachment G. As of the Effective Date of this Agreement, the District is not providing OpTerra with any information about the condition of the roof at Central ES or Hoffer ES, or the suitability of the roof for a PV system at either site. Per the terms of the Agreement, OpTerra shall conduct additional due diligence and work with the District in confirming and finalizing the array locations at all sites, including Central ES and Hoffer ES. From the Effective Date and through the Final Design Phase (as defined in the Agreement), if OpTerra's engineers determine that the roof at Central ES or Hoffer ES is not a suitable location for the PV system, or the District's insurers will not cover the building with the proposed rooftop PV system, OpTerra shall move the proposed location of the PV system from the roof to another location at the same site, connected to the same meter, at no additional cost to the District and within the proposed timelines in the Master Project Schedule. In all other cases, the District may still elect to move the proposed location of the rooftop PV system, but the related costs shall be subject to a Change Order, with the Project Contingency Amount (as defined in the Agreement) available to apply toward the costs.

At each site shown below, OpTerra Energy Services will provide and install shade structure solar PV systems using DSA pre-checked, over-the-counter approved design.

- ☐ Design and obtain DSA approved drawings for the installation of parking canopy and ground mount photovoltaic systems.
- ☐ Provide and install 30-kWAC, 36-kWAC, or 60-kWAC column-mounted string inverters as appropriate for each system's size.
- ☐ Provide and install photovoltaic modules on canopies and ground mounts appropriate for each system's size.
- ☐ Provide and install electrical conduits and power and communication wiring from the string inverters to each campus's main electrical service.
- ☐ Perform solar interconnection into the existing main electrical main service panel, and provide safety/disconnect switch as required by code.
- ☐ As coordinated with Banning USD on a site-by-site basis: trees and light poles in the "shadow" of each PV array plan view will be removed; trees located in the general area of the array, which may affect PV output, will be trimmed back (by Banning USD) or removed.
- ☐ Concrete, asphalt and landscaping removed or disturbed during installation of the PV structures will be patched and/or returned to original condition.
- ☐ Provide and install LED lighting fixtures on the underside of the canopies and tie into existing Banning USD power circuit.
- ☐ Maintain all existing roofing warranties at solar PV roof mount locations.
- ☐ Install Data Acquisition System to monitor the performance of the photovoltaic systems and inverters as described in Attachment D.

The following campuses are included in this ECM:

Site #	Location	PV Module Quantity	String Inverter Quantity	PV System Output (kWp DC)
1	Banning High School	1458	8	510.3
2	Cabazon Elementary School	216	1	75.6
3	Central Elementary School	288	3	100.8
4	Coombs Intermediate School	288	2	100.8
5	District Office	216	1	75.6
6	Florida Property	288	2	100.8
7	Hemmerling Elementary School	324	2	113.4
8	Hoffer Elementary School	252	2	88.2
9	Nicolet Middle School	486	3	170.1
	Total	3,816	24	1,335.6

General PV System Note: Solar Array quantities, output and locations shown above may vary during final design.

ECM-Specific Inclusions

- ☐ Twenty-five (25) year manufacturer's power output warranty for PV panels is provided under this Contract, commencing upon OpTerra Energy Services' installation of equipment.
- ☐ Twenty (20) year manufacturer's warranty for string inverters is provided under this Contract, commencing upon OpTerra Energy Services' installation of equipment.
- ☐ Manufacturer's warranties will be transferred to Banning USD upon completion of the Project.

Services Provided by OpTerra Energy Services and General Conditions

- ☐ OpTerra Energy Services will be responsible for obtaining DSA approval as needed for our Work.
- ☐ Provide project management and engineering.
- ☐ Provide construction management and supervision. An OpTerra Energy Services construction manager will be assigned to this Project and will be responsible for monitoring on-site construction on a daily basis.
- ☐ Provide an on-site construction trailer.
- ☐ Provide on-site storage containers for project materials and equipment.
- ☐ Provide trash dumpsters as needed as well as cleanup and off-site disposal of refuse generated by Project including Hazardous Substances.
- ☐ Provide portable toilets.
- ☐ Provide temporary fencing as required for access control in the areas of and for the duration of our own Work.
- ☐ Provide cranes, lifts and rigging necessary for our own Work.
- ☐ Provide ADA work directly associated with the Project and in the general vicinity of the Project: accessibility and path of travel upgrades; parking signage, parking lot layout and re-stripping for accessible parking, truncated domes, and surface and grade alterations to the path of travel are included.
- ☐ Provide startup, acceptance testing, commissioning, training and O&M manuals as needed on all systems provided under this Contract.
- ☐ Manufacturers' warranty will be transferred to Banning USD.
- ☐ As-built documentation will be provided for the Work.

General Project Exclusions and Clarifications

- ☐ Banning USD is responsible for completing any and all work to close any previously existing A numbers with DSA at any site where OpTerra Energy Services work is taking place. OpTerra Energy Services will not be responsible for any time delays or cost overages due to these delays.
- ☐ Fire Life Safety and other work required as a result of DSA submission are excluded, except as noted below.
- ☐ ADA work, except as specifically set forth above, is excluded.
- ☐ OpTerra Energy Services has assumed Construction will be allowed to proceed smoothly and in a continuous flow. No allowance has been made to demobilize and remobilize resources due to schedule interruptions, other than reasonable school-related events. Banning USD will provide OpTerra Energy Services a minimum of five (5) days advance written notice of any such events.

- ☐ Temporary utilities are to be provided by Banning USD at no cost to OpTerra Energy Services (including, without limitation, trailer power, phone lines, and construction power).
- ☐ Removal and disposal of Hazardous Substances, including asbestos containing materials, to be by Banning USD (except as noted above). If OpTerra Energy Services encounters material suspected to be hazardous, OpTerra Energy Services will notify Banning USD representative and stop further work in the area until the material is removed.
- ☐ OpTerra Energy Services will require the assistance of Banning USD personnel to secure Project Locations and to provide traffic redirection during rigging operations, and during the move-in and move-out of large equipment.
- ☐ No allowance has been made for structural upgrades to existing structures, except as specifically set forth in this Scope of Work.
- ☐ No allowance has been made for screening of new or existing equipment, except as specifically set forth in this Scope of Work.
- ☐ No temporary heating or cooling services have been included in the Contract Amount. OpTerra Energy Services will phase Construction in such a way as to avoid complete interruptions of service.
- ☐ OpTerra Energy Services standard construction means and methods will be used.
- ☐ Banning USD will provide access to the Facilities, laydown areas at the work sites, and a reasonable number of parking spaces for OpTerra Energy Services and OpTerra Energy Services' subcontractor vehicles in parking lots at the Facilities.
- ☐ Work will be performed during normal work hours except as approved by Banning USD.
- ☐ The Scope of Work assumes that, unless specifically identified otherwise, all existing systems are functioning properly and are up to current codes. OpTerra Energy Services will not be responsible for repairs or upgrades to existing systems that are not functioning properly or compliant with current codes. No allowances have been made to bring existing systems up to code.
- ☐ No allowance has been made to repair or replace damaged or inoperable existing equipment that is not specifically being replaced under the Scope of Work. When such items are discovered, OpTerra Energy Services will immediately notify Banning USD representative.
- ☐ No allowance has been made for underground obstructions or unsuitable soil conditions encountered during trenching or other excavation.
- ☐ Smoke detectors and fire alarm system work is excluded.
- ☐ The PV shade structure is not weather tight and will not provide shelter from rain.
- ☐ Water hose bibs for washing the panels are excluded.
- ☐ Parking lot repairs are excluded, except to the extent of damage caused by OpTerra Energy Services or its subcontractors.
- ☐ Repair or replacement of existing housekeeping pads, concrete pads, or base repair of existing walkway lighting are excluded, except as specifically set forth in this Scope of Work.
- ☐ Painting, unless specified, is excluded.
- ☐ With respect to Projects with new equipment connecting to the Facility's existing electrical distribution system, OpTerra Energy Services will not be responsible for the electrical integrity of the existing electrical system, e.g., the condition and proper termination of current-carrying, grounded, and grounding conductors, bus taps, protective elements, the proper protection of existing wire through knockouts, or missing components. Banning USD is responsible for providing and maintaining the facility's electrical distribution system that meets the latest NEC and guidelines adopted by the authority having jurisdiction.
- ☐ OpTerra Energy Services is not responsible for repairing or replacing existing damaged, blocked, or leaky ductwork unless otherwise noted.
- ☐ OpTerra Energy Services will not be responsible for existing damaged pipes, valves, and related parts and components.
- ☐ Decorative fascia along the perimeter of the panels are not included.

OpTerra Energy Services will provide the following General Engineering Services

- ☐ Perform visual survey of construction sites and verify accuracy of OpTerra Energy Services-provided construction documents.
- ☐ ECM RE-01 will be submitted to DSA for review or approval.
- ☐ Provide equipment submittals to Banning USD for review.
- ☐ Provide shop drawings and approvals as appropriate for the work.
- ☐ Provide as-built drawings, Operations and Maintenance manuals and associated documentation upon closeout of project.

Project Site and General Area Access

- ☐ Banning USD will provide continuous access to the construction site upon issuance of Notice to Proceed to OpTerra Energy Services.

- ☐ Vehicles and heavy equipment should be expected at all sites, primarily for delivering and moving and handling materials; such vehicle operations will be coordinated with Banning USD.
- ☐ For ECMs requiring DSA approval, OpTerra Energy Services will provide construction site plans specific to each site prior to on-site construction.
- ☐ OpTerra Energy Services will provide fencing to enclose construction sites as necessary.
- ☐ Fenced-in construction areas will be restricted to project construction personnel.

OpTerra Energy Services Beneficial Use and Warranty criteria for specific pieces of equipment:

- i) SOLAR SYSTEM - The OpTerra Energy Services Warranty commences immediately when the Generating Facility begins generating expected energy after the Utility issues the permission-to-operate letter.

Tentative work scopes to receive Substantial and Final Completion:

Scope of Work	Location	Total Qnty of SC	Total Qnty of FC
ECM RE-01 Solar PV	9 Sites	9, one per Site	9, one per site

ATTACHMENT D
MONITORING INSTALLATION SCOPE OF WORK

Overview of DAS Network Installation and Equipment Requirements

OpTerra Energy Services will provide a revenue-grade billing, data acquisition system (DAS). This will provide readily available access to various internal and external information collected on the distributed generation (i.e., solar PV) plant.

OpTerra Energy Services DAS Monitoring Installation:

- Supply and install hardware specific to the DAS system.
- Supply and install, terminate, label, and test all Data Point of Connection (DPOC) communication cabling from each DAS node to the predetermined and respective DPOC(s); in accordance with District's specifications.
- Supply, install, and configure a Modbus based digital Net Energy Meter (NEM).
- Connect the data portion of digital NEM(s) to their respective DPOC(s).
- Supply, install, and configure a Modbus based digital Net Generation Output Meter (NGOM).
- Perform the physical installation, labeling, testing and certification testing of each data circuit from the digital NEM(s) to their respective DPOC(s).
- Provide basic system training to designated District/Facility maintenance staff.

ATTACHMENT E

M&V SERVICES

I. Definitions:

For purposes of this Attachment and the Contract, the following defined terms have the meanings set forth below:

“Actual kWh” means the AC electricity produced by the Generating Facilities in kilowatt-hours, as measured and recorded by OpTerra Energy Services in the Energy Report. The measurement of the Actual kWh will be at the respective Energy Delivery Point.

“Annual Guarantee Fee” means a fee payable annually in advance during the Guarantee Extension Term by Banning USD to OpTerra Energy Services. The Annual Guarantee Fee for the Guarantee Extension Term will be agreed upon by the Parties at the time of the extension.

“Base Energy Rate” means

<u>True-Up Term</u>	<u>Base Energy Rate per kWh</u>
Years 1-2	\$0.2039
Years 3-5	\$0.2195
Years 6-10	TBD at time of extension, if any

“Energy Report” means an annual report prepared by OpTerra Energy Services containing a precise calculation of the Actual kWh during the applicable Measurement Period. The Energy Report shall be submitted to Banning USD within ninety (90) days after each Measurement Period.

“Energy Guarantee Term” means the period beginning on the first day of the Construction Period and ending on the earlier of: (i) the day immediately preceding the fifth (5th) anniversary of the M&V Commencement Date; (ii) the termination of the Energy Services Contract; (iii) the termination by Banning USD of the Energy Guarantee in accordance with this Attachment, section II, G; or (iv) the failure by Banning USD to pay the Annual Guarantee Fee in accordance with this Attachment, section II, H(i). The Energy Guarantee Term may be extended for five (5) additional years (the “Guarantee Extension Term”) at the option of Banning USD by providing written notice to OpTerra Energy Services at least ninety (90) days in advance of the termination of the Energy Guarantee Term. The Guarantee Extension Term will subject to the terms and conditions of this Attachment E.

“Guarantee Payment” means, for any True-Up Term, a cash payment by OpTerra Energy Services to Banning USD in an amount calculated in accordance with this Attachment for that True-Up Term.

“Guaranteed kWh” means:

<u>True-Up Term</u>	<u>Guaranteed kWh</u>
Years 1-2	4,354,626
Years 3-5	6,450,630
Years 6-10	TBD at time of extension, if any

“True-Up Term” means the first 24-month period beginning on the M&V Commencement Date, and the successive 36-month period beginning on the second (2nd) anniversary of the M&V Commencement Date. True-Up Terms for the Guarantee Extension Term will be agreed upon by the Parties at the time of the extension.

II. General Terms & Conditions

- A. Energy Guarantee. OpTerra Energy Services guarantees that during the Energy Guarantee Term, the Generating Facilities will generate the Guaranteed kWh of energy, as measured in kWh delivered to the Energy Delivery Point, subject to the terms and conditions set forth in this Attachment.
1. Commencing on the second (2nd) anniversary of the M&V Commencement Date, and again at the end of each successive True Up Term thereof, if the cumulative Actual kWh is less than the Guaranteed kWh, then OpTerra Energy Services will send Banning USD a refund check equal to the difference between the Guaranteed kWh and the cumulative Actual kWh, multiplied by the Base Energy Rate. OpTerra Energy Services will make such payment within thirty (30) days after the Energy Report has been accepted by Banning USD.
 2. The Actual kWh generated and delivered to the Energy Delivery Point during the Construction Period will

be added to the cumulative Actual kWh for the first True-Up Term.

B. Adjustment of Energy Guarantee. The following exclusions will result in an adjustment of the Energy Guarantee as set forth in this Section II.B:

1. Someone other than OpTerra Energy Services or its approved service providers shuts down, installs, removes, re-installs, modifies, alters or repairs the Generating Facilities;
2. Destruction, damage, or vandalism to the Generating Facilities, or their ability to safely produce energy, which is not caused or contributed to through any conduct of OpTerra Energy Services, its employees, subcontractors, or agents;
3. Banning USD fails to perform or breaches its obligations under the Energy Services Contract or the Maintenance Services, which failure or breach directly and materially affects the performance of the Generating Facilities;
4. Banning USD fails to provide access or reasonable assistance to OpTerra Energy Services, to the extent any assistance is expressly required of Banning USD under this Contract or the PM Services, in diagnosing or repairing a problem, or fails to maintain the Generating Facilities as required by this Contract and the recommendations of the manufacturers of the equipment comprising the Generating Facilities;
5. An event of Force Majeure;
6. A power or voltage surge not caused by OpTerra Energy Services, its employees, subcontractors, or agents, including a grid supply voltage outside of the standard range specified by the Utility;
7. Theft of the Generating Facilities other than by OpTerra Energy Services, its employees, subcontractors, or agents; and
8. Regulatory shutdowns of the Generating Facilities, which is not caused or contributed to through any conduct of OpTerra Energy Services, its employees, subcontractors, or agents

In the event any of the above exclusions occur at any Generating Facility(ies), the Energy Guarantee shall be assumed to have been achieved at such Generating Facility(ies) for the portion of the Energy Guarantee Term during which such exclusions shall have existed.

C. Inspection of Facilities. Banning USD agrees that OpTerra Energy Services shall have the right, with prior notice, to inspect the Facilities to determine if Banning USD has consistently complied with its obligations as set forth in the Agreement, separate and apart from OpTerra Energy Services' obligations under the Energy Services Contract or the Maintenance Services. In the event that any inspection discloses that Banning USD has failed through intentional act or omission, on or prior to the date of such inspection, to be in compliance with any of its obligations, then the Energy Guarantee shall be assumed to have been achieved for the portion of the Energy Guarantee Term during which such failure shall have existed.

D. Interference. Banning USD may not cause, and shall take all commercially reasonable steps to prevent any third party from causing, any overshadowing, shading or other interference with the solar insolation that falls on the Generating Facilities, provided OpTerra Energy Services has complied with its own obligations under the Energy Services Contract or the Maintenance Services. Upon discovering, or otherwise becoming aware of, any actual or potential overshadowing, shading or other interference with insolation, Banning USD shall promptly notify OpTerra Energy Services. In the event an unforeseeable overshadowing or shading condition not caused by OpTerra Energy Services or its subcontractors exists and continues for five (5) days or more, Banning USD agrees that the Energy Guarantee for such Generating Facility(s) shall be reduced based upon such shading condition, and OpTerra Energy Services will present Banning USD with a proposed reduction to the Energy Guarantee reflecting such overshadowing, shading or other interference.

E. On-Site Maintenance and Measurements. Banning USD irrevocably grants to OpTerra Energy Services the right, during the Energy Guarantee Term and upon reasonable notice to Banning USD, to repair, replace, and maintain the Generating Facilities and appurtenant equipment, and to conduct on-site measurements, including, but not limited to, reading meters and installing and observing on-site monitoring equipment. OpTerra Energy Services shall not exercise such right in a manner that unreasonably interferes with the business of Banning USD as conducted at the Facilities as of the date hereof. Banning USD shall cooperate fully with the exercise of such right by OpTerra Energy Services pursuant to this section. Banning USD shall further cooperate with OpTerra Energy Services' performance of this Attachment by providing utility information, and/or additional information as reasonably requested by OpTerra Energy Services.

F. Termination of Energy Guarantee. If (i) Banning USD notifies OpTerra Energy Services in writing of its intent to terminate the Energy Savings, (ii) this Contract is terminated by OpTerra Energy Services for default by Banning USD or by Banning USD for any reason permitted by this Contract or (iii) Banning USD fails to maintain the Generating Facilities in accordance with this Attachment, or is in default of any of its other obligations under this

Attachment, the obligation of OpTerra Energy Services to prepare and deliver the Energy Report and to make a Guarantee Payment shall also be terminated. If such termination occurs on a date other than the last day of a Measurement Period, OpTerra Energy Services shall have no obligation to make a Guarantee Payment or prepare and deliver an Energy Report for such Measurement Period.

G. Annual Guarantee Fee – Guarantee Extension Term.

- i. Invoicing and Payment. The Annual Guarantee Fee for each Measurement Period of the Guarantee Extension Term shall be invoiced by OpTerra Energy Services to Banning USD in a lump sum on the first day of the corresponding Measurement Period. Banning USD shall pay OpTerra Energy Services such Annual Guarantee Fee, without any retention amount withheld, within thirty (30) days after its receipt of the corresponding invoice. Unless Banning USD gives OpTerra Energy Services prior written notice of its intent to terminate the Energy Guarantee, any failure to timely pay the Annual Guarantee Fee in accordance with this section shall be a material default by Banning USD under this Contract, and OpTerra Energy Services, in addition to any other legal, contractual and equitable remedies available to it, shall have no obligation thereafter to make Guarantee Payments, other than Guarantee Payments owed for prior Measurement Periods, if any.
 - ii. Any amount not paid when due shall, from and after the due date, bear Interest. Accrued and unpaid Interest on past due amounts (including Interest on past due Interest) shall be due and payable upon demand.
 - iii. Not Refundable. The Annual M&V Fee is not refundable for any reason other than a failure by OpTerra Energy Services to perform its obligations under this Attachment E.
- i. No Savings Guarantee. OpTerra Energy Services provides no warranty or guaranty with respect to any cost savings from use of the Generating Facilities.

ATTACHMENT F
MAINTENANCE SERVICES

EQUIPMENT AND FACILITIES COVERED

OpTerra Energy Services will perform preventive maintenance services (“Maintenance Services”) as set forth in this Attachment F with respect to Generating Facilities being constructed on District’s property at the following Project Locations:

Facility	Address
Banning High School)	100 Westward Avenue, Banning, CA 92220
Cabazon Elementary School	50575 Carmen Ave, Cabazon, CA 92230
Central Elementary School	295 North San Gorgonio Ave, Banning, CA 92220
Coombs Intermediate School	1151 W Wilson St, Banning, CA 92220
District Administration	161 W Williams St, Banning, CA 92220
Florida Street Discovery Center	671 North Florida St., Banning, CA 92220
Hemmerling Elementary School	1928 W Nicolet St, Banning, CA 92220
Hoffer Elementary School	1115 East Hoffer St, Banning, CA 92220
Nicolet Middle School	101 East Nicolet St, Banning, CA 92220

Capitalized terms used in this Attachment F and not defined in the Contract, have the meanings set forth below:

I. Definitions

“**Annual Maintenance Fee**” means a fee payable by District to OpTerra Energy Services, in consideration of the provision of up to five (5) years (ten (10) years, if extended pursuant to Section II below) of Maintenance Services. The Annual Maintenance Fee for the first Measurement Period will be Forty-Two Thousand One Hundred Eighty-Eight Dollars (\$42,188.00). The Annual Maintenance Fee will be increased annually thereafter at the rate of Three Percent (3%) per annum, each increase to be effective on the first day of the corresponding Measurement Period. The Annual Maintenance Fee for the Maintenance Extension Term will be agreed upon by the Parties at the time of the extension.

II. Term

So long as District pays to OpTerra Energy Services the Annual Maintenance Fee, OpTerra Energy Services will provide the Maintenance Services, as described herein, up to five (5) years from the M&V Commencement Date (the “Maintenance Term”). The Maintenance Term may be extended for five (5) additional years (the “Maintenance Extension Term”) at the option of Banning USD by providing written notice to OpTerra Energy Services at least ninety (90) days in advance of the termination of the Maintenance Term. The Maintenance Extension Term will subject to the terms and conditions of this Attachment F. At the end of the Maintenance Term, or the Maintenance Extension Term, if extended, District may:

- a. Enter into another agreement with OpTerra Energy Services to perform Maintenance Services
- b. Enter into an agreement with another service provider
- c. Self-perform preventive maintenance

III. Annual Maintenance Fee; Reporting

The Annual Maintenance Fee will be invoiced by OpTerra Energy Services to District in a lump sum following performance of such Maintenance Services. District, or its designee, will pay OpTerra Energy Services such Annual Maintenance Fee, without any retention amount withheld, within thirty (30) calendar days after its receipt of the corresponding invoice. Any failure to timely pay the Annual Maintenance Fee in accordance with this Attachment F will be a material default by District, and OpTerra Energy Services, in addition to any other legal, contractual and equitable remedies available to it, will have no obligation thereafter to provide Maintenance Services. In addition, any such material default under this Section III will relieve OpTerra Energy Services of all obligations under Attachment E, M&V Services, including any obligation to make a Guarantee Shortfall payment.

Any amount not paid when due will, from and after the due date, bear Interest. Accrued and unpaid Interest on past due amounts (including Interest on past due Interest) will be due and payable upon demand.

Upon completion of any maintenance or repair work, OpTerra Energy Services will update service logs detailing the work performed, location and any notes relevant to safe and efficient operations. These service logs will be compiled and submitted to District on a quarterly basis.

If OpTerra Energy Services is no longer the provider of Maintenance Services, District's new provider will maintain similar service logs. OpTerra Energy Services will have reasonable access to inspect service logs to determine that adequate Maintenance Services are being performed.

IV. Preventive Maintenance Services Provided

OpTerra Energy Services will provide the following Maintenance Services during the Maintenance Term and any Extension Term:

- a. Inspection: Inspect PV modules, combiner boxes, inverters, isolation transformers, and PV service roof penetrations and support structure on an annual basis.
- b. Testing: Perform voltage testing, amperage testing, and infrared scans of inverters, combiner boxes, disconnects and switchgear on an annual basis.
- c. Monitoring: Monitor system performance on a daily basis.
- d. Cleaning services to be performed annually for ground mount systems:
 - i. Remove dust, dirt, and debris from outside cabinets of combiner boxes, inverters, transformers, and disconnect switches.
 - ii. Wash PV modules and remove accumulated dust and debris.
 - iii. Remove all weeds, dead material, and other vegetation. This includes all grounds underneath arrays and within a 15-foot perimeter (or such distance as determined necessary by OpTerra Energy Services) around the arrays on an annual basis.

V. Repair Services

If a Generating Facility is damaged and requires safe-off, repair, demolition and/or reconstruction, District must contact the OpTerra Energy Services PV Operations & Maintenance Manager. In the event of damage, any component of the Generating Facility installed by OpTerra Energy Services can be repaired or reconstructed by OpTerra Energy Services at District's request. District must submit a request for quotation to the OpTerra Energy Services PV Operations & Maintenance Manager. OpTerra Energy Services will inspect the damage and provide a written quotation and complete scope of work to District to restore the Generating Facility to normal operational condition. Before proceeding with repairs, OpTerra Energy Services and District must execute a work order, on OpTerra Energy Services' form, for the agreed scope of work and quotation amount. Repair work is done on a time and materials basis.

- Hourly technician labor rate \$150/hr.
- Materials markup 15%

VI. Warranty Services

The OpTerra Energy Services' PV Operations & Maintenance Manager will also be District's point of contact for all issues related to the OpTerra Energy Services Warranty set forth in Article 9 of the Contract. District should refer to Article 9 of the Contract for services provided by OpTerra Energy Services to District in relation to manufacturer's warranties. The terms and conditions of the relevant manufacturer's warranties can be found in the operation and maintenance manuals delivered to District at Final Completion.

VII. Services and Equipment to Be Covered By District

OpTerra Energy Services' obligations under this Attachment F are expressly conditioned upon District's payment of the Annual Maintenance Fee and providing and being responsible for the following, without cost to OpTerra Energy Services:

- a. Making the Generating Facilities described herein available to OpTerra Energy Services as of the Contract Effective Date.
- b. Operating and maintaining security systems associated with the Generating Facilities.
- c. Maintaining all landscaping in and around Generating Facilities, including tree trimming.

- d. Allowing OpTerra Energy Services and its personnel access as necessary to the Generating Facilities, and any related areas that may be reasonably necessary for performance of the Maintenance Services, including reasonable work, parking, and equipment staging areas.
- e. Allowing OpTerra Energy Services and its personnel to access electrical power and other utilities then existing at the Generating Facilities as necessary for OpTerra Energy Services to satisfy its obligations under the Contract.
- f. Remediating, pursuant to Applicable Law, any known Hazardous Substances encountered by OpTerra Energy Services during the performance of the Maintenance Services which Hazardous Substances were not deposited by OpTerra Energy Services, including any backfill with clean soil as may be reasonably required.
- g. Insuring the Generating Facilities against loss due to acts of God and the public enemy; flood, earthquake, tornado, storm, fire; civil disobedience, sabotage, and vandalism.

OpTerra Energy Services will have no obligation to provide the Maintenance Services to the extent such provision of Maintenance Services is materially adversely affected by District's failure to satisfy the conditions set forth in this Attachment F.

ATTACHMENT G
SOLAR ARRAY LAYOUTS

SOLAR SITE LOCATION:

Banning High School)
100 Westward Avenue,
Banning, CA
92220



SOLAR SITE LOCATION:

Cabazon Elementary School
50575 Carmen Ave,
Cabazon, CA 92230



SOLAR SITE LOCATION:

Central Elementary School
295 North San Geronio
Ave,
Banning, CA 92220

and

District Administration
161 W Williams St,
Banning, CA 92220



SOLAR SITE LOCATION:

New Horizons High School (Coombs Intermediate School)
1151 W Wilson St,
Banning, CA 92220

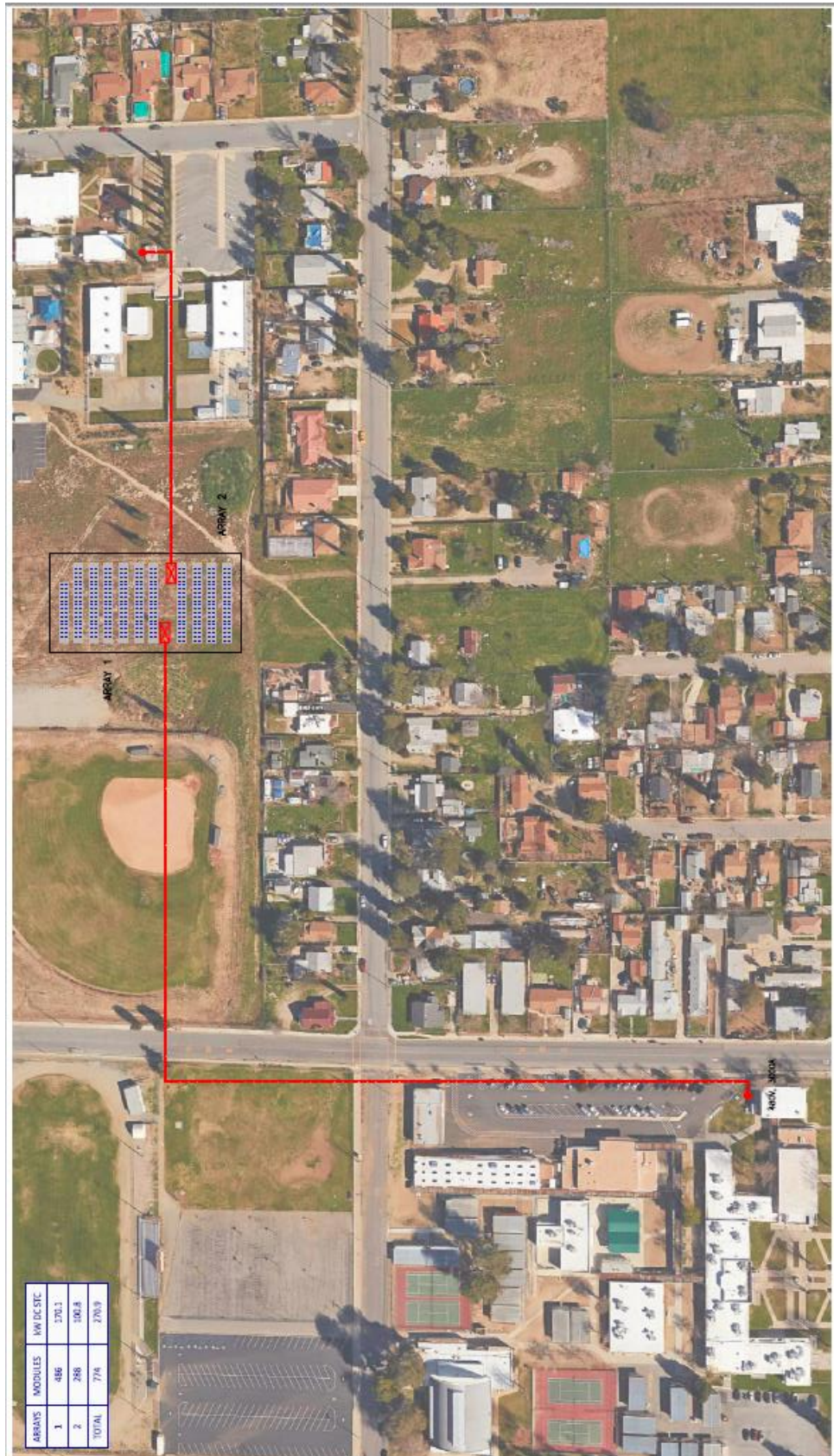


SOLAR SITE LOCATION:

Nicolet Middle School
101 East Nicolet St,
Banning, CA 92220

and

Florida Street Discovery Center
671 North Florida St.,
Banning, CA 92220



SOLAR SITE LOCATION:

Hemmerling Elementary School
1928 W Nicolet St,
Banning, CA 92220



SOLAR SITE LOCATION:

Hoffer Elementary School
1115 East Hoffer St,
Banning, CA 92220

00595-00123/3719650.1



ARRAYS	MODULES	MW DC/STC
1	126	43.5
2	126	43.5
TOTAL	252	87.0