



Engineering procurement and construction contract – Details

Contract Name/No.	[insert contract name or number]
Owner ('We/Us')	[insert name] [address] ABN [insert] Tel: [insert]
Contractor ('You')	[insert name] [address] ABN [insert] Tel: [insert]
Scope of Works	<p>You are responsible for:</p> <ul style="list-style-type: none"> performing the design and engineering of; procuring the Equipment to be supplied for; and executing the work, services and activities to be performed for the construction of, <p>the Facility (including execution of the contractually agreed warranty obligations) and associated infrastructure in accordance with, and as more fully described in, the Specification (see Schedule 1 (Specification)) including any Variation (Works).</p>
Price	<p>The Price is: [insert price in Australian dollars].</p> <p>See Schedule 3 (Price and Schedule of Rates) for breakdown of Price.</p>
Commencement Date (GC 2.1)	<p>The Commencement Date is [insert date] or [insert days] days from the date of signing this Contract.</p> <p>If nothing stated, then the Commencement Date is the date of signing the Contract.</p>
Date for Commercial Operation (GC 2.4)	<p>The Date for Commercial Operation is [insert date].</p>
Your Representative (GC 5.1)	<p>Your Representative is:</p> <p>[insert name and details]</p>
Our Representative: (GC 5.2)	<p>Our Representative is:</p> <p>[insert name and details]</p>

Security <i>(GCs 6.6 and 6.7)</i>	Bank guarantee required: Yes/No Delete whichever is not applicable. Percentage of Price: [5% or 10%]
Defects Liability Period <i>(GC 8)</i>	The Defects Liability Period is [insert months] from the Commercial Operation Date. If nothing stated, it is 24 months.
Additional grounds for extensions of time <i>(GC 16.3(e))</i>	[Insert additional grounds for extensions of time, eg. those which are project specific such as site conditions but not inclement weather.] If none stated, then no additional grounds.
Liquidated damages <i>(GCs 17 and 14)</i>	Delay Liquidated Damages and Performance Liquidated Damages are set out in Schedule 5 (Performance Tests, Performance Guarantees and Performance Liquidated Damages) and 7 (Delay Liquidated Damages). If none stated in Schedule 5 and Schedule 7, then general damages at law apply.
Insurance <i>(GC 21)</i>	[Drafting note: the below should be reviewed and discussed with project insurers, including in light of any project-wide insurance strategy] Public liability: [insert amount] per occurrence and [insert amount] in the aggregate. Contractor's works: [insert amount] per occurrence and [insert amount] in the aggregate. Workers Compensation: [insert amount] per occurrence. Professional liability: [insert amount] per occurrence and [insert amount] in the aggregate. Other insurance: [insert type/amount]
Aggregate limit ('cap') on uninsured liability <i>(GCs 22.5 and 22.6)</i>	[Drafting note: Insert limit of uninsured liability. Consider carefully for each project and the works to be performed by the Contractor. Some projects may, in fact, justify a cap of higher than 100% of the Price.] If nothing stated it is 100% of the Price.
Address for Service of Notices <i>(GC 30)</i>	[insert name of Contractor] Attention: [insert name] Address: [insert address] Email address: [insert address] [Insert name of Contractor] Attention: [insert name] Address: [insert address] Email address: [insert address]
Commercial Operation <i>(GC 39 paragraph 39.1(e) of the definition)</i>	[insert additional pre-conditions to Commercial Operation] If none stated, then no additional grounds.
Date of this Contract	/ /

The parties agree to the performance of the Works on the terms and conditions set out in this Contract.

Executed as a deed

[Drafting note: execution blocks to be confirmed]

Signed and delivered by ***[insert]*** in accordance
with section 127 of the Corporations Act 2001 (Cth)
and by:

Signature of director

Signature of director/secretary

Name of director (print)

Name of director/secretary (print)

Signed and delivered by ***[insert]*** in accordance
with section 127 of the Corporations Act 2001
(Cth) and by:

Signature of director

Signature of director/secretary

Name of director (print)

Name of director/secretary (print)

General Conditions

1 Conditions Precedent

- 1.1 The obligations of the parties under this Contract are conditional upon:
- (a) us notifying you that the ARENA Funding has been received;
 - (b) the Power Purchase Agreement becoming unconditional;
 - (c) financial close occurring (other than the requirement that this Contract has become unconditional in accordance with its terms), as evidenced in a notice delivered by us to you with supporting documentation confirming such;
 - (d) you providing us evidence that the insurance under GC 21 has been effected; and
 - (e) you providing us with the bank guarantee in the form of Schedule 8 (Form of Bank Guarantee) if we request you to do so under GC 6.6.
- 1.2 As soon as reasonably practicable following the Commencement Date, you must use reasonable endeavours to procure the satisfaction of the conditions precedent listed in GC 1.1.
- 1.3 We may waive the satisfaction of any Condition Precedent by notice to you. Where a Condition Precedent is waived, you must satisfy the waived Condition Precedent as soon as reasonably practicable.
- 1.4 We will notify you after we are satisfied that each of the conditions precedent listed in GC 1.1 have been met.

2 Performance of the Works

- 2.1 You must commence the performance of the Works on the Commencement Date.
- 2.2 You must perform the whole of the Works required for the development, design, engineering, fabrication, procurement, construction, installation, commissioning, testing, delivery, completion and rectification of all defects in the Facility such that the Facility, once completed, complies with:
- (a) the Specification;
 - (b) the Performance Guarantees;
 - (c) all applicable Laws, Government Authority Approvals, Standards and Good Solar Industry Practices; and
 - (d) the other requirements of this Contract.
- 2.3 You must perform the Works:
- (a) exercising due care, skill and judgment and using reasonable endeavours;
 - (b) in an efficient, professional, cost effective and environmentally-responsible manner;
 - (c) in accordance with all applicable Laws, Government Authority

Approvals, Standards and Good Solar Industry Practices; and

- (d) in accordance with this Contract and all guidelines, procedures and directions made by us under this Contract.
- 2.4 You must regularly and diligently progress the performance of the Works and ensure that Commercial Operation of the Facility is achieved by the Date for Commercial Operation.
- 2.5 You must ensure that the Works must connect to, and fully interface with, the Auxiliary Works specified in Schedule 1 (Specification). The fact that the Auxiliary Works are not performed by you in no way excuses you from any of your undertakings, warranties, obligations or liabilities under or in connection with this Contract.
- 2.6 We are engaging you as principal contractor and authorise you to have management and control over those parts of the Site on which the Works are performed and to discharge the duties imposed on you as a principal contractor under the **[insert relevant occupational health and safety legislation]**.
- 2.7 You must comply with all applicable Laws and the requirements of any relevant Government Authority. You must ensure that you obtain and maintain all relevant Government Authority Approvals required to perform the Works, unless otherwise specified in Schedule 1 (Specification).
- 2.8 Without limiting GC 2.6, you must comply with:
- (a) all applicable occupational health, safety and environmental laws, guidelines and codes of practice including, without limitation, the **[insert relevant occupational health and safety legislation]**;
 - (b) all occupational health, safety and environmental guidelines, rules and procedures provided to you by us; and
 - (c) any induction requirements in relation to the Site notified by us.
- 2.9 Subject to the exclusions specified in the Fair Work (Building Industry – Accreditation Scheme) Regulations 2005 (Cth), you must maintain, and comply with all conditions of, accreditation under the accreditation scheme established by the Fair Work (Building Industry) Act 2012 (Cth) while building work (as defined in section 5 of the Fair Work (Building Industry) Act 2012 (Cth)) is carried out.

[Drafting note: this clause should be used where the Contract relates to building work (as defined in the FWBI Act – note, this definition is broad and includes such things as installation of fittings such as security and communication

systems) that is funded by the Commonwealth or a Commonwealth Authority. If there is no Commonwealth funding for this project, delete this GC]

- 2.10 You must, in a form acceptable to us, provide us with regular reports, or more frequently on request from us, in relation to the Works and any occupational, health and safety issues in relation to the Works and any other documents you are required to prepare or maintain under any Laws concerning occupational health, safety and the environment.
- 2.11 We may, at any time, require you to provide us with evidence of your compliance with your obligations under GCs 2.6 to 2.9.
- 2.12 The description of the Works set out in Schedule 1 (Specification) represents the parties' best efforts to define the technical information and tasks necessary for performance of the Works. However, you acknowledge that your obligations include the provision of all Equipment and materials and the performance of all works and services necessary for the execution of the Works in accordance with this Contract.
- 2.13 You must immediately notify us on becoming aware of any Industrial Matter and you must meet with us, as soon as practicable after that notification, for the purpose of discussing and agreeing on any necessary or appropriate action to be taken to resolve the Industrial Matter.
- 2.14 You must assist us to perform our training obligations, including the preparation of a training manual, if required, in accordance with and to the standards and timing set out in Schedule 1 (Specification).
- 2.15 You must prepare:
- (a) an operation and maintenance manual; and
 - (b) a written commissioning schedule for the Facility (which includes the target date of completion of Commissioning of the Facility and the target date for Commercial Operation) within 30 Business Days after the Commencement Date,
- in accordance with and to the standards and timing set out in Schedule 1 (Specification).
- 2.16 You must establish, implement and maintain a quality assurance and control program which is subject to our approval.
- ## 3 Provision of Equipment, materials, Spare Parts and consumables
- 3.1 You must supply and make available, at your own cost, all utilities, consumables (including lubricants, chemicals, catalysts and other materials) and facilities necessary to properly perform the

- Works, unless otherwise specified in Schedule 1 (*Specification*).
- 3.2 You must provide, at your own cost, all Equipment and materials necessary to execute the Works specified in Schedule 1 (*Specification*), unless otherwise specified in Schedule 1 (*Specification*). You must procure and transport the Equipment and the materials, at your own risk and expense to the Site, in an expeditious and orderly manner.
- 3.3 You must, at your own expense, handle all imported Equipment at the point(s) of import (if any) and any formalities for customs clearance. If any applicable Laws require any application or act to be made by or in our name, we must take all necessary steps to comply with all applicable laws. You must assist us in complying with those Laws.
- 3.4 You must provide the Spare Parts required up to the expiry of the Defects Liability Period. You must:
- provide us with a parts numbers list for the operation and maintenance of the Equipment; and
 - immediately replace at your cost any Spare Part used:
 - at any time prior to the Commercial Operation Date; and
 - during the Defects Liability Period.
- 4 Our obligations**
- 4.1 We agree to pay you the Price for the Works in accordance with GC 6.
- 4.2 We must provide you with possession of and access to the Site and all other areas reasonably required for the proper performance of the Works on and from the Commencement Date. You acknowledge that you may not be given exclusive possession of, or exclusive access to, the Site.
- 4.3 We must provide personnel to assist you to properly carry out the Tests and the Performance Tests. Prior to the Commercial Operation Date, any act or omission of any personnel provided by us is (provided those personnel are acting in accordance with your instructions, directions, procedures or manuals) deemed to be an act or omission by you and you are not relieved of your obligations under this Contract and you will not have any claim against us by reason of any act or omission.

5 Representatives

- 5.1 The person nominated by you in the Details will be your Representative. Your Representative has authority to issue notices to us and receive notices from us. You may change your Representative at any time by notice to us. You are responsible for all acts and omissions of your Representative.
- 5.2 The person nominated by us in the Details is our Representative. Our Representative has authority to issue directions, notices and certificates to you and receive notices from you. We may change our Representative at any time by notice to you. We are responsible for all acts and omissions of our Representative.

6 Invoicing, payment and security

- 6.1 *You must submit an invoice to us in accordance with Schedule 4 (Payment Schedule).*
- 6.2 Each invoice submitted by you must be in a form approved by us and must include details of the value of the work performed by you and may include details of other moneys then due to you under this Contract.
- 6.3 **[Drafting note: Insert jurisdiction-specific clause 6.3].**
- 6.4 Subject to your compliance with GCs 6.1 to 6.3, we will pay you the amount set out in the invoice submitted by you under GC 6.1 within 15 Business Days of receipt of that invoice, except where we:
- exercise our right to withhold, retain or set off part of the Price under GC 6.8; or
 - dispute the invoice, in which case:
 - we will pay the undisputed part of the invoice (if any) and withhold the balance pending resolution of the dispute in accordance with GC 29; and
 - if the resolution of the dispute determines that we are to pay an amount to you, we will pay that amount upon resolution of the dispute.
- 6.5 No interest will be payable by us in respect of any invoice rendered to us by you under GC 6.1 which remains due and unpaid (including any amounts withheld as a result of a dispute).
- 6.6 If we request you to provide a bank guarantee in accordance with the Details, the bank guarantee to be provided by you must be:
- from a financial institution that is acceptable to us;
 - an irrevocable, unconditional and enforceable undertaking that is payable on demand;
 - for the amount specified in the Details;
 - in the form set out in Schedule 6 (Form of Bank Guarantee); and

- delivered to us prior to commencement of Works at the Site.
- 6.7 Any bank guarantee provided to us under GC 6.6 must be valid until Commercial Operation when it will reduce by 50% of its face value. The remaining 50% of its face value will then be valid until the end of the Defects Liability Period, or the final resolution of any dispute between us under or in connection with this Contract, whichever is the later.
- 6.8 **[Drafting note: Insert jurisdiction-specific clause 6.8].**
- 6.9 We have the right to conduct an audit of the basis of your invoices using your records. This right continues for 12 months after we pay the relevant invoice. If we exercise this right, you must make available to us all relevant records and documentation.
- 6.10 **[Drafting note: Insert jurisdiction-specific clause 6.10].**
- 6.11 A provisional sum included in this Contract will not be payable by us unless we direct you to perform the work or item to which the provisional sum relates. If we direct you to perform that work, the work or item will be priced by us (acting reasonably), and the difference will be added to or deducted from the Price.
- 7 Variations**
- 7.1 You must not vary the Works except as directed by us.
- 7.2 We may by written notice expressed as a “**Variation Notice**” direct you to alter, amend, omit, add to or otherwise vary the Works and you must carry out and be bound by any such variations.
- 7.3 Within 5 Business Days of receipt of the notice referred to in GC 7.2, and before you carry out the variation, you must provide to us a detailed breakdown of the increase or decrease in the Price as a result of the variation.
- 7.4 No variation issued in accordance with this Contract will vitiate or invalidate this Contract.
- 7.5 A variation may involve the omission of any part or parts of the Works and you agree that we may engage others to perform that part or parts so omitted. You acknowledge that the omission of one or more parts of the Works will not constitute a basis to allege that we have repudiated this Contract notwithstanding the extent or timing of the omission.
- 7.6 The rate or price for each variation must be determined by agreement between the parties, or in the absence of agreement, a valuation will be made by us on the basis of the rates and prices set out in Schedule 3 (*Price and Schedule of Rates*), or if there are no applicable rates and prices set out in Schedule 3 (*Price and Schedule of Rates*),

- then a fair and reasonable valuation of the variation must be made by us.
- 7.7 You are not entitled to any payment (pursuant to this Contract or otherwise at common law, equity, statute or code) in relation to any variation unless:
- you have been directed to carry out the variation pursuant to GC 7.2; and
 - the increase or decrease in the Price has been determined in accordance with GCs 7.3 to 7.6.
- 8 Defects Liability Period**
- 8.1 You must, at your own cost, repair, replace or otherwise make good any defects in the Works or Equipment notified by us to you during the Defects Liability Period.
- 8.2 You must bear all incidental costs, including any costs of removal associated with the repair, replacement or making good of the defects in accordance with GC8.1.
- 8.3 The timing of the rectification work described in GC8.1 must be agreed with us, or failing agreement, must be reasonably specified by us, before commencing the work.
- 8.4 If you fail to rectify the defect within the time agreed or specified by us under GC8.3, we may do so or engage another party to do so at your risk and expense.
- 8.5 Any cost incurred by us under GC 8.4 will be a debt due from you to us.
- 8.6 The Defects Liability Period will recommence (and restart from the beginning) from the date of the repair, replacement or making good, but only in respect of that part of the Works or Equipment repaired, replaced or made good.
- 9 Warranted Component Parts**
- 9.1 You must provide warranties for Warranted Component Parts for the duration of the Warranted Component Part Period that are fully assignable to us.
- 9.2 The warranties provided under GC 9.1 must be from both the manufacturers, agents and suppliers of a Warranted Component Part and the installer of any Warranted Component Part. The warranties must also name both you and us as warrantee and warrants for the Warranted Component Part Defect Period that the Warranted Component Parts will comply with all the requirements of this Contract.
- 10 Serial Defects**
- 10.1 You must notify us within 10 days of becoming aware of any Serial Defect, with details of such Serial Defect.
- 10.2 If a Serial Defect is identified by you or by us at any time prior to the expiry of the Defects Liability Period in a batch of modules or inverters, if a particular module or inverter is from the same batch of modules or inverters (as relevant) in which the Serial Defect is identified, that particular module or inverter will be deemed to have the same defect. We may by notice in writing at any time prior to the expiry of the Defects Liability Period, direct you to replace that particular module, inverter and/or batch of modules or inverters in accordance with GC 10.3.
- 10.3 Upon receipt of a notice from us under GC 10.2, except to the extent you can demonstrate that the particular module or inverter is from a different batch to the modules or inverters in which the Serial Defect is identified, you must:
- promptly, at your cost, replace the relevant modules or inverters identified;
 - undertake such replacement at times reasonably approved by us and in a manner that causes as little disruption as reasonably possible to the performance of the Work and/or the operation of the Facility; and
 - bear all incidental costs (including any costs of removal) associated with the replacement of the relevant modules or inverters.
- 10.4 Following replacement of the relevant modules or inverters under GC 10.3, we may require you to carry out additional tests at your cost, to demonstrate that the relevant modules, inverters and/or the entire Facility comply with the requirements of this Contract. If the relevant modules, inverters and/or the entire Facility fail the tests, you must at your cost carry out further replacement until the relevant modules, inverters and/or the entire Facility passes the tests. The tests must be agreed between us.
- 10.5 If you fail to replace the relevant modules, inverters and/or retest the relevant modules, inverters and/or the entire Facility in accordance with GCs 10.3 and 10.4, we may proceed to do the work or engage another party to do the work, and the reasonable costs incurred by us as a result will be a debt due and payable to us on demand and may be deducted from any payments otherwise due from us to you.
- 11 Inspection and testing**
- 11.1 You must at your own expense carry out at the place of manufacture and/or on the Site all Tests and/or inspections of the Works and/or the Facility (including any component part of the Works and Facility) required by this Contract and any applicable Laws or Government Authority Approvals. You must bear the cost of all tests (including the Tests) and inspections required under this Contract (including re-tests) other than tests and inspections that are expressly stated to be at our cost.
- 11.2 You must give us at least 5 Business Days' notice in writing of your intention to perform any Test, including details of the Test to be performed and the proposed date and location of the Test.
- 11.3 We may attend and witness any Test. We must use all reasonable endeavours not to interrupt or impede you in the performance of any Test.
- 11.4 Within 7 days after completion of any Test, you must give us a report in respect of the Test, including the Test results and inspection items.
- 11.5 If you fail to pass any Tests (or any repetition thereof in the event of prior failure) or if any Test is stopped before its completion, the Test must, subject to 24 hours' prior notice having been given by you to us, be repeated as soon as practicable. All appropriate adjustments and modifications are to be made by you with all reasonable speed and at your own expense before the repetition of any Test.
- 11.6 You agree that neither the performance of a Test nor the passing of a Test releases you from any of your responsibilities, obligations or liabilities (including repair or replacement or both of any part of the Works damaged during the performance of any Tests) under this Contract.
- 11.7 You must provide, install, calibrate, operate, maintain, and be responsible for the accuracy of all test instrumentation and equipment required for the Tests. You must remove all of this instrumentation and equipment after the successful completion of the Tests.
- 11.8 We may request you to perform any test and/or inspection not described in this Contract and which would not have otherwise been carried out by you and you must arrange those tests and/or inspections as soon as practicable. Your extra costs necessarily incurred, which may include an allowance for off-Site overheads and profit, in the carrying out of those tests and/or inspections will be added to the Price only if the test or inspection shows that the relevant Works conform with the requirements of this Contract, but are otherwise to be borne by you.
- 11.9 You acknowledge and agree that we are entitled to all products, revenues and other benefits that may be generated or derived from the Facility during the precommissioning, commissioning and the Performance Tests.
- 12 Precommissioning and Commissioning**
- 12.1 You must perform precommissioning of the Facility in accordance with the requirements and procedures in Schedule 1 (Specification).
- 12.2 After the completion of precommissioning under GC 12.1 you must notify us that the Facility are ready for Commissioning.

- 12.3 As soon as reasonably practicable after receipt of a notice under GC 12.2, we will issue a notice to you specifying the date for commencement of Commissioning and you must commence Commissioning of the Facility on the date specified in the notice in accordance with the requirements and procedures in Schedule 1 (*Specification*).
- [Drafting Note: GC 3.4 of the Power Purchase Agreement allows for an option to be included affording the Owner an opportunity to generate electricity prior to Commercial Operation. Owner to confirm whether this will be appropriate, and if so, an additional GC must be inserted to this effect.]**
- 13 Commercial Operation Performance Tests and Post-COD Performance Tests**
- 13.1 After completion of Commissioning, you must give us at least 5 Business Days' prior written notice of when you intend to carry out the Commercial Operation Performance Tests at the times and in accordance with the requirements set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).
- 13.2 As soon as reasonably practicable after receipt of a notice under GC 13.1, we will issue a notice to you specifying the date for commencement of the Commercial Operation Performance Tests at the times and in accordance with the requirements set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).
- 13.3 After Commercial Operation, you must give us at least 10 Business Days' prior written notice of when you intend to carry out the Post-COD Performance Tests at the times and in accordance with the requirements set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).
- 13.4 As soon as reasonably practicable after receipt of a notice under GC 13.3, we will issue a notice to you specifying the date for commencement of the Post-COD Performance Tests at the times and in accordance with the requirements set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).
- 14 Performance Guarantees and Performance Liquidated Damages**
- 14.1 You guarantee that the Facility and all component parts will meet the Performance Guarantees specified in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*), including the Commercial Operation Performance Guarantees and the Post COD Performance Guarantees.
- 14.2 If, following the completion of the Commercial Operation Performance Tests, the Minimum Commercial Operation Performance Guarantees are not met, you must at your cost and expense make changes, modifications or additions to the Facility, or any part of the Facility, as may be necessary for the Facility to achieve the Minimum Commercial Operation Performance Guarantees. You must notify us upon completion of the necessary changes, modifications or additions and must, subject to our rights under GC 14.3, continue to repeat the Commercial Operation Performance Tests until the Minimum Commercial Operation Performance Guarantees are met. Subject to GC 14.3, nothing in this GC 14.2 derogates from your obligation to meet the Performance Guarantees.
- 14.3 If, for reasons not attributable to us, the Minimum Commercial Operation Performance Guarantees are not met by the Longstop Date, we may terminate this Contract under GC 28.1(g) and we may also reject the Facility under GC 14.4.
- 14.4 If we reject the Facility or any part of the Facility under GC 14.3, we will be entitled to recover all sums paid by us in respect of such part(s) of the Facility and you must, at your cost, dismantle and remove the Facility (or the rejected part of the Facility) from the Site and restore the Site to its original condition.
- 14.5 If, after carrying out the Commercial Operation Performance Tests, the Commercial Operation Performance Guarantees specified in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*) are not met either in whole or in part, you must at your cost make the modifications and/or additions to the Works or any part of the Works as may be necessary to meet at least the Commercial Operation Performance Guarantees. You must notify us upon completion of the necessary changes, modifications and/or additions and repeat the Commercial Operation Performance Tests until the Commercial Operation Performance Guarantees have been met.
- 14.6 Notwithstanding that any of the other Commercial Operation Performance Guarantees have not been met, but provided that all of the other requirements for Commercial Operation have been met or waived in writing by us, we may (in our absolute and unfettered discretion) issue a Certificate of Commercial Operation under GC 15.6. If we issue a Certificate of Commercial Operation under this GC 14.6, you must do all things reasonably necessary to assist us to ensure that the other requirements for the issue of a Certificate of Commercial Operation in relation to the Facility are met.
- 14.7 Despite this GC 14 or any other provision of this Contract, if you have not met any of the Commercial Operation Performance Guarantees at the earliest of:
- the Longstop Date;
 - when you are liable for Delay Liquidated Damages up to the aggregate liability set out in the Details; or
 - when we issue a notice deeming Commercial Operation to have been achieved (notwithstanding that any of the other Commercial Operation Performance Guarantees have not been met) under GC 14.6,
- you must pay to us the Price Reduction Payment in accordance with Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).
- [Drafting note: we have currently provided for the Owner's compensation for failure to achieve Commercial Operation Performance Guarantees to be a reduction in the Price. This is included on the basis that the Owner considers that it has not been provided with the Facility that it has paid for, and as such the Price should be reduced. Another option is for Performance Liquidated Damages to be payable in respect of the Commercial Operation Performance Guarantees as well as the Post-COD Performance Guarantees.]**
- 14.8 Despite this GC 14 or any other provision of this Contract, if you have not met any of the Post-COD Performance Guarantees in accordance with Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*), you must pay the Performance Liquidated Damages to us in the amounts and at the times specified in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).
- 14.9 Our entitlement to a Price Reduction Payment under GC 14.7 and the payment of Performance Liquidated Damages under GC 14.8 will be in satisfaction of the relevant Performance Guarantees.
- 14.10 The payment of a Price Reduction Payment or Performance Liquidated Damages does not in any way relieve you from any of your obligations to complete the Works or from any of your other obligations and liabilities under this Contract.
- 14.11 The Performance Liquidated Damages claimed by us must not exceed the maximum liability for Performance Liquidated Damages set out in Schedule 5 (*Performance*

Tests, Performance Guarantees and Performance Liquidated Damages).

- 14.12 Without limiting any other rights we may have, we may deduct any Performance Liquidated Damages from any amounts payable by us to you under this Contract.
- 14.13 If we are entitled to be paid a price reduction payment or Performance Liquidated Damages under this GC 14, this does not limit our right to enforce any other remedy we may have against you. However, nothing under this Contract entitles us to claim duplicate damages under this Contract and under law regarding your failure to meet the Performance Guarantees.
- 14.14 The parties agree that the price reduction payment and Performance Liquidated Damages are a fair and reasonable pre-estimate of the damages likely to be sustained by us as a result of your failure to meet the Performance Guarantees.
- 14.15 If this GC 14 (or any part) is found for any reason to be void, invalid or otherwise inoperative so as to disentitle us from claiming Performance Liquidated Damages, we are entitled to claim against you for damages at law for your failure to achieve any or all of the Performance Guarantees. These general damages must not exceed the maximum liability for Performance Liquidated Damages set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).

15 Commercial Operation

- 15.1 As soon as the Facility has, in your opinion, satisfied each of the preconditions for achieving Commercial Operation, you must give notice to us to that effect.
- 15.2 Within 10 Business Days of our receipt of your notice under GC 15.1, we will:
- (a) issue a Certificate of Commercial Operation stating that the Facility has reached Commercial Operation and the date on which the Facility reached Commercial Operation or
- (b) notify you that the Facility has not achieved Commercial Operation and indicate any defects or deficiencies in the Facility or the Works.
- 15.3 If we notify you there are defects or deficiencies in the Facility or the Works, you must correct the defects or deficiencies and the procedures in this GC 15.2 and GC 15.3 must be repeated until we issue a Certificate of Commercial Operation.
- 15.4 You acknowledge and agree that no payment and no partial or entire use or occupancy of the Site, the Works or the Facility by us in any way

constitutes an acknowledgement by us that Commercial Operation has occurred, nor does it operate to release you from any of your warranties, obligations or liabilities under this Contract.

- 15.5 You must hand over care, custody and control of the Facility to us upon the issue of the Certificate of Commercial Operation.
- 15.6 Notwithstanding that all the requirements for the issuing of a Certificate of Commercial Operation have not been met, we may at any time, in our absolute discretion, issue a Certificate of Commercial Operation. The issue of a Certificate of Commercial Operation under GC 15.2 will not operate as an admission that all the requirements of Commercial Operation have been met, and does not prejudice any of our rights, including our right to require you to satisfy all these requirements.

16 Extension of time

- 16.1 As soon as you become aware of an incident or an event of whatsoever nature affecting or likely to affect the progress of the Works you must give us a written notice to that effect.
- 16.2 Within 3 Business Days of it becoming reasonably evident that the Works are delayed or are likely to be delayed beyond the Date for Commercial Operation, you must give written notice to us expressed as an “**Extension of Time Notice**” and setting out full details of the cause of the delay with supporting documents and stating a reasonable period by which you believe the Date for Commercial Operation should be extended.
- 16.3 Subject to the other provisions of this GC 16, you are only entitled to an extension of time to the Date for Commercial Operation where a delay to the Date for Commercial Operation is caused by any of the following events, whether occurring before, on or after the Date for Commercial Operation:
- (a) any act, omission or breach by us, our employees, agents or contractors;
- (b) the execution of a variation under GC 7, except where that variation is caused by your act, omission or breach;
- (c) an Event of Force Majeure;
- (d) a suspension under GC 27, except where that suspension is caused by your act, omission or breach; or
- (e) the occurrence of any event specified in the Details.
- 16.4 As soon as practicable after receipt of the notice in GC 16.2, we will notify you of the period, if any, by which the Date for Commercial Operation will be extended.
- 16.5 Despite any other provisions of this GC 16, we may, in our absolute discretion and at any time, make an

extension to the Date for Commercial Operation. We have no obligation to grant or to consider whether we should grant an extension of time and we are not required to exercise this discretion for your benefit.

- 16.6 Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not an event which entitles you to an extension of time, then to the extent that the delays are concurrent, you are not entitled to an extension of time to the Date for Commercial Operation.
- 16.7 It is a condition precedent to your entitlement to an extension of time under GC 16.7 that you submit the notice strictly within the time and as required under GC 16.2.
- 16.8 Any principle of law or equity (including those which might otherwise entitle you to relief and “the prevention principle”) which might otherwise cause the Date for Commercial Operation to be set at large and render the liquidated damages unenforceable, will not apply.
- 16.9 A delay by us or the failure by us to grant a reasonable extension of time or to grant an extension of time will not cause the Date for Commercial Operation to be set at large.
- 16.10 An extension of time granted under this GC 16 is your sole entitlement to compensation for delay to Works.
- 16.11 We are not liable for any costs, losses or damages suffered or incurred by you arising out of or in connection with delays to the Works. You expressly acknowledge that you have made an allowance in the Price for the risk of bearing all costs, losses and damages which you may suffer or incur arising out of or in connection with delays to the Works and that you have no entitlement to bring any claim against us in respect of any such costs, losses or damages.

17 Delay Liquidated Damages

- 17.1 If you fail to achieve Commercial Operation by the Date for Commercial Operation you must pay us Delay Liquidated Damages at the rate stated in Schedule 7 (*Delay Liquidated Damages*) for each day after the Date for Commercial Operation up to and including the Commercial Operation Date or the date this Contract is terminated, whichever occurs first.
- 17.2 Your aggregate liability for Delay Liquidated Damages under GC 17.1 will not exceed the amount specified in Schedule 7 (*Delay Liquidated Damages*).
- 17.3 The parties agree that the Delay Liquidated Damages are a fair and reasonable pre-estimate of the damages likely to be sustained by us if you fail to achieve Commercial Operation by the Date for Commercial Operation.

- 17.4 If we are entitled to be paid Delay Liquidated Damages under GC 17.1, this does not limit our right to enforce any other remedy we may have against you. The payment of Delay Liquidated Damages by you does not relieve you from any of your obligations to achieve Commercial Operation or from any of your other warranties, obligations or liabilities under or in connection with this Contract.
- 17.5 If this GC 17(or any part) is found for any reason to be void, invalid or otherwise inoperative so as to disentitle us from claiming Delay Liquidated Damages, we are entitled to claim against you for damages at law for your failure to achieve Commercial Operation by the Date for Commercial Operation. These general damages must not exceed the maximum liability for Delay Liquidated Damages set out in Schedule 7 (*Delay Liquidated Damages*).
- 18 Final Completion**
- 18.1 You must notify us at least 20 Business Days before the whole of the Works and Facility will, in your opinion, reach the stage of Final Completion.
- 18.2 You must notify us as soon as the whole of the Works and Facility have, in your opinion, satisfied each of the preconditions for achieving Final Completion.
- 18.3 Not later than 10 Business Days after receipt of your notice under GC 18.2, we will either:
- (a) issue a Certificate of Final Completion stating that the Facility has reached Final Completion and the date on which the Facility reached Final Completion; or
 - (b) notify you that the Facility has not achieved Final Completion and indicate any defects and/or deficiencies.
- 18.4 If we notify you of any defects and/or deficiencies, you must then correct those defects and/or deficiencies and the procedures described in GCs 18.2 and 18.3 must be repeated until the Certificate of Final Completion is issued.
- 18.5 The Certificate of Final Completion will be evidence of accord and satisfaction, and in discharge of each party's obligations in connection with this Contract except for:
- (a) obligations in relation to Spare Parts and Warranted Component Parts;
 - (b) indemnities;
 - (c) warranties;
 - (d) Wilful Misconduct relating to the Works and Facility or any part thereof;
 - (e) any defects or omissions in the Works and Facility or any part thereof which were not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Certificate of Final Completion; and
- (f) unresolved issues the subject of any Dispute for which written notice under GC 29 is given either prior to, or within 5 Business Days after, the issue of the Certificate of Final Completion.
- 18.6 Despite any other provision of this Contract, no partial or entire use or occupancy of the Project Site, the Works or the Facility by us, whether during the Post COD Performance Tests or otherwise, in any way constitutes an acknowledgment by us that Final Completion has occurred, nor does it operate to release you from any of your warranties, obligations or liabilities under or in connection with this Contract.
- 19 Independent contractor**
- 19.1 The parties acknowledge that you are our contractor and not our employee or agent.
- 20 Warranties**
- 20.1 You warrant that:
- (a) the Works will be performed with all the skill and care to be expected of appropriately qualified and experienced contractors with experience in performing works of a similar size, type, nature and complexity to the Works;
 - (b) the Works will be performed in a timely and professional manner in accordance with this Contract;
 - (c) you have, and you will be deemed to have, done everything that would be expected of a prudent, competent and experienced contractor in:
 - (i) assessing the risks which you are assuming under this Contract; and
 - (ii) ensuring that the Price contains allowances to protect you against any of these risks eventuating, and you will not make a claim for an increase in the Price if any of those risks eventuate;
 - (d) the Equipment must be new and unused, fit for the purpose and of a quality reasonably expected in the process and manufacturing industries, free from material defects and deficiencies of any kind, and free from any encumbrance or lien and must conform to the requirements set out in Schedule 1(*Specification*);
 - (e) the Works will be performed in accordance with Schedule 1 (*Specification*), for the Price and by the Date for Commercial Operation;
- (f) the Facility will meet the requirements specified in this Contract, including the Performance Guarantees; and
- (g) the Works will be performed with the highest regard for safety and protection of the environment and so that the Facility is capable of being operated and utilised in accordance with all applicable Laws, Government Authority Approvals and this Contract.
- 20.2 We do not warrant, guarantee or make any representation about the accuracy or adequacy of any information, data or documents made available to you as to the existing conditions at the Site. Such information, data or documents do not form part of this Contract.
- 21 Insurance**
- 21.1 You must take out and maintain during the period of this Contract:
- (a) a comprehensive public liability policy to cover all sums which you may become legally liable to pay consequent upon:
 - (i) death of, or bodily injury (including disease or illness) to, any person; and
 - (ii) loss of, or damage to, property (including loss of use),
in connection with the performance of the Works;
 - (b) insurance in respect of all claims and liabilities arising, whether at general law or under statute relating to workers compensation or employer's liability, from death of, or bodily injury (including disease or illness) to any person employed by you in connection with this Contract and you must ensure that all subcontractors are similarly insured in respect of their employees;
 - (c) a policy of insurance against any and all liability, loss and damage of any kind whatsoever to the Works; and
 - (d) other insurances specified in the Details, required by law, or otherwise reasonably required by us.
- The limit of liability provided by each policy must not be less than the amount specified in the Details.
- 21.2 You must ensure that all policies of insurance required to be taken out by you under this Contract include us as a named co-insured and you must do anything we reasonably request to protect us as an insured. However, if the relevant insurer refuses to include us as a named co-insured, you must ensure that the policy notes our interest under this Contract.
- 21.3 You must notify us immediately of any cancellation of a relevant

- insurance policy and of any change to the policy which affects our interests.
- 21.4 Without limiting our rights under any insurance policy taken out by you in accordance with this Contract (whether as co-insured or otherwise), if an event occurs or a circumstance arises which may affect our interests and which may give rise to a claim under any insurance policy to be taken out by you under this Contract, you must:
- notify us within 10 Business Days of that event;
 - actively make a claim under the relevant policy and remit to us any insurance proceeds recovered by you in respect of our rights and interests under or in connection with this Contract or any liability to third parties; and
 - ensure that we are kept fully informed of any subsequent actions and developments concerning the relevant claim.
- 21.5 At our request, you must promptly produce evidence acceptable to us that you are maintaining the insurances required by this GC 21.
- 21.6 We have the right to take out and maintain any policy of insurance required by this GC 21 if you fail to do so.
- 21.7 You agree to reimburse us for any expenses we incur in taking out and maintaining any policy of insurance taken out by us under GC 21.6.

22 Liability and indemnities

- 22.1 You will be liable for and you must indemnify us against any liability and any loss or damage of any kind whatsoever arising out of your acts or omissions whether or not the acts or omissions are in tort (including negligence), breach of contract or otherwise in relation to this Contract, except to the extent that liability or loss or damage arises out of the negligent acts or omissions of us.
- 22.2 Each indemnity in this Contract is a continuing obligation separate and independent from your other obligations and survives termination of this Contract.
- 22.3 It is not necessary for us to incur expense or make payment before enforcing a right of indemnity conferred by this Contract.
- 22.4 Without prejudice to our right to recover Delay Liquidated Damages under GC 17 or a Price Reduction Payment or Performance Liquidated Damages under GC 14, neither party will be liable to the other party in any circumstances for any Indirect Loss or damage.
- 22.5 Your total liability to us under this Contract which is not subject to insurance taken out under GC 21 will not exceed the amount of the aggregate limit of uninsured liability set out in the Details.

- 22.6 If:
- you fail to take out and maintain insurance under GC 21 and we do not take out the insurance under GC 21.6; or
 - you take out insurance under GC 21 but fail to comply with your obligations under GC 21, or through any act or omission prejudice the insurance cover,
- then the amount of your aggregate limit of uninsured liability set out in the Details is deemed to increase by the amount of insurance that would have been available if you had taken out and maintained the insurance or had not prejudiced the insurance (as the case may be).
- 22.7 GCs 22.4 and 22.5 do not limit your liability:
- under GCs 2.6, 2.8, 14.4 and 23.6;
 - under GC 22.1, in respect of any claim or loss in relation to personal injury, disease, illness or death;
 - under any other provisions of this Contract which expressly impose a greater liability;
 - in cases of fraud, wilful misconduct or illegal or unlawful acts; or
 - in cases of your acts or omissions which are contrary to the most elementary rules of diligence which a conscientious contractor would have followed in similar circumstances.

22.8 [Insert jurisdiction-specific clause 22.8].

- 22.9 You further agree that the rights, obligations and liabilities of the parties (including those relating to proportionate liability) are as specified in this Contract and not otherwise whether such rights, obligations and liabilities are sought to be enforced as a breach of contract or claim in tort (including negligence), in equity, under statute or otherwise at law

23 Intellectual property

- 23.1 We retain the Intellectual Property Rights in the Owner Background IP.
- 23.2 We give you a licence to reproduce and use the Owner Background IP as necessary for the sole purpose of you complying with your obligations under this Contract. You must not reproduce, use or otherwise deal with the Owner Background IP, or allow any other person to do the same, for any other purpose. We have the right to revoke this licence at any time by notice in writing to you.
- 23.3 You retain the Intellectual Property Rights in the Contractor Background IP.
- 23.4 You give us a licence to reproduce and use the Contractor Background IP to own, operate, repair and maintain the Works.

- 23.5 You agree and acknowledge that all Project IP will be vested in and owned by us.
- 23.6 You warrant that performance of the Works in accordance with this Contract will not infringe the Intellectual Property Rights of any third party.
- 23.7 You agree to notify us as soon as you become aware of any suspected, threatened or actual infringement of any Intellectual Property Rights in the:
- Owner Background IP;
 - Contractor Background IP; or
 - Project IP.
- 23.8 You agree to provide all reasonable assistance we may request to protect the Intellectual Property Rights in the:
- Owner Background IP; and
 - Project IP.

24 Confidential information

- 24.1 Each party undertakes that it will not, either during the term of this Contract or at any time thereafter (except to the extent necessary to comply with its obligations under this Contract) disclose to any person any information of or relating to the other party of which it has come to possess as a result of this Contract or the negotiations preceding this Contract including the terms of this Contract, including all information and documentation supplied by you or us or information to which you or we have access in the performance of this Contract.
- 24.2 You must not publish alone or in conjunction with any other party or organisation any information, drawing or photograph concerning this Contract except with our written consent and subject to such conditions as we may prescribe.
- 24.3 Nothing in this Contract prohibits disclosure of information which:
- is in the public domain otherwise than as a result of a breach of this GC 24;
 - is received from a third party provided that it was not acquired directly or indirectly by that third party as a result of a breach of this GC 24;
 - is required to be disclosed by Law or any Government Authority having authority over a party; or
 - is for the purposes of obtaining legal advice.

25 Taxes

- 25.1 Should any Taxes be levied on, in respect of, or in relation to, the performance of the Works these will be to your account. You will be responsible for payment of those Taxes and will immediately provide us with documentary evidence of payment if payment is made by you on our behalf.
- 25.2 Except where expressly stated otherwise, all amounts referred to in

- this Contract are exclusive of GST. Where any supply occurs under or in connection with this Contract or for the performance of the Works, the party making the supply (Supplier) is entitled to increase the amount payable for the supply by the amount of any applicable GST.
- 25.3 Where under this Contract you are entitled to any adjustment to the Price, and such adjustment is based on the reasonable or actual cost to you of performing any work, any input tax credits available to you, or your representative member, in relation to performing such work will be deemed to reduce the cost of such work.
- 25.4 Where the amount payable to the Supplier (as that term is defined in the GST Legislation) for a supply under or in connection with this Contract or the Works is based on the actual or reasonable costs incurred by the Supplier, the amount which the Supplier is entitled to be paid will be reduced by any input tax credits available to the Supplier, or its representative member, in respect of such costs.
- 25.5 A party will not be obliged to pay any amount in respect of GST on a supply to the other party unless and until a tax invoice that complies with the GST Legislation has been issued in respect of that supply. Each party agrees to do all things including providing invoices or other documentation, that may be necessary or desirable to enable or assist the other party to claim input tax credits to the maximum extent possible or itself claim all input tax credits that might be available to it in order to reduce the amount recoverable from the other party under this Contract.
- 25.6 You acknowledge and agree that if a Law requires us to deduct an amount in respect of withholding tax from a payment under this Contract such that you would not actually receive on the due date the full amount provided for under this Contract then on the due date:
- we must deduct the amount for the withholding tax;
 - we must pay an amount equal to the amount deducted to the relevant Government Authority in accordance with applicable Law and give the original receipt to you; and
 - we must pay you an amount equal to the difference between the payment and the amount deducted.
- 26 Force Majeure**
- 26.1 If, as a result of an Event of Force Majeure, a party becomes unable, wholly or in part, to perform any of its obligations under this Contract or is delayed in performing those obligations:
- the affected party must immediately give notice to the other party setting out full details of the Event of Force Majeure and the reasons for the Event of Force Majeure preventing that party from, or delaying that party from, performing the affected obligations under this Contract;
 - the affected obligations identified in the notice referred to in GC (a), will be suspended but only so far as, and for so long as, the performance of those obligations is affected by the Event of Force Majeure; and
 - the affected party must use its best endeavours to overcome or remove the effects of the Event of Force Majeure as quickly as possible.
- 26.2 Upon completion of the Event of Force Majeure, the affected party must as soon as reasonably practicable recommence the performance of the affected obligations.
- 26.3 You have no entitlement and we have no liability for:
- any costs, losses, expenses, damages or the payment of any part of the Price during an Event of Force Majeure; and
 - any delay costs in any way incurred by you due to an Event of Force Majeure.
- 26.4 An Event of Force Majeure does not relieve a party from liability for an obligation which arose before the occurrence of that event, nor does that event affect the obligation to pay money in a timely manner where the obligation matured prior to the occurrence of that event.
- 27 Suspension**
- 27.1 We have the right, at any time and for any reason, to suspend performance of your obligations under this Contract by giving you notice.
- 27.2 When you receive a notice of suspension from us in accordance with GC 27.1, you must suspend performance of the relevant obligations until such time as we direct you to resume performance of those obligations by notice in writing. At such time, you must promptly recommence the performance of those obligations in accordance with this Contract.
- 27.3 You are only entitled to an extension of time to the Date for Commercial Operation and compensation for delay under GC 16 where the suspension is not caused by your act, omission or breach.
- 28 Termination**
- 28.1 We may, by notice to you, immediately terminate this Contract if:
- you commit or suffer an Insolvency Event;
 - you are in breach of GC 30;
 - you have incurred and are liable for Delay Liquidated Damages up to the aggregate liability specified in Schedule 7 (*Delay Liquidated Damages*);
- you have incurred and are liable for Performance Liquidated Damages up to the aggregate liability specified in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*);
 - you have abandoned the Works and/or repudiated this Contract;
 - you have failed to achieve Commercial Operation by the Longstop Date;
 - you have failed to achieve the Minimum Commercial Operation Performance Guarantees by the Longstop Date; or
 - the Power Purchase Agreement is terminated.
- The rights given by this GC 28 are in addition to any other rights that may be exercised by us under this Contract or at law.
- 28.2 You may only terminate this Contract by notice to us if:
- we commit or suffer an Insolvency Event; or
 - we have failed to make a payment in breach of GC 6, and you have provided us with a notice requiring payment within 20 Business Days of the expiry of the period in GC 6.4, except with respect to any payment or portion that we dispute under GC 29.
- 28.3 If you receive a notice of termination from us, or you terminate by notice to us, you must:
- stop work (except to the extent specified in the notice from us);
 - take such action as necessary or as we direct, for the transfer, protection and preservation of our property; and
 - do your best to minimise the costs of termination to us.
- 28.4 If this Contract is terminated in accordance with GC 28.2, we will only be liable for the payment for the Works performed to the date of termination and for extra costs necessarily and reasonably incurred by you as a result of termination subject to our rights of set off.
- 28.5 Any expiry or termination of this Contract does not affect any rights of the parties which may have accrued before the date of expiry or termination.
- 29 Dispute Resolution**
- 29.1 If a Dispute arises, the Parties must, prior to the initiation of any legal proceedings, use their best endeavours in good faith to reach a reasonable and equitable resolution of the Dispute.
- 29.2 If a Dispute arises, the Dispute must be referred to the Representatives for resolution by written notice specifying that it is a notice given

- under this GC 29 and giving full particulars of the nature and extent of the Dispute.
- 29.3 If the Dispute is not resolved within 10 Business Days of a referral in accordance with GC 29.2, the Dispute must be referred to:
- determination by an Expert under GC 29.4, where a Dispute relates to the application of any industry or technical standard or any rules, practices or customs of any trade or profession, or whenever the Parties agree that a point of difference between them will be resolved by an Expert; or
 - resolution by a Panel under GC 29.5 for all other Disputes.
- 29.4 Where a Dispute is referred for determination by an Expert under GC 29.3(a), the following process and procedure will apply:
- The Party wishing to appoint an Expert must notify the other Party in writing and give details of the matter that it proposes to be resolved by the Expert (**Expert Determination Notice**). The Parties must endeavour to agree on a single Expert (independent of the Parties and with qualifications and experience appropriate to the matter in Dispute). If, within 10 Business Days of receipt of the Expert Determination Notice, the Parties have not agreed a single Expert to appoint, the Parties will request the President of the Institute of Engineers Australia to appoint the Expert.
 - The Expert will be instructed to determine the Dispute within the shortest practicable time and deliver a report setting out the Expert's opinion with respect to the matters in dispute setting out the reasons for the decision.
 - The Expert shall determine the procedure for the conduct of the process in order to resolve the Dispute and must provide each Party with a fair opportunity to make submissions in relation to the matter in issue.
 - Any process or determination of the Dispute by the Expert shall be made as an expert and not as an arbitrator. The determination of the Expert will be final and binding on the Parties without appeal so far as the Law allows and except in the case of a manifest error or where either Party has not been provided with a fair opportunity to make submissions in relation to the matter in issue as required under GC 29.4(c).
 - Each Party must bear its own costs of and incidental to any proceedings under this GC 29.4. The costs of the Expert will be borne and paid by the Party who gives the notice
- under GC (a) unless the Parties agree otherwise.
- 29.5 Where a Dispute is referred to a Panel under GC 29.3(b), the following process and procedure will apply:
- Each Party must nominate a senior representative for the Panel within 3 Business Days of the referral to the Panel in accordance with GC 29.3(b).
 - The Panel will determine its own procedures for the resolution of a Dispute. Unless otherwise agreed by the Parties, all discussions involving the Panel will be conducted on a without prejudice basis.
 - Decisions of the Panel may only be made by unanimous agreement of the members of the Panel.
 - Any decision of the Panel which is recorded in writing and signed by each member of the Panel is binding on the Parties.
 - Subject to GC 29.6, if the Dispute is not resolved by the Panel within 20 Business Days of the referral under GC 29.3(b), either Party may commence legal proceedings.
- 29.6 Neither party may commence legal proceedings unless the parties have undertaken the processes set out in GCs 29.1 to 29.5 and those processes have failed to resolve the Dispute or one of the Parties has attempted to follow these processes and the other Party has failed to participate.
- 29.7 Nothing in this GC 29 prevents a Party seeking urgent injunctive relief or similar interim relief from a court.
- 29.8 Despite the existence of a Dispute, the Parties must continue to perform their respective obligations under this Agreement.
- 30 Assignment and subcontracting**
- 30.1 You may not assign or novate your rights and obligations under this Contract without our prior written consent.
- 30.2 We have the right to assign or novate any or all of our rights and obligations under this Contract.
- 30.3 You may not subcontract any of your obligations under this Contract without our prior written consent.
- 31 Notices**
- 31.1 Any notice, approval, consent or other communication in relation to this Contract must be:
- in writing;
 - marked to the attention of the relevant Representative; and
 - either:
 - left at the address set out in the Details;
 - sent by prepaid ordinary post (airmail if appropriate) to the address set out in the Details; or
- (iii) sent by email to the email address of the addressee set out in the Details, however, if the addressee has notified a change of postal address or email address, then the communication must be to that address.
- 31.2 A notice, approval, consent or other communication takes effect from the time it is received unless a later time is specified in it.
- 31.3 A letter or facsimile is deemed to be received:
- in the case of a posted letter, on the fifth day after posting (seventh in the case of a letter sent by airmail); and
 - in the case of a facsimile, on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the facsimile number of the recipient.
- 32 Availability of information**
- 32.1 During the period of this Contract, and for a further 2 years, our authorised representatives are entitled to access any relevant personnel, accounts, records (including data stored in computer files), vouchers, receipts and documents of any description which belong to you, or any of your employees, agents, contractors and/or subcontractors, for the purposes of ensuring that the terms and conditions of this Contract have been complied with and that all applications for payment have been and are being made in accordance with this Contract.
- 32.2 All accounts must be maintained by you.
- 32.3 Our duly authorised representatives have the right to reproduce any relevant documents accessed under this GC 32.
- 33 Business ethics**
- 33.1 Neither you, nor any of your employees, agents, contractors and/or subcontractors, are expected, permitted or authorised to take any action on our behalf, including any action which could violate any Laws.
- 33.2 All financial statements, reports and applications for payment which are rendered by you under this Contract must completely and accurately reflect the facts about all the relevant activities, transactions and circumstances handled for the account of us.
- 33.3 You must immediately notify us in writing of any and all violations of this GC 33 upon becoming aware of such violations.
- 34 Conflict of interest**
- 34.1 You must exercise reasonable care and diligence to prevent any actions or conditions which could result in a conflict with our best interests.

- 34.2 Your obligations under this GC 34 apply to the activities of your employees, agents, contractors and/or subcontractors in their relations with our employees, agents, contractors, subcontractors and/or any third parties associated with this Contract (as well as their families).
- 34.3 Your obligations under this GC 34 include, but are not limited to, establishing precautions to prevent your employees, agents, contractors and/or subcontractors from making, receiving, providing or offering gifts, payments, loans, substantial entertainment or other considerations for the purpose of influencing individuals to act contrary to our best interests.
- 34.4 You must immediately notify us in writing of any and all violations of this GC 34 upon becoming aware of those violations.
- 35 Transfer of ownership and care of works**
- 35.1 The ownership of the Equipment transfers to us on the earlier of:
- when the relevant Equipment is identified as being intended solely for incorporation, use or consumption in the Works;
 - where that Equipment cannot reasonably be so identified, at the time when the relevant Equipment is incorporated, used or consumed in the Works; or
 - payment by us of the relevant invoice the value of which includes the Equipment.
- 35.2 The ownership of any Equipment in excess of the requirements for the Works reverts to you at the end of the Defects Liability Period or at any earlier time when we agree with you that the Equipment in question is no longer required for the Works.
- 35.3 Despite the transfer of ownership of the Equipment, the responsibility for care and custody of the Facility and the Works, including the Equipment, together with the risk of loss or damage to the Facility and the Works, including the Equipment, remains with you until the Commercial Operation Date.
- 35.4 You are responsible for the care and custody of the Works, including the Equipment, until the Commercial Operation Date and must make good at your own cost any loss or damage that may occur to the Works, including the Equipment, from any cause whatsoever prior to that date. You are also responsible for any loss or damage to the Works, including the Equipment, caused by you or your suppliers in the course of any work.
- 36 Entire agreement**
- 36.1 This Contract constitutes the entire agreement between the parties and sets out a full statement of the contractual rights and liabilities of the parties in relation to the performance of the Works and no

negotiations between them nor any document agreed or signed by them prior to the date of this Contract in relation to the Works is of any effect.

37 Other matters

- 37.1 Any of our rights under this Contract may only be waived by us in writing signed by a duly authorised representative of us.
- 37.2 This Contract may not be varied except in writing signed by a duly authorised representative of each of the parties.
- 37.3 We may exercise a right, remedy or power in any way we consider appropriate.
- 37.4 If we do not exercise a right, remedy or power at any time, this does not mean that we cannot exercise it later.
- 37.5 To the extent of any inconsistency between the Details and the General Conditions, then the General Conditions will prevail.
- 37.6 To the extent of any inconsistency between the General Conditions and any schedules (including any documents referred to in the schedules), then the General Conditions will prevail.
- 37.7 To the extent of any inconsistency between the Details and any schedules (including any documents referred to in the schedules), then the Details will prevail.
- 37.8 The rights, remedies and powers of the parties under this Contract are in addition to any rights, remedies and powers provided by law.
- 37.9 This Contract may consist of a number of copies each signed by one or more parties to this Contract. When taken together, the signed copies are treated as making up the one document.

38 Governing law

- 38.1 This Contract is governed by the laws of **[insert jurisdiction]** excluding the Vienna Convention on Contracts for the International Sale of Goods and the **[insert relevant sale of goods legislation]**.
- 38.2 The parties agree to submit to the exclusive jurisdiction of the courts of **[insert jurisdiction]**. Each party waives any right it has to object to an action being brought in those courts including by claiming that action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

39 Definitions and Interpretation

- 39.1 In this Contract unless the contrary intention appears:
- ARENA Funding** means the funding from ARENA applied for by us **[Drafting note: further details to be provided]**
- Auxiliary Works** means those works performed by third parties in connecting the Facility to the grid under the Power Purchase Agreement, and includes the

installation of metering equipment, as specified in Schedule 1 (Specification).

Business Day means a day when the banks in **[insert capital city of jurisdiction]** are open for business excluding a Saturday, Sunday or public holiday.

Certificate of Commercial Operation means the certificate issued by us in accordance with GC 15.2(a)

Commencement Date means the date of commencement of the Works as set out in the Details.

Commercial Operation means that stage of the Works when the following has occurred:

- the Facility is complete in all respects in accordance with this ContrSRFact except for minor defects which would not affect the performance of the Facility or the ability of the Facility to operate legally, safely, reliably and efficiently;
- all Tests to be satisfactorily performed before Commercial Operation occurs, including the Commercial Operation Performance Tests in respect of the Facility, have been passed, and the Commercial Operation Performance Guarantees have been met, or a reduction in the Price has been determined and any resulting amounts due have been paid by you;
- the Facility is capable of being operated safely under all anticipated or likely operational conditions and is in a condition which allows us to comply with all Laws relating to its operation;
- all documents and other information, including the technical materials, required under this Contract have been supplied to us in accordance with this Contract or as directed by us from time to time; and
- any other preconditions to Commercial Operation set out in the Details have been met.

Commercial Operation Date means the date certified by us as the date on which Commercial Operation occurred.

Commercial Operation Performance Guarantee means the performance guarantees set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*), to be met by you in order to achieve Commercial Operation.

Commercial Operation Performance Tests means the performance and other tests set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*), to be satisfactorily performed and

completed by you in order to achieve Commercial Operation, at the times and in accordance with the requirements of Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).

Contract means this engineering procurement and construction contract comprising the Details, the General Conditions, the schedules and any other documents referred to in the Details and the Schedules.

Contractor Background IP means Intellectual Property Rights owned by or licensed to you (including know how and technical information) which exists prior to the date of this Contract but does not include Owner Background IP or Project IP.

Date for Commercial Operation means the date by which Commercial Operation must be achieved as set out in the Details, which may be extended or reduced in accordance with GC16.3.

Defects Liability Period means the period set out in the Details.

Delay Liquidated Damages means the liquidated damages for delay specified in the Details.

Details means the section of this Contract headed "Details".

Equipment means the equipment to be supplied by you and incorporated into the Works to form part of the Facility, as set out in the Specification.

Event of Force Majeure means an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent provided that event or circumstance is limited to the following:

- (a) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any governmental or competent authority;
- (b) earthquakes, flood, lightning or other physical natural disaster, but excluding weather conditions regardless of severity; and
- (c) strikes at a national level or industrial disputes at a national level, or strikes or industrial disputes by labour not employed by the affected party, its subcontractors or its suppliers but excluding any industrial dispute which is specific to the Site or you or the performance of this Contract.

Expert Determination Notice has the meaning given in GC29.4

Facility means the **[insert]** MW photovoltaic power station located at **[insert]** and all associated infrastructure to be designed, engineered, procured, fabricated, constructed, installed, commissioned and tested in accordance with the terms of this Contract.

General Conditions means these general conditions comprising GCs 1 to 39.

Good Solar Industry Practices means the practices followed when work is undertaken in accordance with all of the following:

- (a) in a sound and workmanlike manner;
- (b) with due care and skill;
- (c) with due expedition and without unnecessary or unreasonable delays;
- (d) in a manner which allows for this Contract to be efficiently performed;
- (e) using materials of acceptable quality and merchantable quality which are fit for the purposes reasonably ascertainable from this Contract;
- (f) in accordance with the Law and any Government Authority Approval; and
- (g) consistent with best practice for an experienced, prudent and competent solar project contractor of the highest skill and quality.

Government Authority Approval means any authorisation, assessment, consent, approval, licence, lease, determination, ruling, permit, accreditation, registration, exemption, filing, variance, order, judgment, decree, publication, notice to, declaration of or with, or regulation by or with any Government Authority or under any Law relating to the performance of the Works or otherwise in connection with the Works (including the use of the Works), the Site or the Project.

Government Authority means any national, state, local, regional, territorial or municipal government, ministry, governmental department, commission, board, bureau, agency, instrumentality, executive, legislative, judicial or administrative body, having jurisdiction over the Works, the Site or the Project.

GST Legislation means the A New Tax System (Goods and Services Tax) Act 1999 (Cth) and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.

GST means the tax payable on Taxable Supplies under the GST Legislation.

Industrial Matter means industrial action of any sort, whether threatened or actual, involving your employees working at or in connection with the Site.

Insolvency Event means in respect of a party:

- (h) the board of the party passes a resolution under section 436A of the *Corporations Act 2001* (Cth);
- (i) the party is placed into administration pursuant to Part 5.3A of the *Corporations Act 2001* (Cth);
- (j) a deed of company arrangement is entered in respect of the party;
- (k) an application is made to a court for the winding up of the party;
- (l) the party resolves that it be wound up voluntarily;
- (m) a winding up order is made in respect of the party;
- (n) a receiver or receiver and manager are appointed to any substantial assets of the party;
- (o) a court orders that there be a meeting of creditors or members of the party for any purpose related to Part 5.1 of the *Corporations Act 2001* (Cth);
- (p) a mortgagee takes possession of any substantial assets of the party; or
- (q) the party informs the other party or any creditor of the party, in writing, that it is insolvent.

Intellectual Property Rights includes the protected rights attaching to inventions, patents, registered designs, trademarks, copyright, circuit layouts and confidential information.

Law means any statute, ordinance, code, law, decree, circular, rule or regulation by any Government Authority.

Longstop Date means [insert].
[Drafting note: this will be the 'sunset date' by which the Commercial Operation must be achieved and will be set on a project by project basis depending on the requirements of the PPA.]

Minimum Commercial Operation Performance Guarantee means the minimum performance guarantees set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*) required to be met by you.

Owner Background IP means Intellectual Property Rights owned by or licensed to Owner (including

know-how and technical information) which exists prior to the date of this Contract but does not include Contractor Background IP or Project IP.

Panel means the panel established in accordance with GC 29.3.

parties means you and us.

party means you or us.

Performance Guarantees means all of the Performance Guarantees specified in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*), and includes the Commercial Operation Performance Guarantees and the Post-COD Performance Guarantees.

Performance Liquidated Damages means the liquidated damages for underperformance specified in the Details.

Performance Tests means the tests as specified in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*) in order to ascertain whether the Facility or a specified part is able to obtain the Performance Guarantees.

Post COD Performance Tests means the performance and other tests set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*), to be satisfactorily performed and completed by you before Final Completion is achieved, and at the times and in accordance with the requirements of Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*).

Post-COD Performance Guarantee means the performance guarantee set out in Schedule 5 (*Performance Tests, Performance Guarantees and Performance Liquidated Damages*) to be met by you on a date that is more than 24 months after Commercial Operation has been certified under this Contract but before Final Completion is achieved.

Power Purchase Agreement means the power purchase agreement in respect of the Facility between us and **[insert Seller]**, dated on or about the date of this Contract.

Price means the price specified in the Details and Schedule 3 (Price and Schedule of Rates), subject to any increases or decreases as may be made in accordance with this Contract.

Project IP means Intellectual Property Rights discovered or coming into existence as a result of, for the purposes of or in connection with the performance of the Works

in accordance with this Contract but does not include Contractor Background IP or Owner Background IP.

Project means the **[insert wattage]** MW solar PV power station located at **[insert location]**.

Representative means the authorised representative nominated by each party in the Details or any other person appointed by the relevant party and notified to the other party from time to time in accordance with GC 5.

Schedule of Rates means the schedule of rates set out in Schedule 3 (Price and Schedule of Rates).

Serial Defect means substantially the same defect having the same root cause has been identified in:

- (a) 5% of a factory batch of the modules; and
- (b) 5% of a factory batch of the inverters,

delivered, or ready to be shipped, to the Site for incorporation into the Facility.

Site Arrangements means the site arrangements set out in Schedule 2 (Site).

Site has the meaning given to it in Schedule 2 (*Site*).

Spare Parts means the spare parts specified in Schedule 1 (*Specification*).

Specification means the specification for the Facility, as set out at Schedule 1 (*Specification*).

Standards means all industry standards and government regulations applicable to the Works.

Taxes means any and all present and future sales, use, personal, property, real property, value added, goods and services, turnover, stamp, documentary, interest equalisation, business, occupation, excise, income, corporation, profits, gains, gross receipts, or other taxes, fees, withholdings, imposts, levies, duties or other charges of any nature whatsoever or whensoever imposed (other than taxes on our net income) by any government, governmental, semi-governmental or other relevant authority, together with any penalties, fines or interest thereon or similar additions, imposed, levied or assessed or otherwise payable.

Technical Materials includes plans, designs, drawings, engineering information, data, specifications, reports, accounts and any other material specified in this Contract.

Variation means any modification, addition, omission, or other variation to, in or from the Works in accordance with GC 7.

Warranted Component Part Defect means any defect in design, workmanship, materials or installation of a single or series of Warranted Component Part not reasonably capable of being discovered by the Owner prior to the expiry of the Warranted Component Part Defect Period in the course of normal operation and maintenance of the Facility and which materially impacts on the performance of the Facility or the rate at which the Spare Parts are being or are likely to be consumed.

Warranted Component Part Defect Period means the period listed for any specific single or series of Warranted Component Parts in Schedule 6 (Warranted Component Parts) starting from the Commercial Operation Date.

Warranted Component Part means any Equipment or Spare Part identified in Schedule 6 (Warranted Component Parts).

we and **us** and **our** means the person named in the Details as the Owner.

Wilful Misconduct means, regarding the Contractor:

- (a) any fraud, fraudulent concealment or dishonesty by you or your personnel;
- (b) any conduct, act or omission by you or your personnel having substantially harmful consequences, done or omitted to be done intentionally and with conscious or indifference to, or disregard for, the rights or welfare of those who are or may be thereby affected; or
- (c) any illegal or malicious act or omission of you or your personnel.

Works means the works to be performed by you in accordance with this Contract as specified in the Details and Schedule 1 (*Specification*).

you and **your** means the person named in the Details as the contractor.

39.2 In this Contract unless the contrary appears:

- (a) a reference to this Contract or another instrument includes any variation or replacement of either of them;
- (b) the singular includes the plural and vice versa;
- (c) the word person includes a firm, a body corporate, an unincorporated association or an authority;
- (d) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns;

- (e) if a period of time is specified and dates from a given day or the day of an actual event, it is to be calculated exclusive of that day;
- (f) a reference to a GC or schedule is a reference to a GC or schedule in this Contract; and
- (g) the words "including" and "include" are a reference to "including, but not limited to".

39.3 Headings are inserted for convenience only and do not affect the interpretation of this Contract.

Schedule 1 Specification

Note:

This Schedule must set out a detailed description of the Facility and the Works to be performed under this Contract. The detailed description of the Facility and the Works to be supplied must be as clear as possible and must be broken into a series of subheadings including:

- (a) any relevant background and a general description of the Works;*
- (b) detailed description of the Works to be performed, including the Equipment and Spare Parts to be supplied, including detailed technical requirements;*
- (c) any tests to be performed and passed;*
- (d) any specific standards which the Contractor is expressly required to comply with;*
- (e) any specific timing, milestones and program which the Contractor is expressly required to comply with;*
- (f) any project or control co-ordination procedures;*
- (g) any equipment or materials that the Owner has agreed to supply;*
- (h) the documentation that the Contractor is required to provide (eg. manuals, technical material, outage reports); and*
- (i) any spare parts that the Contractor is required to provide.*

Any abbreviations must be defined and technical terms must be explained.

For example, this Schedule could be set out in the following manner:

1. Background and general description of the Works

[This section should include all relevant background information about the equipment, site or conditions that relate to the Works. It should also include general (1-2 line) descriptions of the Works and Equipment to be supplied]

2. Works to be performed including technical requirements

[insert detailed description of the Works, Equipment and the Owner's technical requirements and drawings and other relevant materials where applicable. This section should contain detailed specifications for the Works and Equipment to be supplied (including panels and inverters and any other Warranted Component Parts). You must clearly identify the activities the Contractor has to perform in order to carry out the Works and supply the Equipment.]

Consider:

- the order in which activities must be carried out;***
- who is responsible for delivery and unloading of materials and where to;***
- are there any activities that the Owner will be performing during the contract term;***
- what are the technical specifications that the Works and Equipment must meet?***

3. Standards and procedures

You must comply with the following standards:

[List any Australian Standards or other recognised standards or site standards with which must be complied while carrying out the Works. Quality assurance requirements should be included in this section]

You must comply with the following procedures:

[List any procedures]

4. Testing

[It is extremely important to incorporate accurate testing requirements as part of this Contract. Achieving acceptable test results is one of the conditions to practical completion, which determines when the Owner will have to pay the Contractor. It is preferable that the Owner be required to pay the Contractor when the Owner is satisfied that the Works carried out and Equipment supplied by the Contractor will achieve the results needed by the Owner.]

The type of tests and the type of results that will be acceptable to the Owner should be clearly described in this Contract. Sometimes, the best way to represent this will be in tabular form. If referring to an Australian Standard, extra care must be taken to ensure that the results referred to in the standard are appropriate. The results should be described in the table or reference should be made to the section in the Australian Standard that sets out the type of results that will be acceptable to the Owner.

For example:

Description of test	Required result
In the presence of us, you must carry out the tests set out in AS 1228-1997 on each weld.	100% of the welds must achieve 100% compliance with AS 1228-1997.

5. Documentation

[insert relevant documentation]

6. Timing, Milestones and Program

You must comply with the following timing requirements: **[List the Owner timing requirements (if any)]**

You must achieve the following milestones: **[List milestones to be achieved (if any)]**

You must comply with the following program: **[List the program to be complied with (if any)]**

If there is too much information to be physically included in this Schedule, you can incorporate the appropriate documents by reference. If this is done, you must clearly identify the documents by author, title, date and revision number. Take care not to include parts of documents that do not relate to the Works.

In preparing this Schedule, you should take extreme care to ensure that all of the Works which the owner wants the Contractor to perform and supply are included in order to reduce the likelihood of disputes at a later date, and to reduce the likelihood that Contractors may seek to profit from variations in the future.

Schedule 2 Site

Note:

This Schedule must set out a detailed description of the Site on which the Works will be performed.

For example, this Schedule could be set out in the following manner:

1. Description of the Site

[Insert site details including address and include or refer to drawing numbers or maps of the Site]

2. Other sites

[Insert details of other sites, if any, about which the Contractor needs information in order to perform the Works]

3. Access to the Site

[Insert details of access and any conditions which may impact on access of which the Contractor should be aware]

Schedule 3 Price and schedule of rates

Note:

This Schedule must set out the Price and a detailed breakdown of the Price.

If there are any provisional sums they must be described in detail in this Schedule.

This Schedule must also set out under a separate heading "Schedule of Rates", any schedule of rates. If rates and prices are included only for the purpose of valuing variations, this must be made clear. If there are no rates and prices, you should insert "Not applicable" under the heading "Schedule of Rates".

For example:

1. Price

[Insert the clearest breakdown of the Price that you can obtain. This may be in tabular form]

2. Schedule of Rates

[Insert any applicable schedule of rates]

3. Provisional sums

[Provide clear details of any provisional sums that may apply to the contract and the activities to which those sums relate]

Schedule 4 Payment schedule

Note:

Various payment options are listed below - delete whichever option is not appropriate.

Option 1 - Monthly Progress Payments

On the **[insert date]** of each month (or as otherwise agreed by us) you must submit an invoice to us.

Option 2 - Milestone Payments

Within **[insert days]** of completion of each milestone set out in the milestone payment schedule below, you must submit an invoice to us for the relevant amount payable on achievement of the milestone.

[insert milestone payment schedule]

Option 3 - Lump Sum Payment

Within **[insert days]** of completion of the Works, you must submit an invoice to us for the relevant amount payable on completion.

[You may wish to back end the payment in the Payment Schedule and include an amount which will be paid x days after Commercial Operation or on the expiry of the Defects Liability Period]

Schedule 5 Performance tests, performance guarantees and performance liquidated damages

Note:

This Schedule must set out the Performance Tests, Performance Guarantees, and Performance Liquidated Damages payable by the Contractor if the Facility fails to achieve the Performance Guarantees based upon the performance ratios tested.

With respect to the Performance Liquidated Damages, to ensure there is no risk in a court interpreting GC 13 as a penalty and invalidating it or reading it down, it is important that the reasoning and specific facts known to the parties which support their conclusion given at GC 13.14 that the price reduction payment or liquidated damages amount is a fair and reasonable pre-estimate of the damages flowing from not achieving the Performance Guarantee.

Another option is to base the damages on a formula or set separate amounts for various breaches or triggering events, and select an amount that reflects the seriousness of each breach or event. Where appropriate, a scale of graduated amounts of liquidated damages may be used to reflect the increasing financial consequences in circumstances such as repeated instances of non-compliance with the Performance Guarantee.

1. Performance Tests

a. Commercial Operation Performance Tests

[Generally, the Performance Tests on Commercial Operation would test the nameplate capacity of the Facility, the output capacity of the Facility and the performance ratio of the facility. You should develop the testing framework in conjunction with your technical advisers to match the requirements of the PPA (if any) and to align with the technology to be utilised]

b. Post-Commercial Operation Performance Tests

[Generally, the Performance Tests after Commercial Operation would test the performance ratio of the Facility. You should develop the testing framework, including the number of tests and their timing (eg. 1 or 2 years post Commercial Operation) in conjunction with your technical advisers to match the requirements of the PPA (if any) and to align with the technology to be utilised]

2. Performance Guarantees

a. Commercial Operation Performance Guarantees

[The level at which the Commercial Operation Performance Guarantees and Post-COD Performance Guarantees are set will vary based on factors such as the financial model for the project (ie. required IRR and other measures) and any requirements under the PPA. This will need to be worked through with your technical and financial advisers]

b. Minimum Commercial Operation Performance Guarantees

[The level at which the Minimum Commercial Operation Performance Guarantees will be based on the minimum revenue to be generated by the Facility in order for it to be sustainable. This will need to be worked through with your technical and financial advisers]

c. Post-COD Performance Guarantees

[As above. Note that if the Commercial Operation Performance Guarantees are not met and a Price Reduction Payment is made, the level of the Post-COD Performance Guarantees will need to be adjusted to reflect this and to ensure that the Owner is not compensated twice for the same loss]

3. Price Reduction Payment and Performance Liquidated Damages

a. Price Reduction Payment

[The purpose of the Price Reduction Payment is to ensure that the Owner is compensated for the loss of the anticipated future revenues from the Facility for failure to meet the Commercial Operation Performance Guarantees, calculated on an NPV basis. As noted above, the level at which this is set will need to be worked through with your technical and financial advisers to reflect the financial model and technical aspects of the project. The Price Reduction Payment will be a lump sum amount, generally calculated by reference to a formula]

b. Performance Liquidated Damages

[As above. Performance Liquidated Damages will be specified as a daily amount payable]

Your aggregate liability for Performance Liquidated Damages will not exceed [insert]% of the Price.

Schedule 6 Warranted component parts

Note:

This Schedule must set out the key items of equipment for which warranties are available. For a solar PV Facility this would generally include the panels, inverters, transformers and (if used) trackers as a minimum, and ideally would also include additional equipment such as cabling and mounts. Again, this will be a point to be negotiated with the Contractor.

Warranted Component Parts	Warranted Component Part Periods
[insert]	[insert]

Schedule 7 Delay liquidated damages

Note:

This Schedule must set out the Delay Liquidated Damages to be paid per day. Consider the Owner's exposure financing costs, internal costs and existing pre-commitments. To ensure there is no risk in a court interpreting GC 17 as a penalty and invalidating it or reading it down, it is important that the reasoning and specific facts known to the parties which support their conclusion given at GC 17.3 that the delay liquidated damages amount is a fair and reasonable pre-estimate of the damages flowing from the delay.

An example Delay Liquidated Damages regime is set out below:

Delay Liquidated Damages

You must pay us Delay Liquidated Damages in the amount of **[insert amount]** per day from the Date for Commercial Operation the earlier of the Commercial Operation Date and the date this Contract is terminated.

Your aggregate liability for Delay Liquidated Damages will not exceed **[insert]**% of the Price.

Cap on Delay Liquidated Damages and Performance Liquidated Damages

Despite the aggregate liability for Performance Liquidated Damages specified in Schedule (*Performance Tests, Performance Guarantees, and Performance Liquidated Damages*), your aggregate liability for Delay Liquidated Damages and Performance Liquidated Damages will not exceed **[insert]**% of the Price.

Schedule 8 Form of Bank Guarantee

BANK GUARANTEE

[On the letterhead of the Bank]

Date: **[insert]**

To: **[insert name and address of the Owner]**

Dear **[insert]**

[insert Project] Operation and Maintenance Contract - Bank Guarantee

You entered into a contract dated **[insert date]** with **[insert] (Contractor)** titled **[insert]** for certain works and services (Works) to be undertaken by the Contractor (**Contract**).

We, **[insert Bank]**, irrevocably and unconditionally undertake with you that whenever you give written notice to us demanding payment, we will:

- (a) without any right of set-off or counterclaim;
- (b) without reference to the Contractor, any other person or the Contract;
- (c) without enquiring into the performance or non-performance of the Contract;
- (d) without reference to the correctness or validity of the written demand; and
- (e) despite any notice by the Contractor or any other person not to pay the whole or any part of the Guaranteed Sum,

immediately pay to you or as you may direct such an amount as you may in that notice require not exceeding (when aggregated with any amount(s) previously so paid) the sum equivalent to [5% (or 10% of the Price, reducing by 50% after Commercial Operation under the Contract)] of the Total Yearly Fee (**Bank Guarantee**).

This Bank Guarantee is valid from the date of this letter in its full amount of **[insert]**. Our liability under this Bank Guarantee will be a continuing liability and continues to be fully valid with respect to any written notice to us referred to above until the earlier of:

- (f) us receiving written notification from you that this Bank Guarantee is no longer required by you;
- (g) until this Bank Guarantee being returned to us; or
- (h) until payment to you by us of the whole sum of **[insert]**.

We may at any time without being required to do so pay you the sum of **[insert]** less any amount or amounts which we have previously paid under this Bank Guarantee.

Any payment by us in accordance with this Guarantee will be in immediately available and freely transferable Australian Dollars free and clear of and without any deduction for or on account of any present or future Taxes, levies, imposts, duties, charges, fees, set off, counterclaims, deductions or withholdings of any nature whatsoever and by whomever imposed.

Our obligations under this Guarantee constitute direct primary, irrevocable and unconditional obligations. Our obligations will not require any previous notice to or Claim against the Contractor and will not be discharged or otherwise prejudiced or adversely affected by any:

- (a) waiver, time, lenience or tolerance which you may grant to the Contractor, or the discharge or release of any person;
- (b) breach or breaches of the Contract by the Contractor or you;
- (c) amendment, modification or extension which may be made to the Contract or the Works performed under the Contract (with or without or knowledge or consent);
- (d) intermediate payment or other fulfilment made by us;
- (e) change in the constitution or organisation of the Contractor; or
- (f) other matter or thing which in the absence of this provision would or might have that effect.

This Bank Guarantee may not be assigned by you to any person, firm or company, without our prior written consent, which must not be unreasonably withheld. We hereby consent to:

- (a) you assigning this Bank Guarantee to your lenders or to the Security Trustee appointed by your lenders and we undertake that we will acknowledge such assignment; and
- (b) the grant of security by you to **[insert]**.

You must notify us in writing of any assignment, after which we must make any payment claimed under this Guarantee to the person, firm or company specified in the notice which will constitute a full and valid release by us in relation to that payment.

Any notice required by this Guarantee is deemed to be given when delivered (in the case of personal delivery) or 96 hours after being despatched by prepaid registered post or recorded delivery (in the case of letter) or as otherwise advised by and between the parties.

This Guarantee is governed by and construed in accordance with the laws of **[insert jurisdiction]** and we agree to submit to the exclusive jurisdiction of the courts of **[insert jurisdiction]**, Australia and any courts that may hear appeals from these courts regarding any proceedings under or in connection with this deed.

This Guarantee is executed by us.

IN WITNESS of which the **[insert Bank]** has duly executed this Guarantee on the date stated above.

Executed.

[Drafting note: execution blocks to be confirmed]

Signed and delivered by ***[insert]*** in accordance with section 127 of the Corporations Act 2001 (Cth) and by:

Signature of director

Signature of director/secretary

Name of director (print)

Name of director/secretary (print)

Address for notices: [Insert address]

