

Section P-00520

AGREEMENT

THIS AGREEMENT is by and between The City of Lincoln (herein called Buyer) and Fuji Electric Corporation (herein called Seller).

Buyer and Seller, in consideration of the mutual covenants herein set forth, agree as follows:

ARTICLE 1 – GOODS AND SPECIAL SERVICES.

1.01. Seller shall provide all Goods and Special Services as specified or indicated in the Contract Documents based on the acceptance by Buyer of Seller's Bid.

ARTICLE 2 - THE PROJECT.

2.01. The Project, which the Goods and Special Services to be provided under the Contract Documents may be in whole or only a part, is generally described as follows:

Design of improvements and upgrades to the East Plant Ozone Building including: supplying two new 1300 ppd LOX fed ozone generators and associated PSUs; modifications to the existing closed loop cooling system, modifications to the existing off-gas ozone destruct system; a new gas dispersion system using sidestream injection; and one 13,000 gallon LOX storage tank and associated vaporizers as necessary to convert the liquid oxygen to a gaseous state.

ARTICLE 3 – ENGINEER.

3.01. The Contract Documents for the Goods and Special Services have been prepared by Black & Veatch Corporation, 8400 Ward Parkway, mailing address P.O. Box 8405, Kansas City, Missouri 64114, who is referred to in the Contract Documents as Engineer. Engineer, and its duly authorized agents, are to act as Buyer's representatives, assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents in connection with completion of the Project in accordance with the Contract Documents.

ARTICLE 4 - POINT OF DESTINATION.

4.01. The place where the Goods are to be delivered is defined in the Procurement General Conditions as the Point of Destination and is designated as:

Ashland East WTP  
401 Highway 6  
Ashland, Nebraska 68003

ARTICLE 5 - CONTRACT TIMES.

5.01. Time of the Essence.

A. All time limits for Milestones, if any, and completion and readiness for final payment as stated in the Contract Documents are of the essence of the Contract.

5.02. Contract Times.

A. The Contract Times shall be as indicated below. Project milestone dates are based on award of a contract on or before December 8, 2008. If a contract award is made after such date, the project milestone dates shall be adjusted accordingly. The furnishing of Goods and Special Services shall be completed and ready for final payment in accordance with Paragraph 10.06 of the Procurement General Conditions on or before the date indicated below.

5.03. Date for Submittal of Shop Drawings.

- A. All Shop Drawings and Samples required by the Contract Documents shall be submitted to Engineer for review and acceptance on or before January 16, 2009. A schedule of Shop Drawings submittals and Preliminary Operation & Maintenance manual Submittals shall be provided to Engineer within 14 days of Notice of Award.
- B. Final Operation and Maintenance Manuals shall be included with the delivery of the Goods.
- C. Factory Acceptance Tests shall be completed no later than October 2, 2009.

5.04. Date for Delivery of Goods.

A. The Goods are to be delivered to the Point of Destination and ready for Buyer's receipt of delivery no earlier than September 1, 2009 and complete delivery of equipment no later than November 3, 2009.

5.05. Days for Furnishing Special Services.

A. The furnishing of Special Services to Buyer for successful completion of all required functional and operational testing for successful operation of the Ozone System shall be complete no later than April 1, 2010, provided the equipment is installed and ready for startup no later than February 1, 2010.

5.06. Liquidated Damages.

A. Buyer and Seller recognize that time is of the essence of this Agreement and that Buyer will suffer financial loss if the Goods and Special Services are not furnished within the times specified in Paragraphs 5.04 and 5.05 above, plus any extensions thereof allowed in accordance with Article 7 of the Procurement General Conditions. The parties also recognize that the timely performance of services by others involved in the Project is materially dependent upon Seller's specific compliance with the requirements of Paragraph 5.03. Further, they recognize the delays, expense and difficulties involved in proving the actual loss suffered by Buyer if complete acceptable Goods and Special Services are not delivered on time. Accordingly, instead of requiring such proof, Buyer and Seller agree that as liquidated damages for delay (but not as a penalty) Seller shall pay Buyer \$2000.00 for each day, up to and including the first 30 days that expires after the time specified in Paragraph 5.05 for furnishing of Special Services. Starting on the 31<sup>st</sup> day, Seller shall pay buyer \$4000.00 for each day after 30 days that expires after the time specified in Paragraph 5.05 for furnishing of Special Services. In addition, if equipment is not available for delivery by November 3, 2009 and Installation Contractor is requesting delivery, Seller shall pay Buyer \$2000.00 for each day that expires after November 3, 2009 until all equipment is delivered. Total liquidated damages shall not exceed ten (10) percent of the Contract Amount. In addition to the liquidated damages noted herein, Seller shall pay penalties as specified in the technical Specifications for failure to meet the guaranteed or the specified performance requirements.

B. Buyer shall have the right to deduct the liquidated damages and penalties from any money in its hands, otherwise due, or to become due, to Seller, or to initiate applicable dispute resolution procedures and to recover liquidated damages and penalties for nonperformance of this Contract within the time stipulated.

ARTICLE 6 – CONTRACT PRICE.

6.01. Lump Sum.

A. Buyer shall pay Seller in current funds, for furnishing Goods and Special Services designated in Article 1 in accordance with the Contract Documents, a Lump Sum amount of: Three Million One-Hundred Nineteen Thousand Five Hundred Dollars and No Cents (\$3,119,500.00) as indicated in Seller's Bid.

ARTICLE 7 – PAYMENT PROCEDURES.

7.01. Submittal and Processing of Payments.

A. Seller shall submit Applications for Payment in accordance with Article 10 of the Procurement General Conditions. Applications for Payment will be processed by Engineer as provided in the Procurement General Conditions.

7.02. Progress Payments.

A. Buyer shall make progress payments on account of the Contract Price on the basis of Seller's Applications for Payment as follows:

1. Upon receipt of the first Application for Payment submitted in accordance with Paragraph 10.01.A.1 of the Procurement General Conditions and accompanied by Engineer's recommendation of payment in accordance with Paragraph 10.02.A of the Procurement General Conditions, an amount equal to 10 percent of the Contract Price, less such amounts as Engineer may determine in accordance with Paragraph 10.02.A.3 of the Procurement General Conditions.
2. Upon receipt of the second such Application for Payment accompanied by Engineer's recommendation of payment in accordance with Paragraph 10.01.A.2 of the Procurement General Conditions, an amount sufficient to increase total payments to Seller to 80 percent of the Contract Price, less such amounts as Engineer may determine in accordance with Paragraph 10.02.A.3 of the Procurement General Conditions. Supplier shall submit a detailed Schedule of Values to Engineer for evaluation of partial payment requests as specified in Section P-01300.

7.03. Final Payment.

A. Upon receipt of the final Application for Payment accompanied by Engineer's recommendation of payment in accordance with Paragraph 10.06 of the Procurement General Conditions, Buyer shall pay the remainder of the Contract Price as recommended by Engineer.

#### ARTICLE 8 – SELLER'S REPRESENTATIONS.

8.01. In order to induce Buyer to enter into this Agreement, Seller makes the following representations:

A. Seller has examined and carefully studied the Contract Documents and the other related data identified in the Bidding Documents.

B. If specified, or if, in Seller's judgment, any local condition may affect cost, progress or the furnishing of the Goods and Special Services, Seller has visited the Point of Destination and become familiar with and is satisfied as to the local conditions that may affect cost, progress or the furnishing of the Goods and Special Services.

C. Seller is familiar with and is satisfied as to all Federal, state, and local Laws and Regulations in effect at the time of bidding that may affect cost, progress, and the furnishing of the Goods and Special Services.

D. Seller has carefully studied and correlated the information known to Seller, and information and observations obtained from Seller's visits, if any, to the Point of Destination, with the Contract Documents.

E. Seller has given Engineer written notice of all conflicts, errors, ambiguities, or discrepancies that Seller has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Seller.

F. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for performance and furnishing of the Goods and Special Services

#### ARTICLE 9 – CONTRACT DOCUMENTS.

9.01. Contents.

A. The Contract Documents which comprise the entire agreement between Buyer and Seller concerning the furnishing of Goods and Special Services consist of the following:

(LWS – Ozone System Modif. & Upgrade ) P-00520  
(Procurement ) -5-  
(Lincoln, Nebraska )  
(B&V Project 161998 )  
(Modified with Addendums No. 1 & No. 2 )

10/20/2008

1. This Agreement.
2. Procurement Performance and Payment Bonds.
3. Procurement General Conditions.
4. Procurement Supplementary Conditions.
5. Specifications, as listed in the Table of Contents of the Project Manual.
6. Drawings consisting of 20 sheets, with each sheet bearing the following general title:

Lincoln Water System  
Ozone System Modification and Upgrade

Sheet titles are listed on the cover sheet

7. Addenda 1 through 2.
8. Exhibits to this Agreement (enumerated as follows):
  - a. Exhibit A-1 to Agreement between Buyer and Seller dated \_\_\_\_\_, Assignment of Contract; Consent to Assignment; and Acceptance of Assignment.
  - b. Exhibit A-2 to Agreement between Buyer and Seller dated \_\_\_\_\_, Agreement to Assignment by Seller's Surety.
  - c. Seller's Bid.
  - d. Present Worth of Ozone System Operating Costs (attached to the bid documents)
  - e. Documentation submitted by Seller prior to Notice of Award.
9. Buyer's Forms as listed in the Table of Contents.
10. The following which may be delivered or issued on or after the Effective Date of the Agreement and are not attached hereto:
  - a. Notice to Proceed.

- b. Written Amendment(s).
- c. Change Order(s).
- d. Field Order(s).
- e. Engineer's Written Interpretation(s).

B. The documents listed in Paragraph 9.01.A are attached to this Agreement (except as expressly noted otherwise above).

C. There are no Contract Documents other than those listed in this Article.

D. The Contract Documents may be amended, modified, or supplemented only as provided in Paragraph 3.04 of the Procurement General Conditions.

#### ARTICLE 10 – MISCELLANEOUS.

##### 10.01. Defined Terms.

A. Terms used in this Agreement will have the meanings indicated in the Procurement General Conditions and Procurement Supplementary Conditions.

##### 10.02. Assignment.

A. Buyer has the right to assign the Contract for furnishing Goods and Special Services hereunder and Seller shall accept such assignment. Forms documenting the assignment of the Contract and consent of Seller's surety to the assignment are attached as exhibits to this Agreement.

1. The Contract will be executed in the name of Buyer initially, and will be assigned to an installation contractor designated by Buyer. The anticipated date for the installation contract is July 1, 2009. The assignment will occur on the effective date of the agreement between Buyer and the installation contractor, which is expected to occur on or about July 17, 2009. As of the date of acceptance of assignment by the installation contractor, all references in the Contract Documents to Buyer shall mean the designated contractor whose responsibilities will include the installation of the Goods.

2. The assignment of the Contract shall relieve Buyer from all further obligations and liabilities under the Contract. After assignment, Seller shall become a subcontractor to the assignee and, except as noted herein, all rights, duties, and obligations of Buyer under the Contract shall become the rights, duties and obligations of the assignee.
  
3. Payment Procedures
  - a. Buyer agrees to make a progress payment upon receipt of the first Application for Payment submitted in accordance with Paragraph 10.01.A.1 of the Procurement General Conditions and in accordance with Paragraph 7.02.A.1 of this Agreement.
  - b. Payment of the second Application for Payment in accordance with Paragraph 10.01.A.2 of the Procurement General Conditions and in accordance with Paragraph 7.02.A.2 of this Agreement shall be assigned to the installation contractor.
  - c. Final payment in accordance with Paragraph 10.06 of the Procurement General Conditions and Paragraph 7.03 of this Agreement shall be assigned to the installation contractor.
  
4. After assignment:
  - a. All performances, warranties, and guarantees required by the Contract Documents will continue to run for the benefit of Buyer and, in addition, for the benefit of the assignee.
  - b. Except as provided in this Paragraph 10.02.A.4.b, all rights, duties and obligations of Engineer to assignee and Seller under this Contract will cease.
    - 1) Engineer will review Seller's Applications for Payment and make recommendations to assignee for payments as provided in Paragraphs 10.02 and 10.06 of the Procurement General Conditions.
    - 2) Upon the written request of either the assignee or Seller, Engineer will issue with reasonable promptness such clarifications or interpretations of the Contract Documents, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. Such written clarifications and

interpretations will be final and binding on assignee and Seller unless:

- a) an appeal from Engineer's clarification or interpretation is made within the time limits and in accordance with the dispute resolution procedures set forth in Article 13 of the Procurement General Conditions; or
  - b) if no such dispute resolution procedures have been set forth, a written notice of intention to appeal is delivered by assignee or Seller to the other within 30 days after the date of such decision, and a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction within 60 days after the date of such decision (unless otherwise agreed to in writing by assignee and Seller), to exercise such rights or remedies as the appealing party may have with respect to such clarification or interpretation in accordance with applicable Laws and Regulations.
- 3) When rendering a clarification or interpretation under Paragraph 10.02.A.4.b.2, Engineer will not show partiality to assignee or Seller and will not be liable in connection with any clarification or interpretation rendered in good faith.

B. No other assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound. Specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law). Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

#### 10.03. Successors and Assigns.

A. Buyer and Seller each binds itself, its partners, successors, assigns and legal representatives to the other party hereto, its partners, successors, assigns and legal representatives in respect to all covenants, agreements and obligations contained in the Contract Documents.

10.04. Severability.

A. Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken, and all remaining provisions shall continue to be valid and binding upon Buyer and Seller, who agree that the Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

10.05. Business Addresses.

A. The business address of Seller given herein is hereby designated as the place to which all notices, letters, and other communication to Seller will be mailed or delivered. The address of Buyer appearing herein is hereby designated as the place to which all notices, letters, and other communication to Buyer shall be mailed or delivered. Either party may change its address at any time by an instrument in writing delivered to Engineer and to the other party.

B. The address of the Assignee as indicated on Exhibit A-1 is hereby designated as the place to which all notices, letters, and other communication to Assignee shall be mailed or delivered.

IN WITNESS WHEREOF, Buyer and Seller have signed this Agreement. One counterpart each has been delivered to Buyer, Seller, Surety, and Engineer.

This Agreement will be effective on \_\_\_\_\_.

Buyer: City of Lincoln

Seller: Fuji Electric Corporation

By \_\_\_\_\_

K. J. Yama  
By KATE YASUDA

Title: \_\_\_\_\_

Title: Vice President

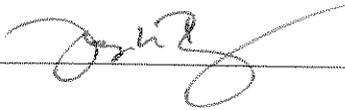
Address for giving notices

Address for giving notices

\_\_\_\_\_

Park 80 East, 2nd Floor  
160 Pehle Ave., Saddle Brook  
N.J. 07663

Approved as to Form

  
\_\_\_\_\_

\_\_\_\_\_  
Attorney for Buyer

Agent for service of process

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Designated Representative:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Designated Representative:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

End of Section

ASSIGNMENT OF CONTRACT, CONSENT TO ASSIGNMENT, AND  
ACCEPTANCE OF ASSIGNMENT

This assignment will be effective on \_\_\_\_\_.

This assignment will be effective on the Effective Date of the Agreement between Buyer and Installation Contractor.

The Contract between the City of Lincoln ("Buyer") and Fuji Electric Corporation ("Seller") for furnishing Goods and Special Services under the Contract Documents entitled Ozone System Modifications and Upgrade is hereby assigned, transferred, and set over to \_\_\_\_\_ ("Installation Contractor"). Installation Contractor shall be totally responsible for the performance of Seller and for the duties, rights and obligations of Buyer, not otherwise retained by Buyer, under the terms of the Contract between Buyer and Seller.

ASSIGNMENT DIRECTED BY:

City of Lincoln  
Buyer

(If Buyer is a corporation, attach evidence of authority to sign. If Buyer is a public body, attach evidence of authority to sign and resolution or other documents authorizing execution of Buyer-Seller Agreement.)

By: \_\_\_\_\_  
(Signature) (Title)

Address for giving notices

Lincoln Water System  
2021 N. 27<sup>th</sup> Street  
Lincoln, NE, 68508

ASSIGNMENT

ACKNOWLEDGED AND ACCEPTED BY:

Fuji Electric Corporation  
Seller

(If Seller is a corporation, attach evidence of authority to sign.)

By:   
(Signature) (Title) Vice President

ASSIGNMENT ACCEPTED BY:

(If Installation Contractor is a corporation, attach evidence of authority to sign.)

\_\_\_\_\_  
Installation Contractor

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

Address for giving notices

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

COPY

EXHIBIT A-2 to Agreement Between Buyer and Seller  
Dated October 20, 2008

Bond No.: K07700246

AGREEMENT TO ASSIGNMENT BY SELLER'S SURETY

Surety hereby acknowledges and agrees that the Contract for furnishing Goods and Special Services under the Contract Documents entitled Ozone System Modification and Upgrade by and between the City of Lincoln ("Buyer") and Fuji Electric Corporation ("Seller") may be assigned, transferred, and set over to \_\_\_\_\_ ("Installation Contractor"), in accordance with Paragraph 11.02 of Agreement between Buyer and Seller.

Surety further agrees that, upon assignment of the Contract, the Installation Contractor shall have all the rights of the Buyer under the Procurement Performance Bond.

(Corporate Seal)

Surety: Westchester Fire Insurance Company

Company: \_\_\_\_\_

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

Signature and Title Ted Moy, Attorney-in-fact  
(Attach Power of Attorney)

Address for giving notices

436 Walnut Street

Philadelphia, PA

19106