

and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having noted that the motion is unopposed; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The OPPD Settlement memorialized in that certain *Amendment No. 2* to the OPPD Contract attached as **Exhibit A** to this Order (the "**Amendment**") is hereby approved in all respects and shall be binding and enforceable in accordance with its terms on the Debtors, their estates, and OPPD, and each of their respective successors and assigns, in each case in accordance with the terms of the Amendment and this Order.

2. The Debtors shall provide an accounting of direct payments made to OPPD Vendors from the Retainage funds by the OPPD Escrow Account to OPPD, the Committee, and the Debtors' bank lenders on every Monday (starting with the first Monday after the payment of the first OPPD Vendor by the OPPD Escrow Account).

3. ZII is authorized to assume, and the OPPD Contract is hereby assumed, as amended pursuant to the Amendment, in its entirety pursuant to sections 105(a) and 365 of the Bankruptcy Code effective immediately upon entry of this Order.

4. ZII is authorized to cure all defaults under the OPPD Contract, which cure amount for the OPPD Contract is \$0. Upon the curing of such defaults, ZII's obligations to cure any

defaults under the OPPD Contract under section 365(b)(1)(A) of the Bankruptcy Code shall be deemed satisfied.

5. Adequate assurance of future performance under the OPPD Contract to the extent required pursuant to section 365(b) of the Bankruptcy Code has been provided.

6. Upon assumption of the OPPD Contract, such contract shall be a postpetition contract of ZII, and all obligations thereunder shall be postpetition obligations of ZII.

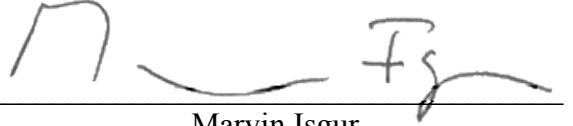
7. Nothing contained in the Motion or this Order, nor any action taken pursuant thereto, nor any payment made pursuant to the authority granted thereby, is intended to be or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Debtors' rights to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a waiver of any claims or causes of action that may exist against any creditor or interest holder; (f) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, other than the OPPD Contract; (g) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the Motion are valid and the Debtors expressly reserve their rights to contest the extent, validity, or perfection or seek avoidance of all such liens.

8. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

10. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Signed: September 17, 2024



Marvin Isgur
United States Bankruptcy Judge

EXHIBIT A

Amendment

CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBJECT TO FRE 408 & ALL SIMILAR PROTECTIONS

**AMENDMENT NO. 2 TO
ENGINEER, PROCURE, AND CONSTRUCT CONTRACT FOR OMAHA PUBLIC
POWER DISTRICT STANDING BEAR LAKE AND TURTLE CREEK GENERATING
STATIONS (CONTRACT NO. 263406)**

This AMENDMENT NO. 2 to Contract No. 263406 (“**Amendment No. 2**”) is entered into as of this 13 day of August (“**Effective Date**”), by and between Omaha Public Power District, a public corporation and political subdivision of the State of Nebraska (“**OPPD**”), and Zachry Industrial, Inc., a Texas corporation (“**Contractor**”) (together with OPPD, the “**Parties**” or individually, a “**Party**”).

WHEREAS, OPPD and Contractor are parties to that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated 21 of September, 2021 (the “**EPC Contract**”);

WHEREAS, pursuant to Article IV, Subsection (b) of the EPC Contract, OPPD withholds five percent (5%) of each Milestone Payment owed to Contractor as retainage and as of the Effective Date, OPPD is holding approximately [\$20,220,446] in retainage (the “**Retainage**”);

WHEREAS, Contractor and certain of its affiliates (collectively, the “**Debtors**”) filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of Texas (“**Bankruptcy Court**”) on May 21, 2024 (the “**Petition Date**”), which initiated the chapter 11 cases (the “**Chapter 11 Cases**”) now jointly administered under lead case number 24-90377 (MI); and

WHEREAS, OPPD and Contractor desire to amend the EPC Contract as described herein.

NOW, THEREFORE, in consideration of the mutual covenants set forth below, the Parties agree as follows:

1. Defined Terms. Unless otherwise defined herein, all capitalized terms used herein shall have the meanings ascribed thereto in the EPC Contract.
2. Amendment of Article IV – Contract Price, Payment. Article IV, Subsection (b) of the EPC Contract is hereby deleted in its entirety and replaced in its entirety with the following:
 - (b) Milestone Payments. Contractor shall submit an invoice, on the tenth (10th) day of each month, showing milestones completed and payments due for those milestones in accordance with the Milestone Payment Schedule set forth in Exhibit G. After review and approval of the invoice by OPPD, milestone payments shall be made to the Contractor in the amount of 100% of approved invoice, without withholding of retainage. Such payment shall be made approximately fifteen (15) days from receipt of the invoice. Payment of such

monthly milestone payments by the District shall not be construed or deemed to be an acceptance of the Work covered thereby.

3. Amendment of Article IV – Contract Price, Payment. Article IV of the EPC Contract is hereby amended to add the following Section (i):

(i) Contractor warrants and agrees that it has the necessary work force and resources to complete the Work, including achieving the Guaranteed Substantial Completion Dates. In an effort to expedite completion of the Work, and provided that Contractor shall assume the EPC Contract (as amended) as specified in Section 10 hereof and recommend approval of this Amendment by the Bankruptcy Court of the Southern District of Texas, the District shall remit certain “Milestone Final Completion” payments to the Contractor. These Milestone Final Completion payments are contingent on the Contractor meeting the lesser of ninety days (90) from Substantial Completion or the dates for the respective Sites listed in subsections (a) and (b) below. Failure of Contractor to meet the scheduled dates below for each individual site will result in Contractor forfeiting the additional Two Million Dollar (\$2,000,000.00) payment for the respective Site set forth in this Amendment No. 2. Subject to the terms of the EPC Contract, including this Amendment No. 2, the Milestone Final Completion payments shall be adjusted as follows:

On Final Completion, the Milestone Final Completion payment shall increase by Two Million Dollars (\$2,000,000.00) per site from the allotted amount set forth in the EPC Contract:

- (a) SBLS will be a payment of Three Million Dollars (\$3,000,000.00) if the current schedule date of March 30, 2025 is met.
- (b) TCS will be a payment of Three Million Dollars (\$3,000,000.00) if the current schedule date of March 16, 2025 is met.

4. Amendment of Article IV – Contract Price, Payment. Article IV of the EPC Contract is hereby amended to add Section (j), as set forth below:

(j) Release of Retainage. The following procedures shall apply to the release of the Retainage:

- (i) SurTec Information Systems, Inc. shall serve as Contractor’s designated third-party administrator (the “**Agent**”);
- (ii) Contractor shall direct Agent to establish an escrow account (the “**OPPD Escrow Account**”);
- (iii) Upon execution of this Amendment No. 2, OPPD shall promptly deposit the entirety of the Retainage into the OPPD Escrow Account; and
- (iv) The Agent shall directly pay Subcontractors, associated with the funds held in the OPPD Escrow Account; *provided that*, OPPD shall receive

contemporaneous notice of all payments made from the OPPD Escrow Account.

5. Amendment of Article XI – Liquidated Damages. Article XI Section (f) of Amendment No. 1 to the EPC Contract is hereby deleted in its entirety, such that Article XI, Section (f) now provides in its entirety, the following:

(f) Payments for Early Completion. Provided that Zachry has successfully completed commissioning requirements per the EPC Contract, as determined by OPPD, Zachry shall be entitled to receive the following payments, to be paid within fifteen (15) days of receipt of an invoice:

(1) For SBLs, \$193,548.00 per day for each calendar day before the Guaranteed Substantial Completion Date that the Work is completed. There shall be an overall cap on this compensation of \$5,999,988, reflecting up to 31 calendar days.

(2) For TCS, \$352,941.00 per day for each calendar day before the Guaranteed Substantial Completion Date that the Work is completed. There shall be an overall cap on this compensation of \$5,999,997, reflecting up to 17 calendar days.

6. Amendment of Article XI – Liquidated Damages. Article XI, Section (b) of Amendment No. 1 to the EPC Contract, is hereby deleted in its entirety, such that Article XI, Section (b) of the Agreement now provides, in its entirety, the following:

(b) On or before August 31, 2024, EPC Contractor, OFE Suppliers and OPPD shall meet and confer regarding the status of Acceptance Tests and progress toward meeting the Guaranteed Substantial Completion Date(s), and EPC Contractor and Suppliers shall commit in writing that the Work will be completed by the Guaranteed Substantial Completion Date(s). Failure to meet the Guaranteed Substantial Completion Date(s) shall be subject to the provisions of subsection (c)(1) below. Such provisions shall be the sole and exclusive remedy for any such failure.

7. Amendment of Article XI – Liquidated Damages. Article XI, Section (c), Subsection (1) (i) and (ii) of the EPC Contract is hereby deleted in its entirety, such that Article XI, Section (c), Subsection (1) (i) and (ii) of the EPC Contract now provides, in its entirety, the following:

(1) Delay in Completion of Work

(i) If the Contractor fails to complete the Work on or before the Guaranteed Substantial Completion Date, for SBLs, as a predetermined reasonable and sole and exclusive remedy for such delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed

Substantial Completion Date for SBLS that the Work is not completed, \$350,000 per calendar day through January 29, 2025, and \$500,000 per calendar day until the Work is accepted as complete. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 28, 2025, then on March 1, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to SBLS.

(ii) If the Contractor fails to complete the Work on or before the Guaranteed Substantial Completion Date, for TCS, as a predetermined reasonable and sole and exclusive remedy for such delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed Substantial Completion Date for TCS that the Work is not completed, \$250,000 per calendar day, through January 15, 2025, and \$400,000 per calendar day until the Work is accepted as complete. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 14, 2025, then on February 15, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to TCS.

8. Revised Schedule. The Guaranteed Substantial Completion Date for SBLS shall be December 30, 2024, and the Guaranteed Substantial Completion Date for the TCS will now be December 16, 2024.

9. Waiver. Upon execution of this Amendment No. 2 and approval of the Bankruptcy Court, all OPPD's current and future Owner Furnished Equipment (OFE) backcharges will be waived and dismissed and all of Contractor's current and future Potential Change Notices (PCN's) will be waived and dismissed.

10. Assumption. Contractor shall seek Court approval to assume the Agreement (as amended by this Amendment) pursuant to Section 365 of the Bankruptcy Code. The Parties agree that all requirements for assumption of this Agreement (as amended by this Amendment) under section 365(b)(1) of the Bankruptcy Code shall be satisfied upon the Parties' entry into this Amendment No. 2. Contractor acknowledges and agrees that it shall continue to perform all obligations under the EPC Contract (as amended by Amendment No. 1 and Amendment No. 2), including achieving Substantial Completion of the SBLS and the TCS as specified in Section 8 of this Amendment No. 2.

11. Bankruptcy Court Approval and Effectiveness. This Amendment No. 2 shall be effective only upon entry of an order by the Bankruptcy Court of the Southern District of Texas approving Contractor's assumption of the EPC Contract (as amended) pursuant to section 365 of the Bankruptcy Code. Upon entry of such order by the Bankruptcy Court of the Southern District of Texas, Sections 6 and 7 of this Amendment shall take effect retroactively to the date of execution of this Amendment.

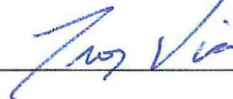
12. Effect of Amendment. Except as provided in Amendment No. 1 and this Amendment No. 2, all other terms and conditions of the EPC Contract shall remain the same and in full force and effect.

13. Counterparts. This Amendment may be executed and delivered by facsimile or other electronic means and upon such delivery the facsimile or electronic signature will be deemed to have the same effect as if the original signature had been delivered to the other Party. This Amendment may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

[Signature Page to Follow]

IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed by their duly authorized representatives as of the date set forth above.

OMAHA PUBLIC POWER DISTRICT

By: 

Title: COO

Date: 8/20/2024

ZACHRY INDUSTRIAL, INC.

By: 

Title: President, EPC

Date: 8/14/2024