Union Carbide trial exhibit UC-1779: Union Carbide Corporation and Brown & Root, Inc. Cost-Plus-a-Fee Engineeri...
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INDX NO.	1ST ORDER NO		2ND ORDER NO			C&P	CRFT	FORE	PROJECT NO														

CODE	ITEM	LOT PRICE	E	T CODE	INVOICE TO BE APPROVED BY	DIST	REQUISITION NO.
121				122		26	

T-CODE 1124

UNION CARBIDE CORPORATION

P. O. Box 8361
South Charleston, WV 25303

HEREINAFTER REFERRED TO AS "OWNER"

AMENDMENT

AMENDMENT NUMBER AA
EFFECTIVE AS OF 12-31-77

Encl. to Constr. Brownsville

TO CONSTRUCTION/MAINTENANCE ORDER CONTRACT NO. 511-729098-1

DATE AS OF 9-25-73

PG. 1 OF 1

Brown & Root, Inc.
4100 Clinton Drive
Houston, TX

HEREINAFTER REFERRED TO AS "CONTRACTOR"

ISSUED 1-19-78

THE CONTRACT REFERRED TO ABOVE IS HEREBY AMENDED AS FOLLOWS:

Contract is hereby closed in its entirety.

FOR INTERNAL DISTRIBUTION ONLY - DESTROY "CONTRACTOR" AND "ACKNOWLEDGMENT" COPIES

BRF 0054

PLAINTIFF'S EXHIBIT
UC-1779

THE PAGE(S) NUMBERED _____, ATTACHED HERETO, IS (ARE) A PART HEREOF AS EFFECTIVELY AS THOUGH IT (THEY) PRECEDED THE SIGNATURES OF TH
AS HEREIN AMENDED, ALL THE TERMS AND CONDITIONS OF SAID CONTRACT, AS HERETOFORE AMENDED, SHALL REMAIN IN FULL FORCE AND EFFECT.

PLEASE SIGN ACKNOWLEDGMENT AND RETURN TO:

MR. J. R. Vales
)304) 747-5247

UNION CARBIDE CORPORATION

BY _____
PURCHASING AGENT

LOCAL PURCHASING

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Owner's File Copy

Contract No. 511-729098-4

Code 3360C

ENGINEERING AND CONSTRUCTION CONTRACT

COST PLUS A FEE

THIS CONTRACT, made and entered into, and effective, as of the Eleventh day of June, 1973 by and between UNION CARBIDE CORPORATION, a corporation organized and existing under and by virtue of the laws of the State of New York, with an office at 270 Park Avenue, New York, New York 10017 (hereinafter called "Owner"), party of the first part, and Brown & Root, Inc., with an office at 4100 Clinton Drive, Houston, Texas (hereinafter called "Contractor"), party of the second part,

WITNESSETH:

That for and in consideration of the mutual covenants and agreements hereinafter set forth, the parties to this Contract (sometimes hereinafter referred to individually as "Party" and collectively as "Parties") covenant and agree as follows:

ARTICLE I – THE PLANT; THE WORK; TERMS AND CONDITIONS; CONFLICTS

(1) Contractor, as an independent contractor, shall perform and complete all the work described in paragraph (2) of this Article (hereinafter called the "Work") in connection with the construction of the following facility or facilities (hereinafter collectively called the "Plant"), the site of which is hereinafter called the "Construction Site"):

An expansion of Owner's chemical complex located on Owner's property in Brownsville, Texas, consisting of the following facilities:

PORTIONS OF THE PLANT	APPROX. GROSS FIXED INV. ($MM)	PROPOSED PROCESS PACKAGE ISSUE DATE	PROPOSED MECHANICAL COMPLETION DATE
Boiler Conversion	1.1	6-15-73	9-30-73
Phase I Acid Expansion	7.0	9-1-73	1Q/75
Barge Dock Improvements	0.5	9-1-73	2Q/74
Miscellaneous Small Projects	3.4	As Required	As Required

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(2) The Work shall consist of the following:

Engineering and construction of all portions of the Plant except construction only of the Phase I Acid Expansion.

(a) Engineering shall consist of the following:

1. Planning and scheduling of engineering and related home office functions.
2. Project cost estimating and home office cost control.
3. Home office progress and cost reporting.
4. Supporting process engineering as necessary.
5. Fire protection engineering.
6. Equipment arrangement engineering.
7. Utilities engineering.
8. General services and distribution facilities engineering.
9. Mechanical, civil, electrical and control systems design engineering.
10. Waste abatement engineering.
11. Design-drafting.
12. Modeling.
13. Bulk materials billing on Owner's forms.
14. Quality assurance and machinery reliability engineering.
15. Engineering at the Construction Site under Owner's supervision.

(b) Construction shall consist of the following:

1. Assist Owner in general planning and scheduling of construction activities and related field functions.
2. Assist Owner in field cost estimating and cost control.
3. Field progress and cost reporting.
4. Subcontract negotiations and managements as required.
5. Except as otherwise provided herein, all construction, including site preparation.

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6. Recruiting and training of labor.

7. Furnishing and managing Construction Equipment.

8. Assist Owner in calibration and checkout of control systems and pre-commissioning of equipment.

9. Cleaning and testing of equipment and piping.

10. Detail planning and scheduling of construction activities and related field functions.

(3) Owner's responsibilities shall consist of the following:

(a) Provide office space and services for Contractor personnel supporting process engineering.

(b) Provide process packages for units to be designed by the Contractor.

(c) Provide design criteria for non-process design, including some standards and specifications deemed mandatory for the work.

(d) Provide a schedule for the issue of process design packages.

(e) Perform mechanical design of certain critical items of equipment to be designated later.

(f) Perform home office engineering for Phase I Acid Expansion.

(g) Provide a subsurface report and foundation recommendations.

(h) Monitor the quality of the Work, costs and progress in engineering and construction.

(i) Review key decisions and plans prior to implementation. These check points will be further defined in the project procedures.

(j) Provide construction criteria and controlling conditions to be in effect at the Construction Site.

(k) Perform all procurement and materials management, including inspection expediting, receiving, field protection and warehousing.

(l) General planning and scheduling of construction activities and related field functions.

(m) Field cost estimating and cost control.

(n) Furnish Small Tools and Consumable Supplies.

(o) Calibration and checkout of control systems and pre-commissioning of equipment.

(p) Commission and start-up all units.

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(4) Except as otherwise provided in this Contract, Contractor shall provide and furnish in connection with its performance of the Work all personnel and services and all construction equipment and other things which are required for its performance of the Work (which construction equipment and other things are sometimes hereinafter referred to in the singular as "Thing" and in the plural as "Things").

(5) The Work shall be performed and completed to the satisfaction of Engineer (named in the Article entitled "OWNER'S AND CONTRACTOR'S REPRESENTATIVES") in strict accordance with the terms and conditions of this Contract. Said terms and conditions (sometimes hereinafter referred to in the singular as "provision" and in the plural as "provisions") are contained in the following: (a) the Articles herein set forth (hereinafter referred to in the singular as "Article" and in the plural as "Articles"); (b) the Sections contained in the General Provisions which are attached to, and are hereby made a part of, this Contract (hereinafter referred to in the singular as "Section" and in the plural as "Sections"); and (c) the certain documents and/or drawings which are included in The Job Criteria (defined in the Article entitled "DOCUMENTS; DRAWINGS") of this Contract or which in other provisions of this Contract are expressly made a part of this Contract.

(6) In case of conflict, the order of precedence shall be as follows in resolving such conflict: (a) the Articles; (b) the Sections; (c) the aforesaid documents; and (d) the aforesaid drawings.

ARTICLE II – DOCUMENTS; DRAWINGS

(1) Owner's criteria, listed below in this paragraph and in this Contract called "The Job Criteria", are hereby made a part of this Contract:

The Job Criteria shall specify the process design of the chemical units and the design basis of the utilities and general facilities. The Job Criteria will be transmitted to Contractor from time to time as soon as information becomes available.

(2) The specifications and drawings which are to be prepared by Contractor under the provisions of paragraph (2) of Article I shall define the Plant clearly and shall be prepared in accordance with good engineering practice. Said specifications and drawings (hereinafter respectively called "The Specifications" and "The Drawings") shall conform to The Job Criteria and to all other applicable provisions of this Contract. Contractor shall submit The Specifications and The Drawings to Engineer for review and comment, as requested by Engineer. If any of The Specifications or any of The Drawings do not in Owner's opinion conform to The Job Criteria and/or to other applicable provisions of this Contract, Engineer shall so notify Contractor, whereupon Contractor at its sole expense shall revise The Specifications and The Drawings to the extent necessary to cause them to so conform. If any work or Things which are not shown, either directly or indirectly, in The Specifications or in The Drawings are necessary to carry out the intent of this Contract, Contractor shall perform such work or furnish such Things as part of the Work. Engineer's review of, and comment on, The Specifications and The Drawings shall not relieve Contractor from responsibility for conformance of the Work to The Job Criteria and to all other applicable provisions of this Contract.

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ARTICLE III – CONTRACT PRICE

Owner shall pay to Contractor for the performance of the Work a total amount (hereinafter called the "Contract Price") which shall be comprised of the sum of the following:

(1) the total amount to be paid under the provisions of Schedule I, attached to and hereby made a part of this Contract, for Reimbursable Items as defined in Schedule I;

(2) the fee specified in, or determined in accordance with the provisions of, the Article entitled "THE CONTRACTOR'S FEE"; and

(3) the total cost to Contractor of selling or otherwise disposing of Surplus Items pursuant to the provisions of the Article entitled "SURPLUS ITEMS".

ARTICLE IV – THE CONTRACTOR'S FEE

The fee (hereinafter called "The Contractor's Fee") shall be comprised of the sum of "The Engineering Fee" and "The Construction Fee", as defined, respectively, in paragraphs (1) and (2) of this Article, and shall cover (a) Contractor's overhead and all other costs and expenses not otherwise provided for in this Contract and (b) Contractor's profit.

(1) The Engineering Fee shall be an amount equal to Sixty-five percent (65 %) of the amount to be paid, under the provisions of Schedule I, for Reimbursable Items checked in Column (2) of Part A of Schedule I.

(2) The Construction Fee shall be an amount equal to Eight percent (8 %) of the amount to be paid, under the provisions of Schedule I, for Reimbursable Items checked in Column (2) of Part C, Part D and Part E of Schedule I.

~~ARTICLE V – CASH DISCOUNT~~

~~Contractor shall notify Owner of all purchases of Things on which a cash discount may be obtained, and of the amount to such discount, at least fifteen (15) days before the date on which payment must be made in order to obtain such discount, and if Owner shall advance to Contractor the amount payable on such purchase price prior to said date, Contractor shall make such payment on or before said date; however, (a) if Contractor fails to give such notice or (b) if funds are advanced by Owner and Contractor fails to make such payment on or before said date, the amount of such discount shall be deducted from the amount due under the next succeeding invoice submitted by Contractor to Owner under this Contract. If such advance is not made by Owner, Contractor shall be under no obligation to make payment on or before said date.~~

ARTICLE VI – TERMS OF PAYMENT

(1) Following the close of each calendar month, Contractor shall submit to Owner an itemized invoice for:

(a) one hundred percent (100%) of the amount to be paid, under the provisions of Schedule I, for Reimbursable Items for such month and one hundred percent (100%) of The Engineering Fee; and

(b) one hundred percent (100%) of that portion of The Construction Fee earned during such month.

Each such invoice shall be supported by satisfactory evidence as to its correctness and shall contain the following certification by Contractor:

"We hereby certify that the work covered by this invoice was performed in compliance with all requirements of the Fair Labor Standards Act of 1938, as amended".

(2) Not later than twenty (20) days after receipt of each such invoice from Contractor, Owner shall pay to Contractor the amount of such invoice, less an amount equal to Ten percent (10 %) of the amount provided for in subparagraph (b) of paragraph (1) of this Article which shall be retained by Owner until payable under the provisions of paragraph (3) of this Article. It is understood and agreed, however, that all payments made hereunder are solely for the convenience of Contractor and shall not be construed as acceptance by Owner of the Work, or of any portion thereof.

(3) Not later than thirty (30) days after Owner's acceptance of *a portion of the Work pursuant to the provisions of the Article entitled "ACCEPTANCE OF THE WORK" and, if requested by Owner, Owner's receipt of evidence satisfactory to Owner that the Work and the Construction Site are free and clear of all laborers', mechanics' and materialmen's liens and all other liens and charges, of every character whatsoever, and the possibility thereof, arising out of work performed and/or Things furnished by Contractor, or by a subcontractor, under or in connection with this Contract or in connection with the Work, Owner shall pay to Contractor that portion of the amounts retained by Owner under the provisions of paragraph (2) of this Article which**

ARTICLE VII – SURPLUS ITEMS

Upon the written request of Owner, or upon the written recommendation of Contractor if approved by Owner in writing, Contractor agrees to sell for the account of Owner at a price satisfactory to Owner, or to otherwise dispose of as Owner may direct, all Things (not then incorporated into the Plant) to which Owner has title and which Owner does not wish to retain during the course of, or within a reasonable time after the completion of, the Work (such Things sometimes in this Contract referred to as "Surplus Items").

ARTICLE VIII – COMPLETION OF THE WORK

The Work shall be completed in accordance with schedules mutually agreed to by the Parties.

Contractor shall prepare, and shall submit promptly to Engineer for approval, a detailed schedule of the various phases of the Work, in form satisfactory to Engineer, showing the starting and completion dates thereof. The approved schedule shall be revised by Contractor as necessary to keep it current with the progress of the Work; no such revision shall be effective, however, unless approved by Engineer.

**is applicable to the portion of the Work so accepted by Owner.

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ARTICLE IX – DATE OF MECHANICAL COMPLETION

*generally

(1) Contractor shall perform all tests, pre-operating procedures and checks (based*upon those set forth in the Schedule entitled "Mechanical Completion and Commissioning Specification", attached to and hereby made a part of this Contract) necessary to determine whether or not the Plant, or a portion of the Plant, has achieved "Mechanical Completion", as defined in said Schedule. Except as otherwise provided in this Contract, Contractor shall provide and furnish all personnel, services and Things necessary for the performance of such tests, pre-operating procedures and checks.

(2) Before performing any of such tests, pre-operating procedures or checks, Contractor shall give Engineer at least forty-eight (48) hours prior written notice. Engineer shall have the right to observe any or all of such tests, pre-operating procedures and checks.

(3) When Contractor considers that Mechanical Completion of the Plant, or of a portion of the Plant, has been achieved (although the Work may not then have been completed), Contractor shall give Engineer written notice (hereinafter in this Article called "The Notice") to that effect.

(4) If upon receipt of The Notice it is the opinion of Engineer that Mechanical Completion of the Plant, or of such portion of the Plant has been achieved, Engineer shall, as promptly as possible but no later than ten (10) working days after Engineer's receipt of The Notice, give Contractor written notice of Owner's acceptance of care, custody and control of the Plant, or of such portion of the Plant, and the Date of Mechanical Completion of the Plant, or of such portion of the Plant, shall be the date of Engineer's receipt of The Notice.

*upon

(5) If, however, *receipt of The Notice it is the opinion of Engineer that Mechanical Completion of the Plant, or of such portion of the Plant, has not been achieved, Engineer shall, as promptly as possible but no later than ten (10) working days after his receipt of The Notice, give Contractor written notice that Owner does not accept care, custody and control of the Plant, or of such portion of the Plant, specifying the reason or reasons, whereupon Contractor shall perform whatever work is necessary to cause the Plant, or such portion of the Plant, to achieve Mechanical Completion; and the procedures hereinabove in this Article set forth shall be repeated until Owner's acceptance of care, custody and control of the Plant, or of such portion of the Plant. If Engineer should fail to notify Contractor within the above-mentioned ten (10) working day period that Owner either accepts or does not accept care, custody and control of the Plant, or of such portion of the Plant, Owner shall be deemed to have accepted care, custody and control of the Plant, or of such portion of the Plant, and the Date of Mechanical Completion of the Plant, or of such portion of the Plant, shall be the date of Engineer's receipt of The Notice.

(6) Owner's acceptance of care, custody and control of the Plant, or of a portion of the Plant, under the provisions of this Article shall not constitute, nor be deemed to constitute, acceptance of the Work, or of any portion thereof, by Owner; and the provisions of this Article shall not be deemed to limit in any manner whatsoever the rights of Owner and the obligations of Contractor under any other provision of this Contract.

(7) The responsibility of Contractor for the care, custody and control of the Plant, or of a portion of the Plant, shall cease on the date of Owner's acceptance of care, custody and control of the Plant, or of such portion of the Plant.

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ARTICLE X – ACCEPTANCE OF THE WORK

When Contractor considers that the Work has been completed in accordance with the provisions of this Contract, Contractor shall give Owner written notice to that effect. If upon receipt of such notice it is the opinion of Owner that the Work has been completed in accordance with the provisions of this Contract, Engineer shall, as promptly as possible but no later than ten (10) working days after Owner's receipt of such notice from Contractor, give Contractor written notice of Owner's acceptance of the Work. If, however, it is the opinion of Owner that the Work has not been completed in accordance with the provisions of this Contract, Engineer shall, within ten (10) working days after Owner's receipt of the aforesaid notice from Contractor, notify Contractor in writing that Owner does not accept the Work, specifying the reason or reasons, whereupon Contractor shall promptly perform whatever work is necessary to complete the Work in accordance with the provisions of this Contract; and the procedures hereinabove in this Article set forth shall be repeated until Owner's acceptance of the Work. If Engineer should fail to notify Contractor within the above-mentioned ten (10) working day period that Owner either accepts or does not accept the Work, the Work shall be deemed to have been accepted by Owner effective upon the expiration of said period. The date of the completion of the Work shall be deemed to be the date of Owner's acceptance of the Work.

ARTICLE XI – OWNER'S AND CONTRACTOR'S REPRESENTATIVES

(1) Owner hereby designates Mr. L. M. Roth as Engineer. Owner reserves the right to change the designation of Engineer from time to time.

(2) Contractor hereby designates Mr. F. W. Bell as Contractor's duly authorized representative with respect to this Contract.

ARTICLE XII – GOVERNING LAW

The validity, interpretation and performance of this Contract shall be governed by the law of the State in which the Construction Site is located.

IN WITNESS WHEREOF, the Parties have caused this Contract to be executed as of the day and year first above written.

UNION CARBIDE CORPORATION

(Owner)

By _____

Title Purchasing Agent

Brown & Root, Inc.

(Contractor)

By _____

Title SENIOR GROUP VICE PRESIDENT

OIL Mm

Form No. UCC334-126 (1/71)
CCCF

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GENERAL PROVISIONS

The Sections which are checked in Column 3 of the Index below are deleted and do not form a part of this Contract.

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Form No. UCC334-12b (1/71)
ECCF

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Section 1. Liens and Charges

Contractor shall indemnify and save harmless Owner from and against laborers', mechanics' and materialmen's liens and all other liens and charges, of every character whatsoever, upon the Work and/or upon the Construction Site arising out of work performed and/or Things furnished by Contractor, or by a vendor or subcontractor, under or in connection with this Contract or in connection with the Work. If at any time there should be evidence of any such lien or charge, Contractor shall cause such lien or charge to be discharged promptly and shall notify Owner in writing when this has been done, and Owner shall have the right to retain out of any payment then due, or thereafter to become due, under this Contract an amount sufficient to discharge such lien or charge. Should there prove to be any such lien or charge after all such payments have been made, Contractor shall refund to Owner all moneys that the latter may be compelled to pay in discharging such lien or charge.

Section 2. Changes

(1) Owner (without invalidating this Contract) shall have the right, by giving notice in writing to Contractor from time to time prior to completion of the Work, (a) to make changes in The Job Criteria, to issue additional instructions and/or to require Contractor to perform additional work, all within the original intent, scope and character of the Work as defined in the Articles entitled, respectively, "THE PLANT; THE WORK; TERMS AND CONDITIONS; CONFLICTS" and "DOCUMENTS; DRAWINGS" and/or (b) to require Contractor to omit a portion or portions of the Work (such changes, additions and omissions being in this Contract referred to in the singular as "Change" and in the plural as "Changes"). Contractor shall comply with such Changes; and the net cost, if any, to Contractor of such Changes shall be paid by Owner to Contractor in accordance with the provisions of the Article entitled "CONTRACT PRICE" and an equitable adjustment will be made in the time within which the Work is to be completed.

(2) Owner (without invalidating this Contract) shall also have the right, by giving notice in writing to Contractor from time to time prior to completion of the Work, to order additions to the Work (such as additional process facilities, projects and/or services) outside of the original intent, scope and character of the Work as defined in the Articles entitled, respectively, "THE PLANT; THE WORK; TERMS AND CONDITIONS; CONFLICTS" and "DOCUMENTS; DRAWINGS". Contractor shall perform all work necessary to complete such additions and the cost of such work shall be paid by Owner to Contractor in accordance with the provisions of the Article entitled "CONTRACT PRICE", except that The Contractor's Fee and the time within which the Work is to be completed shall be subject to adjustment by mutual agreement of the Parties unless otherwise specified in this Contract.

Section 3. Records and Books of Account

Contractor agrees to keep proper records and books of account showing the cost of the Work, and of the various portions thereof, as requested by Engineer, and such records and books of account shall be open to audit by a representative of Owner at all reasonable times during the performance of, and for a period of eighteen (18) months after the completion of, the Work. It is understood and agreed that any amount disclosed by such audit as owed by Contractor to Owner or by Owner to Contractor shall be paid to Owner or Contractor, as the case may be, within twenty (20) days after the date on which such amount is mutually agreed to by the Parties.

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Section 4. Force Majeure

Neither Party shall be liable for default or delay caused by any occurrence beyond its reasonable control, or beyond the reasonable control of a subcontractor, including but not limited to fires, strikes, accidents, acts of God and delays of common carriers. In the event Contractor should be delayed in the completion of the Work by reason of any such occurrence, the time within which the Work is to be completed shall be extended by the period of such delay, but no such extension shall be made unless written notice thereof is given by Contractor to Engineer within five (5) working days after the termination of such delay.

Section 5. Delays by Owner

In the event Contractor should be delayed in the completion of the Work by reason of any act or omission of Owner or of another contractor employed by Owner at the Construction Site, the time within which the Work is to be completed shall be extended by the period of such delay, but Contractor hereby waives all claims for damages by reason of such delay.

Section 6. Warranties as to Materials, Equipment and Workmanship

(1) Contractor hereby warrants that all portions of the work:

~~(a) shall be new unless otherwise authorized by Owner in writing;~~

(b) shall conform to The Specifications and to The Drawings, and shall be of the best quality if no other quality is specified;

(c) shall be fit for the particular purposes for which they are required; and

(d) shall be free from all defects in workmanship until the expiration of twelve (12) months after (i) the Date of Mechanical Completion in the case of portions of the Work which have been incorporated into, or performed on, the Plant by Contractor on or before the Date of Mechanical Completion thereof and (ii) the date of Owner's acceptance of the Work in the case of portions of the Work which have been incorporated into, or performed on, the Plant by Contractor subsequent to the Date of Mechanical Completion thereof; provided, however, that Contractor shall not be liable for any failures which result solely from improper operation or maintenance on Owner's part or which are due solely to normal wear and tear*

~~(2) Contractor further warrants that all equipment designed and manufactured by others than Contractor which Contractor purchases for the Plant shall be specified so as to conform to The Specifications and to The Drawings and shall be fit for the particular purposes for which they are required. With respect to each item of such equipment, Contractor shall use its best efforts to cause a vendor warranty, no less favorable to Owner than the following, to be included in the purchase order covering such item of equipment:~~

*or which a reasonable final inspection by Owner would have revealed.

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~~"Seller hereby warrants to Buyer and to Union Carbide Corporation that each item of~~ equipment sold by it hereunder: (a) shall be new; (b) shall conform in all respects to the drawings, specifications and terms of this purchase order and shall be of the best quality if no other quality is specified; and (c) shall be free from defects in design, materials and workmanship until the expiration of twelve (12) months after the date on which it was placed into service for the purpose for which it was purchased. If any such item of equipment, or any part thereof, fails to meet the foregoing warranties and Buyer or Union Carbide Corporation so notifies Seller within a reasonable time after such failure first becomes known to either Buyer or Union Carbide Corporation, Seller shall thereupon promptly correct such failure at its sole expense."

In the event Contractor is unable to obtain such a warranty from the lowest acceptable vendor, Contractor shall so notify Owner, and Owner shall have the option of approving the warranty offered by the lowest acceptable vendor, or of having such item of equipment purchased from the next lowest acceptable vendor who agrees to furnish such warranty or another warranty acceptable to Owner. If, with respect to any such item of equipment, any vendor warranty is invalid with respect to or is unenforceable by, Union Carbide Corporation (as a third party not a party to the purchase order) under the law of the jurisdiction applicable thereto, then Contractor hereby warrants to Owner that such item of equipment (i) shall conform to the Specifications and to The Drawings and (ii) shall be free from all defects in materials and workmanship to the extent such item is warranted to Contractor by the vendor thereof. Contractor hereby agrees to ~~use its best efforts to enforce each vendor warranty.~~

(3) Contractor hereby agrees that, upon receiving written notice from Owner, it will at such reasonable time as is specified in such notice repair, or remove from the Construction Site and replace, any and all portions of the Work which fail to meet any warranty applicable thereto under the provisions of this Section; provided Owner so notifies Contractor within a reasonable time after such failure becomes known to Owner and makes the Plant available for such repair or removal and replacement.

(4) The cost of such repair or removal and replacement shall be paid by Owner to Contractor in accordance with the provisions of the Article entitled "CONTRACT PRICE" subject, however, to the limitation that if such failure becomes known to Owner after the applicable Date of Mechanical Completion, The Contractor's Fee shall not apply thereto and the cost of all engineering and home office services necessary to correct such failure shall be for the sole account of Contractor. Any other provision of this paragraph to the contrary notwithstanding, if any such failure is caused by or results from the failure of Contractor's officers or other representatives having supervision or direction of the Work as a whole to observe the standards of care normally exercised by a prudent contractor performing similar work, the cost of such repair or removal and replacement shall be for the sole account of Contractor.

(5) Contractor hereby agrees that in the event any failure of any portions of the Work to meet any warranty applicable thereto under the provisions of this Section becomes known to it, it will notify Owner promptly of such failure.

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Section 7. Protection of Things and the Plant

Contractor shall cover and protect, in a manner satisfactory to Engineer, all Things to be incorporated into the Plant and located on the Construction Site or at the marshalling yards, and the Plant itself, from damage from the elements or from any other cause, and shall efficiently maintain, or cause to be maintained, such covering and protection at all times. Contractor shall at all times provide proper guard service where not provided by Owner.

Section 8. Responsibility for Physical Damage; Insurance

The provisions of this Section are set forth in Exhibit "A" entitled "Responsibility for Physical Damage; Insurance", attached to and hereby made a part of this Contract.

Section 9. Surety Bonds

If requested in writing by Owner, Contractor shall furnish a bond to secure its performance under this Contract and the satisfactory completion of the Work, and a separate bond to insure the prompt payment of all persons furnishing labor or Things to Contractor in the performance of the Work and to protect Owner against liens and charges for or on account of such labor or Things. Each such bond shall be in an amount approved by Owner and shall be of a surety company approved by Owner.

Section 10. Inspection; Testing

(1) Contractor shall provide and maintain safe access and proper facilities for the inspection by Engineer of all portions of the Work, including access to the shops in which any portion of the Work is in preparation.

(2) If laws, ordinances, governmental rules and/or regulations require any portion of the Work to be inspected and/or tested, Contractor shall promptly perform the inspection and/or tests so required.

(3) Where Contractor is required, under The Specifications and/or The Drawings or pursuant to this Section, to perform tests and/or inspections, Contractor shall give timely notice to Engineer of the readiness of Contractor to perform each such test and/or inspection. Should Contractor fail to give such timely notice and/or should Contractor cover up, without the consent of Engineer, the portion of the Work to be so tested and/or inspected, Contractor shall, upon request of Engineer, uncover such portion and/or perform a retest and/or a reinspection of such portion.

(4) Engineer shall have the right to order special tests not required by The Specifications and/or The Drawings, whereupon Contractor shall promptly perform such tests.

~~Section 11. Purchase of Things~~

(1) Subject to a mutually agreed upon procurement procedure, Contractor shall submit to Owner for approval a statement showing the names and references of all vendors from whom Contractor intends to purchase Things which are to be used in performing the Work or which are to be incorporated into the Plant. Owner shall promptly in writing either approve the aforesaid statement or return it to Contractor with its disapproval and the reasons therefor. Unless otherwise agreed to by the Parties in writing, Contractor shall not place any purchase order unless the terms thereof with respect to price, the terms of payment and the change order formula shall have first been approved by Owner in writing. As used in this Contract, "purchase order" shall mean a purchase order entered into by Contractor pursuant to this Section and "vendor" shall mean the seller under such purchase order.

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