AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of Arbitration Between SUNLIGHT GENERAL SOMERSET SOLAR, LLC, Claimant, -against- POWER PARTNERS MASTEC, LLC, Respondent.	Case No. 13-158 Y 02021 12

PARTIAL FINAL AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreements entered into between the above-named parties and dated August 24, 2011, December 6, 2011 and December 12, 2011, respectively, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

This arbitration between Sunlight General Somerset, LLC ("Sunlight", "Project Company" or "Owner") and Power Partners Mastec, LLC ("PPM" or "Turnkey Contractor") and two related arbitrations[1], that were consolidated with consent of the parties for the purpose of prehearing preparation, motion practice and hearings, arose out of three similar multi-site solar energy development projects in the State of New Jersey.

[1] Power Partners Mastec LLC v. Sunlight General Sussex Solar, LLC (13-20-1200-2044), Power Partners Mastec, LLC v. Sunlight General Morris Solar LLC (13-20-1200-2045).

Each party claims that the other party repeatedly breached its respective responsibilities and obligations under the Turnkey Design, Engineering, Procurement and Construction Contract ("EPC") signed by the parties on August 24, 2011. Each party also claims that the other party took steps to frustrate the other's performance and that said actions, in many instances, were undertaken either with malicious or fraudulent intent. Each party claims the other's actions or inactions caused them millions of dollars in damages. Sunlight contends that PPM continuously failed to timely meet its obligations to design, construct and put into operation Solar Generating Facilities ("SGF's) pursuant to a one-year schedule, and that delay prevented Sunlight from meeting lease payments to the Somerset County Improvement Authority ("SCIA"). PPM counters that it met its schedule and/or much of the delay was caused by Sunlight's initial inattention to the project or its later interference with PPM's design and construction obligations. Furthermore, PPM asserts that Sunlight intentionally withheld and/or diverted monies due it under the EPC by deducting disputed liquidated damages from said payments so that it could make its lease payments.

Procedural History

This arbitration was commenced by Sunlight on September 13, 2012. PPM filed similar arbitration claims on the related Morris and Sussex County projects on September 16, 2012. Both parties responded to said claims and filed various affirmative defenses[2] and counterclaims which parallel the claims and responses filed in the consolidated arbitrations.

[2] The affirmative defenses are discussed only if they are necessary to our decision on any of the remaining claims of either party.

In January of 2013 the three arbitrator panel was selected. A series of interim conferences were held during the next several months on the consolidated arbitrations.[3] As a result of the conferences, the Panel granted the parties the ability to conduct somewhat limited but substantial preliminary discovery, amend their pleadings and to file motions seeking interim relief and or dispositive motions. During May and June of 2013 both parties filed Amended Demands for Arbitration, responses and counterclaims. PPM, in their Amended Demands, claim the actions by Sunlight entitled it to damages under a breach of contract or quantum meruit theory, were in violation of both the Prompt Payment Act and New Jersey's Trust Fund Act, constituted conversion of PPM's property and demonstrate that PPM was fraudulently induced to enter into the contract. As discussed later, all of these theories other than the breach of contract claims are duplicative, have been remedied, are not supported by the record, or are not within our jurisdiction.

Sunlight, in its Second Amended Demands, asserts claims for breach of contract, replevin, conversion, breach of good faith and fair dealing, violation of the New Jersey Construction Lien Law and indemnification. Again, the Panel finds that the breach of contract theory (and implied duty of good faith and fair dealing), is all that remains as the replevin and conversion claims were resolved, we do not have jurisdiction over the Construction Lien Law claim and the indemnification claim is either barred by the EPC or will be considered in any prevailing party award under Article 19.2.6 of the EPC.[4]

Both parties filed Motions for Interim Relief in May 2013 and a full day hearing was held on said motions on June 14, 2013. The Panel rendered its Interim Order on June 29, 2013. On

[3] All proceedings, decisions or actions referred to in this section relate to all three of the consolidated arbitrations.
[4] Ex. 3674.

July 29, 2013, PPM requested an Order for Interim Emergency Relief which was denied by the Panel on August 2, 2013. Neither of those Orders directly affects the present awards.

Pursuant to the Panel's directed schedule, both parties, on December 30, 2013, filed requests for In Limine Rulings asking for the exclusion of the other party's experts and damage claims. Ultimately, the Panel granted PPM's motions insofar as they sought to exclude Stephen Goodbody as an expert witness[5]; excluded Sunlight's claims for loss of depreciation tax benefits[6]; and loss of electrical capacity[7].

During January and February of 2014, the Panel held 20 days of hearings comprised mostly of live testimony. That phase of the hearing was completed on February 28, 2014. On March 7, 2014, the Panel entered an order granting PPM's renewed Motion to Strike some of Project Companies' damage claims. Subsequently, a telephone hearing was held on March 10, 2014 to allow both parties to make a proffer of exhibits that had been marked as part of the record. After the completion of post-hearing briefing (including the submission of proposed findings of facts and conclusions of law), a full day hearing was held on May 28, 2014 to provide both parties the opportunity to make final arguments and answer questions raised by the Panel. During that hearing an issue concerning the availability of close-out documents required under the contract for payment of completed SGFs remained open. The Panel held a telephonic hearing on June 20, 2014 to rule on this issue. The Panel on that same day declared the record was complete and the hearings were closed except for the awarding of attorneys' fees and costs to the prevailing party and a determination of pre- and post- award interest.

---

[5] Id.

[6] *See*, January 23, 2014 Interim Order

[7] Id.

Background of the Project

In the Spring of 2011, the Somerset County Improvement Authority ("SCIA"), a governmental entity operating pursuant to New Jersey County Improvement Authorities Law, N.J.S.A. §30:37 A-44 et seq. developed a project to implement the county's renewable energy program.[8] Pursuant to this project, various educational institutions, municipalities and other public entities agreed to allow the SCIA to construct SGF's on buildings or land owned by said entities. In return, they contracted to purchase for 15 years of electricity generated by the prospective SGF's at an agreed upon discount. The construction of these SGF's was to be paid for, in part, by a series of bonds to be issued by the SCIA and partly (30%) by grants under a federal program (§ 1603 of American Recovery and Reinvestment Act of 2009).

To initiate this project the SCIA issued a Request for Proposal ("RFP") for the development and construction of the SGF's listed in the RFP. The RFP listed forty proposed SGF's in Somerset County to be constructed and requested bidders to provide estimated expected and guaranteed predictions of kilowatt hours (KWH) per each proposed site. See Ex. 251. The RFP also set forth a schedule of lease payments that would be used to repay the bonds that the SCIA would issue.

Sunlight and PPM agreed to jointly submit a proposal whereby Sunlight would be the owner of the project and enter into agreements with the SCIA and local governmental units ("authorities") and PPM would be the contractor and would be responsible to provide the performance bond for the construction of the various SGF's. The bid was accepted by SCIA in June of 2011.

---

[8] A more complete factual background of the parties, the projects, the underlying documentation, the dispute and the support for their various claims in these arbitrations are set forth in the attached Findings of Fact.

For the next two months, Sunlight Somerset and PPM and their lawyers negotiated the terms of the EPC. Sunlight negotiated a Power Purchase Agreement and Lease Agreement with the SCIA and local authorities. The SCIA and Sunlight expected that the lease payments that would pay off the bonds would be funded by the sales of electricity to the local authorities under the PPA and the sale of Solar Renewable Energy Credits to New Jersey utilities. The parties also met with representatives of SCIA to familiarize themselves with the scope of the project.

The Somerset Agreement

The EPC contract provided for the construction of SGFs that were capable of producing approximately 6900 KW of electricity. PPM was to be paid $28,987,425 for the completion of all of the SGFs. Said price could be changed by the Change Order process (See Art. 3.1, Art. 6 and 8). Said electricity would be sold to the local authorities involved in the project and to the SREC market. Initially this capacity was to be built on 35 proposed sites (44 SGF's), but both parties knew prior to execution of the contract that some of those sites would be withdrawn, replaced or modified. While the provisions of the EPC are detailed, we find them in many instances to be ambiguous, contradictory, conflicting with other program documents that are referenced in the EPC, and repeatedly ignored by the parties. A more complete recitation of the provisions of the EPC is found in the Findings of Fact but a brief review of applicable provisions will be discussed here.

Article 3 of the EPC sets forth PPM's duties as Turnkey Contractor. It was responsible for the "design, engineering, permitting, procurement, erection, installation, interconnection, testing, start-up and operator training" for each SGF. The article then lists the specific steps to be taken in connection with said responsibility including site visits and SGF design documents (which had fixed times for completion), governmental approvals and construction. Construction

of these SGFs was to meet Good Solar Industry Practice and the Scope of Work specifications set forth in Attachment III. Also, PPM was responsible for the performance of its subcontractors. If PPM decided that changes in the proposed SGFs were necessary, PPM could apply for a change order to extend the time schedule and/or change the contract price (Art. 6 and 8).

The Owners' obligations and responsibilities are contained in Article 4. Sunlight was to appoint within 5 days of August 24, 2011, an Owner Representative with full authority to fulfill Owner's responsibilities including approving change orders. It had to provide access for PPM to all sites and assist in obtaining necessary governmental approvals. It had to work with local authorities and SCIA to insure their acts or omissions do not impact or affect PPM's ability to complete the SGFs. Sunlight also must promptly, and in good faith, approve the designs and plans submitted by PPM and assist in obtaining payment for PPM for work done.

Importantly, the EPC in Article 20.11 directs that each party ". . . shall cooperate in good faith with the other Party in its efforts to fulfill its obligations under this Agreement." If there is a dispute it was to be promptly submitted to good faith negotiations and/or arbitration.

The EPC does have a time component to it. The contract talks of building the capacity within a year and contains an attachment (VIII) that sets forth a stepped completion schedule of 25% completion within 5 months, 50% completion within 7 months, 75% within 9 months and 100% within 11 months of notice to proceed. The dispute arises as to when the Notice to Proceed begins. Sunlight points to Article 2 to support its claim that the clock started on August 25, 2011. It did send out an omnibus notice on that date. PPM points to the fact that a project wide application of the Notice to Proceed makes no sense in light of the "Merry-go-round" nature of the project and refers to Article 3.5.2 and emails and minutes from meetings with the SCIA's representative where there are references to setting of new dates for a Notice to Proceed

for added or modified sites. This position makes sense for the sites that needed to be replaced or modified but not for every site. Many of the sites proceeded without material change and the fact that PPM was expected to finish the site visits and evaluations on schedule (30 days) and submit SGF plans and specifications within 90 days (see Art. 3.5) still remains. That being said, while PPM had the primary responsibility to evaluate the sites, design the SGF's and construct them, Sunlight as owner had the duty to assist them: in dealing with SCIA and local authorities, in obtaining necessary governmental permits, promptly in good faith approving SGF plans, assisting in getting PPM paid under Article 6.5 and otherwise helping PPM to meet their contractual obligations. A breach of any of these obligations could relieve PPM of at least some of its schedule responsibilities. It is black letter law that a party whose actions frustrate or prevent another party's performance under the contract cannot claim breach for that failure of performance (*See*, Art. 20.11).

The Morris and Sussex projects were very similar to Somerset in design and process. The Morris County Improvement Authority ("MCIA") issued in September 2012 RFP's for both Morris and Sussex County and Sunlight and PPM were the successful bidder in both. The Program Documents negotiated by Sunlight Morris and Sussex were very similar in structure and form to those in Somerset. They did include a construction price per kilowatt reduced from the Somerset agreement. Between October and early December the parties entered into similar negotiations and meetings with the MCIA and local authorities. The EPC's for both projects were signed in December of 2011. The provisions of the contracts were basically the same as the Somerset EPC with a few changes dealing with the Attachment VIII substantial completion schedule, the Attachment III Scope of Work and Local Unit pricing. The provisions relevant to

this dispute pertaining to each party's obligations, change orders, SGF pricing, liquidated damages, events of default, termination and cooperation were the same.

The Dispute

Even before the execution of the contract, problems arose affecting the parties' ability to complete construction of listed SGFs within a time schedule envisioned by the contract (see Ex. VIII). Many of these issues could be expected given the project's size (44 potential SGFs), geographic scope, the non-viability of some of the sites selected by the SCIA (requiring replacement and re-evaluation) and the number of parties involved in selecting the sites, designing the SGFs, obtaining permits and approving specific work or access rules for the sites. But the actions of both Sunlight and PPM contributed to these delays. Sunlight alleges that the site visits were not conducted properly or on time, the electrical engineering subcontractor's performance was deficient and the designs submitted were insufficient. It also alleges that the supervision of the project caused by excessive turnover of personnel was inadequate and that the failure to timely submit change orders were also contributing causes of the delays.[9]

PPM points to Sunlight's failure to appoint its Owner's Representative (Steve Goodbody) until late October, the failure to fully cooperate in obtaining permits or dealing with local authorities, the insistence by Steve Goodbody to unilaterally change the scope of work set forth in the contract ("gold plating") and his misuse of the design and engineering review procedure in the contract as major factors in the delay.[10] It must be pointed out that Steve Goodbody was not involved in the negotiation of the EPC's, had little experience in projects of this scope or kind,

---

[9] The same allegations are raised in connection with PPM's performance under the Morris and Sussex EPC's.

[10] These same allegations are raised in connection with the Morris and Sussex projects except that much of the "gold plating" dispute was inapplicable as the Scope of Work had been expanded in the Morris and Sussex EPC's.

and could not point out where under the contract he was authorized to micromanage Power Partners' duties under the contract.

There is some truth to many of the parties' allegations, but in the project's first three months progress was still being made. Both parties, at least at an operations level, seemed to understand that the projects could be completed if the parties focused on how to most effectively accomplish the goals of producing the total capacity of electricity projected under the EPC. Steve Goodbody and Tom Kosto of PPM continued to work on addressing the logistical issues encountered in the field.

While the field personnel were focusing on getting the construction on track, another issue arose that increased the magnitude of the present dispute. Under the Program Documents, the SCIA issued over $26 million in bonds to, in large part, pay for the construction of the SGFs. The bondholders were to be paid back through lease payments Sunlight promised to make under the Lease Agreement. Sunlight expected the monies that would be used to make these lease payments would come from the sale of electricity to the local authorities at a fixed price and the sale of SRECs to utilities at a market based rate. Thus, the amount of revenue would be derived from the KWs generated by the SGFs times the PPA and SREC prices. Sunlight asserts that it had no capital or other funds to use to pay the lease payments. The SRECs, whose market price was over $600 at the time of the bid, had fallen to $200 by December 2011 and below $100 by 2012. This caused a drastic decrease in anticipated revenue generated. As the PPA price was fixed, the only way to increase the revenue was to increase the production of electricity from each SGF. The first lease payment was due in September of 2012.

Sunlight first began trying to increase the production at the sites by insisting on modifications to the SGFs to increase the KWH which PPM contends were beyond the scope of

work requirements ("gold plating") and would cost more than the contract price to construct.[11] In December 2011 and January 2012, Sunlight also tried to force a decrease in the costs of construction through a price reduction strategy pursuant to which Sunlight informed PPM that they would approve SGF designs that were being held up by Goodbody's approach of refusing to approve plans that were not in compliance with his view of the requirements if PPM would agree to reduce the price under the EPC that they were entitled to receive. Internally, Goodbody acknowledged withholding approval of suitable designs. This ploy was rejected by PPM.

Concurrently, Sunlight in an effort to protect itself under the Program Documents sought an extension of the production schedule from SCIA. Sunlight personnel met with the representatives of the SCIA and local authorities and requested certain sites be dropped as they had become uneconomic. In addition, it requested an extension in the construction schedule for the SGFs. The request was based in part on information provided to Steve Goodbody by PPM. In July, 2012 the SCIA granted an eight month extension for the completion of some SGFs until April, 2013[12]. Sunlight never informed PPM of this extension nor gave PPM a chance to extend by change order its parallel deadlines under the EPC.

In fact, in early February of 2012 Stacey Hughes of Sunlight wrote PPM invoking the Delay Liquidated Damage clause of the EPC (Art. 7) stating PPM was in default for failing to complete 25% of the SGFs within five months.

In response to both the price reduction strategy and the Delay Liquidated Damage notice, the parties met in New York City and agreed to attempt to negotiate a compromise ("Grand

---

[11] This effort was in some ways counter-productive as continual changes in design and concomitant delays in design approval delayed completion of sites and thus generation of electricity.

[12] As early as January 2012 Sunlight had been informed by SCIA officials that the extension would most probably be granted.

Deal"). Tom Kosto and Steve Goodbody were then directed to address the numerous disputes including schedules, design approval process, costs of design changes and the KW/KWH dichotomy.

During the ensuing months, while the Grand Deal continued to be negotiated, Sunlight received its 8-month extension from SCIA but did not inform PPM. PPM had to learn of the extension from the consultants for SCIA in January 2013. Also, during these months Sunlight continued to issue Delay Liquidated Damage notices to PPM, which PPM continually disputed. The Grand Deal fell apart in July 2012 but an additional attempt at settlement was discussed up through early September. Once that fell through, both parties quickly filed their arbitration demands.

After the arbitrations were filed, many of each parties' actions appeared to be influenced by their arbitration claims and the lawyers involved. That being said and despite several significant events, PPM, over the next 11 months substantially completed the construction of 68 SGFs with capacities of 15 MW which were put in operation during 2013 and are generating electricity for the three projects.

Once the negotiations in September, October and November 2012 had terminated, PPM began a program of submitting numerous change order proposals under the EPC to adjust the construction schedule, and to adjust contract prices under the cost plus provisions of Article 8.41. PPM contends those were not contemporaneously prepared when they arose as mandated by the EPCs, as it hoped all of these changes would have been resolved by way of the Grand Deal. When submitted, they were uniformly rejected by Sunlight. At the same time PPM submitted Applications for Payments ("AFP's") for Milestone payments achieved under Article 6 of both this EPC and the Morris and Sussex EPCs. (_See_ EPC Attachment V-B). As required by the

EPCs, Sunlight applied to the Bond trustee for the monies requested in the September, October and November 2012 AFPs and the February, April and August 2013 AFP's.[13] While it appears that Sunlight referred to Delay Liquidated Damages in its application to the Trustee (US Bank), it never informed the bank that the Liquidated Damages notices had been consistently disputed by PPM nor that any disputed Liquidated Damages were meant to be resolved through the dispute resolution procedures in the EPC (see Article 7.3). Nor did Sunlight hold these disputed funds pending resolution. Instead they used the monies to make lease payments, pay administrative expenses and the costs of these arbitrations.

Despite the abduction of these construction funds by Sunlight, it still expected PPM to continue to construct the SGFs without any expectation of being fully paid, at least until the Project was finished. In February 2013 PPM submitted Change Orders requesting adjustment in the price of several sites, the design of which had been materially changed, under the cost plus

---

[13] Project Companies short paid all October payment applications:
Project Sussex, Amount Billed $2,520,704, Amount Paid $0.
Project Morris, Amount Billed $4,470,001, Amount Paid $0.
Project Somerset, Amount Billed 3,673,757, Amount Paid $0.
Project Companies short paid all November payment applications:
Project Sussex, Amount Billed $3,342,720, Amount Paid $62,233.
Project Morris, Amount Billed $4,920,240, Amount Paid $400,683.
Project Somerset, Amount Billed $5,184,250, Amount Paid $67,449.
Project Companies short paid all February payment applications:
Project Sussex, Amount Billed $9,535,438, Amount Paid $1,649,025.
Project Morris, Amount Billed $9,990,056, Amount Paid $909,522.
Project Somerset, Amount Billed $12,304,671, Amount Paid $0.
Project Companies short paid all April payment applications:
Project Sussex, Amount Billed $9,631,870, Amount Paid $0.
Project Morris, Amount Billed $13,964,158, Amount Paid $0.
Project Somerset, Amount Billed $15,279,915, Amount Paid $0.
Project Companies short paid all August payment applications:
Project Sussex, Amount Billed $16,403,158, Amount Paid $0.
Project Morris, Amount Billed $25,506,387, Amount Paid $0.
Project Somerset, Amount Billed $27,901,277, Amount Paid $0.

provisions of the EPC. (Article 8.4.1) Sunlight responded by terminating PPM as to those sites. During the Spring of 2013, PPM finished most of the remaining sites and on May 21, 2013 notified Sunlight it was suspending work on the projects. Even though it sent this notice it continued to finalize the work on the projects. During this time period Sunlight contends PPM was acting in bad faith by failing to turn over the documentation needed for completion and/or connection of the SGFs and was frustrating access by Sunlight to the completed sites. While some of those allegations might have some substance, they must be viewed in light of the fact that PPM had been denied payment in breach of the EPC, had been terminated from several sites without replacements and had almost all of their change orders rejected.

In July 2013, Sunlight issued Notices of Default on all three projects and Notices of Termination. PPM quickly responded with its own Notices of Default.

DISCUSSION

To begin with, the Panel has some initial observations about the underpinnings of both parties' claims that provide context to our award: First, the record indicates that initially neither party appeared to completely understand the scope and complexity of this project nor the performance requirements set forth in the contract when they negotiated and entered into this agreement. This is especially true in light of the parties' subsequent decision in December 2011 to enter into two additional large projects, Morris and Sussex, which involved additional scores of SGF's despite the challenges and obstacles that were being encountered during the first four months of this project. Trying to design, construct and connect, within a year, the proposed ninety SGF's at sites where everyone knew an unknown number of them would have to be modified or replaced was a daunting task to say the least. Trying to accomplish this while dealing with schools, local governmental authorities and innumerable administrative bodies

became almost impossible within the proposed time frame. Both parties appeared to be so desirous of getting involved in these projects, which because of the Federal government grant program had to start before the end of 2011, that they never adequately focused on what would be entailed. Furthermore, both parties were fully aware at the outset that because of how the programs were set up that changes to the identity and/or design of the SGFs would be necessary.

If the parties understood their burden and wanted to attempt to accomplish the project on schedule, one would expect both parties would have fully prepared from the first day, with detailed plans, site representatives authorized to approve the necessary interim steps, computerized tracking programs, and engineers and other subcontractors. Instead, neither party appeared to have a sense of urgency during the first several months of the project. This, in part, was probably because the parties had little or no experience with this type of multi-site solar generating project. Furthermore, Sunlight did not have its own technical or construction expertise involved in this project until the end of October. Even then Steve Goodbody, who claims to have become the Owners' Representative and who took over control of the design process never was given the authority to make change orders necessitated by Article 4. PPM was in the process of an intra-corporate reorganization that appeared early on to affect the supervision and planning needed for the project. This lack of focus by both parties was a significant cause of the initial delays, especially in light of both parties' commitment to two additional projects in December of 2011.

Second, the parties had totally different perceptions about the underlying meaning and purpose of the contract. Sunlight, comprised of ex-investment bankers, viewed this as a municipal finance exercise where prompt revenue generation was essential, as they were thinly capitalized and needed sufficient money within a year to meet the payments they agreed to make

under the Lease Agreement. To eliminate their exposure they argue that PPM had guaranteed all of the construction projections set forth in the EPC within a year and thus must suffer the financial consequences as to the failure thereof, through the liquidated damage mechanism. Even though Sunlight understood that the preliminary pre-contract site visits were limited and that SGF's might be replaced ("merry-go-round") or modified (Ex. 251), Sunlight contends that the preliminary projected output KWH figures found in the RFP response and/or the EPC contract were set in stone for each SGF and could not be modified for reasons other than those set forth in Art 3.19 or 3.5.2. Stacy Hughes contends that the EPC should be considered, in effect, an insurance policy by PPM guaranteeing enough revenue generating electricity by August 2012 (or December 2012 for the latter two projects) for it to make all of its lease payments plus a profit for Sunlight. That is why she insisted that changes in timing and price would not be agreed to under the EPC no matter what the circumstances. This is the cornerstone of Sunlight's delay liquidated damage claim. Said position is unwarranted by both the EPC and the parties' performance. It is especially questionable in light of the fact that Sunlight controlled much of the schedule through their insistence to modify the scope of work specifications, delaying the approval process and dropping sites they believed were non-economical without providing replacements. This behavior is also unjust in light of the commercial realities of the project.

PPM, the construction company, claimed to have viewed this as a unit price contract (with a cost plus provision for change orders). They thought of the sites as application engineering solar construction projects with no time deadline until the parties agreed upon the required designs and performance specifications for each project, thereby rendering any time

criteria set out in the EPC as surplusage. A review of the EPC, Program Documents and pertinent records do not support this interpretation and PPM's own admissions undercut this position.

Third, despite all of the negotiations and input from experienced attorneys, the provisions of the EPC are both internally inconsistent and conflict in several ways with the Program Documents. Also, the EPC language in various provisions is vague and ambiguous. As New Jersey law provides, to ascertain the intent of the parties, we should first look at the language of the agreement, taken in its entirety, to see if it is clear on its face. If the language in the agreement is unclear, the Panel must look to extrinsic evidence to ascertain the parties' intent. This would include the parties' course of dealing, usage and course of performance. Such an exercise does not support either parties' above-mentioned position. The parties provided a paucity of evidence dealing with the actual negotiations of the EPC. There was little dialogue between the parties about the meanings of the provisions except for a few exhibits and testimony about PPM's last minute concerns relating to the availability of change orders and security for getting paid. (See Ex. 290).

Furthermore, the parties did not appear to clearly communicate their respective understandings as to the purpose of the contract or respective obligations to each other under the specific provisions of the EPC. In fact, in contradiction to Sunlight's contention, the parties' actions and statements during the negotiation period seem to recognize the formative variable nature of the undertaking.

Nor are the parties' actions in performance of the contract that helpful in clarifying the terms of the EPC. In fact, especially during the first several months after execution, both parties appear to repeatedly ignore the requirements under Articles 3 and 4 and other provisions of the contract (e.g., failure to appoint a project manager and prepare contemporaneous change orders).

By the latter phases of the contract during the negotiation of the "Grand Deal" and after it had collapsed, the actions and statements of the parties appeared to be more focused on their legal position or arbitration claims, thus providing very little guidance to the Panel.

Lastly and most importantly, the parties', especially Sunlight's, technical arguments pertaining to the other side's violation of specific provisions of the EPC ignore the one provision of the EPC that is unambiguous and in full accord with New Jersey Common Law. Article 20.11 requires "Each Party shall cooperate in good faith with the other Party in its efforts to fulfill its obligations under the Agreement. To that end, neither Party shall unreasonably deny or withhold or otherwise delay its approval or consent upon the reasonable request for such approval or consent by the other Party. . . ". This is a clear expression of the implied covenant of good faith and fair dealing that is implied in every contract. A party's performance may breach the implied covenant of good faith and fair dealing even though that performance does not violate an express term of the contract. Here it would also violate Article 20.11. Conduct which violates community standards of decency, fairness or reasonableness is adequate for finding of a breach of this covenant. Courts have found this implied duty (here also expressed) may be breached by acting with bad motive or intention and without legitimate purpose. For example, the Supreme Court of New Jersey has held that subterfuge and evasion, such as a party's withholding of vital information from the other party, with the purpose of exploiting the terms of the contract without regard to the harm caused to the other party may constitute a breach of the implied covenant.

In light of these standards, Sunlight's repeated and calculated actions that were in clear violation of Article 20.11 and the duty of good faith and fair dealing has given this Panel grave pause. We find that the Project Companies, when confronted with the economic realities that their SREC price assumptions underlying Sunlight's obligation to make payments pursuant to the

respective lease agreements had so negatively changed that it could not meet this obligation without finding other sources of revenue, started a program to find those monies in the bond funds being held by the U.S. Bank trustee and the 1603 grants, both of which were meant to be used to pay PPM's construction costs.

This program consisted, inter alia, of:

1. Using Steve Goodbody to increase the production of the SGFs by requiring performance specifications, equipment and design enhancements that went beyond the contractual requirements set forth in the EPCs and at the same time holding PPM to the initial contract prices. Also, his withholding of approval of suitable SGF plans that were based on practical and pragmatic designs that were the basis of the original RFP responses and EPCs.

2. Using the delay liquidated damages provisions of the EPCs as both a method of extortion and a source of funds for its lease payments. Initially, in early 2012, Sunlight refused to approve PPM's designs, unless they agreed to a reduced price for construction of the SGF. At the same time Sunlight sent out Delay Liquidated Damage notices, PPM was falling behind on its schedule. It was faced with the choice of giving up some of their contract price or face these delay damage claims. If Sunlight was successful, it could free up some of the construction payment funds to be used by Sunlight for its obligations.

3. Next, Sunlight continued the scheme of delaying an extremely tight design and construction process and thus forcing PPM into further violation of the original schedule set forth in Attachment VIII of each EPC. It did this through a design

> review process which entailed numerous repeated changes in the plans that delayed progress on most of the SGFs. At the same time it refused to approve any change order proposed by PPM extending the construction schedule for any reason, even though Sunlight, using the same factual support applied for and received substantial extensions on their construction obligations under the Program Documents. Sunlight itself never informed PPM that it was granted the extension nor did it assist PPM in receiving any type of concomitant extension. It even charged delay liquidated damages to PPM for both SGFs that were withdrawn under the EPC and replaced but where no new completion date was set and sites that were withdrawn and never replaced.

What did this accomplish? It allowed Sunlight to send out Delayed Liquidation Damage notices under the EPCs and when PPM started requesting milestone AFPs for the SGFs that it was building Sunlight obtained the requested monies from the Trustee and then deducted the disputed liquidated damages. It used these monies to make lease payments and fund their administrative expenses. While the contract allowed Sunlight to offset payment to PPM with liquidated damages for delays caused by PPM, Sunlight clearly knew that any disputed liquidated damage claims had to be submitted to dispute resolution under Article 19 and 20 of the EPCs. Nowhere do the EPCs state that construction funds can be spent by the Project Companies to meet their own obligations while the dispute is in pending arbitration. In fact, Sunlight had to seek an amendment of the License Agreements in October and December of 2012 to get permission from the improvement authorities to use these funds for anything other than construction payments. That did not relieve Sunlight of its duties under the EPCs. PPM was not a party to any such amendments. Nonetheless, with these amendments, Sunlight, during

late 2012 through 2013, diverted tens of millions of dollars from the obtained bond funds and 1603 grants to make its lease payments and fund its operations and this arbitration. At the same time PPM was forced to complete construction and connection of the over 60 SGFs without receiving any payments. Such conduct violates any recognizable standards of decency, fairness or reasonableness.

Project Company's Claims

In its Amended Demands for Arbitration, Sunlight asserts claims for breach of contract, replevin, conversion, breach of covenant of good faith and fair dealing, violation of the New Jersey Construction Lien Law, and indemnification.

The Project Company's claims for replevin and conversion are moot because those claims are premised on the return of 1603 Grant Panels, which are now in the possession of Sunlight. Any claim for damages from PPM's maintaining possession of the Panels would fall within the breach of contract claim. The Project Company's claim for violation of the New Jersey Construction Lien Law will not be addressed because the Panel has already ruled that it does not have jurisdiction to determine the extent, priority or validity of Power Partners' Construction Liens. The Project Company's claims for indemnification are based on alleged costs for extended administrative and legal costs. We have previously ruled that Sunlight's claims for increased administrative costs are barred by the provisions of Section 12.3 of the EPCs. In addition, the issue of legal fees and costs will be addressed in a subsequent award in the context of the prevailing party provision in Article 19.2.6 of the EPCs.

Thus, we will consider Project Company's remaining claims of breach of the EPCs and related breach of the implied covenant of good faith and fair dealing. According to the Project Company's Amended Arbitration Demand, the Project Company asserts that Power Partners

breached the EPC because it (1) failed to complete the work identified in the EPC contract in accordance with the specifications (including good solar industry practice), and contractual obligations, (2) failed to timely complete any of the SGFs, (3) failed to build all of the SGFs identified in the EPC Contract, (4) failed to meet the capacity specifications in the EPCs, (5) wrongfully withheld the 1603 Panels and refused to assist Sunlight in securing 1603 Grants, and (6) failed to provide necessary paperwork for the interconnection and operation of SGFs and prevented access by Sunlight to the SGFs. The claims will be addressed in connection with our discussion of the damages Sunlight contends resulted from said alleged breaches.

As detailed in their Proposed Findings of Fact and Conclusions of Law (*see, e.g.*, re Somerset at pp. 121-122) Sunlight's claims for damages for each site are comprised of three categories: (1) Performance Damages; (2) Liquidated Damages; and (3) Additional Liquidated Damages for Willfulness.

Performance Damages

Project Company's remaining four claims for Performance Damages[14] are:

Additional Cost to Build Terminated SGFs;

Cost to Finish PPM built SGFs;

Lack of string monitoring; and

Net present value of Lost Production.

(i) Additional Cost to Build Terminated Sites

Project Company claims damages for the Somerset Project for the cost to build the so called "terminated sites." Project Company asserts that it was required to terminate these sites because of PPM's delays in meeting its construction milestone and other breaches and that it will

[14] We previously adjudicated in Power Partners favor all of Project Company's claims for Performance Damages other than the four categories discussed herein. *See* Panel Orders dated January 23, 2014 and March 7, 2014.

incur costs above the agreed to contract price to build out these sites. The difference between the contract price and the projected actual cost to build comprises the requested damages.

There are numerous deficiencies in this claim which we need not detail (*e.g.*, whether there actually was an "agreed to" price for the SGFs in question, whether all sites were justifiably terminated by Sunlight under the EPC) because the claim fails for two reasons.

First, the record is undisputed that Project Company has never had a concrete plan to build any of the sites in question. Project Company's witnesses professed a desire to build the sites if and when the requisite financing was in place,[15] but, both Ms. Hughes and Mr. Goodbody admitted that no definitive plans (*e.g.*, the existence of an EPC contract, project financing or even definitive designs) have ever existed for the Project Company to build any of the sites in question. This evidence establishes that the claim for additional cost to build terminated SGFs is purely speculative and therefore the claim is not cognizable.

Second, and not surprisingly, since Project Company has no specific plans to build the sites, its estimates of the increased cost to build them were totally based on conjecture and guestimation. Mr. Goodbody provided solely lay testimony in this regard, which amounts to no more than well-informed guesswork about events which may or may not occur. Such raw speculation cannot form the basis for a damages claim.

Accordingly, even assuming that PPM breached the Somerset EPC contract in a manner allowing damages for the additional costs to build at least some of the terminated sites (which we question as to whether Sunlight has proven), we find that Power Company's claim for damages therefor fails due to a failure of proof for the reasons set forth above.

---

[15] It is interesting to note that while the Project Company contends that PPM guaranteed timely construction of a certain amount of KW per SGF and had to build them even if it was not being paid for reaching its milestones under the EPC, no such guaranty or burden applies to Sunlight, who it believes, can wait as long as it needs to complete the SGFs.

Cost to finish PPM Built Sites

Project Company claims as an element of damages $75,688 to "finish" the PPM built sites in the Somerset Project.

PPM has stipulated that it will cost Project Company this amount to finish the sites in question and has deducted that sum from its claimed damages. There is no question, therefore, that we need to account for this cost element in our award.

Since the parties mutually agreed to transfer the responsibility for the sites from PPM to Project Company and mutually agreed to the appropriate contract price reduction to complete the work on the transferred sites, we do not regard the "cost to finish" as a damage but rather will account for it as a deduction from PPM's damages claim. Accordingly, to the extent that Project Company asserts this category of claim as a "damage" for breach of the Somerset EPC contract, the claim is denied as duplicative of PPM's deduction or offset of this cost from its claim.

Lack of String Monitoring

Project Company claims that PPM breached the Somerset EPC contract because it did not install string monitoring in the SGFs it completed. Mr. Goodbody claimed that the EPC contract required string monitoring because string monitoring was superior to the system installed by PPM, and the EPC and Good Practice would dictate its use.

There are two principal deficiencies with this claim. First, Project Company did not prove either that string monitoring was required by the EPC contract under Art. 3.5.6, the Scope of Work (Attachment III) or Good Solar Industry Practice. Moreover, Mr. Goodbody (and Sunlight's) credibility was severely undermined in this regard by Mr. Goodbody's admission that in the preliminary designs he approved for the sites the Project Company expected to build he did not specify string monitoring. Project Company, thus, asks us to award it damages for

PPM's failure to employ string monitoring which Project Company decided not to utilize under the exact same Program Documents with the County. We decline to do so.

Second, in any event, Mr. Goodbody's damages calculations to compensate for the absence of string monitoring had no credible supporting evidence or expert testimony and were nothing more than his guesstimates and predictions. Such speculative damages are not allowable and, had it been cognizable, the claim would also have failed for failure of proof of recoverable damages.

Net Present Value of Lost Production

This claim is based on a comparison of "production of electricity expected" by "the joint response to each county RFP" with the actual capacity of the SGFs that PPM built. (*See* "Expert Report" of Stephen Goodbody, November 13, 2013, pp. 23-24, admitted on limited basis). The calculation captured the damages caused by "delayed and reduced" production of electricity.

The foundation of this claim is Project Company's contention that PPM promised in the Somerset EPC and related Program documents (*see* Response to RFP) to build SGFs which in total would produce a minimum amount of electricity (a "production promise" as it were). By contrast, PPM asserts that the EPC contract only required it to deliver SGFs which would have the "capacity" to produce the amount of electricity rated for the particular SGF. This "production" versus "capacity" debate has raged between the parties from just after Mr. Goodbody's arrival on the scene in the fall of 2011 and is repeatedly manifested throughout these proceedings. We have carefully reviewed all of the documentary and testamentary evidence on this subject and have concluded that Project Company's contention that PPM "promised" to deliver SGFs with a guaranteed production level of electricity in the Somerset EPC contract for each SGF must fail. Furthermore, Sunlight's actions of terminating some sites

and not replacing the withdrawn sites frustrated PPM's ability to build enough SGF's to meet the originally anticipated production or capacity.

Both parties have constructed elaborate theories to support their positions. We need not analyze them point-by-point because we are persuaded by two straightforward facts:

It is undisputed that the SCIA, Project Company and PPM expected on the basis of the experience of bidding on a prior project, pre-contract meetings with SCIA, and because the pre-contract review of the sites was so limited and superficial that some of the sites listed in the RFP (but no one knew which sites) would be removed from the Program and new available but as yet unidentified sites would be substituted for them. Thus, while the EPC (Attachment V-A) has KW figures for the various SGFs', Sunlight goes too far to assert that in the EPC, PPM unconditionally promised to build a specific set of SGFs with a guaranteed amount of electricity (KWH) for each one.

The EPC contract was drafted by lawyers who had no problem unequivocally setting forth the parties' specific responsibilities when the matter was critical to them. (*See*, *e.g.*, EPC Section 3 for PPM's responsibilities and Section 4 for Project Company's responsibilities). The contract could easily have stated that PPM guaranteed that it would build SGFs sufficient to produce a stated minimum amount of electricity. It does not do so and we decline to interpret various clauses and attachments in the RFPs and their responses to bootstrap such a requirement into this EPC contract.

Moreover, we are persuaded that the negotiating history, the actions of the parties and third party SCIA prior to February of 2012, and the commercial realities of this contract do not clearly support such a contention.

Accordingly, since the predicate factual premise of this claim for damages is not proven, we deny Project Companies' claims for net present value of lost production due to lost KW and production.[16]

Summary

In our prior orders and hereinabove we have now disposed of every element of the Project Companies' claimed damages except for the liquidated damages claims which are discussed below. All such claims, whether specifically discussed in this award or prior orders or not, are expressly denied.

Liquidated Damages

Project Company claims that none of the SGFs achieved "Substantial Completion" or milestones within the timeframes set forth in Attachment VIII of the EPC; therefore, it is entitled to "Delay Liquidated Damages" pursuant to Article 7 of the EPC. Project Company claims that such failures to meet the deadlines automatically entitles it to Liquidated Damages ("LDs") and that such LDs are justified because they are needed to pay the lease payments due the County which cannot be delayed under the Lease Agreement. Project Company acknowledges that Article 12.1.1 caps liquidated damages but relies on Article 12.2 which it argues eliminates this cap in the event of "willful misconduct" which it asserts is present in this case. Thus, under the Somerset EPC, Project Company claims $4,086,898 for "capped" liquidated damages and an additional $2,340,462 for the "uncapped" portion of the total liquidated damages. The total amount of liquidated damages is calculated pursuant to the formula set forth in Article 7.2 based

[16] Additionally, had this claim been proved, the damages calculation supporting it would have been fatal to it because it was supported only by conjecture and speculation and therefore would not support a damages award.

on the assumption that PPM never made any of its deadlines for any SGF (including holding PPM responsible for terminated SGFs).[17]

In its filings and arguments in this case, PPM has made numerous objections both to the cognizability of LDs and to Project Company's calculation of them. Included among these positions is a calculation which PPM asserts is the maximum amount of liquidated damages the Panel could award.

In relying upon the exclusivity provision of Article 7.4 to grant PPM's motion to dismiss some of Project Company's damages claims, the Panel has already rejected PPM's position that the LD provisions of the EPC contract are per se unenforceable. PPM also asserts that Project Company has improperly conflated two steps in the application of Article 7: (1) qualification for LDs, and (2) calculation of LDs. PPM asserts that because the County granted Project Company extensions and never assessed any delay damages against it and, because Project Company never suffered proven losses from the delays owing to the fact that the projects eventually would produce as much as or more than the anticipated revenue that the Project Company was never entitled to LDs under Article 7.

Article 7.2 provides that Turnkey Contractor "shall be liable for" the sum of two types of damages: "(a) the amount that Owner is required to pay for such day of delay under the terms…of the Program Documents, plus (b) an amount…to compensate owner for lost revenue under the PPA for the forgone delivery and sale of electricity…and lost revenue for the forgone generation of SRECS…" What follows in Article 7 is an agreed upon methodology of calculating these types of losses. If, however, the Project Company did not suffer either category

[17] The liquidated damages claimed by the Project Companies under the Morris EPC are $5,293,792 capped damages and $4,216,572 uncapped damages; and the Sussex EPC $3,825,593 capped and $3,400,105 uncapped.

of loss or damages, it is not entitled to any Liquidated Damages and the calculation section of this provision is moot.

The evidence is undisputed that Project Company did not suffer the harm contemplated by 7.2(a) as the County granted extensions to the Owners (Sunlight) under the Program Documents and never required Project Company to pay for such delay nor did they have to borrow any funds to make the lease payments as it took money from PPM's AFPs to pay these obligations.

PPM asserts that the Project Company did not prove the loss of revenue from "forgone delivery and sale of electricity" nor has it proven "lost revenue for the forgone generation of SRECs" because PPM claims each SGF will achieve full delivery of the anticipated 15 years of production and SRECs and any assertion that the delay in the commencement of such periods caused losses to Project Company is pure speculation and conjecture. However, 7.2(b) is not a damages calculation but instead is a triggering mechanism. Regardless, of whether eventually Project Company will have a net loss caused by PPM's delay it is undisputed that at the time PPM failed to meet its first deadline on the project there was "forgone" revenue.

Therefore, we hold that the liquidated damages provision of the Somerset EPC was triggered IF Project Company proved that PPM breached the contract by delaying delivery of the SGFs as set forth in Attachment VIII.

This analysis brings into focus the parties' dispute over whether substantial completion dates sufficient to justify awarding liquidated damages were set under this EPC contract.

As discussed above, Project Company asserts that its blanket notice to proceed issued at the signing of the EPC contract sufficed to trigger the dates set forth in Attachment VIII of the contract. PPM counters that the contract explicitly required the parties to set substantial

completion dates on a site-by-site basis and this was never done. Accordingly, PPM argues that no liquidated damages can be assessed under the contract.

Though a reading of Art. 3.5 might support PPM's position, the article as it relates to the rest of the contract is contradictory and ambiguous. Furthermore, the behavior of the parties is inconsistent with the notion that liquidated damages were irrelevant to this case because a predicate to their being granted never occurred. In the first place, it is clear that on numerous occasions the parties discussed payment of liquidated damages and they seem to have tacitly agreed that "some" liquidated damages were due. Secondly, the internal communications of PPM's management personnel evidence a recognition that PPM would have to pay some monies on account of this claim. Thirdly, the project minutes and other documents in evidence also make reference to the setting of substantial completion dates for various of the SGFs.

On this record, though it is a close case, we cannot find that the absence of the formal setting of substantial completion dates pursuant Attachment VIII absolves PPM of all responsibility for payment of liquidated damages.

The next issue, therefore, becomes how to calculate LDs, if any, for the Somerset project.

Project Company has adopted a position that is incredulous. It calculates LDs as if the substantial completion dates for each site was set at the time the EPC contract was signed at the minimum time allowable under Attachment VIII. It then claims that PPM is liable for maximum calculable LDs regardless of (1) justifiable delays, (2) abandoned sites, (3) materially changed sites, (4) withdrawn sites, (5) force majeure events, or (6) even the commencement of the production of electricity and revenue. We reject Project Company's position as contrary to the EPC, the evidence in the record and New Jersey law.

PPM offers an alternative calculation (*see* pp. 15-16 of Power Partners' Brief in Support of Its Proposed Findings of Fact and Conclusions of Law, April 18, 2014, and Exhibit A thereto), submitting a calculation of $44,359 plus $475,962 for the Somerset project, $235,156 for the Morris project and $69,805 for the Sussex project.

Power Partners' calculation does not have the deficiencies of Project Company's calculation in that it omits abandoned sites, credits Power Partners for justifiable delays, *e.g.*, caused by force majeure events and, most importantly, credits Power Partners for the delays the County granted to Project Company for completion of the projects. While we do not regard Power Partners' calculation of the Somerset, Morris or Sussex LDs as perfect, we accept it as the best evidence available of cognizable liquidated damages for PPM's delays in performing under all three EPC contracts. Accordingly, we find that Project Company is entitled to recover as liquidated damages $44,359 plus $475,962 under the Somerset EPC contract, $235,156 under the Morris project and $69,805 for the Sussex project. These damages should be applied to the specific SGFs as set forth in PPM's Exhibit A to its April 18, 2014 Brief.

Obviously, these findings moot the issue of whether Project Company is entitled to damages in excess of the caps. Nevertheless, we are constrained to observe that in all events, we believe that while some of PPM's actions might be hard to explain under the contract or might be the result of legal maneuvering by both parties after the "Grand Deal" failed and the arbitrations were commenced, the evidence does not come close to sustaining a finding of "willfulness" for any of the projects and we reject Project Company's arguments in that regard.

Power Partners' Claims

In its Amended Demands (and Counter-Claim), Power Partners asserts claims for breach of contract, quantum meruit, violation of the New Jersey Prompt Payment Act, violation of the

New Jersey Trust Fund Act, fraud in the inducement, and conversion. During the May 28th hearing, PPM withdrew its claim that the Project Companies violated the New Jersey Trust Fund Act. As to PPM's conversion claims the Panel finds that failure to pay them monies due under the contract sounds in this instance as another facet of the breach of contract claim. In addition, the Panel denies Power Partners' claims for quantum meruit as it finds that a claim for breach under the EPC exists and thus a quantum meruit claim cannot proceed at the same time.

For PPM to prove fraud in the inducement it must show that Sunlight made a misrepresentation of material fact that it knew as false, that the other party relied on said misrepresentation and that said reliance was reasonable. The Panel finds that the statements made by Sunlight on the eve of execution of the EPC were both material and misleading as it related to the use of bond proceeds and § 1603 grants to secure payment to PPM for the construction of the SGFs and Sunlight knew they were false. The Panel cannot conclude that PPM justifiably relied on these statements as its executives understood the risks in the project and had access to experienced, informed counsel, and agreed to proceed anyway. As to the violation of New Jersey Prompt Payment Act, PPM's attorneys acknowledge such a claim would be duplicative if we were to find a breach of the contract for failure to pay the AFP's and thus we will not consider it.

The Panel therefore will address only Power Partners' claims for breach of contract (both express and implied duty of good faith and fair dealing).

PPM asserts that the Project Companies breached the EPC's by failing to pay it for work done pursuant to the EPC's, misusing the Liquidated Damages Provisions of Art 6, 7 and 19 to divert the bond funds and government grant monies reserved for payment of the construction of the SGFs for improper uses such as lease payments and administrative expenses, failing to

provide PPM with schedule extensions (Art 8.6, 15.2.2) or replacement SGFs pursuant to Art 3.5 2b and improperly terminating the contract for cause.

It also asserts that those actions plus, inter alia, Sunlights' attempt to impose a price reduction strategy, failure to approve practical and programmatic designs, seeking to impose a KWH standard not found in the agreements, delaying the design approval process, seeking extensions from the improvement authorities and not telling PPM of the extension or allowing it a similar extension, failing to approve any of PPM's change orders and agreeing to modify Program Documents without PPM's consent violated the implied duly of good faith and fair dealing implied in New Jersey law (see also. Art 20.11)

As previously discussed in this award and in the following discussion on the amount of PPM's contractual damages, we find Sunlights' actions violated both the letter and spirit of the EPC's. As the measure of damages under the implied duty of good faith and fair dealing and breach of contract are coterminous, we do not need to separately discuss the quantum of damages owed to PPM by the Project Companies under both theories.

Breach of Contract Damages

PPM has submitted an extensive set of materials proffered in support of its damage claims. This material is intended to support the spreadsheets of its Somerset, Morris and Sussex Damage Claim Models found at Appendices 1, 2 and 3 of its post hearing submission.[18] The spreadsheets set forth claimed amounts due PPM in total for monies earned under the EPC, exclusive of claims for interest, attorneys' fees, costs, etc. It is further noted that PPM has submitted substantial documentation in the form of summaries, invoices, etc. proffered in

---

[18] It is noted that the data in Column U thereof, "Direct Costs (O + P + S)," has been taken from a prior spreadsheet contained at Tab 1 of its Damage Claim Summary at Exhibit 5659/5661/5657.

support of its claims in its Damage Claim Vendor Details at Exhibits 5658/5656/5660. The arbitrators have considered these monetary claims and, in light of the whole record, for the reasons set forth in this Award, reach the following conclusions as to amounts to be awarded.

EPC Article 8, Changes, at 8.1, provides that the Owner (Project Company) or Turnkey Contractor (PPM) may request in writing any change to the Work. Further, a "Change Order Event" is defined in Attachment I as, inter alia, "1. Changes in the Project requested or directed by Owner; 2. Changes in the Project proposed by [PPM] and approved by Owner;......5. Events of Force Majeure; 6. Local Unit Authority Caused Delay; 7. Owner Caused Delay;..." The evidence supports the conclusion that there were numerous changes satisfying these criteria, and such changes involved almost every SGF. However, the Project Companies, as we have previously held, improperly undertook a policy of "no change orders" during the course of the projects. The Project Companies alleged that the change orders were rejected as they were not filed contemporaneously with the change order event and were not adequately documented. PPM counters that it delayed submitting change orders during the course of prolonged settlement negotiations which, when completed without success, resulted in PPM submitting all of the outstanding change orders in the fall of 2012. The defense of late notices of changes raised by Sunlight is rejected. Sunlight was fully familiar with the changes during the course of the project from meeting minutes, etc. and, when asked, presented no New Jersey law supporting the proposition raised in its alleged defense.

The capacity of every SGF changed from the original amount. The alleged cost impact of these and other changes are considered here. The Damage Claim Models contain three primary horizontal bands: (A) sites with material changes to the design or construction or changes in KW

of more than 20%; (B) sites with no material changes or changes less than 20% and (C) terminated sites. The Morris Model contains no B Band.

The data contained in the Models at Columns A-M is undisputed but for whether the Material Changes claimed to have occurred at certain SGFs were material changes in accordance with the contract. In accord with Article 8.4.2, where there has been a material change in the type or layout of equipment at an SGF, the more favorable payment provision of 8.4.1 applies. At Somerset, SGF 2 – changed from canopy to roof, SGF 13 – canopy moved three times by Local Unit, SGF 16 – two separate roofs combined into one, SGF 29 – two separate canopies combined into one (along with an +86.85% change), SGF 42 – one roof and one canopy combined into one canopy and SGF s 45-48 – all new sites. At Morris, SGF 5 – changed from canopy to ground mount (along with a -41.96% change), SGF 23 – Morris Community College Parking Lots went through a variety of very significant changes over an extended period of time. At Sussex – SGF 6 – two separate ground mounts combined into one, SGF 19 – a ground mount was added (and ground mounts increased +239.92%), SGF 20 – ground mount was added (and ground mounts increased due to significant reduction in canopy use for an overall -25.36% change). Hence, review of the record leads the Panel to conclude that in each instance where a material change has been claimed by PPM, there has been such a material change meeting the criteria of Article 8.4.2.

Having identified SGFs with material changes and changes in capacity (increase or decrease) of more than 20%, PPM seeks to apply Article 8.4.1 to those SGFs to recover its alleged Direct Costs. It is Sunlight's position that all costs not calculated in accordance with Attachment XVIII-B are contested. In that regard, Sunlight's position is contradicted by the language of Articles 8.4.1 and 8.4.2 and rejected.

In the EPC at Attachment I, Definitions, "Direct Costs" are defined as "[PPM's] actual and verifiable cost (on an open book basis) of labor, support labor, material, equipment, services, tools, supplies, subcontract, jobsite facilities, utilities, and jobsite staffing necessary to perform the Work. For [PPM] owned equipment, the Direct Costs shall be ninety percent (90%) of the then current "bluebook" monthly equipment rental prices of such equipment or such other price as may be mutually agreed-upon in advance. Direct Costs shall not include any home office overhead."

Article 8.4.1 provides, in pertinent part, "[i]f the parties are unable to agree on an adjustment to the Contract Price and [the Project Company] nevertheless directs [PPM] to proceed with a Change Order, then the Contract Price shall be adjusted in an amount equal to…110% of the reasonable Direct Costs incurred or avoided as the case may be, by [PPM] to make such changes to the Work (such Direct Costs to include the salary related expenses of [PPM] personnel performing work necessary to make, or avoided by making, such changes, but excluding home office overhead, management and administrative expenses of [PPM] related to such changes)." The Direct Costs at Column U of the Models consists of the total of (1) Direct Cost incurred at individual SGFs to August 2013, (2) Estimated Costs to Complete certain SGFs and (3) Direct Costs of the Project Allocated to SGFs to August 2013, as set forth in Columns O, P and S in Tab 1. Bands A, B and C at Column O of Tab 1 present Direct Costs incurred at the respective SGFs. Section 8.4 of the EPCs mandates that any direct cost must be demonstrated to be reasonable and necessary. A review of the comprehensive evidence as to Band A at Column O supports the conclusion that the costs shown are proper direct costs of these SGFs. For example, $367,201 is accepted as the direct cost of SGF1 at Somerset. See attached Exhibits 1, 2

and 3 which are the Somerset, Morris and Sussex Models, revised to contain the monetary amounts allowed in these consolidated Arbitrations.

PPM concedes that the costs presented in Band B are not relevant. Band C at Column U contains a list of claimed Direct Costs for Terminated Sites. The claims for Hurricane Sandy Costs and Inventory are discussed below. Any estimated cost to complete shown on Tab 1 at Column P has been disregarded as it is undisputed that PPM will not be carrying out the work to be performed at the respective SGFs.

As to Tab 1 at Column S, Direct Costs of Project allocated to SGFs, we find PPM has in several ways failed to meet its burden of proof. While these alleged allocated costs are presented at Bands A and B, PPM acknowledges that the allocated costs set forth in Band B are irrelevant. Michael Denker was the main witness for PPM in this category. Mr. Denker, an employee of PPM, is neither a CPA nor an independent cost accounting expert. His experience is based in applying PPM's own corporate accounting policy as to how PPM chooses to record and categorize its purported costs, e.g., direct, indirect, overhead, charge out rates, equipment rates (owned and rental), write offs, discounts, etc. He also was not personally involved in gathering or reviewing these costs, many of which appeared fabricated months after they were expended. While Mr. Denker testified that PPM is subject to the accounting requirements of a publicly listed company, there was no presentation showing Generally Accepted Accounting Principles (GAAP) were used to support PPM's "allocated" Direct Cost damage presentation. By definition, Direct Costs shall not include any home office overhead. Here, the claimed allocated costs are mixed with home office overhead. To the extent which the purported allocated Direct Costs were true, reasonable and necessary Direct Costs is not clear. Hence, the purported

allocated Direct Costs were not satisfactorily proven and thus are not accepted. Thus Column U of the Model must be revised in accord with the above conclusions.

Column W presents "Cost Change Orders". Each of these change orders have been evaluated and were reduced to zero where there was a complete lack of proof or reduced to an adjusted amount where there was a partial failure of proof. See attached Schedule of Cost Change Orders with respective award amounts for Somerset and Sussex; there were none for Morris (Exhibit 4).

Any such change order seeking payment for Hurricane Sandy damages was denied. EPC Article 8.5 provides that the sole remedy for an event of Force Majeure is an extension of time and costs are not recoverable. The extension of time has been considered by the panel in connection with our discussion of the Project Companies' liquidated damage claim.

In the Model at Column X, PPM presents its purported Actual Total Costs Plus 10%. In fact, the numerical values presented equal 10% of the values in Column U for Bands A and C. In Band A PPM relies on Article 8.4.1 which, in effect, states that where there is disagreement on pricing, PPM is entitled to 110% of the Direct Costs incurred, or avoided, to make the changes to the Work. This is appropriate.

In Band C at Column U, PPM relies on Article 15.5, Termination by Owner for Convenience. Based on the evidence presented and the finding of multiple material defaults by Sunlight, any purported termination by Sunlight seeking recovery under Article 15.1 or 15.4 is deemed an unjustified termination and converted to Termination by Owner for Convenience. Generally speaking, Article 15.5 allows for payment for the direct costs incurred at each terminated SGF to the date of termination. Hence, the "Plus 10%" is not payable for Band C at Column X. In the Model at Column AA, PPM presents for each SGF in Band B the total amount

of the SGF Price in Column M plus amounts for Cost Change Orders in Column W. Subject to including the adjusted amounts for Cost Change Orders as set forth above in Column W, Column AA is appropriate. PPM presents Column AB as Total Contract Price on Sites with more than 20% Change (Columns U + X) and Costs + 10% for Terminated Sites, Hurricane Sandy Costs and Unpaid Inventory.

At this stage, we have dealt with all of the above but for Unpaid Inventory. To get the proper amount for Column AB, we add the adjusted values in Column U to the adjusted values in Column X. Column AD at Band A equals the adjusted values contained in Column AB for Band A. Column AD at Band B equals the adjusted values contained in Column AA. Column AD at Band C equals the adjusted values contained in Column AC for Band C. Column AD also refers to the adjusted inventory amounts found elsewhere. Column AD "above the line" substitutes values of 5% of the Original SGF Price for Band C, Terminated Sites, where the amount of the Direct Costs is less than 5% of the Original SGF Price. Payment of a minimum of 5% allowance is appropriate in accord with Article 15.5 where the Direct Costs incurred do not reach to the level of said 5%.

Lastly, in its Model, PPM presents, "below the line," its claimed Total Amount Due. By taking from the Model the total of Columns AM and AN, EPC Price for SGFs constructed by PPM and EPC Price for Terminated Sites, respectively, PPM arrives at what it describes as "Total Contract Price" and then reduces the amount by the agreed amount of total payments made by Sunlight and also the "Cost to Complete", the latter of which may be disregarded for the reasons set forth above. Upon carrying out the mathematics, PPM arrives at the amount of the purported "Unpaid Contract Price." In addition to this amount, on the following line on the Model, PPM claims an entitlement under EPC Article 15.3 of the 10% of the Unpaid Contract

Price. Article 15.3, Turnkey Contractor Remedies, states that "[u]pon the occurrence and continuation of and Owner Event of Default, [PPM] has the right to terminate this Agreement upon ten (10) Business Days' Notice. Upon such termination by [PPM], Owner shall pay...[PPM] (i) such amounts as [PPM] would have been entitled to receive in the event of a termination by Owner pursuant to Section 15.5 –plus (ii) an amount equal to ten percent (10%) of the unpaid Contract Price as full compensation for all damages suffered as a consequence of such Owner Event of Default, provided, however, that if the Owner Event of Default giving rise to the termination right is under Section 15.2.2 and affects [PPM's] performance with respect to some but not all SGF's, then the termination under this Section 15.3 shall be exercised only with respect to such affected SGFs." The scope of the effect of the Owner's repeated defaults herein affected all of the SGFs. PPM is entitled to payment under Article 15.3(ii). In conclusion, PPM is entitled to payment of the Unpaid Contract Price, as adjusted by the foregoing escutcheon, plus 10% of that amount as the Amount Due PPM.

Damage Award

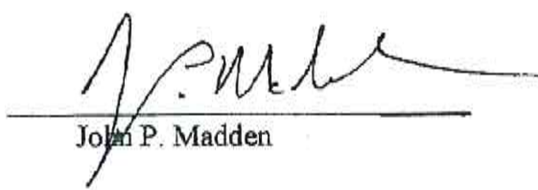
The amount of damages we award to PPM (other than for retained inventory) for its work on the Somerset Project is set forth in detail at Exhibit 1 to this award. From these amounts, the liquidated damages awarded to the Project Companies as set forth on Page 31 of this award needs to be deducted. Therefore, the total net amount due PPM from Sunlight is $23,940,746 minus liquidated damages of $44,359 and $475,962 equaling an award of $23,420,425. We order that sum be paid by Sunlight to PPM within 15 days of this Award. All of the Project Company's damage claims other than for liquidated damages are hereby denied. An award relating to PPM inventory claims is being separately filed. We find PPM to be the prevailing party under Article 19.2.6 of the EPC. An award dealing with pre-award and post-award interest

pursuant to Article 19.2.5 of the EPC and attorneys' fees and costs (including administrative costs) will be addressed in our final award. PPM is directed to file its positions and supporting documentation on these matters within three weeks of the issuance of this Award. Project Company shall file any responsive papers within three weeks thereafter and PPM shall have fifteen days to respond thereto.

This Partial Final Award is in full settlement of all claims and counterclaims submitted in these Arbitrations but for those expressly excepted herein. All claims not expressly granted are hereby denied.

This Partial Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

15 August 2014
Date

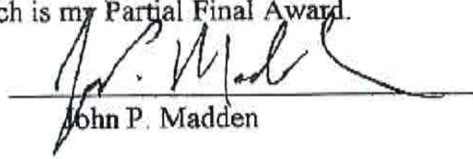

John P. Madden

Date

Eric Watt Wiechmann

I, John P. Madden, do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

15 August 2014
Date


John P. Madden

I, Eric Watt Wiechmann, do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

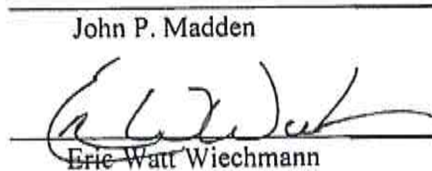
pursuant to Article 19.2.5 of the EPC and attorneys' fees and costs (including administrative costs) will be addressed in our final award. PPM is directed to file its positions and supporting documentation on these matters within three weeks of the issuance of this Award. Project Company shall file any responsive papers within three weeks thereafter and PPM shall have fifteen days to respond thereto.

This Partial Final Award is in full settlement of all claims and counterclaims submitted in these Arbitrations but for those expressly excepted herein. All claims not expressly granted are hereby denied.

This Partial Final Award may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Date | John P. Madden

8-15-14
Date


~~Eric Watt~~ Wiechmann

I, John P. Madden, do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

Date | John P. Madden

I, Eric Watt Wiechmann, do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

8-15-14

ME1 18490159v.5

Date | Eric Watt Wiechmann

Concurrence:

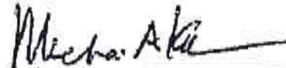
I join in every aspect of this Award except that portion beginning on page 33 "Breach of Contract Damages" and ending on page 40 with the word "PPM". As to that portion of the Award I agree with the methodology utilized, the conclusions reached and the calculations presented and I concur in all regard with the Damages Award set forth.

8/15/14

Date | Michael A. Kahn

I, Michael A. Kahn, do hereby affirm upon my oath as an Arbitrator that I am the individual described in and who executed this instrument, which is my Partial Final Award.

8/15/14



Date | Michael A. Kahn