

Estate File Number: 35-2638322
Court File No.: 35-2638322

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

MOTION RECORD

June 15, 2020

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TO: Service List

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TAB 1

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

**NOTICE OF MOTION
(returnable June 22, 2020)
(Motion to Lift Stay of Proceedings)**

Georges River Energy, LLC (“GRE”) will make a Motion to a Judge presiding over the Commercial List at 11:00 am on Monday, June 22nd, 2020, or as soon after that time as the Motion can be heard, via judicial videoconference in accordance with the change in operations of the Commercial List in light of the COVID-19 emergency. Please refer to the conference details attached as Schedule “A” hereto in order to attend the motion and advise if you intend to join the motion by emailing Sophie Moher at smoher@cassels.com.

PROPOSED METHOD OF HEARING: The Motion is to be heard orally.

THE MOTION IS FOR an Order:

- (a) Abridging the time for service and filing of this Notice of Motion and Motion Record of GRE and dispensing with service on any person other than those served;
- (b) Lifting the stay of proceedings (the “**Stay of Proceedings**”) established by section 69(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) for

the sole purpose of permitting GRE to commence and prosecute an action against KMW Energy Inc. (“**KMW**”), provided however, that, absent further order of the Court, GRE’s sole recourse with respect to any such judgement obtained shall be limited to proceeds of the Architects, Engineers & Environmental Services Professional Liability Policy (the “**Policy**”) issued by Liberty Mutual Insurance Company (“**Liberty**”);

- (c) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- (d) On April 11, 2020, KMW filed a Notice of Intention to Make a Proposal (“**NOI**”) pursuant to section 50.4 of the BIA.
- (e) Pursuant to a contract (the “**Contract**”) entered into on or about December 6, 2016 between GRE and KMW, KMW was to design, engineer and supply a biomass fired energy system that would result in cost savings to Robbins.
- (f) Pursuant to the Contract, KMW recommended and delivered to GRE a steam turbine manufactured by Chola Turbo Machinery (the “**Chola Turbine**”).
- (g) Shortly after the Chola Turbine began operating, it became clear that there were significant problems with it.
- (h) Mid-South Engineering Company, an engineer in a decision-making process related to GRE’s claim of non-conforming goods, concluded that KMW made certain professional errors in the design of the Chola Turbine.

- (i) KMW has admitted that the Chola Turbine was defective.
- (j) Liberty acknowledged receipt of, among other things, GRE's formal notice that it was rejecting the Chola Turbine within the applicable time period of the Policy.
- (k) Pursuant to the order granted by Justice Hainey of the Ontario Superior Court of Justice (Commercial List) on May 15, 2020, and the corresponding endorsement thereto, GRE was permitted to declare a default and formally terminate KMW's right to complete the Contract on or after June 1, 2020.
- (l) On June 2, 2020, GRE formally notified KMW of its material breach of the terms of the Contract due to KMW's delivery of non-conforming goods.
- (m) GRE has continued to suffer financially, as a result of damages for engineering, testing, equipment repairs and professional services in order to address the failings of the Chola Turbine. These damages will continue to increase each day that the non-conforming Chola Turbine remains in operation.
- (n) GRE has also experienced significant operational losses due to the Chola Turbine's failure to generate electricity at the level required by the Contract. These damages also continue to increase each day that the non-conforming Chola Turbine remains in operation.
- (o) GRE cannot continue to sustain the ongoing losses stemming from KMW's delivery of the non-conforming Chola Turbine.

- (p) The proceeds of the Policy are a critical source of funds from which GRE may satisfy its substantial claims against KMW.
- (q) GRE will be materially prejudiced by the continued operation of the Stay of Proceedings since it cannot commence and prosecute an action against KMW unless the Stay of Proceedings is lifted.
- (r) It is fair and just in all of the circumstances that the Court lift the Stay of Proceedings to allow GRE to commence and prosecute an action against KMW for, among other things, negligence and breach of contract, so that GRE can satisfy its claims with the proceeds of the Policy.
- (s) Sections 2, 50.4 and 69 of the BIA.
- (t) Rules 2.03, 3.02, 37 of the *Rules of Civil Procedure*.
- (u) Such further and other grounds as counsel may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (v) The Affidavit of James A. Robbins, sworn June 15th, 2020.
- (w) Such further and other evidence as counsel may advise and this Honourable Court may permit.

Schedule "A"

Conference Details to join Motion via Teleconference

Join Zoom Meeting

<https://us04web.zoom.us/j/8540226142?pwd=NzhLRENVOWpUektBb2FVTTdSUFEzUT09>

Meeting ID: 854 022 6142

Password: 4DvEtw

June 15th, 2020

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SERVICE LIST

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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KMW ENERGY INC.

Estate File Number: 35-2638322
Court File No.: 35-2638322

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for Georges River Energy, LLC

TAB 2

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

**AFFIDAVIT OF JAMES A. ROBBINS
(sworn June 15, 2020)**

I, JAMES A. ROBBINS, of the City of Searsmont, in the State of Maine, MAKE OATH AND SAY:

1. I am the President of Robbins Lumber, Inc. (“**Robbins**”), which position I have held since 2013. I am also the Treasurer of a separate entity affiliated with Robbins called Georges River Energy, LLC (“**GRE**”). In those capacities, I have personal knowledge of the facts to which I depose herein, except where I have indicated that I have obtained facts from other sources, in which case I verily believe those facts to be true.

2. This affidavit supplements my earlier affidavit dated May 1, 2020 (“**May 2020 Affidavit**”) which is attached hereto as **Exhibit “A”**.

3. I am making this affidavit in support of GRE’s motion to lift the stay of proceedings (the “**Stay of Proceedings**”) established by section 69(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) upon the filing of the Notice of Intention to Make a Proposal of KMW Energy, Inc. (“**KMW**”) on April 11, 2020, to allow GRE to pursue certain claims against KMW that may be covered by the Architects, Engineers & Environmental

Services Professional Liability Policy (the “**Policy**”) issued by Liberty Mutual Insurance Company (“**Liberty**”) in favor of KMW. A copy of the Policy is attached hereto as **Exhibit “B”**.

4. The Policy defines a “Claim” as “a demand for money or services, naming an Insured¹ and alleging a Wrongful Act...” The Policy defines a “Wrongful Act” as, “any actual or alleged act, error or omission, or Personal Injury in the performance of Professional Services by an Insured or by any entity or person for whom an Insured is legally liable.”

5. KMW is the insured on the Policy covering Claims made during the time period of the Policy which runs from 12:01 AM on December 15, 2018 through 12:01 AM on December 15, 2019.

6. Liberty issued Endorsement No. 2 to the Policy pursuant to which the limits of liability under the Policy were increased from \$2.0 million to \$5.0 million, solely with respect to KMW’s performance on the project to construct a new co-generation plant that would supply electricity and steam to operate Robbins’ lumber drying kilns and heat for its buildings (the “**Project**”).

7. Liberty issued a letter dated July 8, 2019 (the “**Reservation of Rights Letter**”) and attached hereto as **Exhibit “C”**, acknowledging having received a Loss Notice on June 6, 2019, which consisted in part of GRE’s formal notice that it was rejecting the steam turbine manufactured by Chola Turbo Machinery (the “**Turbine**”) as non-conforming. A copy of GRE’s formal notice is attached hereto as **Exhibit “D”**.

8. In its Reservation of Rights Letter, Liberty agreed to provide coverage to KMW subject to the terms, conditions and exclusions of the Policy and the following reservation of rights.

¹ All terms not otherwise defined herein have the meanings given to them in the Policy attached hereto at **Exhibit “B”**.

9. As set forth in the May 2020 Affidavit, GRE's engineer, Mid-South Engineering Company ("**Mid-South**"), concluded that KMW made certain professional errors in the design of the Turbine. Attached hereto as **Exhibit "E"** is Mid-South's Determination of Claim.

10. Specifically, as further described in pages 6-7 of the Determination of Claim, Mid-South concluded that KMW's design of the Turbine was deficient because, among other things: (i) KMW applied the wrong industry standards for pressure and temperature in the design of the Turbine; and (ii) KMW selected the wrong kind of metal for construction of the Turbine casing.

11. As further described in paragraphs 30 through 38 of the May 2020 Affidavit, KMW has admitted that the Turbine was defective in writing and promised to purchase and install a conforming turbine at KMW's expense.


12. I am not aware of any defense raised by KMW or Liberty as to the professional errors and omissions identified by Mid-South in its Determination of Claim.

13. The proceeds of the Policy are a critical source of funds from which GRE may satisfy its substantial claims against KMW.

14. GRE now seeks to Lift the Stay of Proceedings for the sole purpose of commencing and prosecuting an action against KMW such that GRE may seek to satisfy its claims with the proceeds of the Policy. The action would be for, among other things, negligence and breach of contract in the performance of KMW's professional services under the contract entered into between GRE and KMW pursuant to which KMW was to design, engineer and supply a biomass fired energy system pursuant to the Project.

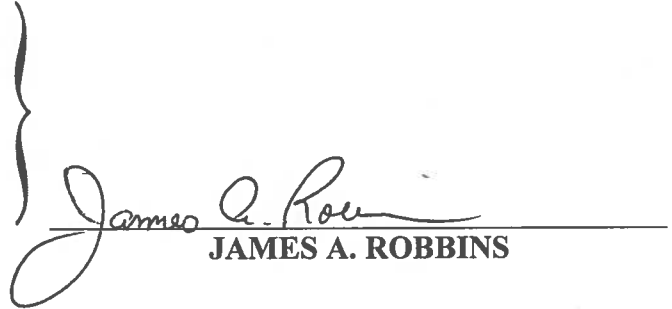
15. GRE is not presently aware of claims by other creditors that may be covered by the Policy.

SWORN BEFORE ME at the City of
Searsmont, Waldo County, in the State of
Maine on June 15, 2020



Notary Public
Commission expires:

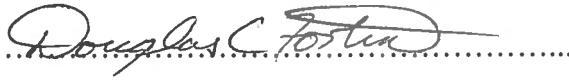
DOUGLAS C. FORTIN
NOTARY PUBLIC
STATE OF MAINE
MY COMMISSION EXPIRES 10-24-24



JAMES A. ROBBINS

Exhibit "A"

This is **Exhibit "A"**
to the affidavit of James A. Robbins sworn
before me this 15th day of June, 2020

.....

Notary Public
Commission expires:

DOUGLAS C. FORTIN
NOTARY PUBLIC
STATE OF MAINE
MY COMMISSION EXPIRES 10-24-24

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

**AFFIDAVIT OF JAMES A. ROBBINS
(sworn May 1, 2020)**

I, JAMES A. ROBBINS, of the City of Waldo, in the State of Maine, MAKE OATH AND SAY:

1. I am the President of Robbins Lumber, Inc. ("**Robbins**"), which position I have held since 2013. I am also the Treasurer of a separate entity affiliated with Robbins called Georges River Energy, LLC ("**GRE**"). In those capacities I have personal knowledge of the facts to which I depose herein, except where I have indicated that I have obtained facts from other sources, in which case I verily believe those facts to be true.

Background

2. Robbins is a fifth generation family-owned business that was established in 1881 and operates a sawmill on a 40-acre site in Searsmont, Maine. Robbins is partnered with a distribution yard in Dartmouth, Nova Scotia. The combined operations employ over 135 individuals.

3. Robbins' operations have, for many years, included a 1.2 megawatt co-generation plant that generated electricity for operations and steam for use in Robbins' kilns to dry lumber and provide heat for the facility.

4. In 2016, Robbins embarked on a project to construct a new co-generation plant that, like its historical co-generation plant, would supply electricity and steam to operate its lumber drying kilns and heat for its buildings (the “**Project**”).

5. A critical factor in planning the Project was to use the mill residuals, such as sawdust, bark and chips, as fuel. This would provide a market for byproducts from independent loggers, landowners and other sawmills which previously had gone to many of Maine’s now-shuttered paper mills.

6. The Project was to be owned and operated by GRE, a separate entity affiliated with Robbins.

7. As part of the Project, GRE planned to purchase and install an 8.5 megawatt steam turbine. GRE planned to sell electricity back into the electrical grid pursuant to a power purchase agreement (the “**Power Purchase Agreement**”) entered into with Central Maine Power Company. In addition, Robbins planned that, upon completion of the Project, it would cease to operate its existing biomass system that was supplying steam to Robbins’ dry kilns.

Contract with KMW

8. On or about December 6, 2016, Robbins entered into a contract (the “**Contract**”) with KMW Energy, Inc. (“**KMW**”) pursuant to which KMW was to design, engineer and supply a biomass fired energy system (“**System**”). The Contract Price for the System was \$12,825,000 USD. A copy of the Contract is attached hereto as **Exhibit A**.

9. As required by the terms of the Contract, KMW supplied a certain performance bond designated as bond no. BDTO-15002-016 (“**Bond**”) guaranteeing its performance of the Contract. The penal sum of the Bond is 50% of the Contract price or \$6,412,500 USD. Liberty

Mutual Insurance Company (“**Liberty**”) is the surety on the Bond. A copy of the Bond is attached hereto as **Exhibit B**.

10. The System designed by KMW was to be comprised of a boiler (essentially a furnace) that would burn biomass fuel (primarily wood chips) to heat water to generate high-pressure steam. The steam would be used to power a steam turbine and generator supplied by KMW to generate electricity. After passing through the turbine, the steam would be piped to Robbins’ kilns to supply heat to dry its lumber products and heat its buildings.

11. KMW agreed that the co-generation System would meet certain specific design criteria. Specifically, KMW promised that the steam turbine would generate 8.5 megawatts of electricity while providing steam for Robbins’ dry kilns and building heat all the while meeting certain efficiency and emissions standards.

The Turbine

12. During the design phase of the Project, KMW recommended that it provide a steam turbine manufactured by Chola Turbo Machinery located in Bangalore, India (the “**Turbine**” or the “**Chola Turbine**”).

13. Pursuant to “Steam Turbine and Generator Item 661” of the Biomass Field Energy System Proposal attached to the Contract, KMW represented to GRE that Chola Turbo Machinery Turbines are extensively proven and have been approved by General Electric.

14. Based on KMW’s assurances, GRE believed that the Chola Turbine would meet the requirements of the Contract specifically including the performance criteria that KMW agreed to meet.

15. GRE expected that the completed Project would result in a net savings of the cost to generate electricity and steam through a combination of a more efficient system and revenue generated from the Power Purchase Agreement.
16. Under the Contract, KMW agreed to deliver the Turbine and generator on December 19, 2017.
17. KMW delivered the Turbine several months late, on or about March 20, 2018. Upon delivery, the Turbine has to be installed by GRE's contractor and put through a commissioning and start up process by KMW.
18. Operation of the System commenced in October 2018. The Turbine began to generate electricity on November 28, 2018.

Problems with the Turbine

19. Almost immediately, it became clear that there were significant problems with the Turbine.
20. Among other things, the Turbine failed to generate electricity in the quantity required by the Contract. In addition, after passing through the Turbine, there was insufficient steam left over to supply Robbins' kilns.
21. Because the System failed to generate sufficient steam, Robbins was forced to continue operating its existing biomass system in conjunction to operate its kilns and provide heat for its buildings. As a direct result, Robbins' actual operating costs with the new System are greatly in excess of its anticipated operating costs.
22. In addition, because the Turbine failed to generate as much electricity as anticipated, GRE was unable to sell power and generate anticipated revenue through the Power Purchase Agreement.

23. During the first half of 2019, KMW and GRE undertook significant efforts to investigate the problems with the System.

24. Among other things, GRE hired MD&A Turbine Consultants to inspect and evaluate the Turbine's operations. A copy of the MD&A report dated May 2, 2019 (the "**MD&A Report**"), is attached hereto as **Exhibit C**.

25. At page 3 of the MD&A Report, MD&A noted that:

To date, the steam turbine has not operated at full power for more than several minutes to determine its maximum MW output. The time duration was too short to collect steady data to measure actual efficiency, but preliminary data at partial loads shows a much higher energy input is needed per a unit of output, than specified. As KMW and Chola continue to search for solutions to the known problems for which they are solely responsible, the steam turbine's ultimate operational status is unknown. The following conclusions are based on the information identified in this report and are subject to change as KMW and its steam turbine supplier, Chola, make changes and more information becomes available.

For the reasons explained below, the steam turbine supplied by KMW does not comply with the requirements of the KMW Contract. It does not comply with industry standards or the performance requirements identified in the KMW Contract. Its operation to date has been unreliable and neither KMW nor Chola have been able to fix this problem. Therefore, the steam turbine is not acceptable and should be replaced with a properly manufactured steam turbine that conforms to the requirements of the KMW Contract. (Emphasis added).

26. Following completion of its evaluation, MD&A concluded among other things: that the Turbine castings were substandard in material properties and thickness and that as a result could lead to failure, serious injury and death; that the Turbine electrical output was deficient and limited to only 85% of output guaranteed by KMW; that the Turbine had a poor performance record with numerous parts requiring replacement within a short time after it began to operate; and that Turbine manufacturer, Chola, lacked the engineering expertise to correct the problems with the Turbine. See pages 28 through 30 of **Exhibit C** for further details.

27. In light of the MD&A Report, on May 3, 2019, GRE formally notified “*KMW that it [was] rejecting the Turbine as a non-conforming good and requiring it be replaced with a new steam turbine that conforms to the industry standards and the requirements of the [Contract].*”

A copy of GRE’s formal notice to KMW that the Turbine is non-conforming is attached hereto as **Exhibit D**.

28. As indicated in the Determination of Claim of the Project Engineer, Mid-South Engineering Company (“**Mid-South**”) attached hereto as **Exhibit E**, in early June 2019, GRE requested that Mid-South serve as engineer in a decision-making process related to GRE’s claim of non-conforming goods.

29. Following its review of the MD&A Report and responses thereto provided by KMW, Mid-South concluded on June 14, 2019, that the Turbine failed to conform to the requirements of the Contract.

KWM’s Response to Turbine Problems

30. On or about July 8, 2019, KMW promised in writing that it would replace the non-conforming Turbine with a conforming turbine. A copy the July 8, 2019, email from KMW’s duly authorized attorney is attached hereto as **Exhibit F**.

31. On or about July 14, 2019, after agreeing to replace the non-conforming Turbine, KMW provided GRE with a preliminary schedule for the replacement project. A copy of KMW’s preliminary schedule is attached hereto as **Exhibit G**.

32. KMW’s schedule identified the basic phases of the replacement effort, starting with steps needed to identify possible suppliers for the new turbine, contacting potential suppliers, arranging site visits, soliciting proposals and selecting a supplier, issuing a purchase order, manufacturing and installation time.

33. Based on that schedule, GRE expected that the new turbine would be commissioned and producing power and steam in accordance with the Contract no later than December 31, 2020.

34. KMW's schedule was predicated on placing an order for the replacement turbine by October 17, 2019.

35. GRE and KMW subsequently agreed to extend the deadline for ordering the new turbine to November 15, 2019.

36. By that time, GRE and KMW had narrowed the list of possible turbine suppliers to two manufacturers.

37. Following review of the two proposals, KMW agreed that it would purchase the replacement turbine from Fincantieri S.p.A. ("**Fincantieri**"), a manufacturer of steam turbines based in Italy.

38. On January 20, 2020, KMW issued its purchase order to Fincantieri in the amount of €1.895 million for a replacement for the rejected, non-conforming Chola Turbine ("**Purchase Order**"). A copy of the Purchase Order is attached hereto as **Exhibit H**.

39. The parties scheduled a kick-off meeting for February 25-26, 2020 among Fincantieri, KMW and GRE to finalize engineering details for the replacement turbine.

40. KMW failed to include in the Purchase Order certain critical equipment and services that KMW agreed to supply under the Contract including a spare rotor, various spare parts and engineering support.

41. These excluded items were supplied by KMW under the original Contract and are critical to the proper operation and maintenance of the new turbine.

42. Following late delivery of the Turbine by KMW, and as the failings of the Turbine became known, GRE provided written notification of its accruing damages and claims against KMW on multiple occasions.

43. Subsequent to issuing the Purchase Order to Fincantieri, KMW threatened to rescind the Purchase Order unless GRE agreed to a financial settlement of its accruing damages claims against KMW.

44. In other words, KMW sought to leverage GRE's need to have a functioning turbine in order to compel GRE to compromise its valid claims for damages arising from KMW's failure to deliver a functioning turbine in the first instance.

Recent Status

45. In response, GRE notified KMW and its Bond surety, Liberty Mutual, by letter dated February 4, 2020, that it was "*considering declaring [KMW] in default under the terms of the [Contract] . . .*" Such notice was required under the Bond prior to termination of the Contract with KMW. A copy of GRE's notice to Liberty dated February 4, 2020, is attached hereto as

Exhibit I.

46. As required by the Bond, Liberty, KMW and GRE participated in a conference (via telephone) on February 18, 2020, to discuss KMW's performance failures under the Contract and the reasons for GRE's notice of default.

47. As planned, representatives of Liberty Mutual, Fincantieri and KMW met with GRE at its Searsmont, Maine, facility during the week of February 25 and 26, 2020, to finalize engineering details for the replacement turbine. Fincantieri also expected to finalize the commercial terms for payment of the replacement turbine by KMW.

48. At these meetings, Fincantieri provided notice at that time that it would not continue efforts to engineer and manufacture the replacement turbine unless KMW finalized payment terms. A copy of minutes of these meetings prepared by Fincantieri are attached hereto as **Exhibit J**.

49. Due to KMW's failure to finalize the payment terms for the replacement turbine, its failure to commit to purchasing critical spare parts and engineering support, and KMW's threats to either suspend work on the replacement turbine or cancel the order, GRE concluded that KMW was unwilling or financially unable to accomplish the replacement as required by the Contract.

50. GRE, through its counsel, again notified Liberty of its intention to terminate the Contract with KMW for default on April 8, 2020. A copy of GRE's counsel's notice to Liberty dated April 8, 2020, is attached hereto as **Exhibit K**.

51. KMW's recent insolvency filing, which cites KMW's obligations to GRE as a primary reason for the filing, demonstrates that GRE was correct in its assessment about KMW's inability to fulfill its obligations under the Contract.

52. Since GRE notified Liberty Mutual that it was considering declaring KMW in default, KMW has failed to take material steps to meet its obligations to provide a conforming steam turbine, specifically including issuing a purchase order for the spare rotor, spare parts and engineering support, and negotiating final terms and conditions with Fincantieri.

Significant and Ongoing Harm being Suffered by GRE

53. As a result of KMW's failure to supply a conforming turbine, GRE has incurred and continues to incur substantial financial impacts. GRE estimates that its damages through the end

of January 2021 (the date when the new turbine was projected to be on line), will exceed \$8.75 million.

54. GRE's damages include \$1.67 million spent out of pocket for engineering, testing, equipment repairs and professional services in order to address the failings of the Chola Turbine. GRE expects to incur another \$250,000 in out-of-pocket costs through the end of January 2021. This figure may increase significantly given KMW's failure to pay certain subcontractors, consultants and suppliers for work performed during GRE's recent maintenance and repair shutdown.

55. In addition to its out-of-pocket costs, GRE has experienced operational losses due to the Turbine's failure to generate electricity at the level required by the Contract. This has prevented GRE from selling electricity in accordance with its Power Purchase Agreement and forced GRE to run a second boiler to meet the needs of Robbins' lumber mill operations.

56. These operational losses through the end of December 2020 are expected to exceed \$3.5 million.

57. In addition, during the estimated six-month period following delivery of the replacement turbine when the non-conforming Turbine is removed and replaced, GRE expects to experience losses in excess of \$2.9 million.

58. The damages described above assumed that the new turbine would be delivered in January 2021. Obviously, in light of KMW's financial distress and failure to honour its obligations under the Contract, this time line is not possible.

59. GRE's damages mount each day that the non-conforming Chola Turbine remains in operation. Attached hereto as **Exhibit L** is GRE's March 2, 2020, demand to KMW outlining its damages claims.

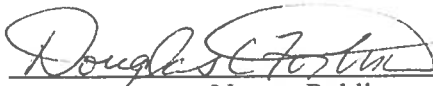
60. The relief sought by KMW in its insolvency proceedings before the Ontario Superior Court of Justice, including the proposed stalking horse purchase agreement makes no provision for KMW's obligation under the Contract.

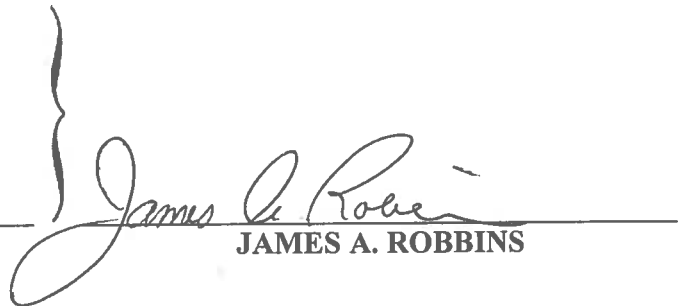
61. GRE has been informed by KMW's surety, Liberty, that Liberty will undertake no obligation with regard to its obligations under the Bond, until GRE issues a notice of termination of the Contract.

62. GRE cannot continue to sustain the ongoing losses stemming from KMW's delivery of the non-conforming Turbine and KMW's inexcusable delays in supplying a conforming turbine.

63. It is critical to GRE and Robbins Lumber's continued existence that Liberty undertake to fulfill its obligations under the Bond by completing the order for the replacement turbine and other steps necessary to complete KMW's obligations under the Contract.

SWORN BEFORE ME at the Town of
Searsmont, in the State of Maine on May 1,
2020


Notary Public
Commission expires:


JAMES A. ROBBINS

DOUGLAS C. FORTIN NOTARY PUBLIC STATE OF MAINE MY COMMISSION EXPIRES 10-24-24
--

Exhibit "B"

This is **Exhibit "B"**
to the affidavit of James A. Robbins sworn
before me this 15th day of June, 2020


.....

Notary Public
Commission expires:

DOUGLAS C. FORTIN
NOTARY PUBLIC
STATE OF MAINE
MY COMMISSION EXPIRES 10-24-24

LIBERTY MUTUAL INSURANCE COMPANY

**Architects, Engineers & Environmental Services
Professional Liability Insurance Policy**





Architects, Engineers & Environmental Services Professional Liability Insurance Declarations

THIS IS A CLAIMS MADE AND REPORTED POLICY. This Policy covers only **Claims** first made against an **Insured** and reported to Liberty International Underwriters, a division of Liberty Mutual Insurance Company (hereinafter referred to as "Liberty") as soon as practicable, but in no event later than 60 days after the expiration or termination of this Policy. Please read the attached Policy terms carefully.

Item I NAMED INSURED:

KMW Energy Inc.

Item II NAMED INSURED'S ADDRESS:

635 Wilton Grove Road
London ON N6N 1N7

Item III POLICY PERIOD:

Inception Date:	12:01 a.m.	December 15, 2018
Expiry Date:	12:01 a.m.	December 15, 2019

Both at local time at the address shown in Item II

Item IV LIMITS OF LIABILITY:

(A) Each Loss:	\$2,000,000
(B) Aggregate per Policy Period:	\$2,000,000

ITEM V SUPPLEMENTAL PAYMENTS

(A) Disciplinary Proceeding:	\$25,000
(B) Reimbursement of Expenses:	\$300/day
(C) Reimbursement of Expenses Aggregate	\$20,000
(D) Legal Expense Reimbursement for Occupational Health and Safety Act:	\$15,000
(E) Loss of Document:	\$25,000

Policy Number: PLTOABENRO003
Renewal of: PLTOABENRO002



Item VI DEDUCTIBLE:

(A) Each **Loss:** \$50,000
(B) Aggregate per **Policy Period:** Not Applicable

Item VII RETRO ACTIVE DATE:

Retroactive Date: December 15, 2016

Item VIII ENDORSEMENT(S):

2 -2

Item IX PREMIUM

\$65,000 Annual Premium

This **Policy** is valid only if, in addition to the facsimile signature of the President of Liberty Mutual Insurance Company, it is dated and signed below by a duly authorized representative of Liberty Mutual Insurance Company.

A facsimile signature in black ink, appearing to be a stylized cursive signature.

Authorized Representative of Liberty Mutual Insurance Company

January 8, 2019

Date

For purposes of the Insurance Companies Act (Canada), this document was issued in the course of Liberty Mutual Insurance Company's insurance business in Canada.

Architects, Engineers & Environmental Services Professional Liability Insurance

POLICY TERMS

(Words and expressions, other than in the headings, printed in **Bold** are defined in Paragraph 22 below)

In reliance upon the statements made in the Application (which shall form part of this Policy), in consideration of and subject to the payment of premium when due, and subject to the terms, conditions, and exclusions of this Policy, Liberty Mutual Insurance Company (hereinafter referred to as “Liberty”) and the **Insured** agree as follows:

1. INSURING AGREEMENTS:

Liberty will pay on behalf of an **Insured** all sums, subject to the terms and conditions of this **Policy**, which an **Insured** becomes legally obligated to pay as **Loss** on account of a **Claim** first made against an **Insured** during the **Policy Period** and reported to Liberty as soon as practicable, but, in no event later than 60 days after the expiration or termination of the **Policy Period**, as a result of a **Wrongful Act** or a **Pollution Incident** that took place prior to the expiration or termination of the **Policy Period**.

2. EXTENSION OF COVERAGE:

Subject to all other terms and conditions, this Policy covers **Loss** that an **Insured** becomes legally obligated to pay as a result of **Claims** arising out of:

- 2.1 an **Insured's** participation in a joint venture but only for an **Insured's** legal liability arising out of **Professional Services** performed by the joint venture;
- 2.2 an **Insured's** unintentional disclosure of confidential or proprietary information. This Extension of Coverage applies only if an **Insured's** disclosure of such information is made in conjunction with an **Insured's** performance of **Professional Services**.

3. SUPPLEMENTAL PAYMENTS

Payments made under this section are Liberty's costs, are not subject to the Deductible and are in addition to the Limits of Liability shown in the Declarations.

3.1 Pre-**Claim** Assistance:

Liberty, at its sole discretion, shall have the right, but not duty to investigate any circumstance reported to Liberty during the **Policy Period** in accordance with Paragraph 6 of this Policy. Liberty will pay for all costs or expenses Liberty incurs until the date a **Claim** is made, as a result of investigating such circumstance.

3.2 **Disciplinary Proceedings**

Liberty will reimburse an **Insured** for all reasonable lawyer's fees for which Liberty has

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provided prior written consent, such written consent to not unreasonably be withheld, and which are incurred in response to a **Disciplinary Proceeding** commenced against an **Insured** and reported to Liberty during the **Policy Period**. Liberty's maximum payment pursuant to this Supplemental Payment shall be the amount stated in Item V (A) of the Declarations for each **Policy Period** regardless of the number of **Disciplinary Proceedings**. Liberty shall not pay **Damages** pursuant to this provision

3.3 Reimbursement of Expenses

If an **Insured** is requested by Liberty to attend hearings, depositions and trials relative to the defense of a **Claim**, Liberty shall reimburse an **Insured's** actual loss of earnings and reasonable expenses due to such attendance up to the amount stated in Item V (B) of the Declarations. The maximum payment Liberty will make pursuant to this Supplemental Payment shall be the amount stated in Item V (C) of the Declarations for each **Policy Period**. Liberty shall not pay **Damages** pursuant to this provision.

3.4 ODA, NHA, OHSA Expense Reimbursement

Liberty will reimburse an **Insured** for all reasonable lawyer's fees for which Liberty has provided prior written consent, such written consent to not unreasonably be withheld, and which are incurred in response to a regulatory or administrative proceeding under the Ontarians with Disabilities Act, 2001, SO 2001(ODA), the National Housing Act, RSC 1985 (NHA), or the Occupational Health and Safety Act, RSO 1990 (OHSA), as amended, or any similar federal, provincial, territorial, state or other governmental statute, law, regulation or ordinance, commenced directly against an **Insured** as a result of a **Wrongful Act** or **Pollution Incident** committed by an **Insured**, and reported to Liberty, during the **Policy Period**. The maximum Liberty will pay pursuant to this Supplemental Payment shall be the amount stated in Item V (D) of the Declarations for each **Policy Period**. Liberty shall not pay **Damages** pursuant to this provision.

3.5 Loss of **Document**:

If a **Document** of an **Insured's** has been destroyed, damaged, lost or mislaid during the **Policy Period** and after diligent search cannot be located, Liberty shall reimburse the **Insured** upon written request, all reasonable expenses incurred during the **Policy Period** to recreate, replace or restore such **Document**. The maximum Liberty will pay pursuant to this Supplemental Payment shall be the amount stated in Item V (E) of the Declarations for each **Policy Period**. Liberty shall not pay **Damages** pursuant to this provision.

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4. EXCLUSIONS

This Policy does not apply to and Liberty shall not be liable for **Loss** resulting from any **Claim** made against an **Insured**:

- 4.1 based upon, arising from or in any way related to the **Insured's** actual dishonest, criminal, malicious or fraudulent act or omission; however, this Exclusion shall not apply to **Claims Expenses** or Liberty's duty to defend any such **Claim** unless or until a judgment or a final adjudication adverse to the **Insured** establishes that the **Insured** committed such dishonest, fraudulent, criminal or malicious act or omission. This exclusion shall not apply to an **Insured** if said **Insured** did not commit, participate in, or have knowledge of any dishonest, fraudulent, criminal or malicious act or omission;
- 4.2 based upon, arising from or in any way related to any **Wrongful Act** or **Pollution Incident** which took place before the Retroactive Date listed in Item VII of the Declarations of this Policy;
- 4.3 based upon, arising from or in any way related to any **Wrongful Act** or **Pollution Incident** which, prior to the inception date of this Policy (or if this Policy is a renewal of a Policy issued and continuously renewed by Liberty, then the inception date of the first Policy issued by Liberty), any of the **Named Insured's** directors, officers, principals, partners or insurance managers knew or could have reasonably expected that such **Wrongful Act** or **Pollution Incident** might give rise to a **Claim**;
- 4.4 by or on behalf of or with the assistance of:
 - a. any other **Insured**; or
 - b. any entity (or its subrogees or assignees) that:
 - i. wholly or partly owns, operates, manages or controls the **Named Insured**;
 - ii. that an **Insured** operates, manages or controls; or
 - iii. that an **Insured** has an ownership interest of greater than 49%;
- 4.5 based upon, arising from or in any way related to an **Insured's** actual or alleged discrimination, humiliation, harassment, or misconduct because of race, creed, color, age, gender, sex, sexual preference or orientation, national origin, religion, disability, handicap, or marital status. However, this exclusion shall not apply to **Claims** brought under the Ontarians with Disabilities Act, 2001, SO 2001, as amended or any similar federal, provincial, territorial, state or other governmental statute, law, regulation or ordinance;
- 4.6 based upon, arising from or in any way related to liability assumed by an **Insured** under any **Contract**. This exclusion does not apply if an **Insured** would have been liable in the absence

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of such **Contract**;

4.7 based upon, arising from or in any way related to any express warranty or guarantee, however, this exclusion shall not apply to any warranty or guarantee made by an **Insured** that the **Professional Services** an **Insured** performs are in conformity with the standard of care to that **Professional Service**;

4.8 based upon, arising from or in any way related to actual construction performed by an **Insured**, or an **Insured's** agent or subcontractor, including, but not limited to, erection, fabrication, installation, assembly, manufacture, demolition, dismantling, drilling, excavation, dredging, remediation, or supplying any materials, parts, or equipment, except for supplying furnishings as a part of interior design services.

However, this exclusion does not apply to:

a. drilling, excavation, or other sampling or testing procedures necessary to perform an **Insured's Professional Services**; or

b. a **Pollution Incident** that is caused by construction, remediation or operational activities performed by an **Insured** or an **Insured's** agent or subcontractor;

4.9 based upon, arising from or in any way related to any product developed, sold, supplied or distributed by an **Insured** or by others under license from an **Insured** for multiple sale or mass distribution, including, but not limited to, computer programs and software;

4.10 based upon, arising from or in any way related to the **Named Insured's** employees' **Personal Injury**, bodily injury, sickness, disease, emotional distress, mental anguish, outrage, humiliation or death arising out of and in the course of his or her employment by an **Insured**; or any obligation for which an **Insured** or any insurance carrier may be liable under the: Worker's Compensation Act R.S.O. 1980; Workplace Safety and Insurance Act, 1997; Occupational Health and Safety Act, RSO 1990; or Employment Insurance Act (1996) of Canada, as amended or any similar federal, provincial, territorial, state or other governmental statute, law, regulation or ordinance;

4.11 based upon, arising from or in any way related to the actual, alleged, or threatened exposure to nuclear source material, nuclear by-product materials, nuclear waste activities, nuclear incident, or extraordinary nuclear occurrence, as defined in the Nuclear Safety and Control Act AC 1997 or the Nuclear Energy Act, RSC 1985, c A-16 or any similar federal, provincial, territorial, state or other governmental statute, law, regulation or ordinance;

4.12 based upon, arising from or in any way related to the failure to maintain, obtain, recommend, or require any form of insurance, suretyship, or bond, either with respect to an **Insured** or other; or

4.13 based upon, arising from or in any way related to an **Insured's** ownership, rental, or leasing

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of any real property or personal property. Personal property includes, but is not limited to, automobiles, aircraft, watercraft, and other kinds of conveyances.

5. **DUTY TO DEFEND:** Liberty has the right and duty to defend any **Claim** made against an **Insured**, including the right appoint and instruct counsel or make any investigation or negotiation it deems expedient.

Liberty shall reimburse any **Claims Expenses** incurred directly by the **Insured**, excess of the Deductible amount stated in Item VI of the Declarations, on a current basis, and no later than 60 days after Liberty has received acceptable documentation of such **Claims Expenses**.

Liberty shall not be obligated to pay any **Loss**, or to undertake or continue the defence of any **Claim** after the applicable limit of Liberty's liability has been exhausted by payment of **Loss** or after deposit of the applicable limit of Liberty's liability in a court of competent jurisdiction, and that in such a case, Liberty shall have the right to withdraw from further defence by tendering control of said defence to the **Insured**.

Any amounts which are subsequently determined as not being payable by Liberty because there is no coverage under this **Policy**, the Limit of Liability of this **Policy** has been exhausted or the amounts are within the applicable Deductible shall be promptly repaid by the **Insured** on whose behalf it was advanced.

6. **REPORTING OF CIRCUMSTANCES:**

If during the **Policy Period** an **Insured** becomes aware of a circumstance that may reasonably be expected to give rise to a **Claim** against an **Insured**, and if an **Insured** reports in writing such circumstance to Liberty, at the address noted in Paragraph 7.1 of this **Policy**, during the **Policy Period**, then any **Claim** subsequently arising from such circumstance reported shall be deemed under this Policy to be a **Claim** made during the **Policy Period**. Such written notice to Liberty shall include:

- 6.1 particulars as to the reasons for anticipating such a **Claim**;
- 6.2 the nature and dates of the alleged circumstance;
- 6.3 the alleged injuries or **Damages** sustained;
- 6.4 the names of potential claimants, if available; and
- 6.5 the manner in which an **Insured** first became aware of the specific circumstance.

7. **NOTICE**

In the event of a **Claim**, an **Insured** shall:

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- 7.1 Promptly forward to Liberty: written notice of such **Claim** at the following address: Liberty Mutual Insurance Company 181 Bay St., Suite 1000, Toronto, Ontario M5J 2T3, Attention: Specialty Casualty Claims, or to claims.liu@libertyiu.com;
- 7.2 Promptly forward to Liberty every demand, notice, summons or other process including institution of arbitration proceedings that the **Insured** receives;
- 7.3 Provide particulars sufficient to identify the **Insured** and the claimant and full information with respect to the time, place and circumstances of the event complained of, and the names and addresses of the injured, and of available witnesses to Liberty.

8. COOPERATION AND SETTLEMENT

The **Insured** shall fully cooperate with Liberty or Liberty's designee in the defense of a circumstance reported to Liberty pursuant to Paragraph 6 of this Policy or a **Claim**, including but not limited to assisting Liberty in the conduct of suits or other proceedings, settlement negotiations, and the enforcement of any right of contribution or indemnity against another who may be liable to the **Insured**. The **Insured** shall attend hearings and trials and assist in securing evidence and obtaining the attendance of witnesses. If after a circumstance is reported to Liberty or **Claim** is made against an **Insured**, and the **Insured** has the right under any **Contract** to either reject or demand arbitration or other alternative dispute resolution process, the **Insured** shall only do so with Liberty's written consent, such written consent to not unreasonably be withheld.

Liberty will not settle any **Claim** without the written consent, such written consent not to be unreasonably withheld, of the first **Named Insured** shown in Item I of the Declarations. If, however, consent to any settlement recommended by Liberty is withheld and the **Insured** elects to contest or to continue to contest such **Claim**, then Liberty's liability for such **Claim** will not exceed the amount for which such **Claim** could have been settled plus **Claims Expenses** up to the date consent was withheld.

9. LIMITS OF LIABILITY

- 9.1 The Limits of Liability, shown in Item IV of the Declarations, and described below, are the most Liberty will pay regardless of the number of **Insured, Claims**, individuals or entities making **Claims**.
- 9.2 The Limits of Liability shown in Item IV of the Declarations, will apply as follows
 - a. The limit for each **Claim** shown in Item IV(A) of the Declarations, is the most Liberty will pay for the sum of all **Loss** arising out of any single **Claim**.

The aggregate limit shown in Item IV(B) of the Declarations is the most Liberty will pay for the sum of all **Loss** for all **Claims**. Payments of **Loss** will reduce the Limits

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of Liability available to pay **Claims**.

- b. The Limits of Liability shown in Item IV of the Declarations apply in excess of the Deductible described in 10 below.

10. DEDUCTIBLE

Liberty's obligation respecting **Loss**, under Paragraph 1 is only to pay the amount which is excess of the amounts stated in Item VI of the Declarations. The Deductible amount shall be borne by the **Insured** uninsured and at their own risk.

The Deductible applies separately to each **Claim** whether this insurance is primary or excess. The Deductible for each **Claim** shown in Item VI(A) of the Declarations is the most the **Insured** must pay as a Deductible of all **Loss** arising out of any single **Claim**. The Aggregate Deductible, if applicable, shown in Item VI(B) of the Declarations is the most an **Insured** must pay as a Deductible for the sum of all **Loss** for all **Claims** made during the **Policy Period**.

11. MEDIATION OF CLAIMS DEDUCTIBLE CREDIT

If the **Insured** and Liberty agree to use **Mediation** and the **Claim** is fully and finally resolved by **Mediation**, the **Insured's** Deductible obligation will be reduced by 50% subject to a maximum reduction of \$25,000.

12. NOTICE OF CANCELLATION

This Policy may be canceled by the **Named Insured** identified in the Declarations, by surrender of this Policy to Liberty or Liberty's authorized representative or by giving Liberty written notice stating when thereafter such cancellation shall be effective.

Liberty will not cancel this Policy except for non-payment of premium, fraud or material misrepresentation in procuring this insurance or in relation to any **Claim**, or changes in law affecting this Policy. If Liberty cancels this Policy, Liberty will mail or deliver to the **Named Insured**, on behalf of all **Insureds**, written notice of cancellation. Liberty will provide at least fifteen (15) days' notice before the effective date of cancellation if Liberty cancels for non-payment of premium. If Liberty cancels for any other reason Liberty will provide at least sixty (60) days' notice before the effective date of cancellation.

If this Policy is canceled, Liberty will send the **Named Insured** any premium refund due. The refund will be pro rata. The cancellation will be effective even if Liberty has not made or offered a refund.

Liberty will give written notice sixty (60) days prior to the expiration of this Policy if Liberty does not intend to renew this insurance subject to any federal, provincial, territorial, state, municipal or

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other mandated requirements. The notice will include Liberty's reason for non-renewal.

If notice is mailed, proof of mailing will be sufficient proof of notice.

13. EXTENDED REPORTING PERIOD

If the **Named Insured** cancels or choose not to renew or Liberty refuses to renew this Policy, the **Named Insured** shall have the right to the following Extended Reporting Period options:

13.1 Automatic Extended Reporting Period: The **Named Insured** shall have the right to a period of sixty (60) days following the effective date of such cancellation or refusal to renew, provided there is no replacement Professional Liability policy obtained providing coverage anytime during such 60 day period, in which to give written notice to Liberty of **Claims** made against an Insured during said sixty (60) day period for any **Wrongful Act** or **Pollution Incident** committed prior to the cancellation date of this Policy and which would otherwise be afforded coverage under this Policy.

13.2 Optional Extended Reporting Period: The **Named Insured** may elect to purchase one of the following extended reporting period options, if written notice of such election together with the additional premium due is received by Liberty no later than sixty (60) days after the effective date of cancellation or refusal to renew:

- a. twelve(12) months;
- b. twenty-four (24) months; or
- c. thirty-six (36) months;

upon the payment of (1) 100%, (2) 150%, or (3) 175%, of the annual premium respectively. However, if a **Claim** is reported under this Policy prior to or during such sixty (60) day period then the additional premiums stated above shall be amended at Liberty's sole discretion.

The **Named Insured** may give written notice to Liberty during said Optional Extended Reporting Period, of any **Claims** made against an **Insured** during the Optional Extended Reporting Period for any **Wrongful Act** or **Pollution Incident** committed during the **Policy Period** or after the **Retroactive date** stated in Item VII of the Declarations and prior to the expiration or termination of the **Policy Period**. If the **Named Insured** elects to purchase the Optional Extended Reporting Period under this Paragraph 13.2, then the Automatic Extended Reporting Period in Paragraph 13.1 above shall be part of, and shall not be in addition to the applicable Extended Reporting Period purchased.

13.3 The Limit of Liability during any Extended Reporting Period shall be part of, and not in addition to the Limit of Liability stated in Item IV of the Declarations. Any Extended Reporting Period will not reinstate or increase the Limit of Liability.

14. OTHER INSURANCE

If there is other collectible insurance, including but not limited to project specific insurance, which applies to a **Claim** covered by this Policy, the other insurance must pay first and this Policy is excess over the other insurance. This Policy applies to the amount of the **Claim** that exceeds the available

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limits of liability and any deductibles or retention amounts of the other insurance.

15. SUBROGATION

In the event of any payment under this Policy, Liberty shall be subrogated to all of the **Insured's** rights of recovery against any person or organization, and the **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing after a **Claim** is made to prejudice such rights. Liberty hereby waives its subrogation rights against a client of an **Insured** to the extent that an **Insured** had, prior to a **Claim** being made, or circumstance reported to Liberty pursuant to Paragraph 6 of this Policy, entered into a written agreement to waive such rights.

16. ALTERATION AND ASSIGNMENT

No change in, modification of, or assignment of interest under this Policy, shall be effective except when made by written Endorsement and signed by Liberty's authorized representative.

17. FIRST NAMED INSURED AS SOLE AGENT

The **Named Insured** first listed on the Declarations shall be the sole agent of all **Insureds** hereunder for the purpose of effecting or accepting any amendments to or cancellation of this Policy, for the purpose of receiving such notices as may be required by law and/or any provision(s) of this Policy, for the completing of any Application and the making of any representations, for the payment of any premium and the receipt of any return premium that may become due under this Policy, for the payment of any Deductible obligations that may become due under this Policy, and the exercising or declining to exercise any right under this Policy.

18. BANKRUPTCY

The bankruptcy or insolvency of an **Insured** or an **Insured's** estate will not relieve Liberty of its obligations under this Policy.

19. LEGAL ACTION AGAINST LIBERTY

No individual or entity has a right under this Policy to join Liberty as a party or otherwise bring Liberty into a suit seeking **Damages** from an **Insured**, or to sue Liberty unless all of the terms of this Policy have been met.

20. TERRITORY AND JURISDICTION:

The coverage afforded by this Policy applies worldwide.

21. INTERPRETATION: IN THIS POLICY:

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- 21.1 a reference to a Paragraph followed by a number means the provision of this Policy bearing that number and includes all provisions commencing with that number. For example, a reference to Paragraph 1 includes Paragraph 1.1. and Paragraph 1.2.;
- 21.2 words and expressions shall be read with such changes in gender or number as the context shall require;
- 21.3 the headings to the Paragraphs are inserted for convenience only and shall not affect the construction of this Policy;
- 21.4 a reference to an act, statute, regulation or other legislation shall be deemed to extend to and include any amendments thereto and successor legislation and any rules, regulations, orders, orders in council, or directives issued thereunder; and
- 21.5 unless expressly stipulated otherwise in this Policy, all dollar amounts expressed throughout this Policy refer to the lawful currency of Canada, and all Loss is payable in such currency. If all dollar amounts expressed throughout the Policy stipulate a currency other than Canadian dollars, all monetary amounts expressed herein shall refer to such stipulated currency and all **Loss** is payable in that stipulated currency.

If any element of **Loss** under this Policy is stated in a currency other than that stated in the Policy, payment under this Policy shall be made at the Bank of Canada's rate of exchange on the date the element of **Loss** is due and payable.

22. DEFINITIONS

- 22.1 "**Bodily Injury**" means physical injury, sickness, disease, death, mental anguish or emotional distress sustained by any person
- 22.2 "**Claim**" means a demand for money or services, naming an **Insured** and alleging a **Wrongful Act** or **Pollution Incident**. Two or more **Claims** alleging, based upon, arising out of or attributable to the same or related **Wrongful Act(s)** or **Pollution Incident(s)**, shall be considered and treated as a single **Claim** regardless of whether made against one or more **Insureds**.
- 22.3 "**Claims Expenses**" mean:
- Reasonable and necessary fees charged by a lawyer(s) designated by Liberty, or designated by an **Insured**, with Liberty's prior written consent, to defend a **Claim**; and
 - All other fees, costs and charges, resulting from the investigation, adjustment, defense, and appeal of a **Claim**, if incurred by Liberty or by an **Insured** with Liberty's prior written consent, including premiums on appeal bonds, provided that Liberty shall not be obligated to apply for or furnish such appeal bonds

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Claims Expenses do not include an **Insured's** or Liberty's salary charges, wages or expenses of partners, principals, officers, directors, members or employees.

- 22.4 **"Contract"** means any agreement, whether express or implied, in fact or in law, written or oral, including, but not limited to, hold harmless and indemnity clauses, warranties, guarantees, certifications, or penalty clauses;
- 22.5 **"Damages"** means compensatory monetary amounts including any judgments (inclusive of any pre- or post- judgment interest), awards, or settlements negotiated with Liberty's approval. **Damages** shall also include punitive or exemplary damages or the multiple portion of any multiplied damage award unless such **Damages** are uninsurable pursuant to applicable law.

Damages do not include:

- a. any return, withdrawal or reduction of professional fees, profits or other charges, or;
- b. fines, sanctions, taxes, penalties or awards deemed uninsurable pursuant to any applicable law.

It is understood and agreed that with respect to the insurability of fines, sanctions, taxes, penalties, awards, punitive or exemplary damages and the multiple portion of any multiplied damage award of all the jurisdictions applicable to a Claim, the jurisdiction with the most favourable laws concerning the insurability of such damages or penalties shall apply to determine whether coverage is available for such damages or penalties.

- 22.6 **"Disciplinary Proceeding"** means any proceeding by a regulatory or disciplinary official, board or agency, to investigate charges of professional misconduct in the performance of **Professional Services**.
- 22.7 **"Document"** shall mean written or printed documents used in the performance of **Professional Services**. **Document** however shall not include electronic media or materials stored in electronic format.
- 22.8 **"Insured"** means the following:
- a. The **Named Insured**;
 - b. Any person who is, was, or hereafter becomes a partner, principal, officer, director, member, or employee of the **Named Insured**, but only for **Professional Services** performed in such capacity on behalf of the **Named Insured**;
 - c. Any temporary or leased personnel, but only for **Professional Services** performed while acting under the direct supervision and on behalf of the **Named Insured**;
 - d. The estate, heirs, executors, administrators, and legal representatives, in the event of

Architects, Engineers & Environmental Services Professional Liability Insurance

the death, disability, incapacity, insolvency, or bankruptcy of any person listed in b or c above, but only to the extent the person would have otherwise been provided coverage under this Policy; and

- e. The lawful spouse of a person listed in b or c above solely by reason of spousal status, or a spouse's ownership interest in property or assets that are sought as recovery. This shall not apply to the extent a **Claim** alleges any **Wrongful Act** by such spouse.
- f. Any **"Predecessor Firm"**

22.9 **"Loss"** means all **Damages** and **Claims Expenses**.

22.10 **"Mediation"** means a non-binding process in which a neutral panel or individual assists the parties in reaching their own settlement.

22.11 **"Named Insured"** means the entity named in Item I of the Declarations of this Policy.

22.12 **"Personal Injury"** means false arrest, detention or imprisonment, or malicious prosecution; the publication or utterance of a libel or slander or other defamatory or disparaging material; a publication or utterance in violation of an individual's right of privacy; wrongful entry or eviction; or the invasion of the right of private occupancy.

22.13 **"Policy Period"** means the period specified in Item III of the Declarations, or any shorter period that may occur as a result of a cancellation or termination of this Policy.

22.14 **"Pollution Incident"** means the actual or alleged discharge, dispersal, seepage, migration, release or escape of **Pollutants** into or upon land, the atmosphere or any watercourse or body of water which results in **"Bodily Injury"** or **"Property Damage"** arising from the performance of **Professional Services**.

22.15 **"Pollutants"** means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste. Waste includes materials to be recycled, reconditioned or reclaimed. **"Pollutants"** does not mean heat, smoke, vapor, soot or fumes from a hostile fire or explosion.

22.16 **"Predecessor Firm"** means any entity whose assets, partners, principals have been acquired by the **Named Insured** provided that:

- a. the application or any supplemental addendum to the application for this Policy provided to Liberty lists such entity as a proposed **Insured**; and
- b. the **Named Insured** has agreed in writing to provide professional liability insurance for such entity

Architects, Engineers & Environmental Services Professional Liability Insurance

22.17 “**Professional Services**” means those services that an **Insured** performs for others in their practice as an architect, engineer, land surveyor or planner, interior designer, landscape architect, construction manager, environmental consultant, scientist, LEED Accredited Professional.

22.18 “**Property Damage**” means:

- a. Physical injury to or destruction of tangible property, including all the resulting loss of use of that property; or
- b. Loss of use of tangible property that has not been physically injured or destroyed.

22.19 “**Wrongful Act**” means any actual or alleged act, error or omission, or **Personal Injury** in the performance of **Professional Services** by an **Insured** or by any entity or person for whom an **Insured** is legally liable.

23. NOTICE OF MEMBERSHIP IN LIBERTY MUTUAL HOLDING COMPANY INC.:

While this Policy is in effect, the **Named Insured** first named in Item I of the Declarations is a member of Liberty Mutual Holding Company Inc. and is entitled to vote either in person or by proxy at any and all meetings of the members of said company. The Annual Meeting of Liberty Mutual Holding Company Inc. is in Boston, Massachusetts, on the second Wednesday in April each year at ten o'clock in the morning.

The **Named Insured** first named in Item I of the Declarations shall participate in the distribution of any dividends declared by Liberty Mutual Holding Company Inc. for this Policy. The amount of such **Named Insured's** participation is determined by the decision of Liberty Mutual Holding Company's Board of Directors in compliance with any laws that apply.

IN WITNESS WHEREOF, we have caused this Policy to be executed and attested, but this Policy shall not be valid unless countersigned on the Declarations page by our duly authorized representative.



PRESIDENT



SECRETARY



Endorsement No. 1

NAMED INSURED AMENDED

(Additional Named Insureds)

Effective Date:	December 15, 2018
Policy Number:	PLTOABENRO003
Issued to:	KMW Energy Inc. KMW International Inc. KMW Biomass Inc.
Issued by:	Liberty Mutual Insurance Company

IT IS HEREBY UNDERSTOOD AND AGREED THAT:

Paragraph 22.11 of this Policy is amended to include the following:

22.11 **Named Insured** shall also include the following entities:

KMW International Inc.
KMW Biomass Inc.

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

A handwritten signature in black ink, appearing to be "J. J. [unclear]".

Authorized Representative of Liberty Mutual Insurance Company

January 08, 2019

Date



Endorsement No. 2

LIMIT OF LIABILITY INCREASED

(Project Specific)

Effective Date: December 15, 2018
 Policy Number: PLTOABENRO003
 Issued to: KMW Energy Inc. KMW International Inc. KMW Biomass Inc.
 Issued by: Liberty Mutual Insurance Company

IT IS HEREBY UNDERSTOOD AND AGREED THAT:

Solely with respect to **Professional Services** rendered or which should have been rendered by the **Insured** for the Robbins Lumber project

- Item IV of the Declarations is amended to read as follows:

Item IV LIMITS OF LIABILITY:

(A) Each Loss:	\$5,000,000
(B) Aggregate per Policy Period:	\$5,000,000

- Solely with respect to Robbins Lumber project. Item VII of the Declarations is amended to read as follows:

Item VII RETRO ACTIVE DATE:

Retroactive Date:	December 15, 2016
-------------------	-------------------

ALL OTHER TERMS AND CONDITIONS REMAIN UNCHANGED.

Authorized Representative of Liberty Mutual Insurance Company

January 08, 2019

Date

Exhibit "C"

This is **Exhibit "C"**
to the affidavit of James A. Robbins sworn
before me this 15th day of June, 2020


.....

Notary Public
Commission expires:

DOUGLAS C. FORTIN
NOTARY PUBLIC
STATE OF MAINE
MY COMMISSION EXPIRES 10-24-24



Bow Valley Square III, Suite 3110
255 – 5th Avenue SW
Calgary, Alberta
T2P 3G6

Direct: 416-847-3564
Fax: 416-307-4372
Email: katherine.baker@libertymutual.com

July 8, 2019

Private and Confidential

Mr. Gerry Higgins
KMW Energy Inc.
275 Colborne Street
London, Ontario
N6B 2S7

(via email to: ghiggins@kmmenergy.com)

Re: Insured: KMW Energy Inc.
Policy No.: PLTOABENR003 (the "Policy")
Company: Liberty Mutual Canada ("Liberty")
Claimant: Georges River Energy
File No.: TORSPC000228816

Dear Mr. Higgins,

Liberty has reviewed the email notification provided on June 7, 2019, from Ms. Wendy Dance of Arthur Gallagher, and its attachments. Included in the attachments was a copy of the Loss Notice dated June 6, 2019; a copy of a letter dated May 3, 2019 from Eaton Peabody, attorneys for Georges River Energy ("GRE"); and a copy of the Rasmussen Report dated May 2, 2019 (collectively referred to as the "Demand"). Please note that the words that are in bold print in this letter are defined in the **Policy**.

Summary of Coverage Position

The Demand has been submitted for coverage consideration under the Architects, Engineers & Environmental Services Professional Liability Insurance Policy PLTOABENR003 (the "Policy"). Liberty will provide coverage to KMW Energy Inc. ("KMW"), for the Demand subject to the terms, conditions and exclusions of the Policy and the following reservations of rights.

The Policy

The Policy has a **Policy Period** from 12:01 a.m. December 15, 2018 to 12:01 a.m. to December 15, 2019. For this period, the Policy has Limits of Liability of \$2,000,000.00 each **Claim** and \$2,000,000.00 in the aggregate for each **Policy Period**. In accordance with Endorsement 2 and solely for the Robbins Lumber Project, the Limits of Liability for each **Loss** is \$5,000,000.00 for each **Claim** and in the aggregate for each **Policy Period**.

There is an applicable Deductible of \$50,000.00 for each and every **Claim**. Please note that the Deductible applies to payment of all **Loss**. Payment of any and all **Loss** will reduce the Limits of Liability available to pay **Claims**. The Deductible amount shall be borne by the **Insured** uninsured and at their own risk. Liberty shall not be liable for any amount in excess of the Policy limits or within the applicable Deductible.

Brief Case Facts

KWM designed a Turbine for GRE that was manufactured and installed by other contractors. The Rasmussen Report states that the Turbine fails to comply with industry standards and the requirements of the Procurement Contract. Such defects included but are not limited to, the failure to manufacture major components of the Turbine with suitable materials that comply with the required Procurement Contract standards. It is further stated that the Turbine has proven to be incapable of producing power and steam at the levels required under the Procurement Contract due to its defective design and manufacture. GRE has therefore demanded that the Turbine be replaced with a new steam turbine.

Analysis

The following coverage analysis is based upon the allegations made in the Demand about the circumstances giving rise to and surrounding this matter. We recognize that the allegations are unsubstantiated at this time, and do not intend to imply that they have any legal or factual basis.

Subject always to all of the Policy's terms and conditions, **Liberty** undertakes to pay on behalf of the **Insured** all sums, subject to the terms and conditions of the **Policy**, which the **Insured** becomes legally obligated to pay as **Loss** on account of a **Claim** first made against the **Insured** during the **Policy Period** and reported to Liberty as soon as practicable, but, in no event later than 60 days after the expiration or termination of the **Policy Period**, as a result of a **Wrongful Act** or a **Pollution Incident** that took place prior to the expiration or termination of the **Policy Period**.

Loss is defined at Policy Paragraph 22.9 to mean all **Damages** and **Claims Expenses**.

Damages is defined at Policy Paragraph 22.5, in part, as:

compensatory monetary amounts including any judgments (inclusive of any pre- or post- judgment interest), awards, or settlements negotiated with Liberty's approval. **Damages** shall also include punitive or exemplary damages or the multiple portion of any multiplied damage award unless such **Damages** are uninsurable pursuant to applicable law.

Damages do not include:

- a. any return, withdrawal or reduction of professional fees, profits or other charges, or;
- b. fines, sanctions, taxes, penalties or awards deemed uninsurable pursuant to any applicable law.

(...)

Claims Expenses is defined at Policy Paragraph 22.3, as

- a. reasonable and necessary fees charged by a lawyer(s) designated by Liberty, or designated by an **Insured**, with Liberty's prior written consent, to defend a **Claim**;
- b. All other fees, costs and charges, resulting from the investigation, adjustment, defence and appeal of a **Claim**, if incurred by Liberty or by an **Insured** with Liberty's prior written consent, including premiums on appeal bonds, provided that Liberty shall not be obligated to apply for or furnish such appeal bonds.

Claims Expenses do not include an **Insured's** or Liberty's salary charges, wages or expenses of partners, principals, officers, directors, members or employees.

Claim is defined at Policy Paragraph 22.2 as:

a demand for money or services, naming an **Insured** and alleging a **Wrongful Act** or **Pollution Incident**. Two or more **Claims** alleging, based upon, arising out of or attributable to the same or related **Wrongful Act(s)** or **Pollution Incident(s)**, shall be considered and treated as a single **Claim** regardless of whether made against one or more **Insureds**.

Wrongful Act is defined at Policy Paragraph 22.19 as:

any actual or alleged act, error or omission, or **Personal Injury** in the performance of **Professional Services** by an **Insured** or by any entity or person for whom an **Insured** is legally liable.

Professional Services is defined at Policy Paragraph 22.17 as:

services that an **Insured** performs for others in their practice as an architect, engineer, land surveyor or planner, interior designer, landscape architect, construction manager, environmental consultant, scientist, LEED Accredited Professional.

Insured is defined in at Policy Paragraph 22.8 in relevant part as

- a. the **Named Insured**;
 - b. any person who is, was, or hereafter becomes a partner, principle, officer, director, member, or employee of the **Named Insured**, but only for **Professional Services** performed in such capacity on behalf of the **Named Insured**;
 - c. any temporary or leased personnel, but only for **Professional Services** performed while acting under the direct supervision and on behalf of the **Named Insured**;
- (...)

The **Named Insured** is designated in Item I of the Declarations as KMW Energy Inc. Liberty, therefore accepts that the Demand constitutes a **Claim** against KMW alleging a **Wrongful Act** arising out of **Professional Services** allegedly provided by KMW. Further, as discussed with yourself and Mr. Adrian Carstolovean, I confirm that this Demand relates to the Robbins Lumber Project and as such, Endorsement 2 applies increasing the Limits of Liability to \$5,000,000.00 for this **Claim**. Therefore, Liberty will provide coverage for KMW under the Policy for the allegations made in the Demand, subject to the Policy terms and conditions, the Limit of \$5,000,000.00, the deductible of \$50,000.00 and the reservations of rights set out below.

In addition to this coverage under the Policy we wish to draw your attention to the following.

- Exclusion 4.2 of the Policy provides that there is no coverage for a **Loss** based upon, arising from or in any way related to any **Wrongful Act** which took place before the Retroactive Date. The Retroactive Date of this Policy is December 15, 2018. The Procurement Contract between KMW and GRE is dated December 6, 2016, however, we understand from the information received to date that the **Wrongful Act** occurred after Retroactive Date. Nevertheless, Liberty reserves its rights under the Policy to rely on Exclusion 4.2 should it be determined in the future that any **Wrongful Act** occurred prior to the Retroactive date.
- Exclusion 4.6 of the Policy states that there is no coverage for **Loss** resulting from any **Claim** made against an **Insured** based upon, arising from or in any way related to liability assumed by an **Insured** under any **Contract**. This exclusion does not apply if an **Insured** would have been liable in the absence of such **Contract**. Given the allegations brought against KMW in the Demand, we wish to reserve our rights specifically on this exclusion.
- Exclusion 4.7 of the Policy states that there is no coverage for **Loss** arising from or in any way related to any express warranty or guarantee, however this exclusion shall not apply to any warranty or guarantee made by an **Insured** that the **Professional Services** an **Insured** performs are in conformity with the standard of care to that **Professional Service**.
- Exclusion 4.8 of the Policy states that there is no coverage for **Loss** arising from or in any way related to actual construction performed by an **Insured**, or an **Insured's** agent or subcontractor, including, but not limited, to erection, fabrication, installation, assembly, manufacture, demolition, dismantling, drilling, excavation, dredging, remediation, or supplying any materials, parts, or equipment, except for supplying furnishings as a part of interior design services. The Demand requests that the Turbine be replaced and/or repaired. Based on Exclusion 4.8 there would be no coverage for such costs to replace or repair the Turbine.
- Exclusion 4.9 of the Policy states that there is no coverage for **Loss** arising from or in any way related to any product developed, sold, supplied, or distributed by an **Insured** or by others under license from and **Insured** for multiple sale or mass distribution.

Further, please note the following:

Policy Paragraph 8 provides, in part, that you shall cooperate fully with Liberty and do nothing that might prejudice Liberty's position. Liberty will not settle any **Claim** without the written consent of KMW. If, however, consent to any settlement recommended by Liberty is withheld and the **Insured** elects to contest or to continue to contest such **Claim**, then Liberty's liability for such **Claim** shall not exceed the amount for which such **Claim** could have been settled plus **Claims Expenses** up to the date consent was withheld.

Policy Paragraph 14 provides that this Policy is to be excess to any other valid insurance. We confirm that KMW holds a CGL Policy with Liberty and that there is a Surety Bond in place with Liberty held on behalf of Georges River Energy. If there are any other policies held by KWM that may in any way possibly pertain to coverage for professional services undertaken by KMW, kindly advise at your earliest convenience.

Defence Counsel

Policy Paragraph 5 provides that Liberty has the right and duty to defend any **Claim** made against an **Insured**, including the right to appoint and instruct counsel or make any investigation or negotiation it deems expedient. As you know, Liberty has appointed Mr. Ian Epstein of Blaney McMurtry LLP, as defence counsel to represent KMW in this matter. As stated above, the \$50,000.00 Deductible applies to **Claims Expenses**. Mr. Epstein has been asked to submit defence bills to your attention with a copy to Liberty so that we may track the exhaustion of your deductible.

Counsel will not be requested or permitted to provide coverage advice to you or Liberty with respect to the Policy and/or its application to Demand. Further, counsel's representation shall be subject to the reservation of right contained in this letter and Liberty's litigation management guidelines. If needed, we may request to meet with counsel, you and/or other key witnesses to discuss the facts of this case, as well as liability, damages and coverage issues. Your cooperation in this regard will be appreciated and will help to bring this claim to an appropriate resolution.

Liberty's position with respect to this matter is based upon the information provided to date and is subject to further evaluation as additional information becomes available. Liberty reserves its right to assert additional terms and provisions of the Policy and additional defences available at law and in equity which may become applicable as new information is learned.

Please feel free to contact me should you have any questions concerning the coverage available under the Policy, or the issues that are raised in this letter. We look forward to working with you to resolve this matter.

Yours very truly,

Katherine Baker

Katherine Baker
Sr. Litigation Auditor/Sr. Claims Specialist, Specialty Casualty Claims

cc: *Mr. Adrian Carstolovean*
Arthur J. Gallagher Canada Limited

(via email to: adrian.carstolovean@aig.com)

Mr. Ian Epstein
Blaney McMurtry LLP

(via email to: iepstein@blaney.com)

Exhibit "D"

This is **Exhibit "D"**
to the affidavit of James A. Robbins sworn
before me this 15th day of June, 2020


.....

Notary Public
Commission expires:

DOUGLAS C. FORTIN
NOTARY PUBLIC
STATE OF MAINE
MY COMMISSION EXPIRES 10-24-24

David C. Pierson
dpierson@eatonpeabody.com



100 Middle St., P.O. Box 15235
Portland, Maine 04112-5235
Phone 207-274-5266 Fax 207-274-5286
www.eatonpeabody.com

May 3, 2019

VIA EMAIL ONLY aatcheson@millerthomson.com

Eric B. Rosen, M.Sc., P. Eng.
c/o Aaron E. Atcheson
Miller Thomson LLP
One London Place
255 Queens Avenue, Suite 2010
London, Ontario N6A 5R8

**RE: Georges River Energy, LLC
KMW Energy, Inc.**

Dear Aaron:

Enclosed on behalf of Georges River Energy ("GRE") please find a copy of the May 3, 2019 report titled "Review of Design, Maintenance and Operational Problems with the Steam Turbine Purchased from KMW Energy, Inc. and Manufactured by Chola Turbo Machinery International" prepared by David Rasmussen P.E. of Mechanical Dynamics & Analysis, LLC (the "Rasmussen Report"). The Rasmussen Report addresses the steam turbine manufactured by Chola Turbo Machinery International (the "Turbine") and supplied by KMW Energy, Inc. ("KMW") under the contract between the parties titled Agreement between Buyer and Seller For Procurement Contracts (EJCDC P-520) dated December 6, 2016 (the "Procurement Contract"). Mr. Rasmussen conducted his investigation at the request of GRE in accordance with section 8.01.C of the standard General Conditions for Procurement Contracts (EJCDC P-700) (the "General Conditions").

As you will note, Mr. Rasmussen concludes that the Turbine fails to comply with industry standards and the requirements of the Procurement Contract in a number of material respects. These include, but are not limited to, the failure to manufacture major components of the Turbine with suitable materials that comply with the required Procurement Contract standards. Further, the Turbine has proven to be incapable of producing power and steam at the levels required under the Procurement Contract due to its defective design and manufacture.

For the above-stated reasons, and in accordance with sections 8.02.A-B of the General Conditions, **GRE is hereby notifying KMW that it is rejecting the Turbine as a non-conforming Good and requiring it be replaced with a new steam turbine that conforms to industry standards and the requirements of the Procurement Contract.** GRE has also notified Mid-South Engineering of the rejection of the Turbine in accordance with the requirements of section 9.06.A of the General Conditions.

The specific claims and references to the related provisions of the General Conditions identified in this letter relate only to the rejection of the Turbine as a non-conforming Good and should not be construed as a waiver of any other claims GRE may have or of the other rights or remedies available to GRE under the Procurement Contract, including any applicable claims for default under the Performance Bond, or under any law or regulation, all of which are expressly reserved.

Thank you for your prompt attention to this matter which GRE hopes to resolve through negotiations in accordance with section 9.06.E of the General Conditions. To facilitate that process, please send me copies of any reports on the Turbine prepared by any of the consultants who have worked on the Turbine including, but not limited to, the one prepared by Rotating Machinery Services which GRE understands KMW has received in late April.

Sincerely,



David C. Pierson

DCP/dm

cc: Georges River Energy (w/ encl.)
Mid-South Engineering, Inc. (w/ encl.)
P. Andrew Hamilton, Esq. (w/ encl.)

Enc.

Exhibit "E"

This is **Exhibit "E"**
to the affidavit of James A. Robbins sworn
before me this 15th day of June, 2020

.....

Notary Public
Commission expires:

DOUGLAS C. FORTIN
NOTARY PUBLIC
STATE OF MAINE
MY COMMISSION EXPIRES 10-24-24



14-Jun-2019

VIA EMAIL ONLY DPierson@eatonpeabody.com

James A. Robbins
c/o David C. Pierson
EATON PEABODY
100 Middle Street
P.O. Box 15235
Portland, Maine 04112-5235

VIA EMAIL ONLY aatcheson@millerthomson.com

Eric B. Rosen, M.Sc., P. Eng.
c/o Aaron E. Aatcheson
Miller Thompson LLP
One London Place
255 Queens Avenue, Suite 2010
London, Ontario N6A 5R8
CANADA

RE: 7066.37.05.03 - Georges River Energy/Searsmont, ME
Review of Non-Conforming Goods Claim by Georges River Energy, LLC dated May 3, 2019

To Whom it may Concern:

Mid-South Engineering (MSE) offered to Georges River Energy (GRE), at the request of GRE's legal representative, to serve as Engineer in a decision-making process related to a GRE claim of non-conforming goods. In this capacity, MSE will accept and review all supporting documentation from the contracted parties related to a GRE claim of the KMW Energy Inc. supplied steam turbine as a non-conforming good in a letter submitted by Eaton Peabody on behalf of GRE dated May 3, 2019. (Appendix A)

Prior to May 1, 2019, Mid-South Engineering completed and fulfilled its obligation to provide requested engineering services for Georges River Energy related to their project to install a biomass boiler and turbine system in Searsmont, Maine. Following completion of this work, MSE was requested by GRE to act as Engineer as defined in Section 9.06 of a contractual agreement between Georges River Energy LLC and KMW Energy Inc. dated Dec. 6, 2016 (Appendix B) and to which, Mid-South Engineering is not signatory. Believing that we can be objective and impartial, MSE provided Proposal No. 7066.37.07.10-001, Rev. 0 dated May 2, 2019 to Georges River Energy, LLC. (Appendix C) to serve in the capacity of Engineer and were subsequently given a purchase order for these services.

The claim, as written, incorporates a report from Mr. David Rasmussen of MD&A, LLC dated May 2, 2019 (Appendix D, "Rasmussen Report") that the supplied turbine fails to comply with industry standards and also fails to meet the requirements of the procurement contract between KMW and GRE. Further GRE has claimed that the turbine has proven to be incapable of producing power and steam (extraction) at the levels required under the procurement contract. To satisfy this claim, GRE is requesting a replacement turbine that conforms to both industry standards and the requirements of the procurement contract.

In review of the claims by GRE and responses by KMW, numerous codes and/or standards have been referenced, along with the procurement contract, and will be considered in this review. The contract provides specific codes and standards that are incorporated and are shown in Appendix K of this document. The other codes referenced in supporting documentation include API 611, API 612, ASME Section VIII Div. 1&2, ASME Section II, ASME/ANSI 1.5, ASTM A356, ASTM A488, and are not clearly identified in the contractual agreement. They are, however, valid codes or standards that have been developed and further revised to meet safety and quality needs of the final product. Suppliers may and oftentimes do routinely use these in designing, manufacturing and testing of their turbines. Determination of conformance/non-conformance is limited to information provided by each party and interpretation of code/standard/contract applicability to the design and operating conditions of this turbine, as specified in the procurement contract. The contract states that "the equipment and materials shall comply with all applicable National Codes, Standards and Regulations."

Although initial claim was filed on May 3, 2019, final documents were submitted to Mid-South Engineering for consideration on June 10, 2019.

Mid-South Engineering reviewed each claim individually and arrived at conclusions for each claim, then a final summary conclusion was made based on consideration of the resultant total impact to substantiate a claim that the turbine, as a whole, constitutes a non-conforming good.

Standards

Importantly, the contract does not explicitly reference any API Standard, but, it is an internationally accepted practice to follow whatever codes and/or standards would apply to the design, manufacturing and testing of a specific steam turbine. With GRE's turbine, the question of which API standard is applicable is a point of contention with KMW having used a turbine supplier that adheres, for the most part, to API 611 5th edition "General Purpose Steam turbines for Petroleum, Chemical and Gas Industry Services" and refers to this standard in responses. The API 612 standard dated 1995 "Special Purpose Steam Turbines for Petroleum, Chemical and Gas Industry" is also referenced by GRE (MD&A report) in the claim and the two standards are for steam turbines but are not identical nor complementary. As this turbine was built in 2017 any reference to a 1995 standard seems outdated, with the current edition released in 2014, but the intent of that standard still exists today. General Purpose turbines, as defined in both API 611 and 612 are "horizontal or vertical turbines used to drive equipment that is usually spared, is relatively small in size (power), or is in non-critical service. They are generally used where steam conditions will not exceed a pressure of 48 bar (700 psig) and a temperature of 400 deg C. (750 deg F) or where speed will not exceed 6000 r/min". "Special Purpose turbines, are those horizontal turbines used to drive equipment that is usually not spared, is relatively large in size (power), or is in critical service. This category is not limited by steam conditions or turbine speed".

The following table identifies which conditions of the API 611 and 612 standards apply to the GRE turbine.

<u>GRE Turbine Conditions</u>	<u>API 611</u>	<u>API12</u>
Horizontal Design	Applies	Applies
Unit is not spared	Does not apply	Applies
Relative size 8.5 MW (Small to mid-size)	Applies	Does not apply
Design pressure 900 psig	Does not apply	Applies
Design Temperature 900 deg F	Does not apply	Applies
Speed > 6000 rpm	Applies	Applies
Non-Critical Service	Applies	Does not apply

In considering which API standard applies, MSE used the criteria established in the respective standards, noting that GRE's turbine is of horizontal design, is not spared, is relatively small in size, is not in critical service, is designed for 900 psig and 900 deg F, and has an operating speed of 5500 r/min. From these seven conditions, the API 611 standard meets 4 of the seven conditions while not meeting the limits for operating pressure and temperature, which are generally limited to 700 psig and 750 deg F. API 612 applies to 5 of the seven conditions, horizontal design, not usually spared, and not limited by steam conditions of pressure and temperature. API 612 does not apply in the conditions for critical service or relative size (power). Given that neither of these standards completely and fully meets the conditions assigned to classify the turbine, MSE is considering both standards as valid and applicable in our decision. In overlapping areas, the more demanding standard would be applied.

Definitions of codes and standards might be helpful: ***"A standard is a set of technical definitions, specifications, and guidelines. They function as instructions for designers, manufacturers, operators, or users of equipment. If you are building something, a standard tells you about the materials, process, designs, structure, etc. In brief, standards tell you how to do something."***

"When a standard has been adopted by governmental bodies and has the force of law, it becomes a code. A standard also becomes a code when it has been incorporated into a business contract. A code is a set of rules that experts in the field recommend people to follow; it is a model. Although it is not a law, it can be adopted into law. A code tells you what needs to be done, but it doesn't explain how it should be done. Some examples of Codes include International Building Code, ASME Boiler and Vessel Code, and AWS D1.1."

Both API 611 and 612 standards then incorporate by reference other codes or standards including ASME Boiler and Pressure Vessel Codes Sections II, VIII, IX, ASME B1.1, B1.20.1, B16.1, B16.5, B16.11, B16.42, B16.47, B17.1, B31.3, PTC 6, AWS D1.1, ASTM A105, A106, A153, A193, A194, A197, A269, A307, A312, A338, E94, E709.

Additionally, only API 611 (API 612 does not) includes references to ASTM A181, A320, A388, A524, A563, A578, A609, E165 and E1003 and only API 612 (API 611 does not) includes references to ASTM A53, A192, A247, A278, A358, A395, A418, A472, A515, A536, E125, E142. The majority of the different references in API 612 relate to operation at higher temperatures and alloy materials.

Materials and Metallurgy

In the MD&A report, it is stated that the material used for some critical components is not selected to meet the proper applicable standards needed for the pressure and temperature to which these components are exposed. KMW has responded that the materials selected meet the conditions at which the turbine operates. The named components include the upper and lower HP casings, which have upper temperature limits of 800 deg F and sustained operational exposure limited to 740-760 deg F (per KMW's May 31 letter listed as Appendix J).

Having two experienced and knowledgeable companies differ on this very important material specification raises serious concerns about safety both near term and long term. MSE, with information provided, cannot determine which authority is correct, but we do believe that the casing temperature absolutely influences the long-term viability of this unit, and that actual physical temperature measurement is needed to complete an evaluation of the worthiness of the casing material. These temperature measurements should be completed sooner, rather than later. MSE recommends that KMW and GRE put together a plan on how to obtain real and accurate temperature measurements for the named components

Turbine Performance

The turbine performance forms part of KMW's guarantee. In this contract the guarantee is tied to performance and design criteria, as listed under "TECHNICAL PERFORMANCE DATA", in attached Appendix E.

The only supporting documentation provided to assist in determining whether or not the turbine is conforming in the area of performance is largely incomplete. MSE has received from KMW an RMS modeling report (Appendix F) and from GRE several ATS reports (Appendices G and H).

It must be noted that no quantitative empirical data has been provided to document power generation at specific inlet pressure, inlet temperature, inlet flow, extraction pressure, extraction temperature, extraction flow, condenser vacuum level, and condenser flow to compare with the technical performance data incorporated in the KMW guarantee.

The RMS report predicts performance of the turbine based on the physical inspection and measured geometry of the turbine components. According to RMS, achieving full power output of 8.5 MW can only be achieved with higher inlet steam flow. Furthermore, operating at maximum design conditions of 900 psig and 900 deg F with 92,868 pph inlet steam flow and extraction flow of 49,765 pph, generation would only achieve 7.64 MW, approximately 10% less than guaranteed for these conditions. This RMS report is dated April 17, 2019 and no comment, reply or contradiction has been provided to MSE that refutes RMS findings.

In an ATS report (Appendix G), dated May 2, 2019, ATS states "there is no way to cleanly verify HP inlet flow" and "there is no way to cleanly verify LP 60# extraction flow" and ATS further states "In order to develop an accurate steam map, two flow meters will have to be installed, one at the HP inlet to the turbine and one at the 60 # extraction". These comments refer to measurements needed to complete an accurate energy balance of the turbine only.

In a separate ATS report (Appendix H), dated June 3, 2019, where ATS was requested to assist GRE in resolving extraction steam flow control problems where extraction pressure of 60 psig could not be

maintained, ATS stated after resolving the control issue: "In conclusion, it must be noted that regardless of V2 position at turbine loads less than 7MW the extraction header cannot meet or maintain 60 psi and at loads greater than 8MW the extraction header pressure rises to the point of lifting the safety valve, set at 70 psi. This operating condition prohibits GRE from running an efficient plant, ultimately costing them money, as they cannot maintain a steady DA temperature due to the fluctuating 60# header across the operating profile of the turbine. This condition must be addressed." The V2 refers to the grid valve used to control steam flow through the turbine.

In the MD&A response of May 24, 2019 (Appendix I), it is stated "The steam turbine was operated by GRE in April and May 2019 to determine maximum output with valves wide open and the boiler at maximum flow capability. This was not feasible except under unusual operating conditions as all three Control Valves could not be opened due to the lack of adequate hydraulic force to overcome the steam pressure drop forces. This is a design fault by the supplier and needs to be rectified.

The maximum capability of the steam turbine was increased from 92,400 pounds per hour to 95,000 pounds per hour. Even at this excessive flow rate, only 7.3 MW of electrical output were measured vs the guaranteed design output of 8.5 MW gross at 92,400 pounds per hour at design steam pressures and temperatures. Not only was more steam being fed to the HP inlet to increase MW output, the extraction steam was reduced to further increase MW output from the LP section. The Extraction steam was reduced to approximately 15,000 pounds per hour from the allowed 49,100 pounds per hour. This shows how the steam turbine lacks the necessary efficiency to convert steam energy into electrical energy."

"The steam turbine design firm, Rotating Machinery Services, was contracted by Energy Resources Group to perform a performance analysis on the CMTI components when they were disassembled in March 2019. The RMS report was released in April of 2019 and concluded that the CMTI steam turbine stages were not idealized for the steam flow and conditions found at GRE. This resulted in lower than typical thermal efficiencies.

The report noted that the turbine frame sold to GRE is known as a Chola 152C steam turbine. Its design operating range is 13.5 to 20 MW. The output required by GRE is 8.5 MW with about 50% of steam extraction."

To this comment, KMW responded (noted in Appendix J):

"CTMI/BT have been requesting the operating parameters multiple times since the turbine was loaded to 8.5 MW. After waiting for more than 4 weeks there was no response from the site at which time BT sent its own representative to site to record the operating data. Here are our notes on the data recorded and also the points mentioned by MD&A:

1. No steam flow meter is installed before the turbine inlet, the flow readings indicated in report are from the flow meter installed after the boiler. It does not take into account the line losses and also the steam flowing to steam sealing system and steam ejector, any other leakages in the line prior to the steam entering the turbine flange cannot be ruled out either.
2. No steam flow meter installed in the extraction line, how can one assume the extraction flow without this?
3. Operating procedures followed for cold and hot start were not as per the instructions of CTMI.

4. There is serious doubt regarding the governor program currently being used via the Woodward 505XT.

Under the circumstances it is unclear how the performance of the turbine can be judged without proper engineering data. Does Mr. Rasmussen from MD&A have a reliable source of gathering data other than what is available at site? CTMI/BT needs clear data to respond to this allegation."

In this area, MSE believes that there are enough measured parameters associated with the turbine installation to complete a realistic and representative review of performance in comparison to the technical performance conditions listed in the contract. References by ATS and CTMI that additional inlet steam flow and extraction steam flow meters are needed to complete an accurate balance are not practical when these meters do not currently exist and would be expensive for GRE to purchase and install. However, it is our understanding that GRE is proceeding with the purchase and installation of these meters.

Regarding KMW's statement that "There is serious doubt regarding the governor program currently being used via the Woodward 505XT", we wish to emphasize that it is the contractual responsibility of KMW/CTMI to program the Woodward Governor 505XT as it sees fit to achieve the desired performance, since this equipment is part of KMW's scope of supply.

Summary Conclusions

1. With respect to the claim of the turbine not complying with industry standards, MSE finds that the vendor's use of API 611 as the guiding standard does not take into account three conditions where this standard does not fit.
 - a. The GRE turbine operates at higher pressure of 900 psig than the 700 psig stipulated in API 611
 - b. The GRE turbine operates at a higher temperature of 900 deg F than the 750 deg F stipulated in API 611.
 - c. Additionally, since this turbine is not spared, it does not fit the API 611 condition for "usually spared".

Since API 612 covers these conditions not covered under API 611, it should have been employed in the design, manufacturing and testing of GRE's turbine in addition to the vendors choice to use API 611 applicable sections. The contract provides language that states, "The equipment and materials shall comply with all applicable National Codes, Standards and Regulations". MSE believes that KMW did not employ all applicable standards in the design, manufacture and testing of GRE's turbine. Best use of industry standards was not followed.

2. Somewhat covered under the category of Standards but important enough for discussion is the metallurgy selected and employed for critical components of the turbine. The differing opinion between MD&A and KMW does not resolve the question of whether or not the casing material selected is suitable for the conditions to which it is exposed. Although MSE believes that this material may be suitable, (if KMW's explanation is valid and can be confirmed), the material's higher temperature performance limit leaves very little room for error and without absolute knowledge of

what the actual exposure temperature might be, more data is needed. In this area we strongly recommend that some form of temperature measurement be employed to gather data on temperatures in the area of greatest exposure under varying conditions over a representative time period. We are unable to conclude the suitability or lack thereof of this material without more information.

3. With respect to the claim of the turbine being incapable of producing power and steam at the levels required under the Procurement contract due to its defective design and manufacture, no quantifiable empirical data has been provided to MSE that substantiates this claim. Despite that, there is sufficient information provided in the RMS modeling report and ATS reports that casts significant doubt that the turbine can perform to design conditions as supplied by KMW. No information provided by KMW challenges this claim and no performance testing or analysis data has been provided to prove that it does meet design conditions. At this time, we can only conclude that the turbine is non-conforming in the performance guarantee area of the contractual agreement.
4. With respect to the claim of the turbine not complying with the requirements of the contract, there is sufficient evidence provided in the ATS reports and reaffirmed in the MD&A report that manufacturing quality and workmanship were sub-standard, to the level of creating justifiable suspicion that some components may not meet minimum safety or operating conditions. Based on the reports provided by ATS, RMS and MD&A we conclude that the turbine has not met all conditions of the contractual agreement.
5. To summarize, MSE concludes that the turbine is non-conforming due to API design standards and workmanship. There is also significant suspicion to suggest that it does not conform to the performance guarantee or the metallurgy standards. Additional data would need to be collected to fully confirm these suspected non-conformances.

Sincerely,

MID-SOUTH ENGINEERING CO.



Walter Goodine

WDG/bl

Enclosures: Appendices A-K

- xc: Mark Steward (MSE/Hot Springs, AR) w/e
James St. Pierre (MSE/Orono, ME) w/e
Pierre Letarte (MSE/Orono, ME) w/e
Andy Hamilton (Eaton Peabody/Bangor, ME) w/e
Gary Higgins (KMW/London, Ontario) w/e

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KMW ENERGY INC.

Estate File Number: 35-2638322

Court File No.: 35-2638322

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

PROCEEDING COMMENCED AT
TORONTO

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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
(IN BANKRUPTCY AND INSOLVENCY)**

THE HONOURABLE MR.)
JUSTICE HAINEY)
MONDAY , THE 22ND
DAY OF JUNE, 2020

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF KMW ENERGY INC.**

**ORDER
(Motion to Lift Stay of Proceedings)**

THIS MOTION, made by Georges River Energy, LLC (“**GRE**”) for an Order pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) lifting the stay of proceedings (the “**Stay of Proceedings**”) under Section 69(1) of the BIA proceeded by way of judicial videoconference due to the COVID-19 emergency.

ON READING the affidavit of James A. Robbins sworn June 15th, 2020 (the “Robbins Affidavit”) and the exhibits thereto, the Motion Record of GRE dated May 5th, 2020, and on hearing the submissions of counsel for GRE, counsel for KMW Energy Inc. (“**KMW**”), counsel for MNP Ltd. in its capacity as proposal trustee of KMW, counsel for Liberty Mutual Insurance Company, counsel for 2751602 Ontario Inc. and 462673 Ontario Inc. o/a Nor-Arc Steel Fabricators and counsel for PepsiCo Foods Canada, no one appearing although duly served as appears from the affidavit of service of Sophie Moher sworn June 15, 2020,

1. **THIS COURT ORDERS** that the time for service of this Motion is abridged and validated, and the court hereby dispenses with further service hereof.

2. **THIS COURT ORDERS** that the Stay of Proceedings established by section 69(1) of the BIA shall be and is hereby lifted for the sole purpose of permitting GRE to commence and prosecute an action against KMW provided however, that, absent further order of the Court, GRE's sole recourse with respect to any such judgement obtained shall be limited to proceeds of the Policy (as defined in the Robbins Affidavit).

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KMW ENERGY INC.

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(IN BANKRUPTCY AND INSOLVENCY)

PROCEEDING COMMENCED AT
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ORDER

(Motion to Lift Stay of Proceedings)

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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF KMW ENERGY INC.

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD

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