

**\*\*\* This document is a template BOMA Energy Services Performance Contract with provisions that may or may not be suitable for a particular project; it is intended as a guide. Parties using this document are advised to consult with legal counsel with expertise in energy services performance contracts. It has been further edited for DMME by Clean Energy Services, Inc. and makes reference to the applicable Virginia statutes.**

## ENERGY SERVICES PERFORMANCE CONTRACT

This Energy Services Performance Contract (this ***“Contract”***) is entered into by and between \_\_\_\_\_, a \_\_\_\_\_ (***“ESCO”***), and \_\_\_\_\_, a \_\_\_\_\_ (***“Customer”***), as of the date of execution set forth below; whereby the ESCO agrees to implement the energy conservation measures and perform the other services set forth in this Contract, including in the attached schedules:

**Schedule A: Project Description;**  
**Schedule B: Performance Guarantee;**  
**Schedule C: Methodology and Baseline;**  
**Schedule D: Performance Tracking Services;**  
**Schedule E: Payment Schedule;**  
**Schedule F: Project Specific Customer Responsibilities;**  
**Schedule G: Required Maintenance; and**  
**Schedule H: ESCO’s Insurance Requirements.**  
**Schedule I: Financing Agreement & Customer Amortization Schedule**  
**Schedule J: Cash Flow Projection**

The ESCO agrees to implement the Project and perform the Contract Services, as hereinafter defined, at the office buildings owned by the Customer commonly known as [Insert Names] and located at:

\_\_\_\_\_  
\_\_\_\_\_ (***“Site”*** or ***“Sites”***).

IN WITNESS WHEREOF, the parties have executed this Contract as of the day and year written below.

By	_____	By	_____
Signature	_____	Signature	_____
Title	_____	Title	_____
Date	_____	Date	_____
	CUSTOMER		ESCO

## DEFINITIONS

All capitalized terms used in this Contract shall have the meaning set forth below, or in Schedule B, Section I:

1. "**Anti-Terrorism Laws**" is defined in Section 5.5.2.
2. "**Change Order**" means a written change in the Project executed by both Parties that, pursuant to Article 8, specifies changes in the Contract Services and, if applicable, changes in the Contract Sum and Contract Time.
3. "**Concealed Conditions**" means subsurface or otherwise concealed physical conditions at the Site of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in construction activities of the type and character as the Work, and that the ESCO could not have discovered through the exercise of reasonable diligence during the performance of the Investment Grade Audit.
4. "**Confidential Information**" is defined in Section 15.2.
5. "**Construction Operations Phasing Plan**" means a construction operation phasing plan detailing the ESCO's phasing and staging of the Work at the Site.
6. "**Construction Schedule**" means the ESCO's construction schedule for the Work that includes, without limitation, a schedule related to the entire Project and for each ECM, and that provides for expeditious and practicable execution of all aspects of the Work.
7. "**Contract Documents**" means this Contract with conditions set forth herein, the Schedules identified above, the Design & Engineering Documents (once approved by the Customer as provided in Section 4.2), the Construction Schedule, any Change Orders, the other documents listed in the Contract, and any modifications to the foregoing documents issued after execution of this Contract.
8. "**Contract Services**" means the Work and the Guarantee Period Services.
9. "**Contract Sum**" is defined in Section 2.1.
10. "**Contract Time**" is defined in Section 1.1.
11. "**Contractor's Fee**" is defined in Section 2.2.
12. "**Cost of the Work**" is defined in Section 2.2.
13. "**Customer**" is defined on the first page of this Contract.
14. "**Date of Commencement**" means the date established pursuant to Section 1.2.
15. "**Day**" means calendar day unless otherwise specifically designated.
16. "**Deliverables**" means the Design Materials that are necessary for the Customer to operate and maintain the Project or are otherwise intended for conveyance to the Customer.
17. "**Design & Engineering Documents**" is defined in Section 4.2.1.
18. "**Design Materials**" means the copies and other tangible embodiments of the drawings, specifications, designs, plans, "architectural work" (as such term is defined in the Architectural Works Copyright Protection Act of 1990) and other documents, prepared by or on behalf of the Customer, the ESCO, and/or Subcontractors in connection with the Project or the Contract Services.
19. "**Energy Conservation Measures**" or "**ECMs**" and each, an "**ECM**", means the equipment, devices, materials, and/or software to be installed at the Site by the ESCO and all related services as described in Schedule A.
20. "**Environmental Incentives**" means all rights, credits (including tax credits), rebates, grants,

- benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the development or installation of the ECMs and the reduction of energy usage at the Site. Without limiting the foregoing, "Environmental Incentives" includes utility rebates or incentive programs, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit program, grants from nongovernmental organizations, and the right to claim federal income tax credits under Sections 45 and/or 48 of the Internal Revenue Code, and the 179D credits..
21. "**ESCO**" or "**Energy Services Company**" is defined on the first page of this Contract.
  22. "**ESCO's Representative**" is defined in Section 5.3.
  23. "**Final Acceptance**" means the date that the Customer has determined, in consultation with the ESCO, that all of the required Work for constructing and commissioning the Project have been completed in accordance with the Contract Documents.
  24. "**Final Acceptance Date**" is defined in Section 1.4.
  25. "**Financing Closing**" is defined in Section 1.2.
  26. "**Financing Contract**" is defined in Section 1.2.
  27. "**Guarantee Period**" is defined in Section 1.1.
  28. "**Guarantee Period Services**" means the performance guarantee, monitoring, Project modification, guarantee reconciliation, Performance Tracking Services, and other services to be performed during the Guarantee Period as described in Schedules B, C, and D of this Contract.
  29. "**Hazardous Material**" means (A) any substance that is listed, defined, designated or classified under any state, federal, or local law relating to the protection of the environment or human health as a (i) hazardous material, constituent, or waste, (ii) toxic material, substance, constituent, or waste, (iii) radioactive material, substance, constituent, or waste, (iv) dangerous material, substance, constituent, or waste, (v) pollutant, (vi) contaminant, or (vii) special waste; or (B) petroleum, petroleum products, radioactive matters, polychlorinated biphenyl, pesticides, asbestos, or asbestos-containing materials.
  30. "**Installation Period**" is defined in Section 1.1.
  31. "**Installation Period Savings**" is defined in Section 2.2.
  32. "**Intellectual Property Rights**" means any patents, copyrights, trademarks, service marks, trade secrets and similar and related intellectual property rights protected by law.
  33. "**Interim Completion**" means the achievement of the requirements for Substantial Completion for a particular ECM prior to the Substantial Completion Date.
  34. "**Investment Grade Audit**" means the report prepared the ESCO that sets forth, among other things, (a) an assessment of the energy consumption characteristics of the Site, (b) specific energy analysis related to the Site and its operation, and (c) recommendations for projects or programs to achieve cost and/or energy savings in the operation of the Site.
  35. "**Manufacturers' Warranties**" is defined in Section 4.14.
  36. "**Mold**" means any type or form of fungus or similar biological material or agent, including mold, mildew, moisture, yeast and mushrooms, and any mycotoxins, spores, scents, or by-products produced or released by any of the foregoing.
  37. "**Parties**" means the ESCO and the Customer. "**Party**" means either the ESCO or the Customer.
  38. "**Performance Tracking Payment**" is defined in Section 2.4.
  39. "**Performance Tracking Services**" means those services to be provided by the ESCO to measure and verify the performance of the ECMs described in Schedule D.

40. "**Project**" means the building analysis and recommendation services, design, engineering, installation, repairs, retrofit, complete implementation of the Energy Conservation Measures, and training program for the Customer's employees as more fully described in the "Project Description" attached hereto as Schedule A and the other terms and provisions of this Contract.
41. "**Punch List**" means minor items of Work to be completed after Substantial Completion and prior to Final Acceptance, which do not prevent an ECM or the Project from being used for the purpose for which it is intended and which will not prevent the issuance of applicable permits or certificates for such use.
42. "**Site**" is defined on the first page of this Contract.
43. "**Subcontractor**" means any partnership, firm, corporation or entity other than an employee of the ESCO, who contracts with the ESCO to furnish services, labor, materials, or labor and materials at the Site. This term also includes subcontractors of any tier, suppliers, fabricators or manufacturers, whether or not in privity with the ESCO.
44. "**Substantial Completion**" means the date that is the later of the following: (i) the Customer has determined, in consultation with the ESCO, the Work for the Project or a particular ECM is sufficiently implemented in accordance with the Contract Documents, including commissioning of any systems required by the Contract Documents, so that the Customer may utilize the Project or the ECM for the use that it is intended, and is fully complete except for minor items, adjustments, and/or corrections that do not interfere with the Customer's use and occupancy of the Project or ECM; or (ii) if the nature of such Work requires that a certificate of occupancy be issued, it means the date of issuance of the required certificate of occupancy.
45. "**Substantial Completion Date**" is defined in Section 1.3.
46. "**USA Patriot Act**" is defined in Section 5.5.2.
47. "**Work**" means the work and services required by the Contract Documents during the Installation Period and during any period of time during which the ESCO is required to correct or replace its work and services pursuant to this Contract, whether completed or partially completed and, includes all labor, materials, equipment, and services provided or to be provided by the ESCO to fulfill the ESCO's obligations under this Contract.

## RECITALS

WHEREAS the Customer is willing to have installed within the Site the equipment and related work described in Schedule A that comprises the Project;

WHEREAS the Customer and the ESCO agree to structure the Project according to the direction provided by Virginia statutes, chiefly The Energy and Operational Performance-Based Contract Act, Title 11 of the Virginia Code, Chapter 6.1, as modified to permit a maximum term of 20 years; and SB 681, the Public – Private Education Facilities Act of 2002;

WHEREAS the Customer desires to retain the ESCO to complete the Project and provide initial start-up, training, monitoring, verification of savings, and other services, as more fully set forth herein; and

WHEREAS the Customer desires to enter into a contract with the ESCO to achieve energy and maintenance cost reductions within the Site, subject to the terms and conditions of the Contract; and for other good and valuable consideration, the Parties, intending to be legally bound, hereby agree as follows:

## ARTICLE 1 – CONTRACT TIME AND PROJECT SCHEDULE

1.1 Contract Time. The "**Contract Time**" is the period of time from the Date of Commencement, as established pursuant to Section 1.2, until the end of the Guarantee Term, as defined in Schedule B, Section I. The Contract Time consists of the Installation Period and the Guarantee Period. The "**Installation Period**" is the period of time from the Date of Commencement until Final Acceptance of the entire Project.

The "**Guarantee Period**" is the period of time from the Savings Guarantee Commencement Date, as defined in Schedule B, Section I, until the end of the Guarantee Term.

1.2 Date of Commencement. The "**Date of Commencement**" is the date established by the following election of the Parties:

☐ If the preceding box is checked, the Customer will not be financing payment of the Work with funds other than its own and will use its own funds to pay for the Work. Accordingly, execution of this Contract by both Parties shall constitute the Date of Commencement.

☐ If the preceding box is checked, the Customer intends to finance payment of the Work with funds other than its own. Accordingly, the Date of Commencement shall not occur until and unless the Customer has closed on its financing of this Contract (the "**Financing Closing**"), as evidenced by fully executed contract documents for financing of the Contract Sum (the "**Financing Contract**") and funding of any escrow account provided for by the Financing Contract. The Customer will achieve Financing Closing on or before \_\_\_\_\_, or such later date agreed to in writing by the ESCO. Within ten (10) calendar days of the Financing Closing, the Customer shall execute and issue a written notice to proceed to the ESCO, upon which event the ESCO will commence performance of the Work hereunder. In the event Customer does not achieve Financing Closing on or before the date specified in this paragraph, or such later date agreed to in writing by the ESCO, the ESCO may terminate this Agreement upon fourteen (14) days prior written notice to the Customer. Upon such termination of this Agreement, the ESCO shall have no further obligations to the Customer hereunder; provided, however, that, notwithstanding such termination, the Customer shall be obligated to pay the ESCO the amount, if any, required pursuant to the agreement between the Parties for the Investment Grade Audit.

1.3 Substantial Completion. The ESCO will commence the Work within ten (10) days after the Date of Commencement and will successfully achieve Substantial Completion of the Project within \_\_\_\_\_ days from the Date of Commencement ("**Substantial Completion Date**"), subject only to adjustments of this Contract Time as provided in the Contract Documents. The ESCO may achieve Interim Completion for a particular ECM(s) in advance of the Substantial Completion Date. ECM(s) completed in advance of Substantial Completion may have Interim Completion dates (as described below).

1.3.1 When the ESCO believes that the entire Project or a particular ECM has achieved Interim or Substantial Completion, the ESCO will submit a certificate of Interim or Substantial Completion and a Punch List to the Customer on a form agreed to by the Parties. If the Customer concurs that the described portion of the Work as performed has achieved Interim or Substantial Completion, the Customer will accept that Work by signing the certificate of Interim or Substantial Completion and the Punch List and returning both to the ESCO. If the Customer does not concur that the Work has achieved Interim or Substantial Completion and/or that the Punch List is not complete or correct, then the Customer shall notify the ESCO within ten (10) business days of any discrepancies. To the extent the ESCO does not dispute the discrepancies raised by the Customer, the ESCO shall (i) promptly and diligently correct the Work to conform to the description of the Work set forth herein, and resubmit the certificate of Interim or Substantial Completion to the Customer, and (ii) promptly complete all items on the Punch List. If the ESCO disagrees with the discrepancies raised by the Customer, the ESCO shall notify the Customer of a dispute and such dispute shall be resolved in accordance with Section 1.3.2 herein. If the Customer does not deliver written notice to the ESCO within ten (10) business days of receiving the certificate of Interim or Substantial Completion and the Punch List, the Customer will be deemed to have agreed to, signed and returned the certificate of Interim or Substantial Completion and the Punch List.

1.3.2 Any disputes concerning the Interim or Substantial Completion of the Work will be resolved by submitting the issue to a third party professional engineering firm reasonably acceptable to both the ESCO and the Customer. The determination of this firm with respect to Interim or Substantial Completion will be final and binding upon the Parties. The ESCO and the Customer shall share equally the costs or fees for such firm in connection with such dispute resolution process.

1.4 Final Acceptance. The ESCO will successfully achieve Final Acceptance of the entire Project within \_\_\_\_\_ days from the Date of Commencement, subject only to adjustments of the Contract Time as provided in the Contract Documents ("**Final Acceptance Date**"). The ESCO acknowledges that the Savings Guarantee Commencement Date, as defined in Schedule B, Section I, will commence on the Final Acceptance Date, even if the ESCO has failed to achieve Final Acceptance of the entire Project.

1.5 Early Completion Incentives and Liquidated Damages

☐ If the preceding box is checked, then this Agreement does not include any incentive payments for early completion of the Project or liquidated damages for late completion of the Project.

☐ If the preceding box is checked, then the Customer shall pay the ESCO an incentive fee of [\_\_\_\_\_ **and No/100 Dollars (\$\_\_\_\_\_)**] for each day the date of Substantial Completion of the entire Project precedes the date that is [\_\_\_\_\_] days after the Date of Commencement. Under no circumstances will the date set forth in the preceding sentence be adjusted for any reason. Any incentive fee earned by the ESCO pursuant to this paragraph shall be included with the final payment for the Work.

☐ If the preceding box is checked, then the Customer shall be entitled to recover as liquidated damages, and not as a penalty, the sum of [\_\_\_\_\_ **and No/100 Dollars (\$\_\_\_\_\_)**] for each day Substantial Completion of the entire Project is delayed beyond the Final Acceptance Date. The Parties agree that it would be extremely difficult and impracticable under the presently known and anticipated facts and circumstances to fix with precision the actual damages the Customer would incur in the event of any such delay, and that the liquidated damages identified in this paragraph are a good faith and reasonable estimate of the damages and loss the Customer would suffer. The liquidated damages will be due and payable by the ESCO to the Customer upon demand.

1.6 Construction Schedule and Construction Operations Phasing Plan.

☐ If the preceding box is checked, the ESCO will, within \_\_\_\_\_ days after the Date of Commencement prepare and submit the Construction Schedule and Construction Operations Phasing Plan, prepared in form and substance reasonably acceptable to or as specifically prescribed by the Customer.

☐ If the preceding box is checked, the Construction Schedule and Construction Operations Phasing Plan are included as attachments to Schedule A: Project Description.

The Construction Schedule shall be updated by the ESCO and submitted to the Customer at least monthly and, if requested by the Customer, in electronic format. The ESCO shall submit a revised Construction Schedule when the ESCO's planned sequence is changed or when Project changes are made that affect the Construction Schedule. Any changes to the Construction Schedule and Construction Operations Phasing Plan are subject to review and approval by the Customer. When performing the Work, the ESCO shall comply with the Construction Operations Phasing Plan and the Construction Schedule.

## **ARTICLE 2 – COMPENSATION TO THE ESCO**

2.1 Contract Sum. The Customer shall pay the ESCO for the due, proper, and complete performance of the Work as required hereunder and for the due performance of all other obligations and duties imposed upon this ESCO pursuant to this Contract, other than the Performance Tracking Services, the "**Contract Sum**" of [\_\_\_\_\_ **and No/100 Dollars (\$\_\_\_\_\_)**], subject to additions and deductions by Change Order as provided in this Contract.

2.2 Installation Period Savings. Cost savings achieved during the Installation Period shall be addressed in accordance with the following election by the Parties:

☐ If the preceding box is checked, in the event the ESCO achieves cost savings during the Implementation Period those cost savings shall not reduce the Contract Sum, and shall belong exclusively to the ESCO.

☐ If the preceding box is checked, the ESCO and the Customer have agreed to share Installation Period Savings, as defined below, on the following basis:

- (i) \_\_\_\_\_ percent (\_\_\_%) of Installation Period Savings shall inure to the benefit of the Customer, and shall be deducted from the Contract Sum payable to the ESCO; and
- (ii) the remaining \_\_\_\_\_ percent (\_\_\_%) of Installation Period Savings shall inure to the benefit of the ESCO, and shall be paid to the ESCO as an additional fee with its final payment.

**"Installation Period Savings"** means the amount by which the Cost of the Work and the Contractor's Fee is less than the Contract Sum. If the Parties agree to share Installation Period Savings pursuant to this paragraph, Schedule E to this Contract shall: (i) delineate the items of cost to be included within the **"Cost of the Work"**; and (ii) identify the **"Contractor's Fee"**.

2.3 Environmental Incentives. The Customer shall own, and may assign or sell in its sole discretion, all right, title, and interest associated with Environmental Incentives. Environmental Incentives will not be included within any calculation of savings or otherwise reduce the ESCO's responsibility for achieving the Guaranteed Annual Savings Amount or Guaranteed Project Savings Amount, as such terms are defined in Schedule B.

2.4 Compensation for Performance Tracking Services. Commencing upon the Interim Completion of each ECM(s) (or such other time identified in Schedule D.) and continuing until the expiration or earlier termination of this Contract, the ESCO will perform the Performance Tracking Services. The Customer shall make annual payments to the ESCO for the Performance Tracking Services for each Performance Guarantee Year in the amounts set forth in Schedule E, Section II (the **"Performance Tracking Payment"**). If, any Performance Guarantee Year, the Customer to pay for the Performance Tracking Services in accordance with this Contract or does not permit the ESCO to perform the Performance Tracking Services, the ESCO shall have no obligation to achieve the performance guarantees set forth in Schedule B with respect to such Performance Guarantee Year.

### ARTICLE 3 – CUSTOMER

3.1 Project Specific Customer Responsibilities. The Customer agrees to undertake the Project specific Customer responsibilities set forth on Schedule F.

3.2 Customer Representative. The Customer will appoint one individual who is authorized to act on behalf of the Customer either to approve, reject or otherwise facilitate the orderly execution of the Contract Services and with whom the ESCO may consult at all reasonable times, and whose instructions, requests, and decisions in writing shall be binding upon the Customer as to all matters pertaining to this Contract. The Customer may substitute a new Customer's representative upon prior notice to the ESCO.

3.3 Information to the ESCO. Information requested by the ESCO and under the Customer's control necessary for the performance of the Contract Services shall be furnished by the Customer with reasonable promptness. Any information or documentation provided by the Customer to the ESCO relating to the Project or Site is provided only for the convenience of the ESCO. The Customer makes no representation or warranty to as to the sufficiency, completeness, or accuracy of such information.

3.4 Telephone and Network Access. The Customer is responsible for providing all required telephone



lines and telephone service and/or all required network LAN/WAN access including but not limited to VPN tunneling, firewall coordination, and static/dynamic IP address maintenance to allow the ESCO 24/7 remote access to performance tracking monitoring systems to the extent required to perform and complete the Contract Services.

#### ARTICLE 4 – INSTALLATION PERIOD SERVICES

4.1 Permits and Approvals. Except for those permits and fees that are specified as the responsibility of the Customer under the Contract Documents, the ESCO shall secure and pay for necessary permits, approvals, assessments and charges required for the proper execution and completion of the Work.

4.2 Design and Engineering Documents

4.2.1 The ESCO shall prepare, for written approval by the Customer, working drawings and specifications setting forth in detail the requirements of the construction and installation of the Project in accordance with the Contract Documents ("***Design & Engineering Documents***"). The Design & Engineering Documents shall include all drawings, specifications, schedules, diagrams, and plans, and such content and detail as is necessary to properly complete the construction of the Project, and shall provide information customarily necessary for the use of such documents by those in the building trades. Where required by law, the Design & Engineering Documents must bear the stamp or seal of architects or engineers licensed by the state in which the Site is located. The Design & Engineering Documents need not be submitted to the Customer as a complete set, but may be submitted in successive packages, each of which address separate construction trades or systems applicable to the Project. Within fourteen (14) days after submission, the Customer shall review each package of Design & Engineering Documents and either (i) approve such documents; or (ii) disapprove such documents, specifying in writing the basis for disapproval. The Customer's failure to approve or disapprove the Design & Engineering Documents within such fourteen (14) day period shall be deemed approval.

4.2.2 The ESCO covenants and agrees that (i) it shall not commence the procurement or construction of any portion of the Project until the completed Design & Engineering Documents relevant to such part or portion have been approved by the Customer in writing; and (ii) the Design & Engineering Documents shall be accurate and free from any errors or omissions, and shall be in compliance with and accurately reflect all applicable laws. The ESCO shall, at no expense to Customer, promptly modify any Design & Engineering Documents which are not in accordance with laws or are inaccurate or contain errors or omissions.

4.2.3 The ESCO acknowledges and agrees that any review, approval, comment or evaluation by the Customer of any plans, drawings, specifications, or other documents prepared by or on behalf of the ESCO shall be solely for the Customer's determining for its own satisfaction the suitability of the Project for the purposes intended therefor by the Customer, and may not be relied upon by the ESCO, its Subcontractors, or any other third party as a substantive review thereof. The Customer, in reviewing, approving, commenting on, or evaluating any plans, drawings, specifications, or other documents, shall have no responsibility or liability for the accuracy or completeness of such documents, for any defects, deficiencies or inadequacies therein or for any failure of such documents to comply with the requirements set forth in the Contract Documents. In no event shall any review, approval, comment, or evaluation by the Customer relieve the ESCO of any liability or responsibility under this Contract, it being understood that the Customer is at all times ultimately relying upon the ESCO's skill, knowledge, and professional training and experience in preparing any plans, drawings, specifications, or other documents.

4.3 Supervision and Performance of the Work. The ESCO shall supervise, perform, and direct the Work, using the professional skill, care, and attention reasonably required for projects similar to the Project. The ESCO shall be solely responsible for and have control over means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. The ESCO agrees to faithfully and fully perform the terms of this Contract, and shall complete the Work free and clear of all

liens. The ESCO shall, at all times during the progress of the Work, employ enough skilled workmen and have on hand and maintain an adequate supply of materials and equipment to complete the Work in accordance with the Construction Schedule. The ESCO has satisfied itself, by its own independent investigation and study, regarding all the conditions of the specific areas in the Site affected by the Work to be done and materials to be furnished; the meaning, intention and sufficiency of any plans and specifications for the Work; the recommendations of the Investment Grade Audit; and the conditions under which the Work is to be done; and has executed this Contract based on such investigation, study and determination.

4.4 Employee Discipline. The ESCO shall enforce discipline and good order among the ESCO's employees and other persons carrying out the Work.

4.5 Safety. The ESCO shall be responsible for initiating, maintaining, and supervising reasonable safety precautions and programs in connection with the performance of the Contract Services. The ESCO shall take reasonable precautions for safety of, and shall provide reasonable and appropriate protection to prevent damage, injury or loss to (1) employees on the Work and other persons who may be affected thereby; (2) the Work and materials and equipment to be incorporated therein; and (3) other property at the Site or adjacent thereto.

4.6 Waste Materials and Rubbish. The ESCO shall keep the premises and surrounding areas free from accumulation of waste materials or rubbish caused by the Work. Upon Final Acceptance of the Project, the ESCO shall, to the Customer's satisfaction, remove from and about the Site all waste materials, rubbish, ESCO's tools, equipment, machinery, and surplus material.

4.7 Recycling. The ESCO shall give preference to the use of recycled products in the performance of any Work, and shall cooperate with any recycling program established for the Site or available through local government(s).

4.8 Access to the Work. The ESCO shall provide the Customer with unrestricted access to the Work in preparation and progress wherever located in the Site.

4.9 Use of Site. The ESCO shall confine its operations to the portions of the Site identified in the Contract Documents or otherwise approved by the Customer, and shall not unreasonably encumber the portions of the Site used for the Work with materials, equipment, or similar items. The ESCO and all Subcontractors shall use only such entrances to the Site as are designated by the Customer. During occupied hours, Contractor shall limit construction operations to methods and procedures that do not adversely and unduly affect the environment of occupied spaces within the Site, including but not limited to creating noise, odors, air pollution, ambient discomfort, or poor lighting.

4.10 Project Meetings. The ESCO shall provide for regularly scheduled project meetings during the Installation Period, and shall give timely advance written notice and agenda of such meetings to the Customer. The ESCO shall record minutes and distribute copies of minutes of meetings to the Customer within five (5) business days after each meeting. The ESCO shall schedule additional project meetings if requested by the Customer.

4.11 Correction of the Work. The Customer shall have the right and authority to reject Work which does not conform to the Contract Documents. The ESCO shall promptly correct Work rejected by the Customer for failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within the warranty period set forth in Section 5.10. The provisions of this Section 4.11 apply to Work done by Subcontractors as well as to Work done by direct employees of the ESCO.

4.11.1 If the ESCO fails to correct the Work, or any portion thereof, that is not in accordance with the requirements of the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, and the ESCO, after receipt of written notice from the Customer,

either (i) has not cured such failure within seven (7) days or (ii) if the nature of the failure is such that it is not capable of cure within seven (7) days, has not reached agreement with the Customer for a plan to cure such failure or has not commenced and diligently and continuously pursued the cure of such failure in accordance with such plan within such seven (7) day period, then the Customer, by written order signed by the Customer or by an agent specifically so empowered by the Customer in writing, may order the ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated or the ESCO has provided the Customer with a plan for corrective action acceptable to the Customer in its reasonable judgment. The right of the Customer to stop the Work shall not, however, give rise to a duty on the part of the Customer to exercise this right for the benefit of the ESCO or any other person or entity.

4.11.2 Nothing contained in this Section 4.11 shall be construed to establish a period of limitation with respect to other obligations which the ESCO might have under the Contract Documents. Establishment of such time period as described in this Section 4.11 relates only to the specific obligation of the ESCO to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the ESCO's liability with respect to the ESCO's obligations other than specifically to correct the Work.

4.12 Performance and Payment Bonds. The ESCO shall, upon execution of this Contract and prior to performing any Work, obtain and furnish to the Customer and maintain in effect throughout the Installation Period a payment and performance bond covering the faithful performance and completion of the Work and the payment of all obligations arising under this Contract during the Installation Period. Such bonds shall be issued by a surety company authorized to do business in the state that the Site is located and in a form acceptable to the Customer, in an amount equal to the Contract Sum. No notice of change order need be given to the surety company. The ESCO shall supply evidence satisfactory to the Customer that the party issuing the bonds has the authority to bind the issuing surety company. If the ESCO fails to furnish and maintain such bonds, the Customer may purchase such bonds on behalf of the ESCO and the ESCO shall pay the cost thereof to the Customer upon demand.

4.13 Startup/Commissioning. The ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed ECMs in accordance with Schedule A, and demonstrate that all ECMs comply with the requirements of the Contract Documents. The tests shall be performed by the commissioning entity designated in Schedule A, or, if no entity is designated, a qualified commissioning entity reasonably acceptable to the Customer. The ESCO shall provide advance written notice of at least ten (10) business days to the Customer of the scheduled test(s). The Customer shall have the right to designate representatives to be present at any or all such tests including representatives of the manufacturers of the ECMs. The ESCO, or its Subcontractor(s), shall correct or adjust all deficiencies in operation of the ECMs identified during the course of the tests described in this Section. The ESCO shall provide to the Customer a description of the ongoing training requirements for the Site's operations and maintenance personnel necessary to maintain proper ECM performance after Final Acceptance.

4.14 Manufacturers' Warranties. At Final Acceptance of the Work or Interim Completion of a particular ECM, the ESCO shall furnish the Customer two (2) original complete sets of all manufacturers' warranties, guarantees, parts lists, and literature applicable to equipment, systems, fittings, and furnishings included in the Work for that ECM (collectively referred to as "**Manufacturers' Warranties**"), completed in favor of the Customer. These Manufacturers' Warranties are in addition to and not in lieu of the ESCO's warranty set forth in Section 5.10, and the Customer is entitled to look to the ESCO for remedy in all cases where the ESCO's warranty applies regardless of whether a Manufacturer's Warranty also applies. The Customer shall acknowledge receipt of the sets of Manufacturers' Warranties on the set itself, and the ESCO shall cause six (6) copies of an acknowledged set to be made and furnished to the Customer. All Manufacturers' Warranties will be for applicable periods and contain terms not less favorable to the Customer than those terms that are standard for the applicable industries, and will either be issued in the first instance in the name of and for benefit of the Customer, or be in a freely assignable form and be assigned to the Customer without limitations.

4.15 Risk of Loss. Regardless of the passage of title, risk of loss and damage to the Work shall remain

with the ESCO until the date of Final Acceptance of the entire Project.

## ARTICLE 5 – OTHER SERVICES AND REQUIREMENTS OF ESCO

5.1 Contract Documents. The ESCO hereby covenants and agrees that it shall duly and properly perform the Contract Services and implement the Project in accordance with the Contract Documents. Unless otherwise provided in the Contract Documents, the ESCO shall provide and pay for labor, materials, tools, equipment and machinery necessary for the proper execution and completion of the Contract Services. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Contract Services including, without limitation, all items and services that are consistent with, contemplated by, or reasonably inferable from the Contract Documents, whether or not such items and services are specifically mentioned therein. The Contract Documents are complementary, and what is required by one shall be binding as if required by all.

5.2 Subcontractors. The ESCO shall furnish in writing to the Customer for its approval the names of the Subcontractors to whom the ESCO plans to award any portion of the Contract Services. Contracts between the ESCO and Subcontractors shall require each Subcontractor, to the extent of the Contract Services to be performed by the Subcontractor, to be bound to the ESCO by the terms of the Contract Documents, and to assume toward the Customer all the obligations and responsibilities which the ESCO, by the Contract Documents, assumes toward the Customer. The ESCO shall be responsible to the Customer for acts and omissions of the Subcontractors, their agents and employees, and any other persons performing portions of the Contract Services, to the same extent as the acts or omissions of the ESCO hereunder.

5.3 ESCO's Key Personnel. Included within Schedule A attached hereto is a list of the ESCO's key personnel who will be responsible for supervising the performance of the Contract Services. Among such individuals there shall be appointed a principal representative of the ESCO (the "**ESCO's Representative**") who shall be the ESCO's authorized representative, and who shall receive and initiate all communications to and from the Customer and be authorized to render binding decisions related to the Contract Services. The ESCO shall not remove any such key personnel from the Project without the Customer's prior written consent, which consent shall not be unreasonably withheld. If, after execution of this Contract, the Customer objects to any of the ESCO's key personnel (for any reason whatsoever), the ESCO shall promptly remove such disapproved personnel. If any of the ESCO's key personnel are removed as provided above, any replacement personnel shall be subject to the prior written approval of the Customer, which approval shall not be unreasonably withheld.

5.4 Taxes. Unless otherwise provided in the Contract Documents, the ESCO shall pay all federal, state or local sales, consumer, use, and other similar taxes for which it bears the incidence of taxation that are legally enacted as of the date of execution of this Contract, whether or not effective or merely scheduled to go into effect.

5.5 Compliance with Law. The ESCO shall comply with and give all notices required by federal, state, county, and municipal laws, ordinances, regulations, and orders and with the rules, regulations, or orders of the local board of fire underwriters or other similar body bearing on the performance by the ESCO of the duties or responsibilities under this Contract. The Contract Sum is based upon laws, codes and regulations in existence as of the date this Contract is executed. Any changes in or to applicable laws, codes, and regulations affecting the cost of the Work shall entitle the ESCO to an equitable adjustment in the Contract Sum and Contract Time through a Change Order.

5.5.1 The ESCO shall promptly remedy any violation of any such law, ordinance, rule, regulation, or order that comes to its attention to the extent that the same results from its performance of the Work. The ESCO shall promptly, and in no event later than the close of the next business day following receipt, give notice to the Customer by telephone, with confirmation in writing, of receipt by the ESCO of any information relating to violations of laws, ordinances, rules, regulations, and orders.

5.5.2 The ESCO represents and warrants to, and covenants with, the Customer that (i) neither the ESCO nor any of its owners or affiliates currently are, or shall be at any time during the term hereof, in violation of any laws relating to terrorism or money laundering (collectively, the “**Anti-Terrorism Laws**”), including without limitation Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001, and regulations of the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) related to Specially Designated Nationals and Blocked Persons (SDN's OFAC Regulations), and/or the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56) (the “**USA Patriot Act**”); (ii) neither the ESCO nor any of its owners, affiliates, investors, officers, directors, employees, vendors, subcontractors or agents is or shall be during the term hereof a “Prohibited Person” which is defined as follows: (1) a person or entity owned or controlled by, affiliated with, or acting for or on behalf of, any person or entity that is identified as an SDN on the then-most current list published by OFAC at its official website, <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf> or at any replacement website or other replacement official publication of such list, and (2) a person or entity who is identified as or affiliated with a person or entity designated as a terrorist, or associated with terrorism or money laundering pursuant to regulations promulgated in connection with the USA Patriot Act; and (iii) the ESCO has taken appropriate steps to understand its legal obligations under the Anti-Terrorism Laws and has implemented appropriate procedures to assure its continued compliance with such laws. The ESCO hereby agrees to defend, indemnify, and hold harmless the Customer, its officers, directors, agents, and employees, from and against any and all claims, damages, losses, risks, liabilities and expenses (including attorney's fees and costs) arising from or related to any breach of the foregoing representations, warranties and covenants. At any time and from time-to-time during the term, the ESCO shall deliver to the Customer within ten (10) days after receipt of a written request therefor, a written certification or such other evidence reasonably acceptable to the Customer evidencing and confirming the ESCO'S compliance with this Section.

5.6 Remedy to Damage or Loss. The ESCO shall promptly remedy damage, injury or loss at the Site to the extent caused in whole or in part by the ESCO, a Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable.

5.7 Royalties and License Fees. The ESCO shall pay all royalties and license fees related to the Contract Services; shall defend suits or claims for infringement of patent rights required for the Contract Services to be performed; and shall hold the Customer harmless from loss on account thereof.

5.8 Publicity. Upon the reasonable request of the Customer, the ESCO shall cooperate with and assist the Customer in connection with any public relations or publicity relating to the Project, including, without limitation, tours of the Site arranged by the Customer. Without the prior written consent of the Customer, the ESCO shall not disclose details or information relating to the Project or Contract Services to the press, the public, any news-disseminating agency or any other party, except to those parties performing portions of the Contract Services, and then only to the extent required for the performance of the particular portion of the Contract Services being performed.

5.9 Retention and Inspection of Documents. The ESCO and its Subcontractors shall furnish the Customer with such information as the Customer reasonably requests regarding the progress and execution of the Contract Services. For three (3) years after the ESCO receives its final payment in connection with the Contract Services, the ESCO and its Subcontractors shall maintain and allow the Customer to inspect and copy records on the Contract Services showing utilization of Subcontractors, work performed, and data and information necessary to support all energy savings calculations.

5.10 Warranty. For the warranty period set forth in Section 5.10.2, the ESCO warrants to the Customer that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from faults and defects not inherent in the quality required or permitted, that the materials, equipment and Work will conform with the requirements of the Contract Documents, and that the Work will be from any encumbrances, liens, security interests, or other defects in title upon conveyance of title to the Customer.

5.10.1 The ESCO's warranty excludes remedy for damage or defect to the extent caused by (i) abuse, (ii) modifications not approved or executed by the ESCO or Subcontractors, (iii) improper or insufficient maintenance or operation that is not in accordance with Schedule G, or (iv) normal wear and tear under normal usage. If required by the Customer, the ESCO shall furnish satisfactory evidence as to the kind and quality of materials and equipment and the recommended maintenance thereto to meet the requirements of this Section 5.10.

5.10.2 The warranty period for the Work shall be the period that is the longer of: (a) eighteen (18) months, running from and after the date of Final Acceptance of the entire Project, and (b) the warranty period for each ECM as set forth in Schedule A, running from and after the date of Final Acceptance of all the Work for a particular ECM (unless Schedule A specifies a different date for the Warranty period to begin running for a particular ECM).

5.10.3 If, at any time prior to the expiration of the warranty period set forth in Section 5.10.2, the Customer shall discover any failure or breach of the ESCO's warranties, the ESCO shall, upon written notice from the Customer and at the ESCO's sole cost and expense, immediately correct such failure or breach (which corrective action shall include, without limitation, any necessary removal, disassembly, reinstallation, repair, replacement, reassembly, retesting, and/or reinspection of any part or portion of the Work and any other property damaged or affected by such failure, breach, or corrective action). The ESCO will remedy any such failure or breach so as to minimize revenue loss to the Customer and, to the extent possible, to avoid disruptions to the Customer's operations. In the event the ESCO fails to initiate and diligently pursue corrective action within five (5) days of the ESCO's receipt of the Customer's notice, the Customer may undertake such corrective action at the ESCO's expense.

5.11 ECM Malfunction. Prior to the expiration of the warranty period set forth in Section 5.10 and subject to the limitation of liability set forth in Section 6.1, the ESCO agrees to compensate the Customer for business expenses, damages to real or personal property, lost profits, or lost revenues resulting from ECM malfunction to the extent caused by nonperformance or error by the ESCO or its Subcontractors.

#### 5.12 Indemnification.

5.12.1 To the fullest extent permitted by law, the ESCO shall indemnify and hold harmless the Customer and the Customer's agents and employees from and against claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from performance of the Contract Services provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused in whole or in part by negligent acts or omissions of the ESCO, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, and in no event shall the preceding indemnification apply to liability to the extent caused by the negligence or willful misconduct of the party indemnified or held harmless. This indemnification shall not be limited to damages, compensation or benefits payable under insurance policies, workers' compensation act, disability benefit acts, or other employees' benefit acts.

5.12.2 In claims against any person or entity indemnified under Section 5.12.1 by an employee of the ESCO, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 5.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for ESCO or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

5.13 Insurance. The ESCO shall purchase from and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Site is located, insurance coverage in accordance with the provisions of Schedule H. Certificates of such insurance shall be filed with the Customer prior to commencement of the Work. During the Guarantee Period, the insurance coverage set forth on Schedule H may be reduced to a level deemed necessary by the Customer, in its reasonable discretion, to protect the Customer from liability for acts of the ESCO and risks and indemnities assumed by the ESCO during the

performance of the Guarantee Period Services.

5.14 Financing Contract Requirements. If one or more Financing Contracts are entered into for the Project, the ESCO agrees to provide the parties to the Financing Contract such written information, certificates, copies of invoices, receipts, lien waivers, affidavits, and other like documents as such parties may reasonably request. The ESCO hereby subordinates any liens or security interests that it may be entitled by law or under the provisions of this Contract to any lien or security interest granted in favor of the party or parties to a Financing Contract.

## **ARTICLE 6 – LIMITATION OF LIABILITY**

6.1 ESCO Limitation. Notwithstanding anything to the contrary contained in this Contract, the aggregate liability of the ESCO to the Customer in relation to this Contract shall not exceed an amount that is equal to the following amount: (a) two times the Contract Sum, if the Contract Sum is less than or equal to \$5,000,000; (b) \$10,000,000, if the Contract Sum is greater than \$5,000,000 but less than or equal to \$10,000,000; or (c) the Contract Sum, if the Contract Sum is greater than \$10,000,000. However, the preceding limitation shall not apply to, and no credit shall be issued against such liability limitation for:

- (i) The ESCO's defense and hold harmless obligations set forth in Section 5.7 as it relates to patent infringement;
- (ii) The ESCO's indemnity obligations set forth in Section 5.12 as it relates to claims by third parties for bodily injury, property damage, or otherwise; and
- (ii) Claims which arise or result from fraudulent or unlawful acts, or the gross negligence or willful misconduct of the ESCO or its Subcontractors.

6.2 Customer Limitation. In no event, whether as a result of termination for default, termination for convenience, suspension of the Work, breach of contract, negligence, or otherwise, shall the Customer be liable for damages for loss of profits, loss of use, loss of revenue, loss of bonding capacity, or any other special, indirect or consequential damages of any kind. The Customer's total liability for any loss, claim, or damage arising out of the Contract Documents or the performance or breach thereof is limited to the lesser of (a) the value of the Contract Services performed, or (b) the Contract Sum.

## **ARTICLE 7 – ARBITRATION**

7.1 Arbitration. Except for those disputes to be decided by an independent engineer as provided in Section 1.3.2 and Section VIII of Schedule B of this Contract, any controversy or claim arising out of or relating to this Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

7.1.1 Should arbitration be invoked by either Party, the hearing location shall be held in the County where the Site is located.

7.1.2 With respect to any claim or dispute resolved by arbitration or litigation, the prevailing Party shall be entitled to recover attorney's fees from the non-prevailing Party. A prevailing Party is a Party that recovers at least 75% of its total claims or that is required to pay no more than 25% of the claims made against it.

7.2 Continuation of Work. Pending final resolution of any dispute under this Contract, the ESCO will proceed diligently with the performance of its duties and obligations under the Contract Documents, and the Customer will continue to make payments of undisputed amounts in accordance with the Contract Documents.

## **ARTICLE 8 – CHANGES IN THE WORK**

8.1 Change Orders. The Customer may order, or the ESCO may request of the Customer (which

request may be approved, rejected, conditioned, or delayed in the Customer's sole and absolute discretion), changes in the Work consisting of additions, deletions, or modifications to the Work. Such changes in the Work shall be authorized only by written Change Order signed by the Customer and the ESCO. The adjustment to the Contract Sum shall be based on the mutual acceptance of a lump sum price for the Change Order work.

8.2 Change Directive. If the Parties do not agree on a lump sum price for the ordered changes to the Work, then the Customer may, in writing, direct ESCO to commence with such changes in the Work. The costs of such Work shall be determined on the basis of actual costs and savings of performing the Work attributable to the change, plus \_\_\_\_ percent (\_\_\_\_%) for profit and overhead. In such case, ESCO shall keep and present, in such form as Customer may reasonably require, an itemized accounting, together with appropriate supporting data. Pending final determination of the Contract Sum adjustment, the ESCO may include its actual costs, plus \_\_\_\_\_%, in its payment requests submitted pursuant to Article 10.

8.3 No Changes That Impact Guarantee. To the extent the ESCO reasonably determines that any change in the Work requested or directed by the Customer will materially and adversely impact the ESCO's ability to meet or sustain achievement of the performance guarantees set forth in Schedule B, the ESCO has the right, in its sole and absolute discretion, to decline such change in the Work.

8.4 Concealed Conditions. ESCO shall immediately notify Customer if it encounters Concealed Conditions at the Site prior to significantly disturbing the same. If such Concealed Conditions cause an increase in ESCO's cost of, or time required for, performance of any part of the Work the ESCO and Customer shall agree, by Change Order, on how to proceed and the extent of any adjustment to the time required for performance of the Work and to the Contract Sum.

8.5 Changes to Contract Sum and Contract Time. The Contract Sum, Substantial Completion Date, Final Acceptance Date, and time periods set forth in Schedule B may only be changed by Change Order.

## **ARTICLE 9 – TIME**

9.1 Time Limits. Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Contract, the ESCO confirms that the Final Acceptance Date is a reasonable period of time for performing the Work.

9.2 Delays in the Progress of the Work. If the ESCO is delayed at any time in progress of the Work by changes ordered in the Work by the Customer, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions that affect the Work not reasonably anticipatable, unavoidable casualties or any other causes which are beyond the control of the ESCO, then the Contract Time shall be extended by Change Order provided that: (i) the ESCO has notified the Customer in writing of such delay within ten (10) days following the date when the ESCO becomes aware, or should have become aware through the exercise of reasonable diligence, of such delay; (ii) the ESCO has taken all reasonable steps to avoid any such delay (including its continuance); and (iii) such delay is not a theoretical delay but does actually adversely affect the critical path of the Work. Otherwise, the ESCO shall not be entitled to an extension of the Contract Time for any delays in the progress of the Work.

## **ARTICLE 10 – PAYMENTS AND COMPLETION**

### **10.1 Payments.**

10.1.1 Payment to the ESCO for the Work performed during the Installation Period shall be made as set forth in this Article 10 and in Schedule E: Payment Schedule. The total of all payments for the Work performed during the Installation Period shall constitute the Contract Sum.

10.1.2 During the Guarantee Period, each Performance Tracking Payment due from the Customer, as set forth on Schedule E, shall be paid to the ESCO within thirty (30) days following



commencement of the Performance Guarantee Year for which such Performance Tracking Payment is due.

10.2 Withholding of Payments. Payments may be withheld to the extent of, and on account of (1) defective Work not remedied, or Contract Services not in accordance with the Contract Documents; (2) claims filed by third parties; (3) failure of the ESCO to make payments promptly to the Subcontractors for labor, materials, or equipment; (4) persistent failure to carry out the Contract Services in accordance with the Contract Documents; (5) failure by the ESCO to perform its obligations under the Contract Documents; or (6) a default by the ESCO under the Contract Documents. The Customer shall promptly notify the ESCO of any reason for withholding payment.

10.3 Retainage. Subject to applicable law, during the Installation Period, retainage of ten percent (10%) of the total amount earned shall be withheld from partial payments to the ESCO until the ESCO has achieved 50% completion of the Work, as determined by the Customer. Thereafter, retainage of five percent (5%) of the total amount earned shall be withheld from partial payments to the ESCO. The retainage shall be released upon Final Acceptance of the entire Project.

10.4 Payment Requests. Each payment request submitted by the ESCO during the Installation Period shall be accompanied by the following, all in form and substance satisfactory to the Customer:

(a) A duly executed and acknowledged ESCO's certification showing all Subcontractors with whom the ESCO has entered into subcontracts, the amount of each subcontract, the amount requested for any Subcontractor in the invoice and the amount to be paid to the ESCO, together with similar certifications from all Subcontractors;

(b) Duly executed waivers of mechanics', materialmen's and construction liens from the ESCO and all Subcontractors. The final invoice for the Contract Sum shall be accompanied by final and full waivers of lien from all parties entitled to receive payment in connection with the Work; and

(c) Such other documents and information as may be necessary or as may be reasonably requested by the Customer to verify satisfactory completion of the Work covered by such invoice.

10.5 Payment Due Date. Payment shall be made net thirty (30) days of submission of a payment request meeting the requirements of this Article 10 and Schedule E. If payment is not made within an additional ten (10) business days after the payment due date, and the Customer is not entitled to withhold payment pursuant to Section 10.2, the ESCO may suspend all Work until payment is made.

10.6 Punchlist Items. In the event that the ESCO has not completed or corrected all Punchlist items at the time of submission of its final payment request for the Work, final payment will be made by the Customer to the ESCO, less \_\_\_% of the value assigned by the Customer to the Punchlist items not yet completed or corrected. Payment with respect to such final Punchlist items shall be made by the Customer on an item-by-item basis within ten (10) days following the completion of such item.

10.7 Liens Filed Against the Work. Provided that the ESCO has been paid by the Customer all sums due to the ESCO pursuant to the Contract, the ESCO shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Site, the ESCO, within thirty (30) days of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which the ESCO is contesting in good faith by appropriate action diligently pursued, provided the ESCO has notified the Customer of the nature of such lien and informed the Customer of the type of action being pursued by the ESCO and, if requested by the Customer, has provided the Customer with a bond satisfying the requirements of the laws of the state in which the Site is located sufficient to cover such claim (or cause the surety to acknowledge in writing that the lien claim is covered

by the payment bond) in the event the ESCO is unsuccessful in contesting same or has made other arrangements satisfactory to the Customer. If, however, the ESCO, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then the Customer may deduct 150% of the amount of the lien claim from the next progress payment until the ESCO has caused such lien to be released and discharged or otherwise contested the same in the manner provided hereinabove. The ESCO shall indemnify, defend and hold harmless the Customer from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

## **ARTICLE 11 – HAZARDOUS MATERIALS**

11.1 ESCO's Responsibilities With Respect to Hazardous Materials. The scope of Work to be performed by the ESCO pursuant to this Contract and the compensation to be paid to the ESCO hereunder for the Work expressly exclude any work or service of any nature associated or connected with the identification, abatement, cleanup, control, or removal of any currently existing Hazardous Materials or Mold on, in or nearby the Site beyond what is specifically defined and identified in Schedule A of this Contract. The Customer agrees that all duties and obligations in connection with any Hazardous Materials or Mold currently located in, on or nearby the Site or brought into the Site by a party other than the ESCO or its Subcontractors, other than those defined in Schedule A, are not the ESCO's responsibility. Should the ESCO become aware, discover or based on reasonable evidence suspect the presence of Hazardous Materials or Mold beyond those to be addressed in Schedule A, the ESCO will immediately cease work in the affected area, and will promptly notify the Customer of the conditions discovered. Should the ESCO stop work because of such discovery or suspicion of Hazardous Materials or Mold, then the Contract Time will, should the Customer elect to choose to continue the Work after remedy thereof, be reasonably extended by Change Order to cover the period required for abatement, cleanup, or removal of the Hazardous Materials or Mold. The ESCO will not be held responsible for any claims, damages, costs, or expenses of any kind associated with such period during which work has been stopped as a result of Hazardous Materials or Mold.

11.2 Customer's Representations and Responsibilities With Respect to Hazardous Materials. The Customer warrants and represents that to the best of the Customer's knowledge, other than as disclosed to the ESCO in writing, there are no Hazardous Materials or Mold in or on the premises that will affect, be affected by, come in contact with, or otherwise impact upon or interfere with the Work to be performed by the ESCO pursuant to this Contract. The Customer further represents that the Customer has not retained the ESCO to discover, inspect, investigate, identify, or remediate Hazardous Materials or Mold or conditions caused by Hazardous Materials or Mold, except to the extent specified in Schedule A. Unless otherwise specified in Schedule A, the Customer will be responsible for taking all necessary steps to correct, abate, clean up, or control Hazardous Materials or Mold not addressed by the ESCO under this Contract. The Customer specifically agrees, to the extent allowed by state law, to indemnify and to hold the ESCO, its officers, agents and employees harmless from and against any and all claims, demands, damages, or causes of action in any way arising out of its release of Hazardous Materials or Mold into the air, soil, or any water system or water course, or any actions taken in connection with same, or any failure to act.

11.3 Hazardous Materials Introduced to the Site by ESCO. Notwithstanding anything to the contrary set forth in this Article 11, if any Hazardous Materials are introduced to the Site after the Date of Commencement by the ESCO, its Subcontractors, and any party for whom they may be liable or if any Mold occurs within the Site as the result of the negligent implementation of the Project or the improper functioning of the ECMs, then any response, removal, cleanup, or other remedial action required by applicable law shall be performed by the ESCO at its sole cost and expense. Except as to the ESCO's initial response to an emergency, any such remedial action(s) shall require the prior review and approval of the ESCO.

## **ARTICLE 12 – OWNERSHIP OF DESIGN MATERIALS**

12.1 Copies Deliverables. The Deliverables are and shall remain the exclusive property of the Customer. The ESCO shall use its best efforts to ensure all copies of the Deliverables are delivered or returned to the Customer or suitably accounted for upon the Customer's request or upon final payment, whichever is earlier. The ESCO may retain one copy of the Deliverables for its records, but shall not use such copies for any purpose other than with respect to the Contract Services without the Customer's prior written consent. The Intellectual Property Rights, if any, relating to the Design Materials or the contents of or concepts embodied in the Design Materials shall remain with and belong to the ESCO or its Subcontractors, as the case may be.

12.2 License for the Use of Design Materials. As to those Design Materials deemed subject to any form of Intellectual Property Rights, the ESCO hereby grants and will cause to be granted and delivered to the Customer from Subcontractors a paid-up, nonexclusive, world-wide, irrevocable, transferable license, for the term of the Intellectual Property Rights, for the Customer to use, reproduce and have reproduced, and for the Customer to allow others to use, reproduce and have reproduced, such Design Materials subject to the restrictions set forth below:

- a. All Intellectual Property Rights in or relating to any of the Design Materials shall remain the property of the ESCO or the appropriate Subcontractor, whether or not the Project is completed; and
- b. The Customer shall not, without the prior written consent of the ESCO, use such Design Materials, in whole or in part, for the construction of any other project. The Customer may, however, at no cost to the Customer, use such Design Materials (i) for completion of the Project and the Contract Services by others upon termination of this Contract or termination of the ESCO's right to perform all or any portion of the Contract Services, and (ii) for the construction, operation, maintenance and repair of (and for additions, improvements, changes or alterations to) the Project after its completion.

12.3 Delivery of Deliverables and As-built Drawings. Upon the earlier of the date of Interim Completion for a particular ECM or the date of termination of this Contract, the ESCO shall deliver to the Customer any Deliverables that have not been previously submitted to the Customer for that ECM. Upon the date of Final Acceptance of the entire Project, the ESCO must provide mylar, reproducible "as-built" drawings of all existing and modified conditions associated with the Project, conforming to typical engineering standards. The as-built drawings shall also be submitted in an electronic format compatible with the AutoCAD or other similar system in use by the Customer.

## **ARTICLE 13 – DEFAULT AND TERMINATION**

13.1 Customer's Right to Cure Default. If the ESCO defaults or persistently fails or neglects to carry out the Contract Services in accordance with the Contract Documents or fails to perform a provision of the Contract, the Customer shall provide written notice of such default, failure or neglect to the ESCO. If the ESCO has not cured such default, failure or neglect within thirty (30) days from receipt of the Customer's notice, and without prejudice to any other right or remedy the Customer may have, the Customer may make good such deficiencies and may deduct the cost thereof, including compensation for the Customer's services and expenses made necessary thereby, from the payment then or thereafter due the ESCO. Additionally, in the case of an "emergency" (defined herein as any default, neglect or defect in or with respect to the Contract Services endangering life, the Customer's or a tenant's ability to occupy all or any portion of the Site, and/or property damage in excess of \$10,000), the Customer shall provide the ESCO with written notice of such default, failure or neglect constituting such emergency, but the Customer may immediately commence and continue correction of such emergency, without waiting for the expiration of the above-described notice and cure period. In any case where the Customer makes good any deficiencies as provided herein, an appropriate Change Order shall be issued deducting from payments then or

thereafter due the ESCO all reasonable and necessary costs incurred by the Customer for the correction of such deficiencies. If payments then or thereafter due the ESCO are not sufficient to cover such amounts, the ESCO shall pay the difference to the Customer upon demand.

13.2 Termination Upon Default. Alternatively, at the Customer's option, if the ESCO has not cured such default or failure within thirty (30) days from receipt of the Customer's notice, Customer may terminate the Contract and take possession of the area at the Site affected by the Work and remove all materials, equipment, tools and construction equipment and machinery thereon owned by the ESCO (or require the ESCO to immediately remove all such materials, equipment, tools and construction equipment and machinery from the Site) and the Customer may finish (or cause another contractor to finish) the Work by whatever method the Customer may deem expedient. After termination by the Customer pursuant to this Section 13.2, the ESCO shall not be entitled to any further payment under this Contract, except to the extent of any amount by which the value of the Work completed prior to such termination and not previously paid for by the Customer exceeds the amount due by the ESCO to the Customer under this Section (including all damages that the Customer would be entitled to recover at law from the ESCO by reason of the ESCO's breach), and even then only at such time as the Work is finally completed by the Customer. If the unpaid balance of the Contract Sum exceeds the cost of finishing the Work, including compensation for any consultant's or architect's services and expenses made necessary thereby (including, without limitation, the Customer's reasonable attorney's fees and costs), such excess shall be paid to the ESCO following completion of the Work by the Customer, but if such cost exceeds such unpaid balance, the ESCO shall pay the difference to the Customer. The Customer shall not be responsible to the ESCO for any loss of anticipated profits on Work not performed on account of a termination under this Section.

13.3 Termination For Convenience. The Customer reserves the right, for its convenience, to terminate all or any portion of the Contract Services or to terminate this Contract by ten (10) days written notice stating the effective date of the termination. In that case, the ESCO and its Subcontractors shall (except for services necessary for the orderly termination of the Contract Services):

- a. stop all Contract Services so terminated;
- b. place no further order or subcontracts for materials, services, equipment, or supplies on the terminated Contract Services;
- c. assign to the Customer (in the manner and to the extent directed) all of the rights of the subcontracts relating to the terminated Contract Services;
- d. take any action necessary to protect property of the Customer and property in the ESCO's possession in which the Customer has, or may acquire, an interest; and
- e. take any other action toward termination of the Contract Services that the Customer may direct.

Thereafter, the Customer shall pay the ESCO for the terminated Contract Services, subject to the limitations set forth herein, the proportion of the Contract Sum or payment for Performance Tracking Services that the terminated Contract Services actually performed (including materials delivered to the Site) at the date of termination bears to the Contract Services required to be performed for such portion of the Contract Services. No payments shall be made for Contract Services not actually performed, and no payment shall be made or due for lost profits for portions of the Contract Services not actually performed.

13.4 ESCO Termination. Subject to the Customer's right to withhold payments pursuant to Section 10.2, if the Customer fails to make payments to the ESCO as set forth in Article 10 and Schedule E: Payment Schedule, the ESCO may, upon thirty (30) days' prior written notice to the Customer, terminate the Contract and recover from the Customer payment for all Contract Services executed and for proven loss with respect to materials, equipment, tools, and machinery, including reasonable overhead, profit and damages applicable to the Project for the Contract Services performed through the date thereof.

#### ARTICLE 14 - ASSIGNMENT

14.1. ESCO Assignment. The ESCO shall not assign this Contract or the Contract Documents or sublet it, in whole or in part, without the prior written consent of the Customer, in its sole discretion, nor shall the ESCO assign any moneys due or to become due to it under the Contract Documents without the prior written consent of the Customer, in its sole discretion. Any assignment of monies due under the Contract Documents made without the prior written consent of the Customer is void, and the assignee in that case acquires no rights against the Customer.

14.2 Customer Assignment. The Customer may assign this Contract and the Contract Documents in its sole discretion to any purchaser of the Site, to a lender for collateral purposes, or any entity wholly owned or controlled by the same owners of the Customer.

14.3 Permitted Assigns. This Contract shall be binding upon, and inure to the benefit of, the successors and permitted assigns of the parties hereto.

#### ARTICLE 15 – OTHER CONDITIONS OR PROVISIONS

15.1 Representations and Warranties. Each Party warrants and represents to the other that:

(a) It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;

(b) Its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its governing documents, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

(c) Its execution, delivery, and performance of this Contract will not result in a breach or violation of, or constitute a default under, any agreement, lease or instrument to which it is a party, or by which it or its properties may be bound or affected; and

(d) It has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits, or orders that would materially and adversely affect its ability to perform hereunder.

15.2 Cooperation. Each Party will cooperate with and assist the other Party, its advisors, consultants, attorneys, employees, agents, and representatives, at all times during the Contract Time so as to complete the Contract Services in an efficient, timely, and economical manner. Such cooperation and assistance by the ESCO shall include, without limitation, any cooperation or assistance required in connection with the Customer's efforts to obtain financing for the Project.

15.3 Confidential Information.

15.3.1 The term "**Confidential Information**" means any documentation or information (i) that is marked as "proprietary" or "confidential", (ii) that is supplied orally with a contemporaneous confidential designation, or (iii) that is known by the receiving Party to be confidential or proprietary information or documentation of the disclosing Party. Confidential Information does not include information that can be

demonstrated: (i) to have been rightfully in the possession of the receiving Party from a source other than the disclosing Party prior to the time of disclosure of said information under this Contract; (ii) to have been in the public domain prior to disclosure; (iii) to have become part of the public domain after disclosure by a publication or by any other means except an unauthorized act or omission or breach of this Contract; or (iv) to have been supplied to the receiving Party without restriction by a third party who is under no obligation to the disclosing Party to maintain such information in confidence.

15.3.2 Each Party acknowledges that it may, in connection with the performance of this Contract, have access to, or be directly or indirectly exposed to Confidential Information of the other Party. Each Party shall hold confidential all Confidential Information of the other Party and shall not disclose or use such Confidential Information without express prior written consent of the disclosing Party, except as may be legally required. Each Party shall use reasonable measures at least as strict as those the Party uses to protect its own confidential information. Such measures shall include, without limitation, requiring employees and subcontractors to execute a non-disclosure agreement before obtaining access to the other Party's Confidential Information.

15.4 Amendments. No amendment to this Contract shall be effective until and unless reduced to writing and executed by the Parties.

15.5 Governing Law. This Contract shall be governed by the laws of the state where the Site is located.

15.6 Severability. If any provision of this Contract shall be held to be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby.

15.7 No Waiver. No course of dealing or failure of the Customer and/or the ESCO to enforce strictly any term, right or condition of this Contract shall be construed as a waiver of such term, right or condition. No express waiver of any term, right or condition of this Contract shall operate as a waiver of any other term, right or condition.

15.8 Entire Agreement. This Contract represents the entire agreement between the Customer and the ESCO with respect to the subject matter hereof, and supersedes all prior negotiations, representations or agreements, whether written or oral.

15.9 Rights Cumulative. Except as otherwise provided in this Contract, (i) rights and remedies available to the Customer and/or the ESCO as set forth in this Contract shall be cumulative with and in addition to, and not in limitation of, any other rights or remedies available to the Parties at law and/or in equity, and (ii) any specific right or remedy conferred upon or reserved to the Customer and/or the ESCO in any provision of this Contract shall not preclude the concurrent or consecutive exercise of a right or remedy provided for in any other provision hereof.

15.10 Further Assurances. Each Party hereto shall, from time to time, at the request of the other Party and without further consideration, execute and deliver and cause to be executed and delivered such other instruments and take such other actions as the requesting Party may reasonably request to undertake the Contract Services and carry out the intent and purposes of this Contract.

15.11 Counterparts. This Contract may be executed in counterparts, each of which shall be deemed an original, and all of which counterparts shall constitute one agreement. To facilitate execution of this Contract, the Parties may execute and exchange facsimile counterparts of the signature pages, provided originally executed signature pages are exchanged promptly thereafter.

15.12 Incorporation by Reference. The recitals set forth on the first few pages of this Contract, as well as all Schedules attached hereto, are hereby incorporated into this Contract by this reference and expressly made a part of this Contract.

15.13 Notices. Any information or notices required to be given under this Contract shall be in writing and shall be delivered either by (i) certified mail, return receipt requested, in which case notice shall be deemed delivered three (3) business days after deposit, postage prepaid, in the U.S. mail; (ii) a reputable messenger service or a nationally recognized overnight courier, in which case notice shall be deemed delivered one (1) business day after deposit with such messenger or courier; or (iii) personal delivery with receipt acknowledged in writing, in which case notice shall be deemed delivered when received. All notices shall be addressed as follows:

If to Customer:

If to ESCO:

The foregoing addresses may be changed from time to time by notice to the other Party in the manner herein before provided for.

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# **SCHEDULE A: PROJECT DESCRIPTION**

## **Section I. Description of the Project, and Each ECM**

*[Information should be provided from the Investment Grade Audit (with any necessary and appropriate revisions) to sufficiently detail the Project as a whole and each ECM, including modifications to existing systems, building or area of building. The description should also describe in detail the ESCO's obligations for performing Energy Star benchmarking, obtaining LEED EB certification, reporting greenhouse gas emission reductions, or other services agreed to by the parties. Also, this description must include any ESCO responsibilities relating to Hazardous Materials (including ACM removal and abatement). ]*

## **Section II. Training Prior to Final Acceptance Date**

*[The description of the ESCO's training program for facility personnel should be contained in this schedule. Training must be completed before equipment acceptance. The duration and frequency of the specified training should also be included. Any provisions for on-going training, potential commitments to train newly hired facility personnel, and training in regard to possible future equipment or software upgrades should also be described. Any fees associated with requests for training beyond what the ESCO is contractually required to provide must also be specified.]*

## **Section III. Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment.**

*[This Section should specify the process that will be used to commission the installed equipment and system(s). Procedures should be defined for developing and implementing a commissioning (Cx) plan, and should specify any requirements for Customer and/or third party review and approvals, pre-functional inspections, use of manufactures' start-up procedures, and for executing functional performance tests. Provisions should be included on how the Customer's project requirements or design intent for each ECM or system will be defined. This section can also define the qualifications and affiliation of the Commissioning Agent (CxA), (if the CxA is a contractor other than the ESCO and/or a specific individual on ESCO team), and provide an overview of the roles and responsibilities of the CxA, ESCO, and Customer in the Cx process. (In essence, the Customer should ensure that commissioning specifications are written so that there is no question to the commissioning tasks required, including the level of testing and documentation required and the specific performance targets and roles/responsibilities.)]*

## **Section IV. Warranty Period**

*[Identify warranty periods for any ECMs that extend beyond the general warranty period identified in Section 5.10 of the Contract.]*

## **Section V. Identification of Key Personnel**

## **Section VI. Construction Schedule and Construction Operations Plan**

*[Either attach to Schedule A, or provide the date when these will be submitted in Section 1.6 of the Contract]*



## SCHEDULE B: PERFORMANCE GUARANTEE

### Section I. Definitions.

All capitalized terms used in this Schedule B shall have the meaning set forth below or in the "Definitions" Section of the Contract.

- A. Causes for Adjustment: The causes for adjustment to the energy savings calculations set forth in Section II.E of Schedule C.
- B. Closing Stub Year: This term is defined in Section III of this Schedule B.
- C. Guarantee Term: The period running from and after the Savings Guarantee Commencement Date for a period of [\_\_\_\_\_] <sup>1</sup> years.
- D. Guaranteed Annual Savings Amount: [\$\_\_\_\_\_] <sup>2</sup> for each Performance Guarantee Year. However, if the Performance Guarantee Year is an Opening Stub Year or Closing Stub Year, the Guaranteed Annual Savings Amount applicable to such Performance Guarantee year shall be [\$\_\_\_\_\_] <sup>3</sup> multiplied by a fraction, the numerator of which is the number of days in such Performance Guarantee Year and the denominator of which is 365, provided, if the Performance Guarantee Year includes a February 29, the denominator shall be 366.
- E. Guaranteed Project Savings Amount: [\$\_\_\_\_\_] <sup>4</sup>
- F. Implementation Period Savings: The savings generated during the period from the Date of Commencement to the Savings Guarantee Commencement Date for the categories of savings included within the Measured Savings Amount calculations.
- G. Measured Savings Amount: Savings to the Customer resulting from the implementation of the Project, measured and calculated in accordance with Schedule C, Subsection I.C, multiplied by the rates for each energy savings category set forth in Schedule C, Subsection II.D.
- H. Non-measured Savings Amount: Savings to the Customer resulting from the implementation of the Project in the amounts stipulated in Schedule C, Subsection I.D.
- I. Opening Stub Year: This term is defined in Section III of this Schedule B.
- J. Performance Guarantee Payment: This term is defined in Section II of this Schedule B.
- K. Performance Guarantee Year: Each period during which energy savings are measured, as specified in Section III of this Schedule B.
- L. Prior Year Calculations: This term is defined in Section IV of this Schedule B.
- M. Project Savings Amount: The Measured Savings Amount and the Non-measured Savings Amount.
- N. Savings Guarantee Commencement Date: The first day of the first utility billing period following the earlier to occur of: (1) the month in which Final Acceptance of the entire Project occurs in accordance with the Contract; or (2) the Final Acceptance Date set forth in Section 1.4 of the

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<sup>1</sup> Insert number of years of the performance guarantee.

<sup>2</sup> Insert currency equivalency of guarantee amount.

<sup>3</sup> Insert same number from earlier in this definition.

<sup>4</sup> Insert amount equal to Guaranteed Annual Savings Amount multiplied by years in the Guarantee Term.

Contract.

## **Section II. Performance Guarantee.**

The ESCO guarantees that the Project Savings Amount over the Guarantee Term will equal or exceed the Guaranteed Project Savings Amount. For each Performance Guarantee Year, the ESCO guarantees that the Project Savings Amount will equal or exceed the Guaranteed Annual Savings Amount. Subject to Section VI of this Schedule B, in the event the Project Savings Amount in any Performance Guarantee Year is less than the Guaranteed Annual Savings Amount, the ESCO will pay the Customer the difference between the Guaranteed Annual Savings Amount and the Project Savings Amount ("Performance Guarantee Payment").

## **Section III. Performance Guarantee Year.**

Each of the following periods during the Guarantee Term shall serve as a Performance Guarantee Year for purposes of the performance guarantee set forth in this Schedule B:

- ☐ If the preceding box is checked, each Performance Guarantee Year shall consist of the 365 day period (or 366 day period, if the calendar year includes 366 days) running from the Savings Guarantee Commencement Date and each anniversary of the Savings Guarantee Commencement Date until the expiration of the Guarantee Term.
- ☐ If the preceding box is checked, the Customer seeks to align the Performance Guarantee Year with the calendar year for budgeting purposes, and therefore each of the following periods shall serve as a Performance Guarantee Year:
  - i. the period from the Savings Guarantee Commencement Date through the next following December 31 (such initial period referred to herein as the "Opening Stub Year");
  - ii. [\_\_\_\_\_] <sup>5</sup> 12-calendar month periods, each running from January 1 through the next following December 31, with the first such period including the first January 1 following the Savings Guarantee Commencement Date and continuing through the next following December 31; and
  - iii. the period running from the January 1 following conclusion of the [\_\_\_\_\_] <sup>6</sup> 12-month period described in subparagraph (ii) immediately preceding and continuing through and including the [\_\_\_\_\_] <sup>7</sup> anniversary of the Savings Guarantee Commencement Date (such final period referred to herein as the "Closing Stub Year").

As set forth in Schedule C, the formulae for calculating the Project Savings Amount are designed to accommodate and yield accurate results for Performance Guarantee Years of varying lengths, including both periods exceeding 12 months in length, any stub years and the Implementation Period.

## **Section IV. Calculation of Project Savings Amount.**

Throughout the Guarantee Term, the Customer will provide the ESCO with all utility bills pertinent to the energy performance calculations described in this Contract within thirty (30) days of receipt. The Customer may provide the ESCO with copies of bills, or access to invoices via an on-line system. Within thirty (30) days of the ESCO's receipt of all pertinent utility bills with meter-reading ending dates falling within a Performance Guarantee Year (including where applicable, the Opening Stub Year or Closing Stub Year), the ESCO will prepare and provide to the Customer its proposed calculation of the Project Savings Amount (as calculated pursuant to Schedule C) and, if applicable, the amount of the Performance

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<sup>5</sup> Insert a number equal to the years in the Guarantee Term minus one.

<sup>6</sup> Insert a number equal to the years in the Guarantee Term minus one (e.g., if the Guarantee Term is 10 years, insert "9<sup>th</sup>").

<sup>7</sup> Insert a number equal to the years in the Guarantee Term (e.g., if the Guarantee Term is 10 years, insert "10<sup>th</sup>").

Guarantee Payment for the immediately-preceding Performance Guarantee Year (the "Prior Year Calculations"). The ESCO must account for all Causes for Adjustment to the energy performance calculations permitted by Schedule C arising during the preceding Performance Guarantee Year within the Prior Year Calculations, and the ESCO waives the right to make any claim for Causes for Adjustments not specified within the Prior Year Calculations. Within thirty (30) days of the Customer's receipt of the Prior Year Calculations, the Customer will notify the ESCO of (1) the Customer's approval of all or any portion of the Prior Year Calculations; and/or (2) the Customer's disapproval of all or any portion of the Prior Year Calculations, including the basis for the disapproval. Within thirty (30) days of receiving notification of the Customer's approval of all or any portion of the Prior Year Calculations, the ESCO will pay to the Customer the Performance Guarantee Payment, if any, due to the Customer on account of the approved portion of the Prior Year Calculations. If the Customer disapproves all or any portion of the Prior Year Calculations, the Parties will use good faith efforts to resolve such dispute within thirty (30) days of notification to the ESCO. If the Parties are unable to resolve the matter within a thirty (30) day period, the dispute shall be resolved in accordance with Section VIII.

#### **Section V. Implementation Period Savings.**

Implementation Period Savings will be added to the calculation of the Measured Savings Amount determined for the Opening Stub Year, if applicable, or first Performance Guarantee Year if there is no Opening Stub Year.

#### **Section VI. Additional Savings.**

In the event that the Project Savings Amount exceeds the Guaranteed Annual Savings Amount in any Performance Guarantee Year, the excess amount may be used to reduce the ESCO's liability for any Performance Guarantee Payment due to the Customer for the immediately following Performance Guarantee Year.

#### **Section VII. Project Modifications to Reduce Performance Guarantee Payment Obligations.**

The mutual goal of the Parties is to maximize the Project Savings Amount. Therefore, the ESCO shall have the right, at all times during the Guarantee Term, subject to the Customer's written approval, to modify or replace any of the ECMs or install additional ECMs and to revise any procedures for the operation of the ECMs or implement other procedures at the Site provided that: (i) such actions by the ESCO do not result in modifying the standards of comfort and service set forth in Schedule C without the express written approval of the Customer; (ii) such actions are necessary to enable the ESCO to achieve the Guaranteed Annual Savings Amount; and (iii) any costs incurred relative to such modifications, additions or replacements of the ECMs, or operational changes or new procedures shall be the sole responsibility of the ESCO. All modifications, additions or replacements of the ECMs or revisions to operating or other procedures shall be described in a supplemental schedule(s) to be provided to the Customer for approval, that shall not be unreasonably withheld or delayed, and incorporated into this Contract through a Change Order, and the work related to such modifications, additions, or replacements shall be carried out in accordance with the terms and provisions of Article 4 of the Contract. Any replacement ECM shall be new and have equal or better potential to reduce energy consumption at the Site than the ECM being replaced. The ESCO shall update any and all software to be used in connection with the ECMs. All replacements of and alterations or additions to the ECMs shall become part of the ECMs described in Schedule A and shall become the property of the Customer.

#### **Section VIII. Disputes Regarding Energy Performance Calculations.**

Any disputes concerning the calculation of the Prior Year Calculations, Causes for Adjustment, or other energy or consumption calculations described in Schedule C shall be resolved as follows:

1. First, the Parties will use good faith efforts to resolve such dispute within thirty (30) days of written notification from the other Party of the dispute.
2. If the Parties are unable to resolve the matter within a thirty (30) day period, the dispute

shall be submitted to a third-party professional engineering firm for resolution with expertise in energy engineering acceptable to both the ESCO and the Customer. The determination of such firm will be final and binding upon both the Customer and the ESCO. ESCO and the Customer will each be responsible for half of the fees of such firm.

The disputed calculation shall not take effect until there is a final adjudication or resolution of the dispute.

**Section IX. Examples.**

Section IV of Schedule C sets forth examples of calculations of energy savings for illustrative purposes.

# SCHEDULE C: METHODOLOGY AND BASELINE

## SECTION I - PERFORMANCE TRACKING METHODOLOGY

- A. Determination of Project Savings Amount**
- B. Baseline Definition**
- C. Measured Savings**
- D. Non-measured Savings**

### **A. Determination of Project Savings Amount**

For purposes of the performance guarantee described in Schedule B, the Project Savings Amount will be determined as follows:

$$\$ = \$_F + \$_O + \$_N$$

Where:

$\$$  = Project Savings Amount

$\$_F$  = Whole Facility Savings Amount, calculated as set forth in Subsection C.1 below.

$\$_O$  = Other Measured Energy Savings Amount, calculated as set forth in Subsection C.2 below.

$\$_N$  = Non-measured Savings Amount, stipulated as set forth in Subsection D below.

### **B. Baseline Definition**

The "Base Year" means the period from and including January 1, [\_\_\_\_\_] through and including December 31, [\_\_\_\_\_].

The baseline is that set of parameters that describes both the energy consumed in the Base Year and the conditions that caused that consumption to occur. This set of parameters includes utility consumption, facility use information, weather data and other information as may be necessary to describe the Base Year conditions. In addition, the baseline includes certain mathematical values, calculated by a model and set forth in Section III of this Schedule C, that are used to correlate the Base Year energy consumption with the factors that caused that consumption. The baseline to be used for this Project is fully defined in Schedule C Section II, Subsections A through H.

### **C. Measured Savings**

- 1. Whole Facility Savings (Option C – "Main Meter Measurement" as described in the International Measurement and Verification Protocol (IPMVP))**

- a. Overview**

Energy savings for a Performance Guarantee Year will be measured by comparing the total energy consumption and demand measured during all utility billing periods in each energy savings category with meter reading period end dates falling within such Performance Guarantee Year ("Billing Periods"; each a "Billing Period") to the total energy consumption and demand for the same area for all Billing Periods in the Base Year. Base Year energy and demand will be adjusted for differences in weather, facility operation and facility modifications to estimate how much energy would have been used in the corresponding Billing Period of the Performance Guarantee Year if the energy conservation measures had not been implemented. The energy saved is the difference between the adjusted Base Year consumption and the Performance Guarantee Year consumption. The demand saved is the difference between the adjusted Base Year demand and the Performance Guarantee Year demand. Energy cost savings is the difference between the cost of the

adjusted Base Year consumption and demand and the Performance Guarantee Year consumption and demand. This process will be followed for each energy savings category involved in the performance guarantee.

b. Equation

Energy and demand units saved for each energy saving category for each Performance Guarantee Year Billing Period will be determined by the following equation:

$$\begin{aligned} \$C &= E_C * \$/\text{Unit} \\ E_C &= E_B - E_G \end{aligned}$$

Where;

$\$C$  = Measured Energy Savings, using IPMVP Option C  
 $\$/\text{Unit}$  = Cost of Energy per Unit Measured, as specified in Schedule C, Section II.D  
 $E_C$  = Energy (or demand) Units Saved  
 $E_B$  = Adjusted Base Year Monthly Billing Period Consumption or Adjusted Base Year Monthly Billing Period Demand for the energy savings category, as described in subsection (c) below  
 $E_G$  = Performance Guarantee Year Billing Period Consumption or demand for the energy savings category

"Whole Facility Savings" ( $\$F$ ) for Performance Guarantee Year "y" shall equal the sum of the Measured Energy Savings ( $\$C$ ) for all energy savings categories and Billing Periods within such Performance Guarantee Year.

c. Determination of Adjusted Baseline Measurements

i. *General*

Consumption and demand for each Base Year Billing Period is adjusted to estimate what the current Performance Guarantee Year Billing Period consumption and demand would have been if no energy conservation measures had been implemented. This is accomplished by adjusting for these factors with respect to differences between the Base Year Billing Period and corresponding Performance Guarantee Year Billing Period:

- a. Changes in the number of days between the Base Year and Performance Guarantee Year billing periods
- b. Changes in weather
- c. Changes in facility use
- d. Modifications to the facility

ii. *Adjusted Baseline Calculations*

Adjusted Base Year Billing Period consumption is calculated as follows for each savings category:

$$Q_i = C_D * (T_i - T_{i-1}) + C_H * HDD_i + C_C * CDD_i + O_i + M_i, \text{ or}$$

Adjusted Base Year Billing Period Consumption = Weather Independent Consumption + Weather Dependent Consumption + Offset + Causes for Adjustments

Where:

$Q_i$  = adjusted Base Year Billing Period consumption for Performance Guarantee Year Billing Period "i"  
 $C_D$  = a constant representing units of consumption per billing period day as calculated by model and set forth in Section III of this Schedule C  
 $T_i$  = ending date of current Performance Guarantee Year billing period  
 $T_{i-1}$  = ending date of previous Performance Guarantee Year billing period

$C_H$  = a constant representing units of consumption per heating degree day as calculated by model and set forth in Section III of this Schedule C

$HDD_i$  = heating degree days in the current billing period

$C_C$  = a constant representing units of consumption per cooling degree day as calculated by model and set forth in Section III of this Schedule C

$CDD_i$  = cooling degree days in the current billing period

$O_i$  = offset for the current billing period

$M_i$  = other adjustments for the current billing period

Adjusted Base Year demand is calculated with a slightly different formula as follows:

$$D = D_D * (T_i - T_{i-1}) + D_H * (HDD_i / (T_i - T_{i-1})) + D_C * (CDD_i / (T_i - T_{i-1})) + O_i + M_i, \text{ or}$$

Adjusted Base Year Demand = Weather Independent Demand + Weather Dependent Demand + Offset + Use and Modification Adjustments

Where:

$D$  = adjusted Base Year demand

$D_D$  = a constant representing units of demand per billing period day as calculated by model and set forth in Section III of this Schedule C

$D_H$  = a constant representing units of demand per heating degree day as calculated by model and set forth in Section III of this Schedule C

$D_C$  = a constant representing units of demand per cooling degree day as calculated by model and set forth in Section III of this Schedule C

### *iii. Weather Independent Consumption*

Because utility meters are not always read on the same day of the month, the number of days in a meter's billing period frequently varies. The term,  $C_D * (T_i - T_{i-1})$ , in the above equation is used to account for this difference, where  $(T_i - T_{i-1})$ , gives the number of days in the Performance Guarantee Year Billing Period "I". Thus, Weather Independent Consumption is the consumption per day adjusted to reflect the difference, if any, between the number of days in the Base Year Billing Period and number of days in the corresponding Performance Guarantee Year Billing Period. The approach is identical for demand, except that the term  $D_D$  is substituted for  $C_D$ , and there is no adjustment for variance in the number of days between the Base Year Billing Period and Performance Guarantee Year Billing Period, because demand is a single maximum meter reading value for each Billing Period, not dependent upon the number of days in such period.

### *iv. Weather Dependent Consumption*

Change in weather between the Base Year Billing Period and corresponding Performance Guarantee Year Billing Period is accounted for with the term,  $C_H * HDD_i + C_C * CDD_i$ . Weather Dependent Consumption is consumption per degree-day times the number of degree-days in the current Performance Guarantee Year Billing Period. A cooling degree-day is the difference between the average daily temperature and the balance point temperature ( $AvgTemp - BalanceTemp$ ). A heating degree-day is the difference between the balance point temperature and the average daily temperature ( $BalanceTemp - AvgTemp$ ). Degree-days are either positive numbers or zero. If the degree-day calculation yields a negative number, the period is considered to have zero degree-days of that type. The balance point temperature is different for each building and for each fuel type. The balance point temperatures used for this project are defined in Schedule C Section II-A. The weather station used to determine daily temperatures is specified in Schedule C Section II-C.

Demand is treated similarly, except that a "heating degree-days per day" or "cooling degree-days per day" figure for the entire Billing Period, as set forth in Section III of this Schedule C, is substituted in lieu of heating degree-days and/or cooling degree-days. This provides a measure of average daily weather intensity, which is the relevant variable with respect to demand.

v. *Offset*

Offset is that portion of the energy consumption in a Billing Period that cannot be accounted for with the Weather Independent and Weather Dependent consumption. It is mostly attributable to seasonal changes in facility use such as summer shutdown and holidays. Section III of this Schedule C includes offset figures for each energy savings category and each billing period in the Base Year. Since the corresponding Performance Guarantee Year Billing Period may overlap two or more Base Year Billing Periods, the offset for a Performance Guarantee Year Billing Period will be the weighted average of the corresponding Base Year Billing Period offset that actually overlaps the applicable Performance Guarantee Year Billing Period Offset for the Performance Guarantee Year as determined with this equation:

$$O_i = O_1 * dG_1/dB_1 + O_2 * dG_2/dB_2 + \dots O_n * dG_n/dB_n$$

Where:

$O_i$  = current Performance Guarantee Year offset

$O_1$  = Base Year Billing Period 1 offset

$O_2$  = Base Year Billing Period 2 offset

$O_n$  = Base Year Billing Period n offset

$dG_1$  = days in Performance Guarantee Year Billing Period that overlap Base Year Billing Period 1

$dG_2$  = days in Performance Guarantee Year Billing Period that overlap Base Year Billing Period 2

$dG_n$  = days in Performance Guarantee Year Billing Period that overlap Base Year Billing Period n

$dB_1$  = days in Base Year Billing Period 1

$dB_2$  = days in Base Year Billing Period 2

$dB_n$  = days in Base Year Billing Period n

n = number of Base Year Billing Periods overlapped by Performance Guarantee Year period

vi. *Other Adjustments*

Causes for Adjustment for a Base Year Billing Period may be required in accordance with Schedule C Section II-E.

The total adjustment for any Performance Guarantee Year Billing Period will be determined with this equation:

$$M_i = Adj_1 + Adj_2 + \dots Adj_n$$

Where  $Adj_1$ ,  $Adj_2$  and  $Adj_n$  are all of the Causes for Adjustments determined to be necessary by the Parties for the Performance Guarantee Year Billing Period pursuant to Schedule C, Section II-E. The sign of the adjustment will be positive when the change will cause an increase in energy and the sign of the adjustment will be negative when the change will cause a decrease in energy. In each instance when the ESCO proposes to make "Other Adjustments," as identified in Schedule C, Section II-E, the ESCO will propose such Other Adjustments to the Customer, with adequate explanation and documentation.

**2. Other Measured Energy Savings (Options A or B, as described in the International Measurement and Verification Protocol (IPMVP))**

a. Equation

Other Measured Energy Savings will be determined as follows:

$$\$_O = E_O * \$/\text{Unit}$$

$$E_O = E_{MB} - E_{MG}$$

Where:

$\$_O$  = Other Measured Energy Savings

$\$/\text{Unit}$  = Cost of Energy per Unit Measured, as specified in this Schedule C, Section II.D



$E_O$  = Other Measured Energy Units Saved  
 $E_{MB}$  = Measured Base Year Consumption  
 $E_{MG}$  = Measured Guarantee Year Consumption

The total Other Measured Energy Savings for any Performance Guarantee Year will be the sum of the Other Measured Energy Savings for all savings categories.

b. Explanation of Methodology

ECM/Site Name:

IPMVP Method:

Brief Description of Rationale:

Option A

Option B

Pre-retrofit Values

Item	Value	Source	Frequency of Measurement	Measurement Method
Name/Description				
Quantity				
Size/Capacity				
Operating Hours				
Load				
Assumptions				

Post-retrofit Values

Item	Value	Source	Frequency of Measurement	Measurement Method
Name/Description				
Quantity				
Size/Capacity				
Operating Hours				
Load				
Assumptions				

**D. Non-measured Savings**

As a result of implementing Energy Conservation Measures, additional non-energy savings may accrue towards this Contract's guaranteed savings that the Parties have agreed should be stipulated in this Schedule.

The following savings amounts shall be included in each annual calculation of the Project Savings Amount:

*[Specify categories of non-measured savings, and annual savings amount stipulated for each category.]*

Facility	Annual Amount	Explanation

## **SECTION II - BASELINE & SUPPORTING INFORMATION**

- A. Meter Tuning Contract**
- B. Meter List**
- C. Weather Source**
- D. Energy Rates**
- E. Causes for Adjustment**
- F. Calendar and Schedules**
- G. Standards of Service and Comfort**
- H. Other Information**

### **A. Meter Tuning Contract**

The purpose of meter tuning is to establish a relationship between the weather and the consumption and demand measured by a particular meter. Tuning consists of identifying relationships between "historic" utility performance and weather (heating degree days and/or cooling degree days). The end result is a set of coefficients, which will be used in modeling the energy use of a facility to calculate the energy savings or increase associated with weather normalizing the baseline energy usage.

In Section III of this Schedule C, the parties have established the meter tuning coefficients using the twelve (12) month baseline period (typically, the 12 months prior to the beginning of installation) for each guarantee meter, as listed in Section II.B of this Schedule C.

### **B. Meter List**

#### **1. Guarantee Meters**

The following meters will be used to measure actual energy consumption for both the Base Year and Performance Guarantee Years.

#### **Electric Meters**

<b>Meter Name</b>	<b>Account Number</b>	<b>Utility Co.</b>	<b>Rate</b>	<b>Units</b>

#### **Gas Meters**

<b>Meter Name</b>	<b>Account Number</b>	<b>Utility Co.</b>	<b>Rate</b>	<b>Units</b>

## 2. Supplemental Sub-Meters

The consumption measured by these meters is not guaranteed. Information from these meters may be used to determine baseline adjustments due to modifications to the Site or changes in operation.

<b>Meter Name</b>	<b>Account Number</b>	<b>Utility Co.</b>	<b>Rate</b>	<b>Units</b>

## C. Weather Source

Data for weather-related calculations used in this Contract will be Daily High-Low Temperatures obtained from the National Weather Service Station at [WEATHER STATION NAME]. In the event the specified weather station is de-activated, weather data will be collected from the nearest weather station with suitable observations. If the data source becomes unavailable or a superior source is identified, the ESCO may select an alternative data source with the Customer's approval.

## D. Energy Rates

The rates set forth in this Subsection will be used throughout the Guarantee Term to determine the Measured Savings Amount.

### 1. Electricity

<b>Name of Utility: Rate Schedule:</b>			
	<b>Charge</b>	<b>Unit</b>	<b>Comments</b>
Customer Charge:		Per Billing Period Per Billing Period	
Demand Charges:		Per Billed kW Per Billed kW	
Consumption Charges: (T&D + Generation)		Per kWh Per kWh Per kWh	
Other Charges:		Per kWh Per kWh Per kWh	
Determination of Billed Demand:		kW kW	
Other Rate Details:			

### 2. Natural Gas

<b>Name of Utility: Rate Schedule:</b>			
	<b>Charge</b>	<b>Unit</b>	<b>Comments</b>
Customer Charge:		Per Billing Period Per Billing Period	

Consumption Charges:		Per MCF Per MCF Per MCF	
Other Charges:		Per MCF Per MCF Per MCF	
Other Rate Details:			

#### **E. Causes for Adjustment**

Each of the causes described in the table below shall constitute a "Cause for Adjustment" to the energy savings calculations for the Measured Savings Amounts.

Cause	Action	Responsibility
Addition of New Site, or Renovation/ Addition to Existing Site w/ Independent Utility Metering and HVAC Service	1. None required. Site is independently metered. No effect on savings tracking of other buildings.	1. N/A
Addition of New Site or New Energy User on Existing Utility or HVAC Service **	<ol style="list-style-type: none"> <li>1. The Customer will notify the ESCO when additions are planned.</li> <li>2. The ESCO will review the addition plans and determine if the addition is likely to increase energy use above the threshold limits. *</li> <li>3. If the addition is expected to exceed any of the threshold limits then all incoming utilities (consumption and demand) and HVAC service will be sub-metered.</li> <li>4. If the addition is below all of the threshold limits, the addition's energy consumption will be estimated from computerized building simulation, manual calculations or as a ratio of the main building's energy consumption, obtained either from sub-meter data and/or energy simulations.</li> </ol>	<ol style="list-style-type: none"> <li>1. Customer</li> <li>2. ESCO</li> <li>3. Customer</li> <li>4. ESCO</li> </ol>
Addition to Existing Site on Existing Utility or HVAC Service **	<ol style="list-style-type: none"> <li>1. The Customer will notify the ESCO when additions are planned.</li> <li>2. The ESCO will review the addition plans and determine if the addition is likely to increase energy use above the threshold limits. *</li> <li>3. If the addition is expected to exceed any of the threshold limits, sub-meter the addition, just as for a new building.</li> <li>4. If the addition is below all of the threshold limits, the addition's energy consumption will be estimated from computerized building simulations, manual calculations or as a ratio of the main building's energy consumption, obtained either from sub-meter data and/or energy simulations.</li> </ol>	<ol style="list-style-type: none"> <li>1. Customer</li> <li>2. ESCO</li> <li>3. Customer</li> <li>4. ESCO</li> </ol>
Renovation / Modification of an Existing Site on Existing Utility or	<ol style="list-style-type: none"> <li>1. The Customer will notify the ESCO when building renovations are planned.</li> <li>2. The ESCO will review the renovation plans and determine if the renovations are likely to cause a</li> </ol>	<ol style="list-style-type: none"> <li>1. Customer</li> <li>2. ESCO</li> <li>3. Customer</li> <li>4. ESCO</li> </ol>

HVAC Service (including additional plug load or other equipment)**	<p>change in energy use that would exceed the threshold limits. *</p> <ol style="list-style-type: none"> <li>3. If the renovations are expected to raise or lower energy consumption more than the threshold limits, the renovation will be sub-metered for both pre and post renovation periods until the effect on energy has been determined.</li> <li>4. If the expected changes are less than the threshold limits, the effect on energy may be estimated, or, at the ESCO's option, ignored.</li> </ol>	
Demolition / Abandonment of an Existing Site on Existing Utility or HVAC Service **	<ol style="list-style-type: none"> <li>1. The Customer will notify the ESCO when a demolition or abandonment is planned.</li> <li>2. The ESCO will determine if the demolition/abandonment is likely to decrease energy use more than the threshold limits. *</li> <li>3. If the expected decrease is more than the threshold limits, the building will be sub-metered for both pre and post demolition periods until the effect on energy has been determined.</li> <li>4. If the expected changes are less than the threshold limits, the effect on energy may be estimated, or, at the Customer's option, ignored.</li> </ol>	<ol style="list-style-type: none"> <li>1. Customer</li> <li>2. ESCO</li> <li>3. Customer</li> <li>4. ESCO</li> </ol>
Change in Occupancy, Occupancy Hours, Calendar or Set-points Reference Schedule C Section II-F and Section II-G for baseline conditions.	<ol style="list-style-type: none"> <li>1. The Customer will maintain records of occupancy levels, operating hours and operating calendar and apprise the ESCO of the latest figures at least annually.</li> <li>2. If at any point during the guarantee term any of these values change more than 5% of its baseline value, the ESCO may estimate the impact of this change and adjust the baseline accordingly.</li> </ol>	<ol style="list-style-type: none"> <li>1. Customer</li> <li>2. ESCO</li> </ol>
Re-commissioning of Out-of-Service Sites **	<ol style="list-style-type: none"> <li>1. When a building is scheduled to be re-commissioned, sub-metering equipment will be installed to measure: (a) the building's energy use in its out-of-service condition, and (b) the building's energy use after re-commissioning.</li> <li>2. The ESCO will use the metered values to adjust the Base Year for the increased energy consumption.</li> </ol>	<ol style="list-style-type: none"> <li>1. Customer</li> <li>2. ESCO</li> </ol>
Customer Initiated ECM's	<ol style="list-style-type: none"> <li>1. If a customer initiated ECM is estimated to save less than 5% of the Guaranteed Annual Savings Amount, no adjustment will be made to the savings measured under this contract. For purposes of this Cause for Adjustment, multiple Customer-initiated ECMs obtained through a single procurement or contract will be considered as one ECM for purposes of calculating the percentage of the Guaranteed Annual Savings Amount.</li> <li>2. To measure savings from a customer initiated ECM, Customer will develop a separate M&amp;V plan to track the ECM's savings. Pending agreement from the ESCO, the resulting savings from the Customer initiated ECM will be subtracted from this contract's savings.</li> <li>3. In no event will the original M&amp;V plan's current year measured savings be reduced below the immediately preceding year's savings due to a Customer initiated ECM.</li> </ol>	<ol style="list-style-type: none"> <li>1. N/A</li> <li>2. Customer</li> <li>3. N/A</li> </ol>

Other Causes	1. The Parties may mutually agree to other Causes for Adjustment to address changes in certain baseline conditions.	1. ESCO/Customer
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Notwithstanding the foregoing, the Parties agree that the following activities or occurrences shall not be deemed Causes for Adjustment under this Contract:

*[Specify here any activities the Customer seeks to specifically exclude from consideration as a Cause for Adjustment.]*

In the event the ESCO has reason to believe that any action or failure to act by the Customer or a measurable deviation from the baseline may constitute a Cause for Adjustment to the energy performance calculations set forth in this Contract, the ESCO must notify the Customer of a possible Cause for Adjustment within sixty (60) days of becoming aware of such action, failure to act, or measurable deviation. If the ESCO fails to notify the Customer within such sixty (60) day period, the ESCO thereafter waives the right to present any claim for an adjustment to the energy performance calculations on account of such action or failure to act. In all instances, the ESCO must account for all Causes for Adjustment to the energy performance calculations arising during the preceding Performance Guarantee Year within the Prior Year Calculations (as defined in Schedule B), and the ESCO waives the right to present any Causes for Adjustments not specified within the Prior Year Calculations. Customer agrees to accept Causes for Adjustment to account for changes in the Site and its use which may have occurred prior to the execution of this Contract (but after the performance of the Investment Grade Audit) and which come to the attention of ESCO after the execution of this Contract to the same extent as factors occurring subsequent to the execution of this Contract, provided any such Cause for Adjustment is presented within the timeframes set forth in this paragraph.

\* Threshold Limits Per Fuel-type/Category:

Area –	3% of square footage of Site Area as of the Date of Commencement
Electricity –	3% of highest annual peak demand resulting from the Meter Tuning Coefficients set forth in Schedule C Section III.
Natural Gas –	3% of installed Base Year gas-heating capacity
Other Fuel –	3% of installed Base Year maximum capacity
Air Conditioning –	3% of installed Base Year air-conditioning capacity

\*\* Reference Schedule C Section II-B for the meters included in the baseline.

## F. Calendar and Schedules

Except as otherwise authorized by this Section II.F, the Customer agrees to operate the conditioned spaces in the Site within the date/times and occupancy modes set forth in the following Calendars and Schedules.

### Calendar

Date(s)	Event	Date(s)	Event


### Schedules

Facility Type	Schedule Type	Daily Schedule
	Weekday	
	Weekday	
	Weekend	
	Holiday	

<b>Start Times</b>	1 hour prior to scheduled event for area in question
<b>Stop Times</b>	After scheduled event for area in question
<b>Special Requirements</b>	As demanded for given area in question, adjustment required, unless demanded in Base Year.

### Occupancy

Time Period	Occupancy Schedule
Weekdays	
Weekends	
Holidays	

These occupancy schedules do not apply to the following areas:

*[e.g. Datacom centers, Telcom Centers, and spaces leased to tenants where the parties acknowledge the schedules will not apply].*

In these areas equipment may be allowed to run continuously.

Moreover, these occupancy schedules will not apply in any instance where the ESCOs or its representatives direct or approve the running of equipment outside of the occupancy schedules in order to improve the efficiency of the ECMs and related equipment.

### **G. Standards of Service and Comfort**

The Customer agrees to operate the conditioned spaces in the Site within the temperature ranges scheduled in the Temperature Control Table below. Operating conditions outside the range specified in this table shall constitute a Cause for Adjustment under this Contract. However, the ESCO acknowledges that adjustments may be made to the temperature ranges within spaces of less than [ ] square feet to accommodate tenant comfort and use of the space without any adjustments to the baseline, provided spaces with adjustments outside of the temperature ranges do not exceed [ ] square feet in the aggregate throughout the Site.

In the event that an adjustment to the baseline is sought, the ESCO shall submit the proposed baseline adjustments to the Customer and describe the reasons for the adjustment as part of the Prior Year Calculations described in Schedule B.

**Temperature Control Table**

	Heating Set-point Range	Cooling Set-point Range
Occupied	68°F - 71°F	72°F - 75°F
Unoccupied	50°F	Off



### **SECTION III**

#### **METER TUNING COEFFICIENTS - GUARANTEE METERS**

*[Specify the meter tuning coefficients for all of the guarantee meters listed in Schedule C, Section II.B.]*

## **SECTION IV**

### **EXAMPLES OF ENERGY SAVINGS CALCULATIONS**

*[Insert examples demonstrating how the calculations will be performed using prior year data.]*

## **SCHEDULE D: PERFORMANCE TRACKING SERVICES**

## SCHEDULE E: PAYMENT SCHEDULE

### **SECTION I – INSTALLATION PERIOD PROGRESS PAYMENTS**

☐ If the preceding box is checked, within fifteen (15) working days after the Date of Commencement, the ESCO must submit to the Customer a "***Schedule of Values***" that lists in detail the estimated value of each construction activity included in the Contract Sum (including insurance credits and other credit items required to be listed) for the Project. The Schedule of Values must be prepared in form and substance acceptable to or as specifically prescribed by the Customer. Construction progress payments shall be made to the ESCO monthly based on the percentage completion of items delineated on the Schedule of Values during the prior month.

☐ If the preceding box is checked, a Schedule of Values is attached to Schedule A. Construction progress payments shall be made to the ESCO monthly based on the percentage completion of items delineated on the Schedule of Values during the prior month.

☐ If the preceding box is checked, the Parties have elected to share Installation Period Savings in accordance with Section 2.2 of the Contract. For purposes of Section 2.2, the following terms shall be defined as follows.

"***Cost of the Work***" means costs necessarily incurred by the ESCO in good faith and in the performance of the work, and includes only the items set forth below:

[Delineate items to be included in the definition of Cost of the Work.]

"***Contractor's Fee***", except as limited by the Contract Sum, shall be equal to \_\_\_\_\_ percent (\_\_\_%) of the Cost of the Work.

☐ If the preceding box is checked, the Customer intends to finance payment of the Work with funds other than its own, and have payments due the ESCO as provided in the Contract Documents be made through an escrow administered by an escrow agent reasonably acceptable to the Customer and the parties to the Financing Contract. If the Customer elects to have payments made through an escrow, the Customer and the ESCO agree to execute the customary form of construction escrow disbursement agreement then in use by the escrow agent, with such revisions (i) as shall be required to comply with the terms of the Contract Documents, and (ii) as may be reasonably required by the Customer or the parties to the Financing Contract. In connection therewith, the ESCO hereby agrees to perform those matters required of the ESCO by the escrow agent so that the escrow agent may properly administer said escrow, which matters may include, but are not limited to, providing information as to the ESCO's financial condition and executing various indemnification agreements. The cost of such escrow shall be borne by the Customer. The ESCO will submit payment request forms to the Customer, and the Customer shall promptly forward the payment request forms to the escrow agent requesting payment to the ESCO in an amount equal to the value of Work performed since the last interim payment as shown on the Schedule of Values.

### **SECTION II – PERFORMANCE TRACKING SERVICES PAYMENTS**

The ESCO shall be paid the following amounts for Performance Tracking Services. Payments shall be made in accordance with Section 10.1.2 of the Contract. "Performance Guarantee Year 1" in the following table refers to the first 12-month Performance Guarantee Year, as defined in Schedule B. No payment shall be required for any Opening Stub Year, as defined in Schedule B.

<b>Performance Guarantee Year</b>	<b>Payment for Performance Tracking Services</b>
1	
2	
3	
4	
5	

6	
7	
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10	
11	
12	
13	
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19	
20	

## **SCHEDULE F: PROJECT SPECIFIC CUSTOMER RESPONSIBILITIES**

1. The Customer agrees to undertake the duties and responsibilities set forth in this Schedule, either using the Customer's own forces or through one or more contractors.
2. The Customer agrees to maintain the Energy Conservation Measures in accordance with the Required Maintenance checklist attached as Schedule G, with allowance for normal wear and tear.
3. Customer must maintain the Site in accordance with the Required Maintenance checklist attached as Schedule G.
4. Equipment and systems must be maintained in proper working condition in accordance with Schedule G in all cases where the performance of said equipment affects or could affect the guarantee. Should the Customer refuse to perform the required maintenance as per Schedule G, such failure shall constitute a Cause for Adjustment.
5. If the ESCO or the Customer find that an ECM requires repair or replacement, the other Party must be notified and the ESCO will repair or replace the ECM if required to do so pursuant to its obligation to correct the Work or its warranty obligations under this Contract. If the Manufacturers' Warranties apply to the ECM requiring repair or replacement, the Customer shall cause the repair or replacement of the ECM in accordance with the Manufacturers' Warranties. If the ESCO is not required to repair or replace the ECM and the Manufacturers' Warranties do not apply, the ESCO and the Customer shall agree to a schedule for the repair or replacement of the ECM, at the Customer's expense, that establishes reasonable timeframes for the engineering, procurement, and construction and installation associated with such work. The Parties will use good faith efforts to agree to adjustments to the energy performance calculations that accounts for the energy savings attributable to the period of time needed to repair or replace the ECM.
6. Any adjustment to the energy performance calculations in accordance with the preceding paragraphs is subject to the terms and provisions of Section II-E to Schedule C, which require the ESCO to notify the Customer within sixty (60) days of the ESCO becoming aware of a possible Cause for Adjustment, and to specify all Causes for Adjustment in the annual guaranteed savings reconciliation process.

### **GENERAL RESPONSIBILITIES**

The Customer agrees to: a) provide, or cause its suppliers to provide, periodic utility invoices to the ESCO in accordance with Schedule C; b) execute all the Customer responsibilities as defined in Article 3 of the Contract; c) provide to the ESCO reasonable access to the Site and information necessary for the ESCO to perform its responsibilities. Access will include, but is not limited to, the following items:

- All mechanical equipment rooms in the Site
- All temperature control and energy management systems that control part or all of any of the Site
- Personnel with responsibility for operating and/or managing the Site
- Monthly utility invoices and billing history for all of the meters listed in Schedule C Section II-B.
- Construction documents, equipment inventories, and other documents that may be helpful in evaluating a cause for adjustment as listed in Schedule C Section II-E.
- Any data from meters or sub-meters relevant to the Performance Tracking Services.

## **SCHEDULE G: REQUIRED MAINTENANCE**

*[This checklist is a tool by which the ESCO may record and track compliance with operations and maintenance procedures performed by facility staff. It typically specifies a list of tasks and the corresponding schedule for the performance of the prescribed procedures. Facility personnel will complete the checklist and forward it to the ESCO, usually on a predetermined basis. (This checklist is a useful method for both the ESCO and Customer to verify that the required maintenance activities are being performed at the scheduled intervals and should be comprehensive).]*





The ESCO shall purchase, at its sole cost and expense, from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located such insurance as will protect ESCO from claims set forth below which may arise out of or result from ESCO's operations under the Contract and for which the ESCO may be legally liable, whether such operations be by the ESCO or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

- (1) claims under workers' compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;
  - (2) claims for damages because of bodily injury, occupational sickness or disease, or death of the ESCO's employees;
  - (3) claims for damages because of bodily injury, sickness or disease, or death of any person other than the ESCO's employees;
  - (4) claims for damages insured by usual personal injury liability coverage;
  - (5) claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;
  - (6) claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;
  - (7) claims for bodily injury or property damage arising out of completed operations;
- and
- (8) claims involving contractual liability insurance applicable to the ESCO's obligations under Section 13.

The insurance required by this Schedule H shall be written for not less than the limits of liability specified below or required by law, whichever is greater. Coverage, whether written on an occurrence or claims-made basis, shall be maintained without interruption from the date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment.

Certificates of insurance acceptable to the Customer shall be filed with the Customer prior to commencement of the Work. These certificates and the insurance policies required herein shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Customer. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final payment request. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the ESCO with reasonable promptness in accordance with the ESCO's information and belief. The words "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" shall be deleted from the certificate form's cancellation provision. Failure of Customer to demand such certificate or other evidence of full compliance with these insurance requirements or failure of Customer to identify a deficiency from evidence that is provided shall not be construed as a waiver of ESCO's obligation to maintain such insurance. Customer shall have the right, but not the obligation, of prohibiting ESCO or any Subcontractor from entering the Site until such certificates or other evidence that insurance has been placed in complete compliance with these requirements is received and approved by Customer. Failure to maintain the required insurance may result in termination of this contract at Customer's option. If ESCO fails to maintain the insurance as set forth herein, Customer shall have the right, but not the obligation, to purchase said insurance at ESCO's expense. With respect to insurance maintained after final payment, an additional certificate(s) evidencing such coverage shall be promptly provided to Customer whenever requested. Certificates showing compliance with the requirements in the amounts set forth below shall be signed by a

person authorized to bind coverage on the insurers' behalf. Certified copies of policies shall be provided to Customer within 10 business days at Customer's request. All insurance carriers shall be rated at least "A-" for financial strength and "VIII" for financial size by A. M. Best throughout the period of time insurance is required to be in force. Deductibles and self-insured retentions shall not exceed \$25,000 and shall be the sole responsibility of ESCO.

The ESCO shall procure and maintain for the duration of the contract insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work hereunder by the ESCO, its agents, representatives, employees, or Subcontractors. The cost of such insurance shall be solely incurred by the ESCO, unless otherwise specified. By requiring insurance herein, Customer does not represent that coverage and limits will necessarily be adequate to protect ESCO and such coverage and limits shall not be deemed as a limitation on ESCO's liability under the indemnities granted to Customer in this contract.

**The ESCO shall purchase and maintain the following insurance:**

**1. Commercial General Liability Insurance**

- a. Coverage shall be at least as broad as Insurance Services Office (ISO) "occurrence" form CG 00 01 (ed. 10/01) covering commercial general liability or its equivalent.
- b. Limits not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate.
- c. A separate designated construction project general aggregate limit shall apply to each designated construction project under this contract, and that limit shall be equal to the amount of the general aggregate limit. Designated Construction Project(s) general aggregate limit endorsement ISO CG 25 03 (ed. 03/97) or its equivalent shall meet this requirement.
- d. Customer, its subsidiaries, officers, directors, and employees are to be covered as additional insureds using ISO additional insured endorsement CG 20 10 (ed. 11/85). The coverage shall contain no special limitations on the scope of protection afforded to Customer.
- e. ESCO's insurance coverage shall be primary and non-contributory.
- f. The insurer shall agree to waive all rights of subrogation against the Customer, its subsidiaries, officers, directors, and employees for losses arising from Work performed by the ESCO for the Customer.
- g. Coverage shall state that ESCO's insurance shall apply separately to each insured against whom claim is made or suit is brought, except as respect to the limits of the insurers' liability.
- h. ESCO shall include all Subcontractors as insureds under its policies or shall furnish separate certificates for each Subcontractor. All coverage for Subcontractors shall be subject to all of the requirements stated herein. Commercial General Liability coverage shall include independent contractors coverage, and the ESCO shall be responsible for assuring that all Subcontractors are properly insured. Customer and ESCO shall be additional insureds on Subcontractors' Commercial General Liability insurance. When requested by Customer, ESCO shall furnish copies of certificates of insurance evidencing coverage for each Subcontractor.

**2. Workers' Compensation Insurance**

- a. Coverage shall meet statutory requirements of the State in which Work is to be performed.
- b. The insurer shall agree to waive all rights of subrogation against the Customer, its subsidiaries, officers, directors, and employees for losses arising from Work performed by the ESCO for the Customer.

**3. Employers Liability Insurance**

Coverage shall provide limits not less than bodily injury by accident \$1,000,000 each accident; bodily injury by disease \$1,000,000 policy limit; and bodily injury by disease \$1,000,000 each person.

4. Business Auto Coverage

a. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01 (ed. 10/01) covering automobile liability, Code Symbol 1 "Any Auto". Business auto coverage shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing equivalent liability coverage.

b. ESCO shall maintain business auto liability coverage with a limit of not less than \$1,000,000 each accident.

c. ESCO waives all rights against Customer and its subsidiaries, officers, directors, and employees for recovery of damages arising out of the use, operation or ownership of vehicles. The insurer shall agree to waive all rights of subrogation against the Customer, its subsidiaries, officers, directors, and employees for losses covered by Business Auto Coverage.

5. Umbrella / Excess Liability Insurance

a. ESCO shall maintain Umbrella / Excess Liability with a limit of not less than \$4,000,000 each occurrence, \$4,000,000 general aggregate.

b. ESCO may select limits in any combination of primary and excess limits to meet the total limits required.

c. ESCO waives all rights against Customer and its subsidiaries, officers, directors, and employees for recovery of damages. The insurer shall agree to waive all rights of subrogation against the Customer, its subsidiaries, officers, directors, and employees for losses covered by Umbrella / Excess Liability Insurance.

4. Builder's Risk Insurance

a. Before any materials are purchased under this contract, ESCO shall, unless Customer has specifically waived such in writing because such risks are covered by Customer's existing property owner's insurance, obtain a Builder's Risk Insurance policy that shall insure Customer and ESCO as their respective rights may appear under the contract. The policy shall provide coverage at least as broad as Insurance Services Office (ISO) Special Form with a limit equal to 100% of the replacement cost of the Project on a non-reporting basis. Coverage shall exclude earthquake, soft costs, and materials furnished outside the scope of this contract. Coverage shall include coverage for flood, storage and transport of materials, equipment, supplies of any kind whatsoever to be used on or incidental to the project.

5. Professional Liability (Errors & Omissions) Insurance

a. ESCO shall require that ESCO's architect and/or engineer shall indemnify and hold harmless Customer and each officer, director and employee against all claims against any of them, for personal injury or bodily injury, wrongful death or property damage arising out of negligent performance of professional services or caused by an error, omission, or negligent act of the ESCO's engineer and/or architect or anyone employed by the ESCO's engineer and/or architect.

b. ESCO shall require that ESCO's architect and/or engineer maintain Professional Liability Insurance with a limit of not less than \$2,000,000 each claim, \$2,000,000 general aggregate.

c. All subconsultants to the ESCO's engineer and/or architect providing professional services under this contract shall also provide evidence of Professional Liability Insurance at limits not less than that

required herein of ESCO's engineer and/or architect.

6. ESCO Pollution Legal Liability Insurance

a. ESCO shall, unless Customer has specifically waived such in writing because such risks are covered by Customer's existing owner's insurance, maintain in force for the full period of this contract insurance covering losses caused by pollution conditions that arise from the operations of the ESCO described under the scope of services of this contract. Such insurance shall apply to bodily injury; property damage, including loss of use of damaged property or of property that has not been physically injured; cleanup costs; and defense, including costs and expenses incurred in the investigation, defense, or settlement of claims. The policy of insurance affording these required coverages shall be written in an amount of at least \$5,000,000 per claim, with an annual aggregate of at least \$5,000,000.

c. If coverage is written on a claims-made basis, the ESCO warrants that any retroactive date applicable to coverage under the policy precedes the effective date of this contract; and that continuous coverage will be maintained or an extended discovery period will be exercised for a period of ten (10) years beginning from the time that work under the contract is completed.

d. If the scope of services as defined in this contract includes the disposal of any hazardous or nonhazardous materials from the Site, the ESCO must furnish to the Customer evidence of pollution legal liability insurance maintained by the disposal site operator for losses arising from the insured facility accepting waste under this contract. Coverage certified to the Customer must be maintained in minimum amounts of \$5,000,000 per loss, with an annual aggregate of at least \$5,000,000.

e. The policy shall be endorsed to include the Customer, its subsidiaries, officers, directors and employees as additional insureds.

**SCHEDULE I: FINANCING AGREEMENT AND  
AMORTIZATION SCHEDULE**

## **SCHEDULE J: CASH FLOW PROJECTION**