**ENERGY PERFORMANCE CONTRACT**

*This Energy Performance Contract (EPC) is for design, construction, guarantee, and follow-up measurement and verification of energy- and water-saving projects. An Investment Grade Audit (IGA) must have previously been completed that identified the costs and savings of each project. The IGA provides the basis to develop and negotiate this EPC.*

This is a model document only and does not attempt to identify or address all circumstances or conditions you may encounter or desire. Consult with your legal counsel and procurement staff to adapt it to meet your needs.

When completing this contract, delete comments in blue throughout this document.

**ENERGY PERFORMANCE CONTRACT**

**Table of Contents**

[Article 1 Definitions; Investment Grade Audit Report; Schedules and Exhibits 7](#_Toc460487834)

[Section 1.1 Definitions 7](#_Toc460487835)

[Section 1.2 Investment Grade Audit Report 8](#_Toc460487836)

[Section 1.3 Schedules and Exhibits 8](#_Toc460487837)

[Section 1.4 Other Documents 10](#_Toc460487838)

[PAYMENTS AND SCHEDULES 10](#_Toc460487839)

[Article 2 Purchase and Sale; Effective Date; Term of Contract; Interim Period 10](#_Toc460487840)

[Section 2.1 Purchase and Sale 10](#_Toc460487841)

[Section 2.2 Effective Date 11](#_Toc460487842)

[Section 2.3 Term of Contract; Interim Period 12](#_Toc460487843)

[Article 3 Savings Guarantee; Annual Reconciliation; Payments to ESP 12](#_Toc460487844)

[Section 3.1 Energy and Cost Savings Guarantee 12](#_Toc460487845)

[Section 3.2 Annual Review and Reimbursement/Reconciliation 13](#_Toc460487846)

[Section 3.3 ESP Compensation and Fees 14](#_Toc460487847)

[Section 3.4 Billing Information Procedure 14](#_Toc460487848)

[Section 3.5 Payment 14](#_Toc460487849)

[Section 3.6 Effective Date of Payment Obligation 15](#_Toc460487850)

[Section 3.7 Open Book Pricing 15](#_Toc460487851)

[Article 4 Fiscal Funding 16](#_Toc460487852)

[Section 4.1 Non-appropriation of Funds 16](#_Toc460487853)

[Section 4.2 Non-substitution 16](#_Toc460487854)

[AUDIT AND CONSTRUCTION PHASE 16](#_Toc460487855)

[Article 5 Energy Usage Records and Data 16](#_Toc460487856)

[Article 6 Location and Access 17](#_Toc460487857)

[Article 7 Permits and Approvals; Coordination 17](#_Toc460487858)

[Section 7.1 Permits and Approvals 17](#_Toc460487859)

[Section 7.2 Coordination During Installation 18](#_Toc460487860)

[Article 8 Construction Schedule and Equipment Installation; Approval 18](#_Toc460487861)

[Section 8.1 Construction Schedule; Equipment Installation 18](#_Toc460487862)

[Section 8.2 Systems Startup and Commissioning 18](#_Toc460487863)

[Article 9 Equipment Warranties 19](#_Toc460487864)

[Article 10 Standards of Comfort 20](#_Toc460487865)

[Article 11 Environmental Requirements 20](#_Toc460487866)

[Section 11.1 Excluded Material and Activities 20](#_Toc460487867)

[Section 11.2 Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps 21](#_Toc460487868)

[Article 12 Training by ESP 22](#_Toc460487869)

[POST-CONSTRUCTION PHASE 22](#_Toc460487870)

[Article 13 Equipment Service 22](#_Toc460487871)

[Section 13.1 Actions by ESP 22](#_Toc460487872)

[Section 13.2 Malfunctions and Emergencies 22](#_Toc460487873)

[Section 13.3 Actions by Entity 23](#_Toc460487874)

[Article 14 Modification, Upgrade or Alteration of Equipment 24](#_Toc460487875)

[Section 14.1 Modification of Equipment 24](#_Toc460487876)

[Section 14.2 Upgrade or Alteration of Equipment 24](#_Toc460487877)

[Article 15 Material Changes 25](#_Toc460487878)

[Section 15.1 Material Change Defined 25](#_Toc460487879)

[Section 15.2 Reported Material Changes; Notice by Entity 25](#_Toc460487880)

[Section 15.3 Other Adjustments 26](#_Toc460487881)

[Article 16 Performance by ESP 26](#_Toc460487882)

[Section 16.1 Corrective Action; Accuracy of the Services 26](#_Toc460487883)

[Section 16.2 Annual Reporting Requirements 27](#_Toc460487884)

[ADMINISTRATION 27](#_Toc460487885)

[Article 17 Ownership of Certain Proprietary Rights; Existing Equipment 27](#_Toc460487886)

[Section 17.1 Ownership of Certain Proprietary Property Rights 27](#_Toc460487887)

[Section 17.2 Ownership of Existing Equipment 28](#_Toc460487888)

[Article 18 Insurance; Indemnification 28](#_Toc460487889)

[Section 18.1 Insurance 28](#_Toc460487890)

[Section 18.2 Damages to Equipment or Property 28](#_Toc460487891)

[Section 18.3 Indemnification 29](#_Toc460487892)

[Section 18.4 Liabilities 29](#_Toc460487893)

[Article 19 Conditions Beyond Control of the Parties 29](#_Toc460487894)

[Article 20 Events of Default 29](#_Toc460487895)

[Section 20.1 Events of Default by Entity 29](#_Toc460487896)

[Section 20.2 Events of Default by ESP 29](#_Toc460487897)

[Article 21 Remedies upon Default 30](#_Toc460487898)

[Section 21.1 Remedies upon Default by Entity 30](#_Toc460487899)

[Section 21.2 Remedies upon Default by ESP 30](#_Toc460487900)

[Article 22 Assignment 31](#_Toc460487901)

[Section 22.1 Assignment by ESP 31](#_Toc460487902)

[Section 22.2 Assignment by Entity 31](#_Toc460487903)

[Article 23 Representations and Warranties 31](#_Toc460487904)

[Article 24 Additional Representations of the Parties 32](#_Toc460487905)

[Article 25 Miscellaneous Documentation Provisions 33](#_Toc460487906)

[Section 25.1 Performance Bonds, Labor and Material Payment Bonds 33](#_Toc460487907)

[Section 25.2 Further Documents 33](#_Toc460487908)

[Section 25.3 Entity’s Responsibilities 33](#_Toc460487909)

[Section 25.4 Waiver of Liens 34](#_Toc460487910)

[Article 26 Conflicts of Interest 34](#_Toc460487911)

[Article 27 Complete Contract 34](#_Toc460487912)

[Article 28 Applicable Law 35](#_Toc460487913)

[Article 29 Interpretation of Contract 35](#_Toc460487914)

[Article 30 Notice 35](#_Toc460487915)

**EPC ATTACHMENT A: SCHEDULES**

**SCHEDULES**

**SAVINGS GUARANTEE**

**Schedule A Baseline Consumption and Guaranteed Savings**

1. **Savings Guarantee**
2. **Baseline Consumption**
3. **Methodology to Adjust Baseline**

**Schedule B Measurement and Verification Plan and Reporting Requirements**

1. **Risk and Responsibility in M&V**
2. **Measurement and Verification Plan**
3. **Post-installation Report Outline**
4. **Annual M&V Report Outline**

**PAYMENTS SCHEDULE**

**Schedule C Project Financials**

1. **Final Project Cost & Project Cash Flow Analysis**
2. **Financing Agreement and Payment Schedule**
3. **Compensation to ESP for Annual Services**
4. **Rebates, Incentives and Grants**
5. **Contingency Fund**

**DESIGN AND CONSTRUCTION PHASE**

**Schedule D Scope of Work**

1. **Description of Project Site(s)**
2. **Pre-existing Equipment Inventory**
3. **Equipment to be Installed by ESP**
4. **Construction and Installation Schedule**

**Schedule E Standards of Comfort**

**PROJECT CLOSEOUT AND POST-CONSTRUCTION**

**Schedule F Systems Start-Up and Commissioning**

1. **Commissioning Plan**
2. **Operating Parameters of Installed Equipment**
3. **ESP’s Training Responsibilities**
4. **Retro-Commissioning**

**Schedule G Maintenance Responsibilities**

1. **ESP’s Maintenance Responsibilities**
2. **Entity’s Maintenance Responsibilities**

**Schedule H Facility Maintenance Checklist**

**ADMINISTRATION**

**Schedule I Alternative Dispute Resolution Procedures**

**OPTIONAL SCHEDULES**

**Pre-Existing Service Contracts**

**Energy Savings Projections**

**Facility Changes Checklist**

**Current and Known Capital Projects**

**EPC ATTACHMENT B: COST AND PRICING TOOL**

**EPC ATTACHMENT C: EXHIBITS**

**Exhibit A Performance Bond**

**Exhibit B Labor and Material Payment Bond *if required***

**Exhibit C Certificate of Acceptance - Investment Grade Audit Report**

**Exhibit D Certificate of Acceptance – Implementation of Installed Equipment**

**Exhibit E Equipment Warranties**

**Optional Exhibits**

**Manifest of Ownership**

**Minority and Woman-Owned Business Certification**

**Certification Finance Term no Longer than Average Useful Life**

**Notice of Substantial Completion**

**Notice to Proceed with Construction Phase**

**Record of Reviews by Entity**

**Montana Prevailing Wage Schedule**

**ENERGY PERFORMANCE CONTRACT**

This Energy Performance Contract (the "Contract") is made and entered into by and between \_\_\_\_\_\_\_\_\_\_\_\_("ESP"), having its principal offices at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, and \_\_\_\_\_\_\_\_\_\_\_\_ ("Entity") having principal offices at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, for the purpose of installing certain energy and water cost saving equipment, described in **Schedule D Part 3 Equipment to be Installed by ESP**, and providing other services designed to save utility and operation costs for Entity's property and buildings, known as \_[*building or campus name*]\_, located at \_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the "Project Site(s)").

**RECITALS**

WHEREAS it is the policy of the State of Montana to promote efficient use of energy and water resources in public buildings and energy conservation in vehicles by authorizing governmental entities to enter into energy performance contracts; and

WHEREAS energy performance contracts are a means by which governmental entities can economically and expeditiously achieve energy and water conservation; and

WHEREAS, Entity owns and operates the Project Site(s), and is in need of energy and water cost saving equipment and services designed to save energy and associated energy costs at said Project Sites; and

WHEREAS,Entity has been authorized to enter into a third party financing agreement for all professional services, equipment and construction for the purchase and installation of Guaranteed Savings measures, collectively referred to as the “Work” (as herein after defined); and

WHEREAS, ESP has developed or become knowledgeable about certain procedures for reducing energy and water costs through services provided and equipment installed and maintained at project sites similar in scope and scale of Entity; and

WHEREAS**,** ESP was selected after a determination that its proposal was the most advantageous to Entity pursuant to a Request for Proposal and contract for the Investment Grade Audit (as hereinafter defined); and

WHEREAS, ESP has made an assessment of the utility consumption characteristics of the Project Site(s) and existing Equipment described in **Schedule D Part 1 Description of Project Site(s)**, which was delivered to Entity as an Investment Grade Audit Reportwhich Entity has approved; and

WHEREAS, Entity desires to retain ESP to purchase, install and service certain Guaranteed Savings equipment and to provide other services and strategies described in the attached Schedules, for the purpose of achieving energy and water cost reductions within Project Site(s), as more fully described herein; and

WHEREAS, Entity is authorized under the laws of the State of Montana to enter into this Contract for the purposes set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Entity and ESP hereto covenant and agree that the following Schedules, Exhibits and Appendices are attached hereto (or will be, as provided in this Contract) and are made a part of this Contract by reference.

# Definitions; Investment Grade Audit Report; Schedules and Exhibits

## Definitions

**Certificate of Acceptance:** The certificates for Entity acceptance of ESP work as provided substantially in the form provided in **Exhibit C** and **Exhibit D**.

**Contract:** This Energy Performance Contract (EPC) and all Schedules and Exhibits attached hereto.

**Contract Sum:** The sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services and M&V services (as applicable) related to the project.

**Effective Date:** The date described in **Section 2.2 Effective Date**, generallythe date after which all equipment has been installed and accepted by Entity as signified by the certificate of acceptance provided in **Exhibit D**.

**Energy and Cost Savings Guarantee:** The guarantee that is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in **Schedule C Part 3 Compensation to ESP for Annual Services** and in accordance with the Savings Calculation Formula as set forth in **Schedule B Measurement and Verification Plan and Reporting Requirements**.

**Equipment:** The goods enumerated on **Schedule D Part 3 Equipment to be Installed by ESP** that is now or hereafter from time to time become attached hereto and incorporated herein by reference, together and with any and all additions, modifications, attachments, replacements and parts thereof.

**Event of Default:** Those events described in **Article 20 Events of Default**.

**Guaranteed Savings:** The savings as provided in **Schedule A Baseline Consumption and Guaranteed Savings**.

**Interim Period:** The period from contract execution until the Effective Date.

**Investment Grade Audit:** A study of energy or water usage of a public building by a qualified energy service provider utilizing a professional engineer licensed in the state of Montana. It includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements, and the operation and maintenance cost savings and utility cost savings projected to result from the recommended improvements.

**Measurement and Verification (M&V):** The methodology, measurements, inspections, and mathematical calculations to determine utility consumption before and after an EPC is implemented. M&V demonstrates that the guaranteed savings are met as detailed in **Schedule B Measurement and Verification Plan and Reporting Requirements**.

**Project Site(s):** The facilities of Entity in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Project Site(s)

**Work:** Collectively, the equipment, professional services and construction related to the project.

## Investment Grade Audit Report

*Section 1.2: This section records the approval and acceptance by Entity of the Investment Grade Audit Report which must be completed prior to the execution of this contract. A Certificate of Acceptance of the audit should be signed by both parties and attached to the contract (Exhibit C). If the list of measures is not completely finalized prior to the signing of this contract, then language to that effect should be included.*

ESP has prepared the complete Investment Grade Audit Report of the Project Site(s)which has been approved and accepted by Entity as set forth in **Exhibit C** **Certificate of Acceptance—Investment Grade Audit Report**. The Investment Grade Audit Report includes all cost-saving measures agreed upon by the parties.

## Schedules and Exhibits

*Section 1.3: The contract schedules detail the substantive technical parameters of the projects negotiated by the parties and accepted and approved by Entity. These schedules are also referenced throughout the various sections of the Contract. Their titles may be included here for ease of reference or located at the end of the contract. If any schedules need to be completed after execution of the contract, language to the effect they are forthcoming should be included. (Please note that descriptions for each contract schedule are provided in a separate document)*

ESP has prepared and Entity has approved and accepted the following Schedules, Tool, and Exhibits, copies of which are attached hereto (or will be as provided for in the Contract), set forth in their entirety as Attachment A, Attachment B, and Attachment C respectively and made a part of this Contract by reference.

**ATTACHMENT A: SCHEDULES**

**SAVINGS GUARANTEE**

**Schedule A Baseline Consumption and Guaranteed Savings**

1. **Savings Guarantee**
2. **Baseline Consumption**
3. **Methodology to Adjust Baseline**

**Schedule B Measurement and Verification Plan and Reporting Requirements**

1. **Risk and Responsibility in M&V**
2. **Measurement and Verification Plan**
3. **Post-installation Report Outline**
4. **Annual M&V Report Outline**

**PAYMENTS SCHEDULE**

**Schedule C Project Financials**

1. **Final Project Cost & Project Cash Flow Analysis**
2. **Financing Agreement and Payment Schedule**
3. **Compensation to ESP for Annual Services**
4. **Rebates, Incentives and Grants**
5. **Contingency Fund**

**DESIGN AND CONSTRUCTION PHASE**

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1. **Description of Project Site(s)**
2. **Pre-existing Equipment Inventory**
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2. **Entity’s Maintenance Responsibilities**

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**ATTACHMENT C: EXHIBITS**

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**Exhibit B Labor and Material Payment Bond *if required***

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**Exhibit D Certificate of Acceptance – Implementation of Installed Equipment**

**Exhibit E Equipment Warranties**

**Optional Exhibits**

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**Minority and Woman-Owned Business Certification**

**Certification Finance Term no Longer than Average Useful Life**

**Notice of Substantial Completion**

**Notice to Proceed with Construction Phase**

**Record of Reviews by Entity**

**Montana Prevailing Wage Schedule**

## Other Documents

*Section 1.4: This section makes the original Request for Proposal (RFP) and the selected ESP's proposal part of the contract. It also acknowledges the completion of ESP's Investment Grade Audit Report and its approval and acceptance by Entity. It is recommended that the original Investment Grade Audit Report in its entirety be attached and/or referenced as an Exhibit to this contract. It is important to note the last sentence of this provision makes it clear that if there is any future discrepancy between the Investment Grade Audit Report and any technical schedule(s), the terms of this contract shall apply.*

This Contract incorporates herein and makes a part hereof the entire RFP and ESP Proposal for this Project. The Investment Grade Audit Contract and Investment Grade Audit Report are also incorporated into this Contract by reference. Acceptance by Entity of the Investment Grade Audit Report is reflected in **Exhibit C**. Notwithstanding, the provisions of this Contract and the attached Schedules shall govern in the event of any inconsistencies between the Investment Grade Audit Report and the provisions of this Contract.

### PAYMENTS AND SCHEDULES

# Purchase and Sale; Effective Date; Term of Contract; Interim Period

## Purchase and Sale

*Section 2.1. When using a third-party financing or lease-purchase structure ESP will receive 100% of the Contract Sum, excluding M&V costs and any remaining contingency funds, from Entity once the Certificate of Acceptance (Exhibit D) is signed. The payments to ESP during the construction period (Interim Period) can be drawn down by ESP from the proceeds of the financing or lease through an escrow account set up by the financing institution. Payments will be made based upon the percentage of work completed and approved by Entity. Entity should require a retainage be withheld from ESP until the Certificate of Acceptance is executed at which time final payment can be made. Select applicable paragraph(s). The first paragraph is for lease-purchase agreements and shall be deleted if the project includes no lease-purchase components.*

Entity agrees to lease Equipment through a third party financier, name of lender, as provided for in a separate lease document, **Schedule C Part 2 Financing Agreement and Payment Schedule.** ESP agrees to provide the Equipment, together with installation, maintenance and other services as provided herein, as in **Schedule D Part 3** **Equipment to be Installed by ESP** based upon the terms and conditions set forth in **Schedule C Part 2 Financing Agreement and Payment Schedule**.

The agreed to Contract Sum for the Work is a Guaranteed Maximum Price of $**\_\_\_\_\_\_** as set forth in **Schedule C Part 1 Final Project Cost & Project Cash Flow Analysis**. The Guaranteed Maximum Price includes a contingency of \_\_\_% as set forth in **Schedule C Part 5 Contingency Fund**. Financing and payment terms are described in **Schedule C Part 2 Financing Agreement and Payment Schedule**.

ESP will provide the Work and all related services identified in **Schedule D Part 3 Equipment to be Installed by ESP** and the services detailed in **Schedule G Part 1 ESP’s Maintenance Responsibilities** and **Schedule C Part 3 Compensation to ESP for Annual Services**. ESP shall supervise and direct the Work and shall be responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Contract. ESP shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

Entity shall pay ESP the Contract Sum in accordance with **Schedule C Part 2 Financing Agreement and Payment Schedule**. Payments will be made on a progress basis in accordance with **Schedule C Part 2 Financing Agreement and Payment Schedule,** for Work completed and authorized by Entity during the Interim Period. Retainage of \_\_\_% will be withheld from each payment until the construction installation is completed as set forth in **Section 2.2 Effective Date**.

## Effective Date

*Section 2.2: This section defines the Effective Date which is the actual beginning date for the savings guarantee period. It is standard for this date to be the first month AFTER ESP has completed construction and delivered a notice that all equipment is installed and operating. In addition, Entity will have accepted the installation by signing a Certificate of Acceptance which should be attached to the contract. It also clearly states that no payment for any of ESP’s on-going services (e.g. measurement and verification, project monitoring, maintenance, training, etc.) will be made prior to the Effective Date. It is recommended that the repayment obligation of project financing be arranged to coincide with the Effective Date. The timing of the Effective Date may also need to be arranged to accommodate Entity's fiscal year for the purpose of appropriations and budgeting. This date alignment should not prevent ESP from timely remuneration for training and other services performed prior to Effective Date.*

The Effective Date shall be the first day of the month after the month in which all schedules are in final form and accepted by Entity and ESP shall have delivered a Notice to Entity that it has installed and commenced operating all of the Equipment specified in **Schedule D Part 3 Equipment to be Installed by ESP** and in accordance with the provisions of **Article 8** **Construction Schedule and Equipment Installation; Approval, Schedule D Part 4 Construction and Installation Schedule** and **Schedule F Systems Start-Up and Commissioning**; and Entity has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in **Exhibit D** **Certificate of Acceptance – Implementation of Installed Equipment**.

Notwithstanding anything to the contrary inthis **Article 2 Purchase and Sale; Effective Date; Term of Contract; Interim Period,** the Effective Date shall not occur and Entity shall not be required to accept the work under this Contract unless and until all Equipment installed for the Project Site(s) is completed by ESP in accordance with the terms and conditions of this Contract. Entity shall have 15 days after notification by ESP to inspect and accept the Equipment. Entity reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. ESP shall not be paid in full, including retainage, until after the punch list is completed and ESP has satisfied any and all claims for labor and materials and the Certificate of Acceptance has been signed. The Certificate of Acceptance will not be unreasonably withheld by Entity.

Compensation payments due to ESP for on-going services and maintenance under this Contract as set forth in **Schedule C Part 3 Compensation to ESP for Annual Services** shall begin no earlier than \_\_\_\_\_ from the Effective Date as defined herein.

## Term of Contract; Interim Period

*Section 2.3: Prior to the Effective Date (Section 2.2) the final contract and technical schedules are negotiated and executed by signature. At that point in time ESP typically begins the final design of the project and finalizes the construction schedule with Entity. The minimum contract term is four years or one year longer than the initial monitoring period, whichever is greater. An EPC may not exceed 20 years, the cost-weighted average useful life of the cost-saving measures, or the finance term, whichever is shortest.*

*The "Interim Period" refers to the construction period, during which some amount of energy savings will start to accrue.*

Subject to the following sentence, the term of this Contract shall be \_\_\_\_\_\_\_\_ years measured beginning with the Effective Date. Nonetheless, the Contract shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Effective Date shall be known as the "Interim Period". All energy savings achieved during the interim period shall be fully credited to Entity.

# Savings Guarantee; Annual Reconciliation; Payments to ESP

## Energy and Cost Savings Guarantee

*Section 3.1: This section establishes the term of the Energy and Cost Savings Guarantee to be on an annual basis and structured to cover any and all annual payments (debt service/lease payment and on-going ESP fees) to be made by Entity. It ensures that ESP’s savings guarantee will at least cover annual project lease-purchase and financing costs (principal and interest) and all annual ESP service fees for maintenance.*

ESP has formulated and, subject to the adjustments provided for in **Article 15** **Material Changes,** has guaranteed the annual level of Guaranteed Savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract in accordance with the methods of savings measurement and verification as set forth in **Schedule B** **Measurement and Verification Plan and Reporting Requirements**. The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract as specified in **Schedule A** **Baseline Consumption and Savings Guarantee** and has been structured by ESP to be sufficient to cover any and all annual payments required to be made by Entity as set forth in **Schedule C Part 2 Financing Agreement and Payment Schedule** and **Schedule C Part 3 Compensation to ESP for Annual Services.**

## Annual Review and Reimbursement/Reconciliation

Section 3.2: At the end of each year of the contract and within a specified number of days, there will be a review and reconciliation of the actual achieved savings (subject to any adjustments made for weather, occupancy, operations etc.) with ESP's guaranteed savings. If there is a savings shortfall, ESP is statutorily required and contractually liable to reimburse Entity for the difference between what was actually achieved and the amount guaranteed. If the achieved savings exceed the guarantee, the excess savings will be retained by Entity.

Guaranteed cost savings shall be measured and/or calculated as specified in **Schedule B Measurement and Verification Plan and Reporting Requirements** and **Schedule A Part 2 Baseline Consumption** and **Schedule A Part 3 Methodology to Adjust Baseline**. ESP shall provide a Measurement and Verification Report within ninety (90) days of the end of the year for the previous year for each anniversary of the Effective Date.

In the event the Energy and Cost Savings achieved during such guarantee year are less than the Guaranteed Savings as defined in **Schedule A Baseline Consumption and Guaranteed Savings**, ESP shall pay Entity an amount equal to the deficiency.

ESP shall remit such payments to Entity within \_\_\_ days of written notice by Entity of such monies due. When the total energy savings in any one year during the guarantee period exceed the Energy and Cost Savings Guarantee as set forth in **Schedule A** **Baseline Consumption and Guaranteed Savings**, such excess savings shall be retained by Entity. In no event shall credit for excess savings be used to satisfy shortfalls of guaranteed savings in previous or future years of the Contract

If guaranteed cost savings are not achieved during any year in the initial monitoring period, ESP shall pay all costs for measurement and verification reports until guaranteed cost savings are achieved for all years in a term of consecutive years equal to the initial monitoring period.

## ESP Compensation and Fees

Section 3.3: This section ensures that ESP's savings guarantee will, at a minimum, cover annual project financing costs (principal and interest). In addition, it states that all annual ESP service fees for maintenance will also be paid from savings.

ESP has structured the Guaranteed Savings referred to in 3.1 above to be sufficient to include any and all annual payments required to be made by Entity in connection with financing/purchasing the Equipment to be installed by ESP under this Contract as set forth in **Schedule C Part 2 Financing Agreement and Payment Schedule**. Actual energy and operations savings achieved by ESP through the operation of Equipment and performance of services by ESP shall be sufficient to cover any and all annual fees, including measurement and verification, to be paid by Entity to ESP for the provision of services as set forth and in accordance with the provisions of **Schedule C Part 3** **Compensation to ESP** and **Schedule G Part 1 ESP's Maintenance Responsibilities**.

## Billing Information Procedure

Sections 3.4 & 3.5: These sections which deal with payment can be negotiated and structured to suit the needs of Entity. It is important to provide ESP with monthly utility bills and to do so in a timely manner. The project's billing schedule for on-going ESP services can be set up on a monthly or quarterly basis.

Payments due to ESP under this Section 3 shall be calculated each \_[period]\_\_\_\_\_\_\_ in the following manner:

* + 1. By the \_\_\_\_\_\_\_\_\_\_\_\_\_ day after receipt, Entity shall provide ESP with copies of all energy bills for the Project Site(s) which it shall have received for the preceding month;
    2. Upon receipt of the required information, ESP shall calculate the savings in accordance with the agreed-upon calculation formulae in **Schedule B** **Measurement and Verification Plan and Reporting Requirements**.
    3. Except as noted in D., based upon paragraphs A and B above, ESP shall prepare and send to Entity a \_\_[period]\_\_\_\_\_\_\_ invoice which shall set forth for each \_\_\_\_\_\_\_\_\_\_ the amounts of the energy and operations dollar savings calculated in accordance with **Schedule B** **Measurement and Verification Plan and Reporting Requirements** and for the services as provided for in **Schedule C Part 3 Compensation to ESP for Annual Services**. The invoice will set forth the total \_[period]\_\_\_\_ payment due from Entity.
    4. If ESP is responsible to pay all costs for measurement and verification reports due to a shortfall under Section 3.2, ESP may not invoice Entity and Entity has no financial obligation to pay for measurement and verification services.

## Payment

Entity shall pay ESP within \_\_\_ days of receipt of ESP's invoice.

## Effective Date of Payment Obligation

Section 3.6: This section states that no ESP fees for ongoing maintenance, monitoring or other services shall be paid until all equipment is installed and operating in accordance with the agreed upon Construction Schedule and Entity has approved the completed installation and signed the requisite Certificate of Acceptance – Implementation of Installed Equipment.

Notwithstanding the above provisions in Section 3, Entity shall not be required to begin any payments to ESP for maintenance, monitoring, measurement and verification, or other services under this Contract unless and until all equipment installation is completed by ESP in accordance with the provisions of **Article 8** **Construction and Equipment Installation; Approval** and **Schedule F Systems Start-Up and Commissioning,** and accepted by Entity as evidenced by the signed Certificate of Acceptance as set forth in **Exhibit D** **Certificate of Acceptance – Implementation of Installed Equipment**, and unless and until said equipment is fully and properly functioning.

## Open Book Pricing

Section 3.7: This section establishes that ESP will fully disclose all costs, providing access to records for all labor and material costs, making them available for three years beyond final payment.

Open book pricing will be required, such that ESP will fully disclose all costs of materials and labor purchased and subcontracted by ESP and a list of hourly rates and corresponding position descriptions for labor or services provided by ESP. Estimates for number of hours required for the project and deviations of these budgeted hours shall require prior written approval by Entity or shall not be paid. ESP will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. ESP will afford Entity access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. The pricing methodology and individual cost markups disclosed during preliminary contract negotiations will be expected to be applied, providing the scope and size of the project remain the same as assumed when markups were disclosed.

Entity shall have the right to audit all books and records (in whatever form they may be kept, whether written, electronic or other) relating or pertaining to this contract or agreement (including any and all documents and other materials, in whatever form they may be kept, which support or underlie those books and records), kept by or under the control of ESP, including, but not limited to those kept by ESP, its employees, agents, assigns, successors and subcontractors.

ESP shall maintain such books and records, together with such supporting or underlying documents and materials, for at least 3 years following the completion of the Work. The books and records, together with the supporting or underlying documents and materials shall be made available, upon request, through its employees, agents, representatives, contractors or other designees, during normal business hours at ESP’s office or place of business. In the event that no such location is available, then the books and records, together with the supporting or underlying documents and records, shall be made available for audit during normal business hours at [location] .

# Fiscal Funding

## Non-appropriation of Funds

Section 4.1: This section protects Entity in the event no funds or insufficient funds are appropriated to cover the financial payments due to ESP under the terms of this Contract, in effect terminating the contract with no penalty to Entity. This is a standard provision in public sector performance contracting and is generally accepted by the EPC industry since it is unlikely that funding for utilities (source of funds) would be withheld.

In the event no Entity or other funds or insufficient Entity or other funds are appropriated and budgeted, and funds are otherwise unavailable by any means whatsoever in any fiscal period for which payments are due ESP under this Contract, then Entity will, not less than \_\_\_ days prior to end of such applicable fiscal period, notify ESP in writing of such occurrence. With this event this Contract shall terminate on the last day of the fiscal period for which appropriations were made without penalty or expense to Entity of any kind whatsoever, except as to the portions of payments herein agreed upon for which Entity and/or other funds shall have been appropriated and budgeted or are otherwise available.

## Non-substitution

Section 4.2: In the rare event that funds were not appropriated or Entity is in default, and to protect ESP, this provision prevents Entity from securing funding for the same purposes for a period of one year following the termination of the contract.

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by ESP due to a default by Entity, Entity agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by ESP under the terms of this Contract for a period of three-hundred sixty five (365 ) calendar days following such default by Entity, or termination of this Contract due to non-appropriations.

### AUDIT AND CONSTRUCTION PHASE

# Energy Usage Records and Data

*Article 5: This section ensures that ESP has access to the historical energy consumption, facility operations and occupancy data in order to develop baseline utility consumption. At a minimum, there should be 24 months of data made available, however, 36 months is recommended. Existing facility conditions, operations and equipment needs to be carefully recorded to establish an accurate baseline. This will serve as a record of your buildings as they were configured prior to project installation and will be critical to the establishment and adjustment of baseline, and measurement of savings. As well, any prior technical studies and/or energy audits should also be made available for ESP's review and verification.*

Entity has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract to ESP or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Project Site(s).

# Location and Access

*Article 6: This provision states Entity's responsibility for providing adequate space and protection for the installed equipment and authorizes ESP access to the facility to perform routine and emergency operations.*

ESP acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Entity shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Contract. Entity shall provide access to the Project Site(s) for ESP to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by ESP and acceptable to Entity. ESP shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. ESP's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by Entity. ESP shall immediately notify Entity when emergency action is taken and follow up with written notice with three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Project Site(s), if any.

# Permits and Approvals; Coordination

## Permits and Approvals

*Section 7.1: This standard construction provision requires ESP comply with all code requirements, pay all associated permit fees and provide Entity with copies of each permit and license required to do the work. Entity agrees to assist ESP to the best of its ability to obtain all required permits and approvals.*

Entity shall use its best efforts to assist ESP in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall Entity, however, be responsible for payment of any permit fees. The equipment and the operation of the equipment by ESP shall at all times conform to all federal, state and local code requirements. ESP shall furnish copies of each permit or license which is required to perform the work to Entity before ESP commences the portion of the work requiring such permit or license.

## Coordination During Installation

*Section 7.2: This standard provision directs Entity and ESP to coordinate the equipment installation activities to not interfere with Entity's business activities. If an installation will require interference, ESP must first obtain Entity's written approval to proceed. If a facility generates revenue for Entity (e.g. civic center, theater, arena etc.) and scheduled revenue-producing activities are interrupted due to the fault of ESP, either during project installation or operation, then a provision for the collection of damages may be negotiated.*

Entity and ESP shall coordinate the activities of ESP's equipment installers with those of Entity, its employees, and agents. ESP shall not commit or permit any act which will interfere with the performance of business activities conducted by Entity or its employees without prior written approval of Entity.

# Construction Schedule and Equipment Installation; Approval

## Construction Schedule; Equipment Installation

Section 8.1: It is important that the construction/installation phase of the project be managed in compliance with individual Entity requirements and the appropriate governing statutes. Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases necessary. The construction contract would then be referred to in the body of the contract and attached as an exhibit, appendix or other type of attachment. Another approach would be to consolidate the appropriate construction language for inclusion in the body of the final contract.

Construction and equipment installation shall proceed in accordance with the construction schedule approved by Entity and attached as **Schedule D Part 4 Construction and Installation Schedule**.

## Systems Startup and Commissioning

Section 8.2: This section requires ESP to conduct performance testing of the equipment as specified in its Commissioning Plan located in Schedule F Systems Start-Up and Commissioning, and verify the specified operating parameters to make certain the system is working properly. In most instances this activity occurs prior to Entity's final acceptance of the project as fully installed, however, if any testing is negotiated to occur after project acceptance, language to that effect should be included here. It also requires ESP notify Entity of when the testing will take place and gives Entity (or its designee) the right to be present during all tests. Make sure the commissioning plan includes manufacturer’s startup and performance sheets.

ESP shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in **Schedule F Systems Start-Up and Commissioning** and prior to acceptance of the project by Entity as specified in **Exhibit D Certificate of Acceptance – Implementation of Installed Equipment**. Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. ESP shall provide notice to Entity of the scheduled test(s) and Entity and/or its designees shall have the right to be present at any or all such tests conducted by ESP and/or manufacturers of the Equipment. ESP shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures as specified in **Schedule F Systems Start-Up and Commissioning**. ESP shall be responsible for correcting and/or adjusting all deficiencies in Equipment operation that may be observed during system testing procedures. Prior to Entity acceptance ESP shall also provide Entity with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in **Schedule D Part 3 Equipment to be Installed by ESP**.

# Equipment Warranties

*Article 9: This warranty provision requires all installed equipment be new and protected by appropriate written manufacturers’ warranties for a minimum of one year, covering parts and performance. It also requires warranties provide for the installation of only new parts (not used or reconditioned) during the warranty period. While equipment warranties will be transferred to Entity after completed project installation, this provision makes ESP responsible for pursuing any necessary remedies during the warranty period. If ESP fails to exercise the warranty and damages occur, ESP is responsible for all costs of repair and any lost savings.*

ESP warrants that all equipment sold and installed as part of this Contract is new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the date of the Substantial Completion for the particular cost-saving measure if operated and maintained in accordance with the procedures established per building. Substantial Completion shall be defined as the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that Entity can utilize and take beneficial use of the Work for its intended use or purpose. Substantial Completion does not occur until the Equipment or system has been commissioned, accepted, and the “Substantial Completion” form fully executed.

After the warranty period, ESP shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in **Schedule G Part 1 ESP’s Maintenance Responsibilities**.

ESP further agrees to assign to Entity all available manufacturer’s warranties relating to the Equipment and to deliver such written warranties and which shall be attached and set forth as **Exhibit E Equipment Warranties**; pursue rights and remedies against the manufacturers under the warranties in the event of Equipment malfunction or improper or defective function, and defects in parts, workmanship and performance. ESP shall, during the warranty period, notify Entity whenever defects in Equipment parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESP. During this period, the cost of any risk of damage or damage to the Equipment and its performance, including damage to property and equipment of Entity or the Project Site(s), due to ESP’s failure to exercise its warranty rights shall be borne solely by ESP.

All warranties, to the extent transferable, shall be transferable and extend to Entity. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction. All extended warranties shall be addressed as the property of Entity and appropriately documented and titled.

Notwithstanding the above, nothing in this Section shall be construed to alleviate/relieve ESP from complying with its obligations to perform under all terms and conditions of this Contract and as set forth in all attached Schedules.

# Standards of Comfort

*Article 10: This section references the* ***Schedule E Standards of Comfort*** *which ESP is contractually liable to maintain throughout the term of the contract. These standards are negotiated between ESP and Entity to reflect realistic ranges of heating, cooling and hot water temperatures, lighting levels, chilled water requirements, and other specified comfort and operating parameters to be maintained.*

ESP will maintain and operate the Equipment in a manner which will provide the standards of heating, cooling, ventilation, hot water supply, and lighting quality and levels as described in **Schedule E Standards of Comfort**. During the term of this Contract, ESP and Entity will maintain, according to **Schedule G Maintenance Responsibilities**, and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in **Schedule E Standards of Comfort**.

# Environmental Requirements

## Excluded Material and Activities

*Section 11.1. This section addresses hazardous materials and establishes that ESP may encounter such materials but is not responsible for identification, handling or any work. Entity will be responsible for such handling at its expense. In the event ESP discovers such materials, ESP will stop work and Entity will handle it. Neither ESP’s stoppage of work nor Entity’s discovery are grounds for default. If work can commence, any lost time will be added to the time schedule. ESP is responsible for any hazardous materials related to equipment it brings to the site.*

Entity recognizes that in connection with the installation and/or service or maintenance of Equipment at Entity’s Project Site(s), ESP may encounter, but is not responsible for, any work relating to:

* + 1. asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof,
    2. fungus (any type of form of fungi, including mold or mildew, and mycotoxins, spores, scents or by-products produced or released by fungi),
    3. incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement, or
    4. pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively “Hazardous Materials”), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof.

The materials and activities listed in the foregoing sentence are referred to as “Excluded Materials and Activities”. Entity agrees that if performance of work involves any Excluded Materials and Activities, Entity will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. In the event ESP discovers Hazardous or Excluded Materials, ESP shall immediately cease work, remove all ESP personnel or subcontractors from the site, and notify Entity. Entity shall be responsible to handle such Materials at its expense. ESP shall undertake no further work on the Project Site(s) except as authorized by Entity in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by Entity shall not constitute a default by Entity. In the event of such stoppage of work by ESP, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by ESP as a result will be added by Change Order.

ESP shall be responsible for any hazardous or other materials, including, without limitation, those listed in this sectionthat it may bring to the Project Site(s).

## Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps

*Section 11.2. ESP is required to have an agreement with an approved PCB ballast disposal company that will properly handle transport, recycling, and incineration, providing information for site handling and a Certificate of Destruction. Similarly ESP is required to have an agreement with an approved lamp disposal company. In both cases, Entity will sign manifests of ownership.*

ESP will enter into an agreement with an approved PCB ballast disposal company that will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from Entity’s PCB ballasts will be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction will be provided by the approved facility to Entity. ESP’s responsibility shall be for the proper and legal management of any of Entity’s PCB ballasts removed as a result of the installation of the Equipment and shall be limited only until said PCB ballasts are loaded onto an approved PCB ballast disposal ESP’s vehicle for transportation.

ESP will enter into an agreement with an approved lamp disposal company who will provide approved containers, materials required to label, transportation, recycling or incineration in accordance with EPA requirements, and a copy of the manifest.

Entity agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Project Site(s).

# Training by ESP

*Article 12: In many performance contracts the training of facility personnel is often conducted prior to acceptance by Entity of the completed installation. There are occasions, however, where it may be necessary to conduct training after project acceptance, which can be noted and included in the appropriate schedule. If there are charges for unscheduled training, such charges should be noted in this section.*

ESP shall conduct the training program described in **Schedule F Part 3 ESP's Training Responsibilities**. The training specified in **Schedule F Part 3 ESP’s Training Responsibilities** must be completed prior to acceptance of the Equipment installation. ESP shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to Entity and shall have no effect on prior acceptance of Equipment installation.

### POST-CONSTRUCTION PHASE

# Equipment Service

## Actions by ESP

*Section 13.1: This section refers to the maintenance and service responsibilities of each party as they are specified in* ***Schedule G Maintenance Responsibilities****. It also states that if Entity is at fault for causing additional maintenance or repair to the equipment, then Entity will be charged by ESP for the cost of the required maintenance or repair.*

ESP shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to **Schedule G Part 1** **ESP's Maintenance Responsibilities**. Entity shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in **Schedule C Part 3 Compensation to ESP for Annual Services**, provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of Entity or any employee or other agent of Entity, and ESP can so demonstrate such causal connection, ESP may charge Entity for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

## Malfunctions and Emergencies

*Section 13.2: This section requires Entity to notify ESP within a specified number of hours of actually knowing about any situation that impacts the performance of the equipment. As described here, the impacts cover both pre-existing energy related equipment and the newly installed equipment. The impacts defined here include equipment malfunction or modification, interruption of power supply or any emergency situation which may affect the Energy and Cost Savings Guarantee. If such an impact is known by Entity to have occurred and Entity delays in notifying ESP and doesn't correct the situation, it will treated as a Material Change and the baseline will be adjusted accordingly. If Entity makes an effort to assess the situation and incorrectly determines it doesn't have an impact, then ESP will not fault Entity, although an adjustment to the baseline may still be warranted.*

Entity shall use its best efforts to notify ESP or its designated subcontractors within 24 hours after Entity's actual knowledge and occurrence of:

* + 1. any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings,
    2. any interruption or alteration to the energy supply to the Project Site(s), or
    3. any alteration or modification in any energy-related equipment or its operation.

Where Entity exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings. Entity shall notify ESP within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. ESP shall respond or cause its designee(s) to respond within \_\_\_\_ hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Entity shall be followed within three business days by written notice to ESP from Entity. If Entity unreasonably delays in so notifying ESP of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, ESP may charge Entity for its loss associated with the guaranteed savings under this Contract, due to the delay, for the particular time period, provided that ESP is able to show the direct causal connection between the delay and the loss.

ESP will provide a written record of all service work performed. This record will indicate the reason for the service, description of the problem and the corrective action performed.

## Actions by Entity

*Section 13.3: This section states Entity may not make any changes to the operation and maintenance of the equipment without the prior written approval of ESP unless otherwise indicated in* ***Schedule G Part 2 Entity’s Maintenance Responsibilities*** *or if there is an emergency and ESP can't be reasonably notified. In the case of such emergency, Entity should follow instructions provided by ESP for emergency action.*

Entity shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of ESP except as set forth in **Schedule G Part 2** **Entity's Maintenance Responsibilities**. Notwithstanding the foregoing, Entity may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESP before taking any such actions. In the event of such an emergency, Entity shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by ESP. Entity agrees to maintain the Project Site(s) in good repair and to protect and preserve all portions thereof which may in any way affect the operation or maintenance of the Equipment.

# Modification, Upgrade or Alteration of Equipment

## Modification of Equipment

During the Term of this Contract, Entity will not, without the prior written consent of ESP, affix or install any accessory Equipment or device on any of the Equipment if such addition will change or impair the originally intended functions, value or use of the Equipment without ESP’s prior written approval, which shall not be unreasonably withheld.

## Upgrade or Alteration of Equipment

*Section 14: This section describes the terms and conditions under which ESP may make changes to the equipment, operating procedures or take other energy savings actions. If such changes are implemented during any time during the contract they must be described in a supplemental schedule and be approved by Entity. As well, any equipment replaced is required to be new and have the potential to produce at least as much or more savings. If computer software is updated, the licensing provisions of Section 17.1 still apply.*

ESP shall at all times have the right, subject to Entity's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions at the Project Site(s), provided that:

* + 1. ESP complies with the standards of comfort and services set forth in **Schedule E Standards of Comfort**;
    2. such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable ESP to achieve the guaranteed energy and cost savings at the Project Site(s) and;
    3. any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of ESP.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to Entity for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. ESP shall have the right to update any and all software to be used in connection with the Equipment in accordance with the provisions of **Section 17.1** **Ownership of Certain Proprietary Rights** and **Schedule G Part 1 ESP’s Maintenance Responsibilities**. All replacements of and alterations or additions to the Equipment shall become part of the Equipment described in **Schedule D Part 3 Equipment to be Installed by ESP** and shall be covered by the provisions and terms of **Article 8** **Construction Schedule and Equipment Installation; Approval**.

# Material Changes

*Article 15: This section defines the term "Material Change" which covers any condition other than weather that affects building energy use by more than the negotiated percentage (see above discussion). It is typical for the percent of deviation to be negotiated as a value ranging between 2% and 5% based on aggregate consumption costs. The lower value (2%) may be appropriate for large facilities (over $20,000/month utility bills) and the higher value (5%) may be appropriate for small facilities (less than $5,000/month utility bills).*

## Material Change Defined

A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of Entity, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in **Schedule A Part 2 Baseline Consumption** and **Part 3 Methodology to Adjust Baseline** and **Schedule B** **Measurement and Verification Plan and Reporting Requirements** by at least \_\_% after adjustments for climatic variations. Actions by Entity which may result in a Material Change include but are not limited to the following:

* + 1. manner of use of the Project Site(s) by Entity, or
    2. hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s), or
    3. Permanent changes in the comfort and service parameters set forth in **Schedule E Standards of Comfort**, or
    4. occupancy of the Project Site(s), or
    5. structure of the Project Site(s), or
    6. types and quantities of equipment used at the Project Site(s), or
    7. modification, renovation or construction at the Project Site(s), or
    8. Entity's failure to provide maintenance of and repairs to the Equipment in accordance with **Schedule G Part 2 Entity's Maintenance Responsibilities**, or
    9. any other conditions other than climate affecting energy use at the Project Site(s) including but not limited to the replacement, addition or removal of energy and water consuming devices whether plug in or fixed assets, or
    10. casualty or condemnation of the Project Site(s) or Equipment, or
    11. changes in utility provider or utility rate classification, or
    12. any other conditions other than climate affecting energy or water use at the Project Site(s), or
    13. modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.

## Reported Material Changes; Notice by Entity

*Section 15.2: This section requires Entity to notify ESP in writing if there are any actual or planned changes to the facility which would affect energy consumption by more than the specified percentage in Section 15.1. In the event of an emergency or situation that would prevent advance notification, Entity has a specified number of hours to inform ESP that a Material Change has occurred.*

Entity shall use its best efforts to deliver to ESP a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) at least \_\_ days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to ESP of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by Entity within \_\_\_\_ hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by Entity to have occurred.

## Other Adjustments

*Section 15.3: This section states that if all building conditions and operations stay the same, then energy consumption will not vary more than the negotiated percentage during any month when compared to the baseline use for that month and after adjustments for weather are made. See discussion in 15.1 and 15.2 above. In the event such a variation occurs, ESP will try to determine the cause of the deviation and report its findings to Entity. ESP and Entity will then determine what adjustments will be made to the baseline as described in* ***Schedule A Parts 2 and 3 (Baseline Energy Consumption; Methodology to Adjust Baseline****).*

As agreed in **Section 15.1** Entity will alert ESP of material changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, ESP will work with Entity to investigate, identify and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, ESP and Entity shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Schedule B** **Measurement and Verification Plan and Reporting Requirements** and **Schedule A Part 2 Baseline Energy Consumption** and **Part 3 Methodology to Adjust Baseline**. Any disputes between Entity and ESP concerning any such adjustment shall be resolved in accordance with the provisions of **Schedule I Alternative Dispute Resolution Procedures**.

# Performance by ESP

## Corrective Action; Accuracy of the Services

Section 16.1: This section directs ESP to protect the Project Site(s) and its contents to repair and restore to the original condition any damage caused by ESP in connection with this contract. Any costs incurred to correct such damage are to be paid by ESP. ESP is solely responsible for the technical professional accuracy of all work performed under this Contract including work done by subcontractors or others.

ESP shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Schedule E Standards of Comfort** and the construction schedule specified in **Schedule D Part 4 Construction and Installation Schedule**. ESP shall repair and restore to its original condition any area of damage caused by ESP's performance under this Contract. Entity reserves the right to review the work performed by ESP and to direct ESP to take certain corrective action if, in the opinion of Entity, the structural integrity of the Project Site(s) or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESP's performance of the work shall be borne by ESP.

ESP shall remain responsible for the professional and technical accuracy of all services performed, whether by ESP or its subcontractors or others on its behalf, throughout the term of this Contract.

## Annual Reporting Requirements

At the end of each year during the guarantee period as specified in **Schedule A** **Baseline Consumption and Guaranteed Savings** and no later than ninety (90) days thereafter, ESP shall complete and submit the data required in **Schedule B Part 3 Annual M&V Report Outline**.

### ADMINISTRATION

# Ownership of Certain Proprietary Rights; Existing Equipment

## Ownership of Certain Proprietary Property Rights

*Section 17.1: This provision addresses ESP's proprietary rights over customized (or exclusive) software used in an energy management system which may control, manage and perform other functions in conjunction with the project (there may other technical designs, processes, formulas etc., which this provision would cover). Of particular importance is the stipulation that grants Entity a continuing license (at no charge) to use and operate the project without violating any ESP's proprietary rights.*

Entity shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. ESP shall grant to Entity a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for Entity to continue to operate, maintain, and repair the Equipment in a manner that will yield guaranteed cost savings for the specified contract term. ESP shall not be liable for providing new versions of software or other enhancements if or unless such new versions or enhancements are necessary to achieve the guaranteed cost savings.

## Ownership of Existing Equipment

*Section 17.2: This provision states that Entity has ownership of all existing equipment and that ESP shall notify Entity in writing of what equipment and materials are to be replaced. If Entity chooses to keep the equipment to be replaced, ESP will be notified and Entity will be responsible for identifying the location of where the property is to be stored or relocated. ESP is responsible for all equipment and materials to be disposed. The exception to this is the treatment of any hazardous or environmentally sensitive materials.*

Ownership of the equipment and materials presently existing at the Project Site(s) at the time of execution of this Contract shall remain the property of Entity even if it is replaced or its operation made unnecessary by work performed by ESP pursuant to this Contract. If applicable, ESP shall advise Entity in writing of all equipment and materials to be replaced at the Project Site(s) and Entity shall within \_\_\_\_ days designate in writing to ESP which equipment and materials that should not be disposed of off-site by ESP. It is understood and agreed to by both Parties that Entity shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. ESP shall be responsible for the disposal of all equipment and materials designated by Entity as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

# Insurance; Indemnification

*Article 18: This section needs to reflect Entity's standard requirements with regard to insurance and indemnification.*

## Insurance

At all times during the term of this Contract, ESP shall maintain in full force and effect, at its expense: (1) Worker's Compensation Insurance sufficient to cover all employees of ESP working to fulfill this Contract, and (2) Casualty and Liability Insurance on the Equipment and Liability Insurance for its employees and the possession, operation, and service of the Equipment. The limits of such insurance shall be not less than $\_\_\_\_\_\_\_\_\_\_\_\_\_ for injury to or death of one person in a single occurrence and $\_\_\_\_\_\_\_\_\_\_\_\_\_ for injury to or death of more than one person in a single occurrence and $\_\_\_\_\_\_\_\_\_\_\_\_\_ for a single occurrence of property damage. Such policies shall name Entity as an additional insured.

Prior to commencement of work under this Contract, ESP will be required to provide Entity with current certificates of insurance specified above. These certificates shall contain a provision that coverages afforded under the policies will not be canceled or changed until at least thirty (30) days' prior written notice has been given to Entity.

## Damages to Equipment or Property

ESP shall be responsible for (i) any damage to the Equipment or other property on the Project Site(s) and (ii) any personal injury where such damage or injury occurs as a result of ESP's performance under this Contract.

## Indemnification

ESP shall save and hold harmless Entity and its officers, agents and employees or any of them from any and all claims, demands, actions or liability of any nature based upon or arising out of any services performed by ESP, its agents or employees under this Contract.

## Liabilities

Neither party shall be liable for any special, incidental, indirect, punitive or consequential damages, arising out of or in connection with this Contract. Further, the liability of either party under this Contract shall not exceed the Contract Sum in the aggregate.

# Conditions Beyond Control of the Parties

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, or similar events, this Contract shall at the other party's option (i) remain in effect but said performing party's obligations shall be suspended until the said events shall have ended; or, (ii) be terminated upon ten (10) days’ notice to the performing party, in which event neither party shall have any further liability to the other.

# Events of Default

## Events of Default by Entity

Each of the following events or conditions shall constitute an "Event of Default" by Entity:

* + 1. any failure by Entity to pay ESP any sum due for a service and maintenance period of more than \_\_\_ days after written notification by ESP that Entity is delinquent in making payment and provided that ESP is not in default in its performance under the terms of this Contract; or
    2. any other material failure by Entity to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for \_\_\_\_\_ days after notice to Entity demanding that such failures to perform be cured or if such cure cannot be effected in \_\_\_\_\_\_ days, Entity shall be deemed to have cured default upon the commencement of a cure within \_\_\_\_\_\_\_ days and diligent subsequent completion thereof;
    3. any representation or warranty furnished by Entity in this Contract which was false or misleading in any material respect when made.

## Events of Default by ESP

Each of the following events or conditions shall constitute an "Event of Default" by ESP:

* + 1. the standards of comfort and service set forth in **Schedule E Standards of Comfort** are not provided due to failure of ESP to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within \_\_ days after written notice by Entity to ESP demanding that such failure be cured, shall be deemed cured for purposed of this Contract.
    2. any representation or warranty furnished by ESP in this Contract is false or misleading in any material respect when made;
    3. failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in **Schedule D Part 3 Equipment to be Installed by ESP** and **Part 4 Construction and Installation Schedule**;
    4. provided that the operation of the facility is not adversely affected and provided that the standards of comfort in **Schedule E Standards of Comfort** are maintained, any failure by ESP to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within \_\_ days after written notice by Entity to ESP demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
    5. any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of ESP;
    6. the filing of a bankruptcy petition whether by ESP or its creditors against ESP which proceeding shall not have been dismissed within \_\_\_\_\_ days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESP.
    7. Failure by ESP to pay any amount due Entity or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in **Schedule A** **Baseline Consumption and Guaranteed Savings**.

# Remedies upon Default

## Remedies upon Default by Entity

If an Event of Default by Entity occurs, ESP may, without a waiver of other remedies which exist in law or equity, elect to exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Entity, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy;

## Remedies upon Default by ESP

In the Event of Default by ESP, Entity shall have the choice to exercise any and all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees;

# Assignment

*ESP acknowledges that Entity is induced to enter into this Contract by, among other things, the professional qualifications of ESP. ESP agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of Entity.*

## Assignment by ESP

*Section 22.1: This assignment provision first acknowledges that Entity selected ESP for its unique expertise and qualifications to perform the services specified in the contract. ESP may not assign this contract to another ESP without the written approval of Entity and any ESP assigned this contract must fully comply with all terms and conditions. In addition, ESP and any assignee remain contractually liable to Entity for fulfilling all of ESP's obligations as specified in the contract.*

ESP may, with prior written approval of Entity, which consent shall not be unreasonably withheld, delegate its duties and performance under this Contract, and/or utilize ESPs, provided that any assignee(s), delegee(s), or ESP(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, ESP shall remain jointly and severally liable with its assignee(s) or transferee(s) to Entity for all of its obligations under this Contract.

## Assignment by Entity

*Section 22.2: In turn, this provision allows Entity to transfer or assign this contract to a new building owner or occupant. Entity and its assignee, however, still remain responsible to ESP for Entity's obligations as specified in the contract.*

Entity may transfer or assign this Contract and its rights and obligations herein to a successor or purchaser of the Buildings or an interest therein. Entity shall remain jointly and severally liable with its assignees or transferees to ESP for all of its obligations under this Contract.

# Representations and Warranties

*Article 23: This boilerplate provision states that each party has the requisite authority and ability to enter into this contract.*

Each party warrants and represents to the other that:

* + 1. it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
    2. its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, 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;
    3. its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; and
    4. 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 which would materially and adversely affect its ability to perform hereunder.

# Additional Representations of the Parties

*Article 24: These additional representations address several areas specific to the performance contract. Entity certifies it has or will provide ESP will all energy and energy-related records and all future records to be provided will be truthful and accurate. Entity also declares it has not entered into any leases or service contracts relating to energy equipment or servicing of pre-existing equipment and will notify ESP within a specified period of time if it does so.*

*In addition, ESP certifies that before beginning work under this contract it will: have become licensed to business in the state; provide proof of required insurance and bonds; give Entity access to all document relating to the project (including all contracts and subcontracts) upon request; use licensed and qualified subcontractors; and is financially able to complete the project and perform under the terms of this contract. In addition, ESP certifies that the equipment will meet or exceed the functional design tests performed prior to Entity acceptance and the installed equipment with be compatible with existing equipment and building systems.*

Entity hereby warrants, represents and promises that:

* + 1. it has provided or shall provide timely to ESP, all records relating to energy usage and energy-related maintenance of Project Site(s) requested by ESP and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract will be true and accurate in all material respects; and
    2. it has not entered into any leases, contracts or Contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Project Site(s) or with regard to servicing any of the energy related equipment located in the Project Site(s). Entity shall provide ESP with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Project Site(s) which may be executed from time to time hereafter within \_\_\_\_ days after execution thereof.

ESP hereby warrants, represents and promises that:

* + 1. before commencing performance of this Contract:
       1. it shall have become licensed or otherwise permitted to do business in the State of Montana
       2. it shall have provided proof and documentation of required insurance and bonds pursuant to this Contract;
    2. it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
    3. it shall use qualified subcontractors who are qualified, licensed and bonded in Montana to perform the work so subcontracted pursuant to the terms hereof;
    4. the Equipment will meet or exceed the provisions set forth in **Section 8.2 Systems Start Up and Commissioning** and in **Schedule F Systems Start-Up and Commissioning**;
    5. the Equipment is or will be compatible with all other Project Site(s) mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation; and
    6. it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

# Miscellaneous Documentation Provisions

## Performance Bonds, Labor and Material Payment Bonds

Such executed bonds are incorporated herein by reference as **Exhibit A Performance Bond** and **Exhibit B Labor and Material Payment Bond,** if applicable**.**

## Further Documents

The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

## Entity’s Responsibilities

*This provision protects both ESP and Entity by establishing a method for ESP to supervise Entity's compliance with the scheduled routine and preventative maintenance activities to be performed by Entity (either by in-house personnel or existing maintenance contract). This checklist should be developed for both the newly installed and pre-existing energy-related equipment.*

* + 1. Methods of Operation by Entity

The parties acknowledge and agree that said Energy and Cost Savings would not likely be obtained unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by Entity on a regular and continuous basis.

* + 1. Entity Maintenance Responsibilities

Entity agrees that it shall adhere to, follow and implement the cost-saving measure procedures and methods of operation to be set forth on **Schedule G Part 2 Entity’s Maintenance Responsibilities**,to be attached hereto and made a part hereof after Entity's approval, such approval not to be unreasonably withheld, conditioned or delayed.

* + 1. Inspection of Project Site(s)

Entity agrees that ESP shall have the right once a month, with prior notice, to inspect Project Site(s) to determine if Entity is complying, and shall have complied with its obligations as set forth in **Section 25.3(B).** For the purpose of determining Entity's said compliance, the checklist to be set forth at **Schedule H Facility Maintenance Checklist** as completed and recorded by ESP during its monthly inspections, shall be used to measure and record Entity's said compliance. Entity shall make the Project Site(s) available to ESP for and during each monthly inspection, and shall have the right to witness each inspection and ESP’s recordation on the checklist. Entity may complete its own checklist at the same time. ESP agrees to not interfere with Entity operations during any monthly inspection.

## Waiver of Liens

ESP will obtain and furnish to Entity a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment.

# Conflicts of Interest

Conflicts of interest relating to this Contract are strictly prohibited. Except as otherwise expressly provided herein, neither party hereto nor any director, employee or agent of any party hereto shall give to or receive from any director, employee or agent of any other party hereto any gift, entertainment or other favor of significant value, or any commission, fee or rebate in connection with this Contract. Likewise, neither party hereto nor any director, employee or agent of either party hereto, shall without prior notification thereof to the other party enter into any business relationship with any director, employee or agent of the other party or of any affiliate of the other party, unless such person is acting for and on behalf of the other party or any such affiliate. A party shall promptly notify the other party of any violation of this section and any consideration received as a result of such violation shall be paid over or credited to the party against whom it was charged. Any representative of any party, authorized by that party, may audit the records of the other party related to this Contract, upon reasonable notice and during regular business hours including the expense records of the party’s employees involved in this Contract, upon reasonable notice and during regular business hours, for the sole purpose of determining whether there has been compliance with this section.

# Complete Contract

This Contract, when executed, together with all Schedules and Exhibits attached hereto or to be attached hereto, as provided for by this Contract shall constitute the entire Contract between both parties and this Contract may not be amended, modified, or terminated except by a written Contract signed by the parties.

# Applicable Law

This Contract and the construction and enforceability thereof shall be interpreted under the laws of the State of Montana.

# Interpretation of Contract

Entity shall have the authority to determine questions of fact that arise in relation to the interpretation of this Contract and ESP’S performance hereunder. However, such determinations are subject to the Alternative Dispute Resolution procedures as described in **Schedule I Alternative Dispute Resolution Procedures**. Unless the Parties agree otherwise, or the Work cannot be continued without a resolution of the question of fact, such determinations and Alternative Dispute Resolution procedures shall not be cause for delay of the Work. ESP shall proceed diligently with the performance of this Contract and in accordance with Entity’s decision whether or not ESP or anyone else has an active claim pending. Continuation of the Work shall not be construed as a waiver of any rights accruing to ESP.

# Notice

Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail, return receipt requested, postage prepaid, or delivered to a nationally recognized express mail service, charges prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice.

TO ESP: ***ESP Name, Attention:, Complete address.***

***Include COPY TO: information for ESP, if applicable.***

TO ENTITY: ***Entity Name, Attention: Complete address.***

***Include COPY TO: information for ENTITY, if applicable.***

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this Contract by their duly authorized representatives on the date first above written.

(Corporate Seal)

ATTEST:

(ENTITY)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(ESP)

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**EPC ATTACHMENT A: SCHEDULES**

*EPC Attachment A is provided as a separate document: 8\_EPC\_Contract\_Schedules.*

**EPC ATTACHMENT B: COST AND PRICING TOOL**

*EPC Attachment B has been developed as a separate document. The tables Table B1, B3, and B4 were started under the initial RFP from the Entity and continued with the IGA contract. The ESP completes data entry into the tables under the EPC. If using the spreadsheet version of the tables, various fields will be automatically calculated. The completed tables must be included as part of the Contract.*

The Cost and Pricing Tool provides the Department, Entity, and ESP with standard EPC project cost details. Certain information is required of the ESP, and other information is provided at specific steps during EPC project development. This tool has been used throughout the EPC process including:

* Base Agreement with the Department where the ESP provided general information for maximum percent of total project cost and maximum percent markup;
* Request for Proposal from the Entity where the ESP modified the percentages for the specific Entity and their potential project; and
* IGA Contract where the cost of the IGA was added and percentages were refined further to reflect the scope of work and potential project size;

Under this Contract, the ESP shall enter the actual costs of the project and the actual percentages are calculated. Costs entered for Table B1 under the IGA may not be modified, with the exception of:

1. the IGA cost, if this cost has been modified during the course of the IGA; and
2. percentages of project costs and markups, which may only be decreased from those included in the IGA contact.

For each category, the term “ESP” includes the ESP and any close affiliate, parent, or wholly-owned subsidiary. Any individual category costs, whether for services provided directly by the ESP ("ESP-direct") or purchased from others, such as contractors, vendors, or material providers, may not include markups or profit. All ESP markups must be presented in the “EPC Maximum % Markup” column. All ESP profit must be presented in line **4 Profit** of **Table B1:** **Project Cost Estimate**.

Burdened labor cost is the base rate of compensation plus employment taxes, insurance and general benefits – vacation time, sick time, holiday pay, retirement benefits, and flexible spending accounts for dependent care and health. Commissions, bonuses, use of a company vehicle, profit-sharing, and other similar benefits must be included in line **4 Profit** of **Table B1:** **Project Cost Estimate**.

The Work is defined, collectively, as the equipment, professional services and construction related to the project.

**EPC ATTACHMENT C: EXHIBITS**

*EPC Attachment C is provided as a separate document: 12\_EPC\_Contract\_Exhibits.*