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ENERGY SAVINGS PERFORMANCE CONTRACT

This Energy Savings Performance Contract is for design, construction, guarantee, and follow-up monitoring of energy-saving projects. An energy audit was previously completed that identified the costs and savings of each project. The audit provides the basis to develop and negotiate this Energy Savings Performance Contract.

MODEL ENERGY SAVINGS PERFORMANCE CONTRACT

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MODEL ENERGY SAVINGS PERFORMANCE CONTRACT

This Energy Savings Performance Contract (the “Contract”) is made and entered into by and between _____ Energy Savings Contractor (the “ESCO”), having its principal offices at _____, and the District of Columbia Government (the “District”), acting by and through its Department of General Services (“DGS” or the “Department”), for the purpose of installing certain energy and water cost saving equipment, described in **Schedule R (Equipment to Be Installed by ESCO)**, and providing other services designed to save energy for the Department’s property and buildings, known as _____, located at _____ (the “Project Site(s)”).

For the purposes of this Agreement template, certain Articles and Sections within this document are subject to negotiation between the District and the ESCO based upon the outcome of the Investment Grade Audit and upon final Agreement execution. This will be noted where applicable.

RECITALS

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

WHEREAS, ESCO has developed or become knowledgeable about certain procedures for controlling energy and water consumption through services provided and equipment installed and maintained at Project Sites similar in scope and scale of the Department; and

WHEREAS, ESCO was selected after a determination that its proposal was the most advantageous to the Department pursuant to a Request for Proposal (“RFP”) and contract for the Investment Grade Audit (“Investment Grade Audit” or “IGA”) and Project Development Proposal (as hereinafter defined); and

WHEREAS, ESCO has made an assessment of the utility consumption characteristics of the Project Site(s) and existing Equipment described in **Schedule Q (Description of Project Site(s))**, which was delivered to the Department as an Investment Grade Audit Report which the Department has approved and is attached as **Appendix D: Investment Grade Audit Report**; and

WHEREAS, the Department desires to retain ESCO to purchase, install, and service certain energy and water cost 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, the Department is authorized under the laws of the District of Columbia 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, the Department and ESCO 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.

ARTICLE 1. DEFINITIONS, SCHEDULES, EXHIBITS AND APPENDICES

Section 1.1. Definitions.

Acceptance means an authorized representative of the District has inspected and agreed that the work meets all requirements of this Contract, to include documentation requirements.

Approval means the Department and/or the District has reviewed submittal, deliverables, or administrative documents (e.g., insurance certificates, etc.), and has determined the documents conform to contract requirement. Department and/or District approval shall not relieve the Contractor(s) of responsibility for complying with Federal, District, local laws, and regulations.

Certificate of Acceptance: The certificate substantially in the form provided in **Exhibit III**.

Commencement Date: The date described in **Section 2.2 (Commencement Date)**.

Contract: This Energy Savings Performance Contract and all Schedules and Exhibits attached hereto.

Contracting Officer (“CO”) shall be a business communications liaison between the Department and the Contractor(s). He or she ensures that the Department’s and Contractor’s goals are mutually beneficial. The CO is an employee who is responsible for recommending, authorizing, or denying actions and expenditures for task orders, and those that fall outside of the normal business practices of it supporting Contractor(s) and Subcontractor(s).

ESCO(s) means the individual, firm, company, corporation, partnership, or combination thereof, contracting with the Department to the contract work. The Contractor(s) is one of the parties to this Contract.

Contract Sum: The sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services related to the project.

Department refers to the Department of General Services, the District of Columbia government agency responsible for building, maintaining, and sustaining the majority of the District government’s real estate portfolio.

District means all authorized District of Columbia (“DC”) Government agencies and their representative having authority over the Facility.

Energy and Water Cost Savings: The savings as provided in **Schedule A (Savings Guarantee)**.

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 J (Compensation to ESCO for Annual Service)** and in accordance with the Savings Calculation Formula as set forth in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements)**.

Energy Services Agreement refers to an arrangement where a service provider (“ESCO”) delivers energy-saving services using equipment it designs, installs, owns, and may or may not operate and maintain.

Energy Service Company (“ESCO”): a business enterprise that develops, installs, and may finance and/or perform operations and maintenance for projects designed to improve energy efficiency and reduce operations and maintenance costs for its customers' facilities. Otherwise known as the “Contractor.”

Equipment: The goods enumerated on **Schedule R (Equipment to be Installed by ESCO)** 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 **Section 20 (Events of Default)** hereof.

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

Investment Grade Audit (“IGA”): A study by the qualified energy services provider selected for a particular Energy Savings Performance Contract project which includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements and the utility and operations and maintenance cost savings projected to result from the recommended improvements.

Operational meaning equipment is functioning as specified by the manufacturer recommendations.

Prevailing Wage is defined as the hourly wage, usual benefits, and overtime, allegedly paid to the majority of workers, laborers, and mechanics within a particular area as determined by the Service Contract Action Wage Determination, Davis Bacon and or the District of Columbia Living Wage Act; whichever of the applicable is higher. Prevailing wages are established by regulatory agencies for each trade and occupation employed in the performance of public work, as well as by State Departments of Labor or their equivalents.

Project Site(s): The facilities of the Department 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 project construction related to the project.

Section 1.2. Acronyms

COTR – Contracting Officer’s Technical Representative

CO – Contracting Officer

DCMR – District of Columbia Municipal Regulations

DGS – Department of General Services

ESA – Energy Services Agreement

ESCO – Energy Service Company

ESPC – Energy Savings Performance Contract

EMCS – Energy Management Control System - is a computerized control system designed to regulate the energy consumption of a building by controlling the operation of energy consuming systems, such as the heating, ventilation, and air conditioning (HVAC), lighting, and water heating systems, and is capable of monitoring environmental and system loads, and adjusting HVAC operations in order to optimize energy usage and respond to demand response signals.

FIM – Facility Improvement Measure – is any improvement that generates energy consumption, carbon dioxide equivalent, and/or cost savings.

IGA – Investment Grade Audit

IGAA – Investment Grade Audit Agreement

Section 1.3. Investment Grade Audit Report and Project Development Proposal.

ESCO has prepared the complete Investment Grade Audit Report of the Project Site(s) set forth in **Appendix D (Investment Grade Audit Report)** which has been approved and accepted by the Department as set forth in Exhibit III (i) (**Certificate of Acceptance—Investment Grade Audit Report**). The audit includes all measures agreed upon by the parties.

Section 1.4. Schedules, Exhibits and Appendices

ESCO has prepared and the Department has approved and accepted the following schedules (“Schedule(s)”), copies of which are attached hereto (or will be as provided for in the Contract), set forth in their entirety as Attachment I and made a part of this Contract by reference.

Schedules

Savings Guarantee

- Schedule A Savings Guarantee
- Schedule B Baseline Energy Consumption; Methodology to Adjust Baseline
- Schedule C Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements
- Schedule D-G Left blank for optional schedules

Payments and Schedule

- Schedule H Final Project Cost & Project Cash Flow Analysis
- Schedule I Financing Agreement and Payment Schedule
- Schedule J Compensation to ESCO for Annual Services
- Schedule K Rebates, Incentives and Grants
- Schedule L-P Reserved for optional schedules

Design and Construction Phase

- Schedule Q Description of Project Site(s)
- Schedule R Equipment to be Installed by ESCO
- Schedule S Construction and Installation Schedule
- Schedule T Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
- Schedule U Standards of Comfort
- Schedule V ESCO’s Training Responsibilities
- Schedule W-AA Left blank for optional schedules

Post-Construction

- Schedule BB ESCO’s Maintenance Responsibilities
- Schedule CC Department’s Maintenance Responsibilities
- Schedule DD Facility Maintenance Checklist
- Schedules EE – II Left blank for optional schedules

Administration

- Schedule JJ Alternative Dispute Resolution Procedures
- Schedule KK – OO Left blank for optional schedules

Optional Schedules

Pre-Existing Service Contracts
Energy Savings Projections
Facility Changes Checklist
Current and Known Capital Projects at Facility

Exhibits

Exhibit I Performance Bond
Exhibit II Labor and Material Payment Bond *if required*
Exhibit III (i) Certificate of Acceptance—Investment Grade Audit Report
Exhibit III (ii) Certificate of Acceptance—Installed Equipment
Exhibit IV Equipment Warranties
Optional Exhibits
Manifest of Ownership
Minority and Woman-Owned Business Certification
Certification that Financing Term is no Longer than the Aggregated
Equipment Lifetime
Notice of Substantial Completion
Notice to Proceed with Construction Phase
Record of Reviews by the Department

Appendices

Appendix A RFP for ESCO Solicitation (Pre-qualification Phase; Final Selection
Phase)
Appendix B ESCO Proposal (Pre-qualification Phase; Final Selection Phase)
Appendix C Investment Grade Audit and Project Development Contract
Appendix D Investment Grade Audit Report
Appendix E DGS Standard Contract Provisions for Construction Contract
Appendix F DGS Standard Contract Provisions for Supplies and Services Contract

Section 1.5. Other Documents

This Contract incorporates herein and makes a part hereof the entire RFP and ESCO Proposal for this Project labeled Appendix A and B respectively. Acceptance by the Department of the Investment Grade Audit Report is reflected in Exhibit III (i). 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

ARTICLE 2. PURCHASE AND SALE; COMMENCEMENT DATE AND TERMS; INTERIM PERIOD

Section 2.1. Purchase and Sale

The agreed Contract Sum for the Work is a Guaranteed Maximum Price of \$ _____ as set forth in **Schedule H (Final Project Cost & Project Cash Flow Analysis)**. Payment terms are described in **Schedule I (Financing Agreement and Payment Schedule)**.

ESCO will provide the Work and all related services identified in **Schedule R (Equipment to be Installed by ESCO)** and the services detailed in **Schedule BB (ESCO's Maintenance Responsibilities)** and **Schedule J (Compensation to ESCO for Annual Services)**. ESCO 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. ESCO 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.

If the Department elects to secure financing, the Department shall pay ESCO the Contract Sum in accordance with **Schedule I (Financing Agreement and Payment Schedule)**. Payments will be made on a progress basis in accordance with **Schedule I (Financing Agreement and Payment Schedule)**, for Work completed and authorized by the Department during the Interim Period. The Progress Payments outlined in **Schedule I (Financing Agreement and Payment Schedule)** will not be applicable to this Contract. Retainage of 10% will be withheld from each payment until the construction installation is completed as set forth in **Section 2.2 (Commencement Date)**.

Section 2.2. Commencement Date

The Commencement Date shall be the first day of the month after the month in which all Schedules are in final form and accepted by the Department and ESCO shall have delivered a notice to the Department that it has installed and commenced operating all of the Equipment specified in **Schedule R (Equipment to be Installed by ESCO)** and in accordance with the provisions of **ARTICLE 8 (Construction Schedule and Equipment Installation; Approval)**, **Schedule S (Construction and Installation Schedule)** and **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**; and the Department has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**.

Notwithstanding anything to the contrary in this **Article 2** and **Article 3 (Purchase and Sale; Commencement Date and Terms; Interim Period)**, the Commencement Date shall not occur, and the Department shall not be required to accept the work under this Contract unless and until all Equipment installation for the Project Site(s) is completed by ESCO in accordance with the terms and conditions of this Contract. The Department shall have fourteen (14) days after notification by the ESCO to inspect and accept the Equipment. The Department 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. If the Department elects to secure financing, ESCO shall not be paid in full, including retainage, until after the punch-list is completed and ESCO 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 the Department.

Compensation payments due to ESCO for on-going services and maintenance under this Contract as set forth in **Schedule J (Compensation to ESCO for Annual Services)** shall begin no earlier than thirty (30) from the Commencement Date as defined herein.

The inspection and Acceptance requirements for the Contract shall be governed by **Article No. 5**, Inspection of Supplies, and **Article No. 6**, Inspection of Services, of the Government of the District of Columbia's Department of General Services Standard Contract Provisions ("SCP") for Supplies and Services Contracts, January 2016 **Exhibit E.1**. and Construction, **Exhibit E.2**

Section 2.3. Term of Contract; Interim Period

Contract shall be subject to the following sentence; the term of this Contract shall be TBD years measured beginning with the Commencement Date. The Contract shall be effective and binding

immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period will be fully credited to the Department.

ARTICLE 3. SAVINGS GUARANTEE; ANNUAL RECONCILIATION; PAYMENTS TO ESCO

Section 3.1. Energy and Cost Savings Guarantee

ESCO has formulated and, subject to the adjustments provided for in **ARTICLE 15 (Material Changes)**, has guaranteed the annual level of energy and water cost 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 C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V 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 (Savings Guarantee)** and has been structured by the ESCO to be sufficient to cover any and all annual payments required to be made by the Department as set forth in **Schedule J (Compensation to ESCO for Annual Services)** and **Schedule I (Financing Agreement and Payment Schedule)**.

Section 3.2. Annual Review and Reimbursement/Reconciliation

Contract Energy-related cost savings shall be measured and/or calculated as specified in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting)** and **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)** and a report provided within sixty (60) days of the end of the year for the previous year for each anniversary of the Commencement Date.

In the event the Energy and Cost Savings achieved during such guaranteed year are less than the Guaranteed Energy and Cost Savings as defined in **Schedule A (Savings Guarantee)**, the Department shall direct the ESCO to one of the following options to rectify the shortfall:

1. Fix and/or repair any deficiencies that are the cause of the shortfall at no cost to the Department.
2. Install additional equipment or perform additional measures to make up for the shortfall at no cost to the Department.
3. Pay the Department an amount equal to the deficiency.

The ESCO shall remit such payments to the Department within sixty (60) days of written notice by the Department 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 (Savings Guarantee)** and are in addition to those monies due the ESCO for compensation for services as set forth in **Schedule J (Compensation to ESCO for Annual Services)**, such excess savings shall be retained by the Department. In no event shall credit for excess savings be used to cover savings shortfalls in previous years nor satisfy saving guarantees in future years of the Contract.

Section 3.3. ESCO Compensation and Fees

ESCO has structured the Energy and Cost Savings Guarantee referred to in Section 3.1 above, to be sufficient to include any and all annual payments required to be made by the Department in connection with financing/purchasing the Equipment to be installed by ESCO under this Contract as set forth in **Schedule**

I (Financing Agreement and Payment Schedule). Actual energy and operations savings achieved by ESCO through the operation of Equipment and performance of services by ESCO shall be sufficient to cover any and all annual fees to be paid by the Department to ESCO for the provision of services as set forth and in accordance with the provisions of **Schedules J (Compensation to ESCO)** and **BB (ESCO's Maintenance Responsibilities)**.

Section 3.4. Billing Information Procedure

Section 3.5. Payment

For Measurement & Verification and other annual services, the Department shall pay ESCO according to the payment schedule outlined in **Schedule J (Compensation to ESCO for Annual Services)**. For construction, the Department shall pay ESCO monthly progress payments based on completion of the Work if applicable. The Department shall pay ESCO within thirty (30) days of receiving an invoice; and ESCO will be entitled to interest at the rate allowed by law on all sums overdue and unpaid from the date due.

Section 3.6. Effective Date of Payment Obligation

Notwithstanding the above provisions in Section 3.5, if the Department elects to secure financing, the Department shall not be required to begin any payments to ESCO under this Contract unless and until all equipment installation is completed by ESCO in accordance with the provisions of **Article 8 (Construction and Equipment Installation; Approval)** and **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**, and accepted by the Department as evidenced by the signed Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**, and unless and until said equipment is fully and properly functioning.

Section 3.7. Open Book Pricing

Open book pricing will be required, such that the ESCO will fully disclose all costs of materials and labor purchased and subcontracted by the ESCO and a list of hourly rates and position descriptions for labor or services provided by the ESCO. Estimates for the number of hours required for the project and deviations of these budgeted hours shall require prior written approval by the Department or shall not be paid. ESCO will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. The ESCO will give Department 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.

The Department and/or District 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 (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 the ESCO, including, but not limited to those kept by the ESCO, its employees, agents, assigns, successors, and subcontractors.

The ESCO shall maintain such books and records, together with such supporting or underlying documents and materials, for the duration of this Contract and for at least three (3) years following the completion of this contract, guarantee period, or agreement, including any and all renewals thereof. The books and records, together with the supporting or underlying documents and materials shall be made available, upon

request, electronically to the District through its employees, agents, representatives, contractors, or other designees, during normal business hours.

ARTICLE 4. FISCAL FUNDING

[*In accordance with the RFP, Section C.5.4.3.2, the language under this Article will be developed by the Department after DGS determines the financial structure, cost and financial terms based on the outcome of the IGA and will be agreed to upon the final Contract execution.]

AUDIT AND CONSTRUCTION PHASE

ARTICLE 5. ENERGY USAGE RECORDS AND DATA

The Department has provided the ESCO with the readily available benchmarking data, drawings, specifications, and other documentation in the Department's possession concerning the Premises, Sites, and Site Electrical Systems and shall continue to provide such drawings, specifications, and other documentation, where readily available, that ESCO may reasonably require to develop and complete detailed designs for each System. There may be cases where drawings, specifications, and other documentation of the District government property do not exist, and the ESCO may need to either do without or create said documentation. For this purpose, the Department has provided ESCO with reasonable access to the Premises and the Sites to verify field conditions and has made and shall make appropriate staff reasonably available to answer questions and provide information required by ESCO to support the detailed design process.

ARTICLE 6. LOCATION AND ACCESS

ESCO acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. The Department shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Contract. The Department shall provide access to the Project Site(s) for ESCO to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to the Department. ESCO shall be granted access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The ESCO's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Department. ESCO shall immediately notify the Department 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.

ARTICLE 7. PERMITS AND APPROVALS; COORDINATION

Section 7.1. Permits and Approvals

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

7.1.1 PERMITS AND RESPONSIBILITIES—The ESCO shall, without expense to the Government, be responsible for paying for and obtaining any necessary licenses, certificates, approvals, and permits, and

for complying with any applicable Federal, State, and Municipal laws, codes, and regulations, in connection with the prosecution of the work. They shall be similarly responsible for all damage to persons or property that occurs as a result of his fault or negligence. They shall take proper safety, health, and environmental precautions to protect the work, the workers, the public, and the property of others. They shall also be responsible for all materials delivered and work performed and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been accepted.

Section 7.2. Coordination During Installation

The ESCO shall not perform work at DCPS school during its testing days. The Department and ESCO shall coordinate the activities of ESCO's equipment installers with those of the District, its employees, and agents. ESCO shall not commit or permit any act which will interfere with the performance of municipal activities conducted by the District or its employees without prior written approval of the Department.

ARTICLE 8. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; APPROVAL

Section 8.1. Construction Schedule; Equipment Installation

It is important that the construction/installation phase of the project be managed in compliance with the Department requirements and the appropriate governing statutes. The DGS Construction Standard Contract Provisions is incorporated hereto as **Exhibit E.2** to this ESA.

Construction and equipment installation shall proceed in accordance with the construction schedule approved by the Department and attached as **Schedule S (Construction and Equipment Installation Schedule)**. There may be unexpected delays in schedule due to weather conditions or unexpected school testing days. The ESCO shall build these uncertainties into their schedule.

Section 8.2. Systems Startup and Equipment Commissioning

The ESCO 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 T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)** and prior to acceptance of the project by the Department as specified in **Exhibit III (i) (Certificate of Acceptance)**. 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. The ESCO shall coordinate with site occupancy activity and provide notice to the Department of the scheduled test(s) and the Department and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Equipment. The ESCO 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 T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in Equipment operation that may be observed during system testing procedures. Prior to Department acceptance, ESCO shall also provide the Department with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in **Schedule R (Equipment to be Installed by ESCO)**.

ARTICLE 9. EQUIPMENT WARRANTIES

[*The language in this Article is subject to negotiation based on the outcome of the IGA and will be agreed to upon final Contract execution.]

ESCO 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 energy conservation 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 the Department 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, ESCO shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in **Schedule BB (ESCO’s Maintenance Responsibilities)**.

ESCO further agrees to assign to the Department 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 IV (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. ESCO shall, during the warranty period, notify the Department whenever defects in Equipment parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO. 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 the Department or the Project Site(s), due to ESCO’s failure to exercise its warranty rights shall be borne solely by ESCO.

All warranties, to the extent transferable, shall be transferable and extend to the Department. 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 the owner and appropriately documented and titled.

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

ARTICLE 10. STANDARDS OF COMFORT

[*The language in this Article is subject to negotiation based on the outcome of the IGA and will be agreed to upon final Contract execution.]

ESCO 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 U (Standards of Comfort)**. During the term of this Contract, ESCO and the Department will maintain, according to **Schedule BB (ESCO’s Maintenance Responsibilities)** and **Schedule CC (Department’s Maintenance Responsibilities)** and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in **Schedule U (Standards of Comfort)**.

ARTICLE 11: ENVIRONMENTAL REQUIREMENTS

Section 11.1. Excluded Material and Activities

The Department recognizes that in connection with the installation and/or service or maintenance of Equipment at the Department's Project Site(s), ESCO may encounter, but is not responsible for, any work relating to: (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof; (ii) fungus (any type of form of fungi, including mold or mildew, and myotoxins, spores, scents or by-products produced or released by fungi); (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement; or (iv) 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". The Department agrees that if performance of work involves any Excluded Materials and Activities, the Department will perform or arrange for the performance of such work and shall bear the sole risk and responsibility, therefore. In the event ESCO discovers Hazardous or Excluded Materials, ESCO shall immediately cease work, remove all ESCO personnel or subcontractors from the site, and notify the Department. The Department shall be responsible for handling such Materials at its expense. ESCO shall undertake no further work on the Project Site(s) except as authorized by the Department in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Department shall not constitute a default by the Department. In the event of such stoppage of work by ESCO, 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 ESCO as a result will be added by Change Order.

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

Section 11.2. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps

ESCO 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 the Department'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 the Department. ESCO's responsibility shall be for the proper and legal management of any of the Department'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 ESCO's vehicle for transportation.

ESCO 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 U.S Environmental Protection Agency ("EPA") requirements;; and a copy of the manifest.

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

ARTICLE 12. TRAINING BY ESCO

The ESCO shall conduct the training program described in **Schedule V (ESCO's Training Responsibilities)** hereto. The training specified in **Schedule V (ESCO's Training Responsibilities)** must be completed prior to acceptance of the Equipment installation. Whenever needed, the ESCO shall provide ongoing training with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to the Department and shall have no effect on prior acceptance of Equipment installation.

POST-CONSTRUCTION PHASE

ARTICLE 13. EQUIPMENT SERVICE

Section 13.1. Actions by ESCO

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

Section 13.2. Malfunctions and Emergencies

The Department shall use its best efforts to notify the ESCO within seventy-two (72) hours after the Department's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact the guaranteed energy savings; (ii) any interruption or alteration to the energy supply to the Project Site(s); or (iii) any alteration or modification in any energy-related equipment or its operation.

Where the Department 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 on the guaranteed energy savings. The Department shall notify ESCO within seventy-two (72) hours upon it having actual knowledge of any emergency condition affecting the Equipment. ESCO shall respond or its designee(s) shall respond within twenty-four (24) hours and shall promptly proceed with corrective measures.

The ESCO 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.

Section 13.3. Actions by the Department

The Department shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of ESCO except as set forth in **Schedule CC (Department's Maintenance Responsibilities)**. Notwithstanding the foregoing, the Department may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, the Department shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided

in advance by ESCO. The Department 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.

ARTICLE 14. MODIFICATION, UPGRADE OR ALTERATION OF THE EQUIPMENT

Section 14.1. Modification of Equipment

During the Term of this Contract, the Department will not, without the prior written consent of ESCO, 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 ESCO's prior written approval, which shall not be unreasonably withheld.

Section 14.2. Upgrade or Alteration of Equipment

ESCO shall at all times have the right, subject to the Department'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 in the Project Site(s), provided that: (i) the ESCO complies with the standards of comfort and services set forth in **Schedule U (Standards of Comfort)** herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the guaranteed energy and cost savings at the Project Site(s) and; (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the ESCO.

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 the Owner 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. The ESCO 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 BB (ESCO's Maintenance Responsibilities)**. All replacements of and alterations or additions to the Equipment shall become part the Equipment described in **Schedule R (Equipment to be Installed by ESCO)** and shall be covered by the provisions and terms of **Article 8 (Construction Schedule and Equipment Installation; Approval)**. All costs and fees associated with the aforementioned work shall be subject to **Section 3.7 (Open Book Pricing)** and the submitted ESCO rate schedule pre-approved by the District.

ARTICLE 15. MATERIAL CHANGES

Section 15.1. 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 the Department, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)** and **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Report Requirements)** and negotiated per IPMVP protocols. Actions by the Department which may result in a Material Change include but are not limited to the following:

-
- (i) Manner of use of the Project Site(s) by the Department;
 - (ii) Hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s);
 - (iii) Permanent changes in the comfort and service parameters set forth in **Schedule U (Standards of Comfort)**;
 - (iv) Occupancy of the Project Site(s);
 - (v) Structure of the Project Site(s);
 - (vi) Types and quantities of equipment used at the Project Site(s);
 - (vii) Modification, renovation, or construction at the Project Site(s);
 - (viii) The Department's failure to provide maintenance of and repairs to the Equipment in accordance with **Schedule CC (Department's Maintenance Responsibilities)**;
 - (ix) 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;
 - (x) Casualty or condemnation of the Project Site(s) or Equipment;
 - (xi) Changes in utility provider or utility rate classification;
 - (xii) Any other conditions other than climate affecting energy or water use at the Project Site(s);
or
 - (xiii) Modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.

Section 15.2. Reported Material Changes; Notice by the Department

The Department shall use its best efforts to deliver to the ESCO 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 thirty (30) 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 the ESCO 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 the Department within seventy-two (72) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Department to have occurred.

Section 15.3. Other Adjustments

As agreed in **Section 15.1** the Department will alert ESCO of materials changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, the ESCO will work with the Department to investigate, identify, and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, ESCO and the Department shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Report Requirements)** and **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)**.

ARTICLE 16. PERFORMANCE BY ESCO

Section 16.1. Corrective Action; Accuracy of the Services

ESCO 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 U (Standards of Comfort)** and the construction schedule specified in **Schedule S (Construction and Installation Schedule)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract.

The Department reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of the Department, 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 ESCO's performance of the work shall be borne by ESCO.

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

Section 16.2. Annual Reporting Requirements; Annual ENERGY STAR Rating

At the end of each year during the guarantee period as specified in **Schedule A (Savings Guarantee)** and no later than ninety (90) days thereafter, the ESCO shall complete and submit the data required in **Schedule C (C.4 Annual M&V Reporting Requirements)**. The ESCO shall provide an ENERGY STAR rating for each eligible facility for each year of the guarantee period if applicable and if requested by the Department.

ADMINISTRATION

ARTICLE 17. OWNERSHIP OF CERTAIN PROPRIETARY RIGHTS; EXISTING EQUIPMENT

Section 17.1. Ownership of Certain Proprietary Property Rights

The Department 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. The ESCO shall grant to the Department a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Department to continue to operate, maintain, and repair the Equipment in a manner that will yield guaranteed utility consumption reductions for the specified contract term. ESCO 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 utility consumption reductions.

Section 17.2. Ownership of Existing Equipment

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 the Department even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the Department in writing of all equipment and materials to be replaced at the Project Site(s) and the Department shall within 14-days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that the Department shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The ESCO shall be responsible for the disposal of all equipment and materials designated by the Department as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

ARTICLE 18. PROPERTY/CASUALTY/INSURANCE; INDEMNIFICATION

Section 18.1 Insurances.

Prior to commencement of work under this Contract, ESCO will be required to provide the Department 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 the Department.

Section 18.2. Damages to Equipment or Property: ESCO 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 ESCO's performance under this Contract.

Section 18.4. Liabilities.

[Disclaimer: For the purposes of this Section, the term "Contractor" refers to ESCO.]

A. GENERAL REQUIREMENTS. The Contractor at its sole expense shall procure and maintain, during the entire period of performance under this contract, the types of insurance specified below. The Contractor shall have its insurance broker or insurance company submit a Certificate of Insurance to the CO giving evidence of the required coverage prior to commencing performance under this contract. In no event shall any work be performed until the required Certificates of Insurance signed by an authorized representative of the insurer(s) have been provided to, and accepted by, the CO. All insurance shall be written with financially responsible companies authorized to do business in the District of Columbia or in the jurisdiction where the work is to be performed and have an A.M. Best Company rating of A- / VII or higher. Should the Contractor decide to engage a subcontractor for segments of the work under this contract and wish to propose different insurance requirements than outlined below, then, prior to commencement of work by the subcontractor, the Contractor shall submit in writing the name and brief description of work to be performed by the subcontractor on the Subcontractors Insurance Requirement Template provided by the CA, to the Office of Risk Management (ORM). ORM will determine the insurance requirements applicable to the subcontractor and promptly deliver such requirements in writing to the Contractor and the CA. The Contractor must provide proof of the subcontractor's required insurance prior to commencement of work by the subcontractor. If the Contractor decides to engage a subcontractor without requesting from ORM specific insurance requirements for the subcontractor, such subcontractor shall have the same insurance requirements as the Contractor.

General liability, commercial auto, workers' compensation, and property insurance policies (if applicable to this agreement) shall contain a waiver of subrogation provision in favor of the Government of the District of Columbia.

The Government of the District of Columbia shall be included in all policies required hereunder to be maintained by the Contractor and its subcontractors (except for workers' compensation and professional liability insurance) as an additional insureds for claims against The Government of the District of Columbia relating to this contract, with the understanding that any affirmative obligation imposed upon the insured Contractor or its subcontractors (including without limitation the liability to pay premiums) shall be the sole obligation of the Contractor or its subcontractors, and not the additional insured. The additional insured status under the Contractor's and its subcontractors' Commercial General Liability insurance policies shall be effected using the ISO Additional Insured Endorsement form CG 20 10 11 85 (or CG 20 10 07 04 **and** CG 20 37 07 04) or such other endorsement or combination of endorsements providing coverage at least as broad and approved by the CO in writing. All of the Contractor's and its subcontractors' liability policies (except for workers' compensation and professional liability insurance) shall be endorsed using ISO form CG 20 01 04 13 or its equivalent so as to indicate that such policies provide primary coverage (without any right of contribution by any other insurance, reinsurance or self-insurance, including any deductible or retention, maintained by an Additional Insured) for all claims against the additional

insured arising out of the performance of this Statement of Work by the Contractor or its subcontractors, or anyone for whom the Contractor or its subcontractors may be liable. These policies shall include a separation of insureds clause applicable to the additional insured.

If the Contractor and/or its subcontractors maintain broader coverage and/or higher limits than the minimums shown below, the District requires and shall be entitled to the broader coverage and/or the higher limits maintained by the Contractor and subcontractors.

B. **INSURANCE REQUIREMENTS**

[Insurance coverages and limits are subject to change at the sole discretion of the Office of Risk Management]

1. Commercial General Liability Insurance (“CGL”) - The Contractor shall provide evidence satisfactory to the CO with respect to the services performed that it carries a CGL policy, written on an occurrence (not claims-made) basis, on Insurance Services Office, Inc. (“ISO”) form CG 00 01 04 13 (or another occurrence-based form with coverage at least as broad and approved by the CO in writing), covering liability for all ongoing and completed operations of the Contractor, including ongoing and completed operations under all subcontracts, and covering claims for bodily injury, including without limitation sickness, disease or death of any persons, injury to or destruction of property, including loss of use resulting therefrom, personal and advertising injury, and including coverage for liability arising out of an Insured Contract (including the tort liability of another assumed in a contract) and acts of terrorism (whether caused by a foreign or domestic source). Such coverage shall have limits of liability of not less than \$1,000,000 each occurrence, a \$2,000,000 general aggregate (including a per location or per project aggregate limit endorsement, if applicable) limit, a \$1,000,000 personal and advertising injury limit, and a \$2,000,000 products-completed operations aggregate limit.

The contractor should be named as an additional insured on the applicable manufacturer’s/distributor’s Commercial General Liability policy using Insurance Services Office, Inc. (“ISO”) form CG 20 15 04 13 (or another occurrence-based form with coverage at least as broad).

DGS should collect, review for accuracy and maintain all warranties for goods and services.

2. Automobile Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of commercial (business) automobile liability insurance written on ISO form CA 00 01 10 13 (or another form with coverage at least as broad and approved by the CO in writing) including coverage for all owned, hired, borrowed and non-owned vehicles and equipment used by the Contractor, with minimum per accident limits equal to the greater of (i) the limits set forth in the Contractor’s commercial automobile liability policy or (ii) \$1,000,000 per occurrence combined single limit for bodily injury and property damage.
3. Workers’ Compensation Insurance - The Contractor shall provide evidence satisfactory to the CO of Workers’ Compensation insurance in accordance with the statutory mandates of the District of Columbia or the jurisdiction in which the contract is performed.

Employer's Liability Insurance - The Contractor shall provide evidence satisfactory to the CO of employer's liability insurance as follows: \$500,000 per accident for injury; \$500,000 per employee for disease; and \$500,000 for policy disease limit.

All insurance required by paragraphs 1,2 and 3 shall include a waiver of subrogation endorsement for the benefit of Government of the District of Columbia.

4. Cyber Liability Insurance - The Contractor shall provide evidence satisfactory to the Contracting Officer of Cyber Liability Insurance, with limits not less than \$2,000,000 per occurrence or claim, \$2,000,000 aggregate. Coverage shall be sufficiently broad to respond to the duties and obligations as is undertaken by Contractor in this agreement and shall include, but not limited to, claims involving infringement of intellectual property, including but not limited to infringement of copyright, trademark, trade dress, invasion of privacy violations, information theft, damage to or destruction of electronic information, release of private information, alteration of electronic information, extortion and network security. The policy shall provide coverage for breach response costs as well as regulatory fines and penalties as well as credit monitoring expenses with limits sufficient to respond to these obligations. Limits may not be shared with other lines of coverage. A copy of the cyber liability policy must be submitted to the Office of Risk Management (ORM) for compliance review.
5. Professional Liability Insurance (Errors & Omissions) - The Contractor shall provide Professional Liability Insurance (Errors and Omissions) to cover liability resulting from any error or omission in the performance of professional services under this Contract. The policy shall provide limits of \$1,000,000 per claim or per occurrence for each wrongful act and \$2,000,000 annual aggregate. The Contractor warrants that any applicable retroactive date precedes the date the Contractor first performed any professional services for the Government of the District of Columbia and that continuous coverage will be maintained or an extended reporting period will be exercised for a period of at least ten years after the completion of the professional services. Limits may not be shared with other lines of coverage.
6. Sexual/Physical Abuse & Molestation - The Contractor shall provide evidence satisfactory to the Contracting Officer with respect to the services performed that it carries \$1,000,000 per occurrence limits; \$2,000,000 aggregate of affirmative abuse and molestation liability coverage. Coverage should include physical abuse, such as sexual or other bodily harm and non-physical abuse, such as verbal, emotional or mental abuse; any actual, threatened or alleged act; errors, omission or misconduct. This insurance requirement will be considered met if the general liability insurance includes an affirmative sexual abuse and molestation endorsement for the required amounts. So called "silent" coverage or "shared" limits under a commercial general liability or professional liability policy will not be acceptable. Limits may not be shared with other lines of coverage. The applicable policy may need to be submitted to the Office of Risk Management (ORM) for compliance review.
7. Commercial Umbrella or Excess Liability - The Contractor shall provide evidence satisfactory to the CO of commercial umbrella or excess liability insurance with minimum limits equal to the greater of (i) the limits set forth in the Contractor's umbrella or excess liability policy or (ii) \$5,000,000 per occurrence and \$5,000,000 in the annual aggregate, following the form and in excess of all liability policies. All liability coverages must be scheduled under the umbrella and/or excess policy. The insurance required under this paragraph shall be written in a form that annually reinstates all required limits. Coverage

shall be primary to any insurance, self-insurance or reinsurance maintained by the District and the “other insurance” provision must be amended in accordance with this requirement and principles of vertical exhaustion.

- C. **PRIMARY AND NONCONTRIBUTORY INSURANCE**
The insurance required herein shall be primary to and will not seek contribution from any other insurance, reinsurance or self-insurance including any deductible or retention, maintained by the Government of the District of Columbia.
- D. **DURATION.** The Contractor shall carry all required insurance until all contract work is accepted by the District of Columbia and shall carry listed coverages for ten years for construction projects following final acceptance of the work performed under this contract and two years for non-construction related contracts.
- E. **LIABILITY.** These are the required minimum insurance requirements established by the District of Columbia. However, the required minimum insurance requirements provided above will not in any way limit the contractor’s liability under this contract.
- F. **CONTRACTOR’S PROPERTY.** Contractor and subcontractors are solely responsible for any loss or damage to their personal property, including but not limited to tools and equipment, scaffolding and temporary structures, rented machinery, or owned and leased equipment. A waiver of subrogation shall apply in favor of the District of Columbia.
- G. **MEASURE OF PAYMENT.** The District shall not make any separate measure or payment for the cost of insurance and bonds. The Contractor shall include all of the costs of insurance and bonds in the contract price.
- H. **NOTIFICATION.** The Contractor shall ensure that all policies provide that the CO shall be given thirty (30) days prior written notice in the event of coverage and / or limit changes or if the policy is canceled prior to the expiration date shown on the certificate. The Contractor shall provide the CO with ten (10) days prior written notice in the event of non-payment of premium. The Contractor will also provide the CO with an updated Certificate of Insurance should its insurance coverages renew during the contract.
- I. **CERTIFICATES OF INSURANCE.** The Contractor shall submit certificates of insurance giving evidence of the required coverage as specified in this section prior to commencing work. Certificates of insurance must reference the corresponding contract number. Evidence of insurance shall be submitted to:

**The Government of the District of Columbia
And e-mailed to the attention of:**

Domonique Banks c/o Karen Araujo
Contracting Officer, Supervisory Contract Specialist
Contracts and Procurement Division
Department of General Services
Tel: O: 202-545-3035 | M: 202-384-7744 | karen.araujo@dc.gov

The CO may request and the Contractor shall promptly deliver updated certificates of insurance, endorsements indicating the required coverages, and/or certified copies of the insurance policies.

If the insurance initially obtained by the Contractor expires prior to completion of the contract, renewal certificates of insurance and additional insured and other endorsements shall be furnished to the CO prior to the date of expiration of all such initial insurance. For all coverage required to be maintained after completion, an additional certificate of insurance evidencing such coverage shall be submitted to the CO on an annual basis as the coverage is renewed (or replaced).

J. DISCLOSURE OF INFORMATION. The Contractor agrees that the District may disclose the name and contact information of its insurers to any third party which presents a claim against the District for any damages or claims resulting from or arising out of work performed by the Contractor, its agents, employees, servants or subcontractors in the performance of this contract.

K. CARRIER RATINGS. All Contractor's and its subcontractors' insurance required in connection with this contract shall be written by insurance companies with an A.M. Best Insurance Guide rating of at least A- VII (or the equivalent by any other rating agency) and licensed in the District.

ARTICLE 19. [INTENTIONALLY OMITTED]

ARTICLE 20. [INTENTIONALLY OMITTED]

ARTICLE 21. [INTENTIONALLY OMITTED]

ARTICLE 22. ASSIGNMENT

The ESCO acknowledges that the Department is induced to enter into this Contract by, among other things, the professional qualifications of the ESCO. The ESCO 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 the Department in accordance with Article 9 of the Standard Contract Provisions for Construction Contracts, attached as **Exhibit E.2**.

Section 22.1. Assignment by ESCO

Any and all proposed assignments shall be governed by the Standard Contract Provisions – SCP Goods and Services Article 9 and Construction Article ____.

Section 22.2. Assignment by the Department

The Department may transfer or assign this Contract and its rights and obligations herein to a successor or purchaser of the Buildings or an interest therein.

ARTICLE 23. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

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

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- (iii) 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; or
 - (iv) 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.

ARTICLE 24. ADDITIONAL REPRESENTATIONS OF THE PARTIES

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

The Department hereby warrants, represents, and promises that:

- (i) It has provided or shall provide timely to ESCO, all records relating to energy usage and energy-related maintenance of Project Site(s) requested by ESCO 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
- (ii) 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). The Department shall provide ESCO 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 sixty (60) days after execution thereof.

ESCO hereby warrants, represents, and promises that:

- (i) Before commencing performance of this Contract:
 - (a) It shall have become licensed or otherwise permitted to do business in the District of Columbia;; and
 - (b) It shall have provided proof and documentation of required Clean Hands, insurance, and bonds pursuant to this Contract;
- (ii) It shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- (iii) It shall use qualified subcontractors who are qualified, licensed and bonded in this state to perform the work so subcontracted pursuant to the terms hereof;
- (iv) The Equipment will meet or exceed the provisions set forth in **Section 8.2 (Systems Start Up and Equipment Commissioning)** and in **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**;;

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- (v) 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
 - (v) That 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.
 - (vi) The Contractor agrees to comply with the Campaign Finance Reform Act certification requirement **Attachment A.9** pursuant to D.C. Official Code § 1-1161.01 and will satisfy all self-certification requirements prior to the execution of any task order, as applicable.

ARTICLE 25. MISCELLANEOUS DOCUMENTATION PROVISIONS

Section 25.1. Waiver of Liens, Construction Performance and Payment Bonds, Labor and Material Payment Bonds

Such executed bonds are incorporated herein by reference as **Exhibit I (Performance Bond)** and **Exhibit II (Labor and Material Payment Bond, if applicable)**.

Section 25.2. 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.

Section 25.3 The Department's Responsibilities

(a) Methods of Operation by the Department

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 the Department on a regular and continuous basis.

(b) Department Maintenance Responsibilities

The Department agrees that it shall adhere to, follow, and implement the energy conservation procedures and methods of operation to be set forth on **Schedule CC (Department's Maintenance Responsibilities)**, to be attached hereto and made a part hereof after the Department's approval, such approval not to be unreasonably withheld, conditioned or delayed.

(c) Inspection of Project Site(s)

The Department agrees that ESCO shall have the right once a month, with prior notice, to inspect Project Site(s) to determine if the Department is complying and shall have complied with its obligations as set forth in **Section 25.3(b)**. For the purpose of determining the Department's said compliance, the checklist to be set forth at **Schedule DD (Facility Maintenance Checklist)** as completed and recorded by ESCO during its monthly inspections, shall be used to measure and record the Department's said compliance. The Department shall make the Project Site(s) available to ESCO for and during each monthly inspection and shall have the right to witness each inspection and ESCO's recordation on the checklist. The Department

may complete its own checklist at the same time. ESCO agrees not to interfere with the Department operations during any monthly inspection.

Section 25.4. Waiver Of Liens

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

ARTICLE 26: CONFLICTS OF INTEREST

Section 26.1 Conflicts of Interest

Unless a determination is made as provided herein, no officer or employee of the District will be admitted to any share or part of this contract or to any benefit that may arise therefrom, and any contract made by the Contracting Officer or any District employee authorized to execute contracts in which they or an employee of the District will be personally interested shall be void, and no payment shall be made thereon by the District or any officer thereof, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit. A District employee shall not be a party to a contract with the District and will not knowingly cause or allow a business concern or other organization owned or substantially owned or controlled by the employee to be a party to such a contract, unless a written determination has been made by the head of the procuring agency that there is a compelling reason for contracting with the employee, such as when the District's needs cannot reasonably otherwise be met. (DC Procurement Practices Act of 1985, D.C. Law 6-85, D.C. Official Code, section 2-310.01, and Chapter 18 of the DC Personnel Regulations) The Contractor represents and covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its services hereunder. The Contractor further covenants not to employ any person having such known interests in the performance of the contract.

ARTICLE 27. COMPLETE CONTRACT

This Contract, when executed, together with all Schedules 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.

ARTICLE 28. APPLICABLE LAW

This Contract and the construction and enforceability thereof shall be interpreted under the laws of the District of Columbia and those of the Federal Government.

ARTICLE 29. INTERPRETATION OF CONTRACT

The Department shall have the authority to determine questions of fact that arise in relation to the interpretation of this Contract and the ESCO'S performance hereunder. However, such determinations are subject to the Alternative Dispute Resolution procedures as described in **Schedule JJ (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. The ESCO shall proceed diligently with the performance of this Contract and in accordance with the Department's decision whether or not the ESCO or anyone else has an active claim pending. Continuation of the Work shall not be construed as a waiver of any rights accruing to the ESCO.

ARTICLE 30. ORDER OF PRECEDENCE

- (1) An Applicable Court Order, if any;
- (2) Energy Service Agreement, including all schedules, exhibits, and appendices;
- (3) Investment Grade Audit Agreement;
- (4) Standard Contract Provisions for Supplies and Services Contracts, and Standard Contract Provisions for Construction Services;
- (5) Best and Final Offer(s) (in order of most recent to earliest);
- (6) RFP, as amended;
- (7) ESCO's Proposal.

ARTICLE 31. 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 ESCO: *ESCO Name, Attention:, Complete address.
Include COPY TO: information for ESCO, if applicable.*

TO DEPARTMENT: *Department of General Services,
Attention: Domonique Banks
3924 Minnesota Ave. NE, 5th Floor
Washington, DC 20019*

COPY TO OFFICE OF
GENERAL COUNSEL: *Department of General Services,
Attention: Office of General Counsel
3924 Minnesota Ave. NE, 6th Floor
Washington, DC 20019*

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:

(DEPARTMENT OF GENERAL SERVICES)

_____ By _____

(ESCO)

_____ By: _____

CONTRACT ATTACHMENT I: Schedules, Exhibits, and Appendices

Under a separate file, see detailed descriptions, required tables and examples.

Schedules

Savings Guarantee

- Schedule A Savings Guarantee
- Schedule B Baseline Energy Consumption; Methodology to Adjust Baseline
- Schedule C Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements
- Schedule D-G Left blank for optional schedules

Payments and Schedule

- Schedule H Final Project Cost & Project Cash Flow Analysis
- Schedule I Financing Agreement and Payment Schedule
- Schedule J Compensation to ESCO for Annual Services
- Schedule K Rebates, Incentives and Grants
- Schedule L-P Left blank for optional schedules

Design and Construction Phase

- Schedule Q Description of Project Site(s)
- Schedule R Equipment to be Installed by ESCO
- Schedule S Construction and Installation Schedule
- Schedule T Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
- Schedule U Standards of Comfort
- Schedule V ESCO's Training Responsibilities
- Schedule W-AA Left blank for optional schedules

Post-Construction

- Schedule BB ESCO's Maintenance Responsibilities
- Schedule CC Department's Maintenance Responsibilities
- Schedule DD Facility Maintenance Checklist
- Schedules EE – II Left blank for optional schedules

Administration

- Schedule JJ Alternative Dispute Resolution Procedures
- Schedule KK – OO Left blank for optional schedules

Optional Schedules

- Pre-Existing Service Contracts
- Energy Savings Projections
- Facility Changes Checklist
- Current and Known Capital Projects at Facility

Exhibits

- Exhibit I Performance Bond
- Exhibit II Labor and Material Payment Bond *if required*
- Exhibit III (i) Certificate of Acceptance—Investment Grade Audit Report
- Exhibit III (ii) Certificate of Acceptance—Installed Equipment
- Exhibit IV Equipment Warranties
- Optional Exhibits
 - Manifest of Ownership
 - Minority and Woman-Owned Business Certification
 - Certification that Financing Term is no Longer than the Aggregated Equipment Lifetime
 - Notice of Substantial Completion

Notice to Proceed with Construction Phase
Record of Reviews by the Department

Appendices

Appendix A	RFP for ESCO Solicitation (Pre-qualification Phase; Final Selection Phase)
Appendix B	ESCO Proposal (Pre-qualification Phase; Final Selection Phase)
Appendix C	Investment Grade Audit and Project Development Contract
Appendix D	Investment Grade Audit Report
Appendix E	DGS Standard Contract Provisions for Construction Contract
Appendix F	DGS Standard Contract Provisions for Supplies and Services Contract