

**ENERGY SERVICES PERFORMANCE CONTRACT
FOR
THE EMPIRE STATE BUILDING
(INSERT PROJECT NAME) RETROFIT PROJECT**

This Energy Services Performance Contract for the Empire State Building (PROJECT NAME) Retrofit Project (this "*Contract*") is entered into by and between Johnson Controls, Inc. ("*ESCO*"), and Empire State Building Company L.L.C. ("*Customer*"), as of the date of execution set forth below; whereby the ESCO agrees to implement the energy conservation measures and perform the other services set forth in this Contract, including in the attached schedules:

- Schedule A: Project Description;**
- Schedule B: Performance Guarantee;**
- Schedule C: Methodology and Baseline;**
- Schedule D: Performance Tracking Services;**
- Schedule E: Payment Schedule;**
- Schedule F: Project Specific Customer Responsibilities;**
- Schedule G: Required Maintenance;**
- Schedule H: ESCO's Insurance Requirements;**
- Schedule I: Building Rules and Regulations; and**
- Schedule J: Competitive Bidding and WAF Procedures**

The ESCO agrees to implement the Project and perform the Contract Services, as hereinafter defined, at the office buildings owned by the Customer commonly known as the Empire State Building and located at:

Empire State Building
350 5th Avenue
New York, NY 10118

(the "*Site*").

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

EMPIRE STATE BUILDING COMPANY L.L.C. JOHNSON CONTROLS, INC.

By _____	By _____
Signature _____	Signature _____
Title _____	Title _____
Date _____	Date _____

DEFINITIONS

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

1. "**Anti-Terrorism Laws**" is defined in Section 5.5.2.
2. "**Building Rules and Regulations**" means those rules, regulations, and procedures applicable to tenants and contractors performing work of any nature within the building, which are attached to this Contract as Schedule I.
3. "**Change Order**" means a written change in the Project executed by both Parties that, pursuant to Article 8, specifies changes in the Contract Services and, if applicable, changes in the Contract Sum and Contract Time.
4. "**Concealed Conditions**" means subsurface or otherwise concealed physical conditions at the Site of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in construction activities of the type and character as the Work, and that the ESCO could not have discovered through the exercise of reasonable diligence during the performance of the Investment Grade Audit.
5. "**Confidential Information**" is defined in Section 15.3.1.
6. "**Construction Operations Phasing Plan**" means a construction operation phasing plan detailing the ESCO's phasing and staging of the Work at the Site.
7. "**Construction Schedule**" means the ESCO's construction schedule for the Work that includes, without limitation, a schedule related to the entire Project, and that provides for expeditious and practicable execution of all aspects of the Work.
8. "**Contract Documents**" means this Contract with conditions set forth herein, the Schedules identified above, the Design & Engineering Documents (once approved by the Customer as provided in Section 4.2), the Construction Schedule, any Change Orders, the other documents listed in the Contract, and any modifications to the foregoing documents issued after execution of this Contract.
9. "**Contract Services**" means the Work and the Guarantee Period Services.
10. "**Contract Sum**" is defined in Section 2.1.
11. "**Contract Time**" is defined in Section 1.1.
12. "**Customer**" is defined on the first page of this Contract.
13. "**Date of Commencement**" means the date established pursuant to Section 1.2.
14. "**Day**" means calendar day unless otherwise specifically designated.
15. "**Deliverables**" means the Design Materials that are necessary for the Customer to operate and maintain the Project or are otherwise intended for conveyance to the Customer.
16. "**Design & Engineering Documents**" is defined in Section 4.2.1.
17. "**Design Materials**" means the copies and other tangible embodiments of the drawings, specifications, designs, plans, "architectural work" (as such term is defined in the Architectural Works Copyright Protection Act of 1990) and other documents, prepared by or on behalf of the Customer, the ESCO, and/or Subcontractors in connection with the Project or the Contract Services.
18. "**Engineer Neutral**" is defined in Section 1.3.2.
19. "**Energy Conservation Measure**" or "**ECM**" means the equipment, devices, materials, and/or software to be installed at the Site by the ESCO and all related services as described in Schedule A.

20. "**Entire Project**" means the cumulative sum of this Project and all Separate ECMs performed under the Separate ECM Contracts.
21. "**Environmental Incentives**" means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the development or installation of the ECMs and the reduction of energy usage at the Site. Without limiting the foregoing, "Environmental Incentives" includes utility rebates or incentive programs, green tags renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit program, grants from nongovernmental organizations, and the right to claim federal income tax credits under Sections 45 and/or 48 of the Internal Revenue Code.
22. "**ESCO**" or "**Energy Services Company**" is defined on the first page of this Contract.
23. "**ESCO's Representative**" is defined in Section 5.3.
24. "**Extraordinary Measures**" is defined in Section 1.6.
25. "**Final Acceptance**" means the date that the Customer has determined, in consultation with the ESCO, that all of the required Work for constructing and commissioning the Project have been completed in accordance with the Contract Documents.
26. "**Final Acceptance Date**" is defined in Section 1.4.
27. "**Financing Contract**" means a contract for the financing of all or any portion of the Contract Sum.
28. "**Guarantee Period**" is defined in Section 1.1.
29. "**Guarantee Period Services**" means the performance guarantee, monitoring, Project modification, guarantee reconciliation, Performance Tracking Services, and other services to be performed during the Guarantee Period as described in Schedules B, C, and D of this Contract.
30. "**Guarantee Term**" is defined in Schedule B, Section I.
31. "**Guaranteed Annual Savings Amount**" is defined in Schedule B, Section I.
32. "**Guaranteed Project Savings Amount**" is defined in Schedule B, Section I.
33. "**Hazardous Material**" means (A) any substance that is listed, defined, designated or classified under any state, federal, or local law relating to the protection of the environment or human health as a (i) hazardous material, constituent, or waste, (ii) toxic material, substance, constituent, or waste, (iii) radioactive material, substance, constituent, or waste, (iv) dangerous material, substance, constituent, or waste, (v) pollutant, (vi) contaminant, or (vii) special waste; or (B) petroleum, petroleum products, radioactive matters, polychlorinated biphenyl, pesticides, asbestos, or asbestos-containing materials.
34. "**Installation Period**" is defined in Section 1.1.
35. "**Intellectual Property Rights**" means any patents, copyrights, trademarks, service marks, trade secrets and similar and related intellectual property rights protected by law.
36. "**Interim Completion**" means the achievement of the requirements for Substantial Completion for a particular ECM prior to the Substantial Completion Date.
37. "**Investment Grade Audit**" means the report prepared the ESCO that sets forth, among other things, (a) an assessment of the energy consumption characteristics of the Site, (b) specific energy analysis related to the Site and its operation, and (c) recommendations for projects or programs to achieve cost and/or energy savings in the operation of the Site.
38. "**Manufacturers' Warranties**" is defined in Section 4.14.
39. "**Mold**" means any type or form of fungus or similar biological material or agent, including mold,

- mildew, moisture, yeast and mushrooms, and any mycotoxins, spores, scents, or by-products produced or released by any of the foregoing.
40. "**Parties**" means the ESCO and the Customer. "**Party**" means either the ESCO or the Customer.
 41. "**Performance Guarantee Year**" is defined in Schedule B, Section I.
 42. "**Performance Tracking Payment**" is defined in Section 2.4.
 43. "**Performance Tracking Services**" means those services to be provided by the ESCO to measure and verify the performance of the Project and all Separate ECMs described in Schedule D.
 44. "**Phase I Installation Period Payment**" is defined in Section 2.1.2.a.
 45. "**Phase I Installation Period Services**" is defined in Section 2.1.1.
 46. "**Phase II Installation Period Payment**" is defined in Section 2.1.2.b.
 47. "**Phase II Installation Period Services**" is defined in Section 2.1.1.
 48. "**Procured Subcontracts**" means those proposed contracts with Subcontractors identified on Schedule A that the Parties have agreed will be subject to bidding as part of the Procurement Services described in Section 4.2.4.
 49. "**Procurement Services**" is defined in Section 4.2.4.
 50. "**Professional Standard**" means the implementation and exercise of the degree of judgment and skill that is ordinarily possessed by (and generally accepted as being appropriate for) nationally recognized design professional, engineering professionals, and construction professionals of good standing and who are undertaking energy services projects which are of similar scope, nature, and complexity as the Project.
 51. "**Prohibited Person**" is defined in Section 5.5.2.
 52. "**Project**" means the building analysis and recommendation services, design, engineering, installation, repairs, retrofit, complete implementation of the Energy Conservation Measure, and training program for the Customer's employees as more fully described in the "Project Description" attached hereto as Schedule A and the other terms and provisions of this Contract.
 53. "**Punch List**" means minor items of Work to be completed after Substantial Completion and prior to Final Acceptance, which do not prevent the ECM from being used for the purpose for which it is intended and which will not prevent the issuance of applicable permits or certificates for such use.
 54. "**Savings Guarantee Commencement Date**" is defined in Schedule B, Section I.
 55. "**Separate ECM**" means equipment, devices, materials, software, and/or other related services that are performed or installed at the Site by the ESCO pursuant to a contract with the Customer other than this Contract, and for which the installation, measurement, and verification are intended to be undertaken in coordination with the Entire Project. The Separate ECMs may include any one or more of the following:
 - a. Recycling the existing electric chillers to provide increased capacity and higher efficiency and piping work to introduce zone by-pass and the removal of backwash valves, and supplying the Site with a secondary condenser water loop to serve the existing water cooled equipment in the low rise portion of the Site ("**Chiller Plant Retrofit**");
 - b. Providing a thermal barrier and seal openings behind the existing radiators on the exterior walls directing more heat into the occupied space and reducing air infiltration ("**Radiator Insulation**");
 - c. Including the installation of new controls and integration with the existing system to optimize the HVAC system and provide electrical monitoring ("**Building Automation System**"); and

- d. Providing a platform for collecting 15 minute meter data and creating a normalized data base of tenant energy use that will be used to support profiling, reporting, and integration with property management software ("**Tenant Energy Management Metering**").
56. "**Separate ECM Contract**" means any contract between the Customer and ESCO for a Separate ECM.
57. "**Separate ECM Work**" means the work and services required by a Separate ECM Contract, including all labor, materials, equipment, and services provided or to be provided by the ESCO to fulfill the ESCO's obligations under such Separate ECM Contract.
58. "**Site**" is defined on the first page of this Contract.
59. "**Subcontractor**" means any partnership, firm, corporation or entity other than an employee of the ESCO, who contracts with the ESCO to furnish services, labor, materials, or labor and materials at the Site. This term also includes subcontractors of any tier, suppliers, fabricators or manufacturers, whether or not in privity with the ESCO.
60. "**Substantial Completion**" means the date that is the later of the following: (i) the Customer has determined, in consultation with the ESCO, the Work for the ECM is sufficiently implemented in accordance with the Contract Documents, including commissioning of any systems required by the Contract Documents, so that the Customer may utilize the ECM for the use that it is intended, and is fully complete except for minor items, adjustments, and/or corrections that do not interfere with the Customer's use and occupancy of the ECM; or (ii) if the nature of such Work requires that a certificate of occupancy be issued, it means the date of issuance of the required certificate of occupancy.
61. "**Substantial Completion Date**" is defined in Section 1.3.
62. "**USA Patriot Act**" is defined in Section 5.5.2.
63. "**Work**" means the work and services required by the Contract Documents during the Installation Period and during any period of time during which the ESCO is required to correct or replace its work and services pursuant to this Contract, whether completed or partially completed and, includes all labor, materials, equipment, and services provided or to be provided by the ESCO to fulfill the ESCO's obligations under this Contract.

RECITALS

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

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

WHEREAS the Customer desires to enter into a contract with the ESCO to achieve energy and maintenance cost reductions within the Site, subject to the terms and conditions of the Contract; and

WHEREAS, the Customer and ESCO may enter into agreements other than this Contract for the implementation of one or more Separate ECMs, with the intent that the Separate ECMs be designed, installed, measured, and verified in coordination with the Entire Project;

and for other good and valuable consideration, the Parties, intending to be legally bound, hereby agree as follows:

ARTICLE 1 – CONTRACT TIME AND PROJECT SCHEDULE

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

1.2 Date of Commencement. Execution of this Contract by both Parties shall constitute the Date of Commencement.

1.3 Substantial Completion. The ESCO will commence the Work within ten (10) days after the Date of Commencement and will successfully achieve Substantial Completion of the Project within [XXXXXXXXXX] days from the Date of Commencement ("**Substantial Completion Date**"), subject only to adjustments of this Contract Time as provided in the Contract Documents.

1.3.1 When the ESCO believes that the ECM has achieved Substantial Completion, the ESCO will submit a certificate of Substantial Completion and a Punch List to the Customer on a form agreed to by the Parties. If the Customer concurs that the described portion of the Work as performed has achieved Substantial Completion, the Customer will accept that Work by signing the certificate of Substantial Completion and the Punch List and returning both to the ESCO. If the Customer does not concur that the Work has achieved Substantial Completion and/or that the Punch List is not complete or correct, then the Customer shall notify the ESCO within ten (10) business days of any discrepancies. To the extent the ESCO does not dispute the discrepancies raised by the Customer, the ESCO shall (i) promptly and diligently correct the Work to conform to the description of the Work set forth herein, and resubmit the certificate of Substantial Completion to the Customer, and (ii) promptly complete all items on the Punch List. If the ESCO disagrees with the discrepancies raised by the Customer, the ESCO shall notify the Customer of a dispute and such dispute shall be resolved in accordance with Section 1.3.2 herein. If the Customer does not deliver written notice to the ESCO within thirty (30) days of receiving the certificate of Substantial Completion and the Punch List, the Customer will be deemed to have agreed to, signed and returned the certificate of Substantial Completion and the Punch List.

1.3.2 Any disputes concerning the Substantial Completion of the Work will be resolved by submitting the issue to a third party professional engineering firm reasonably acceptable to both the ESCO and the Customer ("**Engineer Neutral**"). The Engineer Neutral shall be authorized to make determinations and bind the Parties on issues related solely to interpretations or adequacy of the Design & Engineering Documents or the execution and/or completion of the Work embodied in the Design & Engineering Documents as it relates to the Substantial Completion Date. The Engineer Neutral shall not have the authority to render determinations regarding delay claims, payment disputes or other Contract disputes that do not involve or arise out of the content of the Design & Engineering Documents and/or the quality of the execution of the Work. All disputes beyond the authority of the Engineer Neutral shall be resolved pursuant to Article 7 herein. The determination of the Engineer Neutral with respect to Substantial Completion will be final and binding upon the Parties. The ESCO and the Customer shall share equally the costs or fees for such firm in connection with such dispute resolution process.

1.4 Final Acceptance. The ESCO will successfully achieve Final Acceptance of the entire Project within [XXXXXXXXXX] days from the Date of Commencement, subject only to adjustments of the Contract Time as provided in the Contract Documents ("**Final Acceptance Date**"). The ESCO acknowledges that the Savings Guarantee Commencement Date will commence upon the earlier of the Final Acceptance Date or the Substantial Completion Date, even if the ESCO has failed to achieve Final Acceptance of the entire Project.

1.5 Early Completion Incentives and Liquidated Damages. This Contract does not include any incentive payments for early completion of the Project or liquidated damages for late completion of the Project.

1.6 Construction Schedule and Construction Operations Phasing Plan. The ESCO will, within thirty (30) days after the Date of Commencement prepare and submit the Construction Schedule and Construction Operations Phasing Plan, prepared in form and substance reasonably acceptable to or as specifically prescribed by the Customer. The Construction Schedule shall be updated by the ESCO and submitted to the Customer at least monthly and, if requested by the Customer, in MS Project format. The ESCO shall submit a revised Construction Schedule when the ESCO's planned sequence is changed or when Project changes are made that affect the Construction Schedule. Any changes to the Construction Schedule and Construction Operations Phasing Plan are subject to review and approval by the Customer. When performing the Work, the ESCO shall comply with the Construction Operations Phasing Plan and the Construction Schedule and all Building Rules and Regulations, including any modifications or additions to the Building Rules and Regulations that are generally applicable to all contractors performing work at the Site. If the Customer determines through reasonable evidence that the performance of the Work is behind schedule such that the ESCO will be unable to achieve Substantial Completion in accordance with the Construction Schedule, the Customer shall have the right, but no obligation, to order the ESCO in writing to take corrective measures necessary to expedite the progress of construction, including, without limitation, (i) working additional shifts or overtime, (ii) supplying additional manpower, equipment, and facilities and (iii) other similar measures (collectively "**Extraordinary Measures**"). The determination of whether the progress of the Work is behind schedule shall take into account any extensions in time to which the ESCO is entitled under Section 9.2 herein. The Customer is hereby permitted to continue use of Extraordinary Measures until the progress of the Work complies with the stage of completion required by the Contract Documents. The Customer's right to require Extraordinary Measures is solely for the purpose of ensuring the ESCO's achievement of Substantial Completion in accordance with the Construction Schedule. In no event shall the Customer have control over, charge of, or any responsibility for construction means, methods, techniques, sequences or procedures or for safety precautions and programs in connection with the Work, notwithstanding the rights and authority granted in this Section or elsewhere in the Contract Documents. If the ESCO contends that the Extraordinary Measures are the result of fault of the Customer, or some other event that may justify an extension of the Contract Time pursuant to Section 9.2 of this Contract, the ESCO may make a claim for additional time or cost pursuant to Article 9 herein. The Customer may exercise its rights under or pursuant to this Section frequently as the Customer deems reasonably necessary to ensure that the ESCO's performance of the Work will comply with the Construction Schedule and the Contract Documents.

ARTICLE 2 – COMPENSATION TO THE ESCO

2.1 Contract Sum. The Customer shall pay the ESCO for the due, proper, and complete performance of the Work as required hereunder and for the due performance of all other obligations and duties imposed upon this ESCO pursuant to this Contract, other than the Performance Tracking Services, the "**Contract Sum**", which shall consist of the Phase I Installation Period Payment and, if the Customer authorizes Phase II Installation Period Services pursuant to Section 4.2.5 of this Contract, the Phase II Installation Period Payment.

2.1.1. The "**Phase I Installation Period Services**" include the work and services of the ESCO to

secure all permits and approvals for the Project, prepare the Design & Engineering Documents, and perform the Procurement Services. The "***Phase II Installation Period Services***" include all Work, other than the Phase I Installation Period Services.

2.1.2 The Phase I Installation Period Payment and Phase II Installation Period Payment shall be determined as follows, subject to additions and deductions by Change Order as provided in this Contract:

- a. The "***Phase I Installation Period Payment***" for the performance of the Phase I Installation Period Services is [XXXXXXXX].
- b. The "***Phase II Installation Period Payment***" for the performance of the Phase II Installation Period Services is the lesser of:
 - i. [XXXXXXXX] ("***Phase II Lump Sum Amount***"); and
 - ii. An amount consisting of the following: (1) the Phase II Lump Amount, less [XXXXXXXX] (which sum represents the total estimated contract sums of the Procured Subcontracts as of the date of execution of this Contract); and (2) the final contract sums of the Procured Subcontracts approved by Customer following the completion of the Procurement Services.

2.1.3 The Customer hereby understands and agrees that the Phase II Lump Sum Amount, Guaranteed Annual Savings Amount, and Guaranteed Project Savings Amount have been arrived at based upon the full performance of this Project and the Entire Project. Accordingly, if the Customer elects not to enter into Separate ECM Contracts for the Entire Project, or if the Customer does not authorize the installation or construction of any Separate ECM included within the Entire Project, then the Phase II Lump Sum Amount, Guaranteed Annual Savings Amount, and Guaranteed Project Savings Amount will be adjusted based upon a schedule of alternates prepared by the ESCO that accounts for all possible combinations of the Project and the Separate ECMs. Such schedule of alternates must be prepared by the ESCO prior to the completion of the Design & Engineering Documents, and shall be subject to the approval of the Customer.

2.2 Installation Period Savings. In the event the ESCO achieves cost savings during the Implementation Period those cost savings shall not reduce the Contract Sum, and shall belong exclusively to the ESCO.

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

2.4 Compensation for Performance Tracking Services. Commencing upon Substantial Completion of the ECM and continuing until the expiration or earlier termination of this Contract, the ESCO will perform the Performance Tracking Services. The Customer shall make quarterly payments to the ESCO for the Performance Tracking Services for each Performance Guarantee Year in the amounts set forth in Schedule E, Section II (the "***Performance Tracking Payment***") and in accordance with Section 10.1.2 of this Contract. The Parties acknowledge and agree that the Performance Tracking Services will measure and verify the performance of the Project and the Separate ECMs, and that the payment of the amounts set forth in Schedule E, Section II, under a Separate ECM Contract shall discharge the Customer's obligation to make any Performance Tracking Payment pursuant to this Section. Subject to the Customer's right to withhold payments pursuant to Section 10.2 of this Contract, if in any Performance Guarantee Year, the Customer fails to pay for the Performance Tracking Services in accordance with this Contract or does not permit the ESCO to perform the Performance Tracking Services, the ESCO shall have no obligation to achieve the performance guarantees set forth in Schedule B with respect to such Performance Guarantee Year.

ARTICLE 3 – CUSTOMER

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

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

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

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

ARTICLE 4 – INSTALLATION PERIOD SERVICES

4.1 Permits and Approvals. Except for those permits and fees that cannot be delegated by the Customer under applicable laws, rules and regulations and that are specifically identified on Schedule A, the ESCO shall secure and pay for necessary permits, approvals, assessments and charges required for the proper execution and completion of the Work. If the Customer is required to incur any costs in connection with obtaining the permits and fees that cannot be delegated by the Customer under applicable laws, such costs shall be deducted from the Contract Sum. The Contract Sum includes payment for all costs the ESCO may incur with respect to “controlled” and “permit” inspections by an independent third party.

4.2 Design and Engineering Documents; Procurement; Authorization of Phase II Installation Period Services

4.2.1 The ESCO shall prepare, for written approval by the Customer, working drawings and specifications setting forth in detail the requirements of the construction and installation of the Project in accordance with the Contract Documents ("***Design & Engineering Documents***"). The Design & Engineering Documents shall include all drawings, specifications, schedules, diagrams, and plans, and such content and detail as is necessary to properly complete the construction of the Project or as otherwise suitable for bidding purposes, and shall provide information customarily necessary for the use of such documents by those in the building trades. Where required by law, the Design & Engineering Documents must bear the stamp or seal of architects or engineers licensed by the state in which the Site is located. The Design & Engineering Documents need not be submitted to the Customer as a complete set, but may be submitted in successive packages, each of which address separate construction trades or systems applicable to the Project. Provided individual packages do not require information from packages not yet complete, the Customer shall review, within thirty (30) days after receipt by the Customer, each package of Design & Engineering Documents and either (i) approve such documents; or (ii) disapprove such documents, specifying in writing the basis for disapproval. The Customer's failure to approve or disapprove the Design & Engineering Documents within such thirty (30) day period shall be deemed approval. The ESCO shall cooperate with the Customer to promptly resolve any questions or issues the Customer may have with respect to the Design & Engineering Documents.

4.2.2 The ESCO covenants and agrees that (i) it shall not commence the procurement or construction of any portion of the Project until the completed Design & Engineering Documents relevant to

such part or portion have been approved by the Customer in writing; and (ii) the Design & Engineering Documents shall be completed in accordance with the Professional Standard and all applicable laws. The ESCO shall, at no expense to Customer, promptly modify any Design & Engineering Documents which are not in accordance with laws or are inaccurate or contain errors or omissions.

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

4.2.4 Following the Customer's written approval of the Design & Engineering Documents (or at such earlier time as may be approved by the Customer), the ESCO agrees to undertake the procurement of the Procured Subcontracts and, subject to the prior written approval of the Customer, negotiate contracts with selected Subcontractors for the performance of the Work within the scope of the Procured Subcontracts (collectively, the "**Procurement Services**"). The Procurement Services must be performed in general accordance with Sections 2 through 5 of Schedule J, Competitive Bidding and WAF Procedures, except that Section 2.d is not applicable.

4.2.5 Within thirty (30) days following the completion of all Procurement Services, the Customer shall either (i) provide a written notice to the ESCO directing the ESCO to proceed with the Phase II Installation Period Services, or (ii) provide a written notice to the ESCO terminating this Contract pursuant to Section 13.3; provided, however, notwithstanding anything to the contrary set forth in Section 13.3, upon any such termination Customer shall pay ESCO an amount that, together with any payments previously made, equals the Phase I Installation Period Payment, and the Customer shall have no other payment obligation under this Contract. The ESCO shall have no obligation to perform the Phase II Installation Period Services unless and until it receives a notice from the Customer to proceed with such services pursuant to this Section.

4.3 Supervision and Performance of the Work. The ESCO shall supervise, perform, and direct the Work, using the professional skill, care, and attention reasonably required for projects similar to the Project. The ESCO shall be solely responsible for and have control over means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. The ESCO agrees to faithfully and fully perform the terms of this Contract, and shall complete the Work free and clear of all liens. The ESCO shall, at all times during the progress of the Work, employ enough skilled workmen and have on hand and maintain an adequate supply of materials and equipment to complete the Work in accordance with the Construction Schedule. The ESCO will employ only union labor for the completion of the Work, unless otherwise prohibited by applicable law. The ESCO has satisfied itself, by its own independent investigation and study, regarding all the conditions of the specific areas in the Site affected by the Work to be done and materials to be furnished; the meaning, intention and sufficiency of any plans and specifications for the Work; the recommendations of the Investment Grade Audit; and the conditions under which the Work is to be done; and has executed this Contract based on such investigation, study and determination.

4.4 Employee Discipline. The ESCO shall enforce discipline and good order among the ESCO's employees and other persons carrying out the Work. The ESCO shall remove any employee from the Project on reasonable written demand of the Customer. Should such removal cause the ESCO to experience substantial delay, an appropriate adjustment to the Contract Time shall be made.

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

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

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

4.8 Access to the Work. The ESCO shall, at all times, provide the Customer with unrestricted access to the Work in preparation and progress wherever located in the Site, provided such unrestricted access does not interfere with any critical Work in progress. Customer shall require that anyone it permits access to the Work in preparation and progress wear appropriate safety apparel and/or gear.

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

4.10 Project Meetings. The ESCO shall provide for regularly scheduled weekly project meetings during the Installation Period, and shall give timely advance written notice and agenda of such meetings to the Customer. The ESCO shall record minutes and distribute copies of minutes of meetings to the Customer within two (2) business days after each meeting. The ESCO shall schedule additional project meetings if requested by the Customer.

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

4.11.1 If the ESCO fails to correct the Work, or any portion thereof, that is not in accordance with the requirements of the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, and the ESCO, after receipt of written notice from the Customer, either (i) has not cured such failure within twenty-one (21) days or (ii) if the nature of the failure is such that it is not capable of cure within twenty-one (21) days, has not reached agreement with the Customer for a plan to cure such failure or has not commenced and diligently and continuously pursued the cure of such failure in accordance with such plan within such twenty-one (21) day period, then the Customer, by written order signed by the Customer or by an agent specifically so empowered by the Customer in writing, may order the ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated or the ESCO has provided the Customer with a plan for corrective action acceptable to the Customer in its

reasonable judgment. The right of the Customer to stop the Work shall not, however, give rise to a duty on the part of the Customer to exercise this right for the benefit of the ESCO or any other person or entity.

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

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

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

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

4.15 Risk of Loss. Regardless of the passage of title, risk of loss and damage to the Work shall remain with the ESCO until the date of Final Acceptance of the entire Project; provided, however, to the extent the Customer recovers any insurance proceeds from the Builder's Risk Insurance carrier or from the Customer's existing property owner's insurance carrier as a result of such loss or damage, the same shall be applied against said loss or damage.

4.16 Theft, and Damage. The Customer will not be responsible for any material theft or damage to any

stored or installed equipment until the Work is accepted by the Customer.

ARTICLE 5 – OTHER SERVICES AND REQUIREMENTS OF ESCO

5.1 Contract Documents. The ESCO hereby covenants and agrees that it shall duly and properly perform the Contract Services and implement the Project in accordance with the Contract Documents and the Professional Standard. Unless otherwise provided in the Contract Documents, the ESCO shall provide and pay for labor, materials, tools, equipment and machinery necessary for the proper execution and completion of the Contract Services. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Contract Services including, without limitation, all items and services that are consistent with, contemplated by, or reasonably inferable from the Contract Documents, whether or not such items and services are specifically mentioned therein. The Contract Documents are complementary, and what is required by one shall be binding as if required by all. The Parties intend that the Contract Services will be coordinated with the work and services performed under the Separate ECM Contracts, and that the ESCO will schedule and perform all Work under this Contract and the work under the Separate ECM Contracts so as to efficiently complete the Project and the Separate ECMs and minimize disruption to tenants at the Site.

5.2 Subcontractors. The ESCO shall furnish in writing to the Customer for its approval the names of the Subcontractors to whom the ESCO plans to award any portion of the Contract Services. Contracts between the ESCO and Subcontractors shall require each Subcontractor, to the extent of the Contract Services to be performed by the Subcontractor, to be bound to the ESCO by the terms of the Contract Documents, and to assume toward the Customer all the obligations and responsibilities which the ESCO, by the Contract Documents, assumes toward the Customer. The ESCO shall be responsible to the Customer for acts and omissions of the Subcontractors, their agents and employees, and any other persons performing portions of the Contract Services, to the same extent as the acts or omissions of the ESCO hereunder. Subcontractors may only use union labor for the completion of the Work, unless otherwise prohibited by applicable law. Further, all Subcontractors must be licensed and bonded in accordance with New York law.

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

5.4 Taxes. The ESCO shall pay all federal, state or local sales, consumer, use, and other similar taxes for which it bears the incidence of taxation, whether or not effective or merely scheduled to go into effect. The Contract Sum is based on taxation requirements in existence (or scheduled to go into effect) as of the date this Contract is executed. Any changes in or to such taxation requirements that affect the cost of the Work shall entitle the ESCO to an equitable adjustment to the Contract Sum through a Change Order; provided, however, the ESCO shall not be entitled to any adjustment to the Contract Sum as the result of any change to income tax laws or any law by which a tax is levied or assessed on the basis of the ESCO's income, profits, revenues, or gross receipts.

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

codes, and regulations affecting the cost of the Work shall entitle the ESCO to an equitable adjustment in the Contract Sum and Contract Time through a Change Order. For purposes of this paragraph, the term "regulations" refers to any administrative regulations promulgated by a governmental authority pursuant to law or code, and does not include the interpretation of legal requirements by government officials in the administration and enforcement of any legal requirement.

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

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

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

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

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

5.9 Retention and Inspection of Documents. The ESCO and its Subcontractors shall furnish the Customer with such information as the Customer reasonably requests regarding the progress and execution of the Contract Services. For three (3) years after the ESCO receives its final payment in connection with

the Contract Services, the ESCO and its Subcontractors shall maintain and allow the Customer to inspect and copy records on the Contract Services showing utilization of Subcontractors, work performed, and data and information necessary to support all energy savings calculations.

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

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

5.10.2 The warranty period for the Project shall be twelve (12) months running from and after the latter of the following dates: (i) the date of Substantial Completion of the Project; and (ii) the date of substantial completion of the last Separate ECM to achieve substantial completion pursuant to the Separate ECM Contract for that project. Further, any extended warranty described in Schedule A for all or any portion of the Project shall apply in accordance with the terms set forth in Schedule A.

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

5.11 ECM Malfunction. Prior to the expiration of the warranty period set forth in Section 5.10 and subject to the limitation of liability set forth in Section 6.1, the ESCO agrees to compensate the Customer for business expenses, damages to real or personal property, lost profits, or lost revenues resulting from tenant claims that are directly attributable to ECM malfunction to the extent caused by nonperformance or error by the ESCO or its Subcontractors and to the extent such ECM malfunction renders the tenant space uninhabitable or leads to a claim for rent abatement based on habitability. The Customer shall use reasonable efforts to provide written notification to the ESCO within seventy-two (72) hours of receiving notification of a tenant claim pursuant to this Section.

5.12 Indemnification.

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

compensation or benefits payable under insurance policies, workers' compensation act, disability benefit acts, or other employees' benefit acts.

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

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

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

ARTICLE 6 – LIMITATION OF LIABILITY

6.1 ESCO Limitation. Notwithstanding anything to the contrary contained in this Contract, the aggregate liability of the ESCO to the Customer arising from this Contract and the Separate ECM Contracts shall not exceed [XXXXXXX]. However, the preceding limitation shall not apply to, and no credit shall be issued against such liability limitation for:

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

6.2 Customer and ESCO Limitation for Consequential Damages or Economic Loss. Except as otherwise provided in Section 5.11 of this Contract, in no event, whether as a result of termination for default, termination for convenience, suspension of the Work, breach of contract, negligence, or otherwise, shall the Customer or ESCO be liable to each other for damages for loss of profits, loss of use, loss of revenue, loss of bonding capacity, or any other special, indirect or consequential damages of any kind.

ARTICLE 7 – ARBITRATION

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

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

7.1.2 Each Party shall bear its own costs, expenses, and charges, including attorneys' fees,

incurred in connection with arbitration proceedings.

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

ARTICLE 8 – CHANGES IN THE WORK

8.1 Change Orders. The Customer may order, or the ESCO may request of the Customer (which request may be approved, rejected, conditioned, or delayed in the Customer's sole and absolute discretion), changes in the Work consisting of additions, deletions, or modifications to the Work. Such changes in the Work shall be authorized only by written Change Order signed by the Customer and the ESCO. The adjustment to the Contract Sum shall be based on the mutual acceptance of a lump sum price for the Change Order work. ESCO initiated change orders shall in no way affect the Work required herein if not accepted by the Customer. The ESCO must give written notice to the Customer of an event giving rise to a change in the Contract or of its discovery of a Concealed Condition within thirty (30) days of when the ESCO either knew, or should have known, of such event or Concealed Condition or the ESCO will be deemed to have waived its right to such Change Order.

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

8.3 No Changes That Impact Guarantee. To the extent the ESCO reasonably determines that any change in the Work requested or directed by the Customer will materially and adversely impact the ESCO's ability to meet or sustain achievement of the performance guarantees set forth in Schedule B, the ESCO has the right, in its sole and absolute discretion, to decline such change in the Work. However, if the change in the Work is deemed necessary by the Customer to protect the Site from damage or allow for maintenance, then the Change Order shall be implemented and the ESCO and Customer shall agree in writing on the extent of the impact of the performance guarantees set forth in Schedule B.

8.4 Concealed Conditions. Prior to significantly disturbing the same, ESCO shall immediately notify Customer if it encounters any conditions at the Site which the ESCO believes are Concealed Conditions. Following such notification, the Customer shall review the conditions and determine whether or not such conditions are Concealed Conditions. If the Customer determines the conditions are Concealed Conditions and the Concealed Conditions cause an increase in ESCO's cost of, or time required for, performance of any part of the Work the ESCO and Customer shall agree, by Change Order, on how to proceed and the extent of any adjustment to the time required for performance of the Work and to the Contract Sum.

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

ARTICLE 9 – TIME

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

9.2 Delays in the Progress of the Work. If the ESCO is delayed at any time in progress of the Work by changes ordered in the Work by the Customer, by labor disputes, fire, abnormal adverse weather conditions that affect the Work not reasonably anticipatable, unavoidable casualties or any other causes which could not have been foreseen or avoided by the exercise of due diligence, and which are beyond the control and without the fault or negligence of the ESCO or its Subcontractors, then the Contract Time shall be extended by Change Order provided that: (i) the ESCO has notified the Customer in writing of such delay within thirty (30) days following the date when the ESCO becomes aware, or should have become aware through the exercise of reasonable diligence, of such delay; (ii) the ESCO has taken all reasonable steps to avoid any such delay (including its continuance); and (iii) such delay is not a theoretical delay but does actually adversely affect the critical path of the Work. Otherwise, the ESCO shall not be entitled to an extension of the Contract Time for any delays in the progress of the Work. The ESCO hereby acknowledges that the Work of this Contract will be performed in an occupied office building and that such occupancy has been factored into the establishment of the Substantial Completion Date. Accordingly, no proposed Change Order from the ESCO arising out of the normal operations and occupancy of the Site shall be considered by the Customer.

ARTICLE 10 – PAYMENTS AND COMPLETION

10.1 Payments.

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

10.1.2 During the Guarantee Period, each quarterly Performance Tracking Payment due from the Customer, as set forth on Schedule E, shall be paid to the ESCO in advance of each Performance Tracking quarter..

10.2 Withholding of Payments. Payments may be withheld to the extent of, and on account of (1) defective Work not remedied in accordance with Section 4.11, or Contract Services not in accordance with the Contract Documents; (2) claims filed by third parties; (3) failure of the ESCO to make payments promptly to the Subcontractors for labor, materials, or equipment; (4) persistent failure to carry out the Contract Services in accordance with the Contract Documents; (5) failure by the ESCO to perform its obligations under the Contract Documents; or (6) a default by the ESCO under the Contract Documents. The Customer shall promptly notify the ESCO in writing of any reason for withholding payment.

10.3 Retainage. Retainage of five percent (5%) of the total amount earned shall be withheld from partial payments to the ESCO. The retainage shall be released upon Final Acceptance of the Project.

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

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

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

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

10.5 Payment Due Date. Payment shall be made net thirty (30) days of submission of a payment request meeting the requirements of this Article 10 and Schedule E. If payment is not made within an additional thirty (30) days after the payment due date, and the Customer is not entitled to withhold payment pursuant to Section 10.2, and has not provided written notice to the ESCO of such withholding, the ESCO may suspend all Work until payment is made. In such event ESCO shall be entitled to an appropriate Change Order to reflect the impact, if any, of such suspension upon the Contract Sum and Contract Time.

10.6 Punch List Items. In the event that the ESCO has not completed or corrected all Punch List items at the time of submission of its final payment request for the Work, final payment will be made by the Customer to the ESCO, less the retainage withheld pursuant to Section 10.3. If the total retainage withheld by the Customer is less than 125% of the value assigned by the Customer to the Punch List items, then the Customer will withhold from the final payment an amount that, together with the retainage withheld pursuant to Section 10.3, equals 125% of the value assigned by the Customer to the Punch List items. If ESCO does not complete the Punch List items within thirty (30) days, Customer may, upon an additional fourteen (14) days' written notice to ESCO, complete the Punch List items out of amounts withheld pursuant to this Section and then pay the ESCO any remaining funds. Payment with respect to such final Punch List items shall be made by the Customer within thirty (30) days following the completion of all Punch List items.

10.7 Liens Filed Against the Work. Provided that the ESCO has been paid by the Customer all sums due to the ESCO pursuant to the Contract, the ESCO shall not voluntarily permit any laborer's, materialmen's, mechanic's, or other similar liens to be filed or otherwise imposed on any part of the Work or the property on which the Work is performed. If any laborer's, materialmen's, mechanic's, or other similar lien or claim thereof is filed or otherwise imposed against the Site, the ESCO, within thirty (30) days of the filing of such lien or other imposition thereof, shall cause such lien to be released or otherwise discharged, except as to liens which the ESCO is contesting in good faith by appropriate action diligently pursued, provided the ESCO has notified the Customer of the nature of such lien and informed the Customer of the type of action being pursued by the ESCO and, if requested by the Customer, has provided the Customer with a bond satisfying the requirements of the laws of the state in which the Site is located sufficient to cover such claim (or cause the surety to acknowledge in writing that the lien claim is covered by the payment bond) in the event the ESCO is unsuccessful in contesting same or has made other arrangements satisfactory to the Customer. If, however, the ESCO, within the aforesaid thirty (30) day period, does not cause such lien either to be released and discharged forthwith or contests same in the manner provided hereinabove, then the Customer may deduct 125% of the amount of the lien claim from the next progress payment until the ESCO has caused such lien to be released and discharged or otherwise contested the same in the manner provided hereinabove. The ESCO shall indemnify, defend and hold harmless the Customer from all claims, losses, demands, causes of action or suits of whatever nature arising out of any such lien or that part of the Work covered thereby.

ARTICLE 11 – HAZARDOUS MATERIALS

11.1 ESCO's Responsibilities With Respect to Hazardous Materials. The scope of Work to be performed by the ESCO pursuant to this Contract and the compensation to be paid to the ESCO hereunder for the Work expressly exclude any work or service of any nature associated or connected with the identification, abatement, cleanup, control, or removal of any currently existing Hazardous Materials or Mold on, in or nearby the Site beyond what is specifically defined and identified in Schedule A of this

Contract. The ESCO is responsible for the removal, abatement, and remediation of asbestos and asbestos containing material necessary to perform the Work to the extent described on Schedule A. The Customer agrees that all duties and obligations in connection with any Hazardous Materials or Mold currently located in, on or nearby the Site or brought into the Site by a party other than the ESCO or its Subcontractors, other than those defined in Schedule A, are not the ESCO's responsibility. Should the ESCO become aware, discover or based on reasonable evidence suspect the presence of Hazardous Materials or Mold beyond those to be addressed in Schedule A, the ESCO will immediately cease work in the affected area, and will promptly notify the Customer of the conditions discovered. Should the ESCO stop work because of such discovery or suspicion of Hazardous Materials or Mold, then the Contract Time will, should the Customer elect to choose to continue the Work after remedy thereof, be reasonably extended by Change Order to cover the period required for abatement, cleanup, or removal of the Hazardous Materials or Mold. The ESCO will not be held responsible for any claims, damages, costs, or expenses of any kind associated with such period during which work has been stopped as a result of Hazardous Materials or Mold.

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

11.3 Hazardous Materials Introduced to the Site by ESCO. Notwithstanding anything to the contrary set forth in this Article 11, if any Hazardous Materials are introduced to the Site after the Date of Commencement by the ESCO, its Subcontractors, and any party for whom they may be liable or if any Mold occurs within the Site to the extent resulting from the negligent implementation of the Project or the improper functioning of the ECMs, then any response, removal, cleanup, or other remedial action required by applicable law shall be performed by the ESCO at its sole cost and expense; provided, however, the ESCO's liability under this Section for remedial actions relating to Mold shall only extend until the expiration of the warranty period set forth in Section 5.11, and shall not apply to Mold existing at the Site on the Date of Commencement. Except as to the ESCO's initial response to an emergency, any such remedial action(s) shall require the prior review and approval of the ESCO.

ARTICLE 12 – OWNERSHIP OF DESIGN MATERIALS

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

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

and for the Customer to allow others to use, reproduce and have reproduced, such Design Materials subject to the restrictions set forth below:

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

12.3 Delivery of Deliverables and As-built Drawings. Upon the earlier of the date of Substantial Completion of the ECM or the date of termination of this Contract, provided the ESCO has been paid the Phase I Installation Period Payment, the ESCO shall deliver to the Customer any Deliverables that have not been previously submitted to the Customer for the ECM. Further, prior to the date of Substantial Completion of the ECM, the ESCO shall have completed all required training for the ECM. Upon the date of Final Acceptance of the Project, the ESCO must provide mylar, reproducible "as-built" drawings of all existing and modified conditions associated with the Project, conforming to typical engineering standards. The as-built drawings shall also be submitted in an electronic format compatible with the AutoCAD or other similar system in use by the Customer.

ARTICLE 13 – DEFAULT AND TERMINATION

13.1 Customer's Right to Cure Default. If the ESCO defaults or persistently fails or neglects to carry out the Contract Services in accordance with the Contract Documents or fails to perform a provision of the Contract, the Customer shall provide written notice of such default, failure or neglect to the ESCO. If the ESCO has not cured such default, failure or neglect within thirty (30) days from receipt of the Customer's notice, and without prejudice to any other right or remedy the Customer may have, the Customer may make good such deficiencies and may deduct the cost thereof, including compensation for the Customer's services and expenses made necessary thereby, from the payment then or thereafter due the ESCO. However, if the nature of the default or failure is such that it cannot with due diligence be cured by the ESCO within thirty (30) days, and the ESCO has diligently prosecuted the cure of such default or failure within said thirty (30) days and thereafter diligently prosecutes such cure until the default or failure is remedied, the Customer may agree in good faith, which agreement shall not be unreasonably withheld or delayed, to extend such thirty (30) day period by such additional time period as may be reasonably required by the ESCO to cure such default or failure. Additionally, in the case of an "emergency" (defined herein as any default, neglect or defect in or with respect to the Contract Services endangering life, the Customer's or a tenant's ability to occupy all or any portion of the Site, and/or property damage in excess of \$10,000), the Customer shall provide the ESCO with written notice of such default, failure or neglect constituting such emergency, but the Customer may immediately commence and continue correction of such emergency, without waiting for the expiration of the above-described notice and cure period. In any case where the Customer makes good any deficiencies as provided herein, an appropriate Change Order shall be issued deducting from payments then or thereafter due the ESCO all reasonable and necessary costs incurred by the Customer for the correction of such deficiencies. If payments then or thereafter due the ESCO are not sufficient to cover such amounts, the ESCO shall pay the difference to the Customer upon demand.

13.2 Termination Upon Default. Alternatively, at the Customer's option, if the ESCO has not cured such default or failure within thirty (30) days from receipt of the Customer's notice, Customer may

terminate the Contract and take possession of the area at the Site affected by the Work and remove all materials, equipment, tools and construction equipment and machinery thereon owned by the ESCO (or require the ESCO to immediately remove all such materials, equipment, tools and construction equipment and machinery from the Site) and the Customer may finish (or cause another contractor to finish) the Work by whatever method the Customer may deem expedient. However, if the nature of the default or failure is such that it cannot with due diligence be cured by the ESCO within thirty (30) days, and the ESCO has diligently prosecuted the cure of such default or failure within said thirty (30) days and thereafter diligently prosecutes such cure until the default or failure is remedied, the Customer may agree, which agreement shall not be unreasonably withheld or delayed, in good faith to extend such thirty (30) day period by such additional time period as may be reasonably required by the ESCO to cure such default or failure. After termination by the Customer pursuant to this Section 13.2, the ESCO shall not be entitled to any further payment under this Contract, except to the extent of any amount by which the value of the Work completed prior to such termination and not previously paid for by the Customer exceeds the amount due by the ESCO to the Customer under this Section (including all damages that the Customer would be entitled to recover at law from the ESCO by reason of the ESCO's breach), and even then only at such time as the Work is finally completed by the Customer. If the unpaid balance of the Contract Sum exceeds the cost of finishing the Work, including compensation for any consultant's or architect's services and expenses made necessary thereby (including, without limitation, the Customer's reasonable attorney's fees and costs), such excess shall be paid to the ESCO following completion of the Work by the Customer, but if such cost exceeds such unpaid balance, the ESCO shall pay the difference to the Customer. The Customer shall not be responsible to the ESCO for any loss of anticipated profits on Work not performed on account of a termination under this Section.

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

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

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

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

13.5 Specific Performance. In addition to the rights and remedies set forth elsewhere in this Contract, the Parties may, in law or in equity, by suit, action, mandamus or any other proceeding, including, without limitation, specific performance, enforce or compel the performance of this Contract.

ARTICLE 14 - ASSIGNMENT

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

14.2 Customer Assignment. The Customer may assign this Contract and the Contract Documents in its sole discretion to any purchaser of the Site, to a lender for collateral purposes, or any entity wholly owned or controlled by the same owners of the Customer. However, prior to the Customer's full payment of the Contract Sum, the Customer must provide the ESCO with reasonable evidence of the proposed assignee's ability to make all remaining payments of the Contract Sum prior to any assignment of this Contract and the Contract Documents.

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

ARTICLE 15 – OTHER CONDITIONS OR PROVISIONS

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

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

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

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

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

15.2 Cooperation. Each Party will cooperate with and assist the other Party, its advisors, consultants, attorneys, employees, agents, and representatives, at all times during the Contract Time so as to complete the Contract Services in an efficient, timely, and economical manner. Such cooperation and assistance by

the ESCO shall include, without limitation, any cooperation or assistance required in connection with the Customer's efforts to obtain financing for the Project.

15.3 Confidential Information.

15.3.1 The term "***Confidential Information***" means any documentation or information (i) that is marked as "proprietary" or "confidential", (ii) that is supplied orally with a contemporaneous confidential designation, or (iii) that is known by the receiving Party to be confidential or proprietary information or documentation of the disclosing Party. Confidential Information does not include information that can be demonstrated: (i) to have been rightfully in the possession of the receiving Party from a source other than the disclosing Party prior to the time of disclosure of said information under this Contract; (ii) to have been in the public domain prior to disclosure; (iii) to have become part of the public domain after disclosure by a publication or by any other means except an unauthorized act or omission or breach of this Contract; or (iv) to have been supplied to the receiving Party without restriction by a third party who is under no obligation to the disclosing Party to maintain such information in confidence.

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

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

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

15.6 Severability. If any provision of this Contract shall be held to be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby; provided, however, that if enforcement of this Contract in the absence of such provision would deprive a Party of a material element of its original bargain, the Parties shall promptly negotiate in good faith a reformation of the Contract to reflect as nearly as possible all material elements of the original Contract.

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

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

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

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

Contract Services and carry out the intent and purposes of this Contract.

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

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

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

[REDACTED]

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

15.14 Contractual Relationship. Nothing contained in this Contract shall be construed as creating a contractual relationship of any kind (i) between the Customer and a Subcontractor, or (ii) between any persons or entities other than the Customer and ESCO. No claim as a third party beneficiary under this Contract shall be made, or be valid, against the ESCO or the Customer.

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