

Performance Contract for Operating Cost-Saving Measures

PURPOSE AND DISCLAIMER: This document is part of a collection of model procurement and contracting documents developed over decades by states and refined by the U.S. Department of Energy. They represent best practices for performance contracting projects. They can be easily customized to meet the needs of any project. These documents are provided as samples for adaptation to the laws and regulations of the user, not as legal advice or opinion, and do not attempt to identify or address all circumstances or conditions users may encounter or desire. Nevada statutes are referenced. Legal counsel is advised.

DESCRIPTION – Performance Contract for Operating Cost-Savings

This Performance Contract for Operating Cost-Savings is for design, construction, guarantee, and follow-up measurement and verification of energy-saving projects. A Financial Grade Operational Audit was previously completed that identified the costs and savings of each project. The Financial Grade Operational Audit provides the basis to develop and negotiate this Performance Contract for Operating Cost-Savings.

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Notice of Substantial Completion
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Record of Reviews by Owner

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Appendix B	ESCO Proposal (Pre-qualification Phase; Final Selection Phase)
Appendix C	Financial Grade Operational Audit and Project Development Contract
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PERFORMANCE CONTRACT FOR OPERATING COST-SAVINGS MEASURES

This Performance Contract for Operating Cost-Savings (the "Contract") is made and entered into as of this day of _____, at _____, in the County of _____, State of _____, by and between _____ ("ESCO"), having its principal offices at _____, and _____ ("Owner") having principal offices at _____, for the purpose of installing certain energy, water and operating cost saving equipment, described in **Schedule R (Equipment to Be Installed by ESCO)**, and providing other services designed to save energy for the Owner's property and buildings, known as _____, located at _____ (the "Project Site(s)").

RECITALS

Overview: The Recitals establish the rationale for project, establishes contract authority, defines procurement process leading up to the contract, etc.

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

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

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

WHEREAS, ESCO was selected after a determination that its proposal was the most advantageous to Owner pursuant to a Request for Proposal and contract for the Financial Grade Operational Audit and Project Development Proposal (as hereinafter defined); and

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

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

WHEREAS, Owner is authorized under the Constitution and the laws of the State of Nevada to enter into this Contract for the purposes set forth herein.

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

ARTICLE 1. DEFINITIONS, SCHEDULES, EXHIBITS AND APPENDICES

Section 1.1. Definitions.

Overview: This defines the key words and phrases. **Tips:** Review this after contract revisions to include any new terms.

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

Contract: This Performance Contract for Operating Cost-Savings and all Schedules and Exhibits attached hereto.

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

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

State statutes may specify allowable savings streams and provide definitions. Conform this language and definitions to the language in state statute.

Energy and Cost Savings Guarantee: The amount of savings that the ESCO guarantees the Owner will achieve as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in **Schedule J (Compensation to ESCO for Annual Service)** and in accordance with the Savings Calculation Formula as set forth in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements)**. Measurement and verification services are required to be conducted by the ESCO each year of the guarantee period in order for the ESCO to guarantee savings.

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

Event of Default: Those events described in **Section 20 (Events of Default)** hereof.

Acceptance Date: The date the Owner accepts the project for beneficial occupancy.

Construction Period: The period from contract signing (including signing of the finance agreement) until the Guarantee Period Start Date (also known as the interim period).

Guarantee Period Start Date: The Acceptance Date or the end of the Construction Period, whichever comes first. The date described in **Section 2.2 (Guarantee Period Start Date)**.

Project Site(s): The facilities of the Owner in need of the more efficient energy, demand, water and operating equipment and services designed to reduce consumption and associated costs at said Project Site(s)

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

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

Section 1.2. Financial Grade Operational Audit Report and Project Development Proposal.

Overview: This section establishes approval and acceptance of the prior Financial Grade Operational Audit Report. A Certificate of Acceptance should be signed by both parties and attached to the contract (Exhibit III (i)). **Tips:** If the list of measures is not completely finalized, that should be stated in the contract.

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

Section 1.3. Schedules, Exhibits and Appendices

Overview: The contract schedules are referenced throughout the contract to provide substantial project detail and clear documentation for any aspect of the project. Exhibits include required forms and approvals. Attachments include supplementary material carried forward from the procurement and Financial Grade Operational Audit stages. **Tips:** Add schedules as needed and list them here. For any schedules that need to be completed after contract execution, include a statement in the contract schedule that information is forthcoming. Refer to general descriptions presented in each contract schedule to ensure full information. Determine what should be presented as a schedule, exhibit or appendices. They are often used interchangeably.

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

Schedules

Savings Guarantee

Schedule A	Savings Guarantee
Schedule B	Baseline Energy Consumption; Methodology to Adjust Baseline
Schedule C	Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements
Schedule D	Data Collection and Reporting –by ESCO Using eProject Builder (ePB)
Schedule E-G	Left blank for optional schedules

Payments and Schedule

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

Design and Construction Phase

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

Post-Construction

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

Administration

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

Optional Schedules

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

Exhibits

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

Appendices

Appendix A RFP for ESCO Solicitation (Pre-qualification Phase; Final Selection Phase)
Appendix B ESCO Proposal (Pre-qualification Phase; Final Selection Phase)
Appendix C Financial Grade Operational Audit and Project Development Contract
Appendix D Financial Grade Operational Audit Report

Section 1.4. Other Documents

Overview: This section incorporates the original procurement document, the ESCO's response and the Financial Grade Operational Audit report and project proposal as exhibits to the contract. It acknowledges the completion of the ESCO's Financial Grade Operational Audit Report and its approval and acceptance. For any discrepancy between the Financial Grade Operational Audit Report and this contract and its technical schedules, the contract governs.

This Contract incorporates herein and makes a part hereof the entire RFP and ESCO Proposal for this Project labeled Appendix A and B respectively. Acceptance by the Owner of the Financial Grade Operational Audit Report is reflected in Exhibit III (i). Notwithstanding, the provisions of this Contract and the attached Schedules shall govern in the event of any inconsistencies between the Financial Grade Operational Audit Report and the provisions of this Contract.

PAYMENTS AND SCHEDULES

ARTICLE 2. PURCHASE AND SALE; GUARANTEE PERIOD START DATE AND TERMS; CONSTRUCTION PERIOD

Section 2.1. Purchase and Sale

Overview: The Owner agrees to the Guaranteed Maximum Price and obtains financing from a financing company, typically through a lease-purchase agreement.

During the Construction Period (also called Interim Period) the ESCO can draw-down payments from the escrow account set-up by the financing company. Payments are made based on the percentage of work completed and approved. The ESCO receives the full amount once the project is approved (Project Acceptance - Certificate of Acceptance is signed). **Tips:** Require a ___% retainage until the Certificate of Acceptance is signed. This is often regulated by state construction law as to maximum percentage and maximum length of retainage.

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

Owner agrees to lease Equipment through a third party financier, name of lender, as provided for in a separate lease document, **Schedule I (Financing Agreement and Payment Schedule)**.

ESCO will provide the Work and all related services identified in **Schedule R (Equipment to be Installed by ESCO)** and the services detailed in **Schedule BB (ESCO's Maintenance Responsibilities)** and **Schedule J (Compensation to ESCO for Annual Services)**. ESCO shall supervise and direct the Work and shall be responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Contract. ESCO shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

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

Section 2.2. Guarantee Period Start Date

Overview: This section establishes the Guarantee Period Start Date for the guarantee, which is after finalization of schedules, inspection, and Certificate of Acceptance. This section also defines any post-installation payments date (M&V services, maintenance) that will be made after the Guarantee Period Start Date.

In an ideal project, project acceptance and commencement will be concurrent with the end of the construction period loan. If project construction is delayed then the project acceptance date will be delayed. If we also delay the commencement date we will not have a full 12 months of guaranteed savings to cover the first full loan payment. We therefore define the Guarantee Period Start Date as either Acceptance Date or the end of the construction loan period, whichever comes first. This synchronizes financing payment periods with the guarantee period.

Tips: Set the Guarantee Period Start Date as the month after Certificate of Acceptance, after all schedules are finalized. Consider fiscal year impacts, adjusting the date to accommodate fiscal year appropriations/budgeting. Set-up financing payments to begin on/after the Guarantee Period Start Date.

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

Notwithstanding anything to the contrary in this **Article 2 and Article 3 (Purchase and Sale; Guarantee Period Start Date and Terms; Construction Period)**, the Guarantee Period Start Date shall not occur and the Owner shall not be required to accept the work under this Contract unless and until all Equipment installation for the Project Site(s) is completed by ESCO in accordance with the terms and conditions of this Contract. Owner shall have _____ days after notification by the ESCO to inspect and accept the Equipment. Owner reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. ESCO shall not be paid in full, including retainage, until after the construction is completed to Owner's satisfaction and ESCO has satisfied any and all claims for labor and materials and the Certificate of Acceptance has been signed. The Certificate of Acceptance will not be unreasonably withheld by the Owner.

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

Section 2.3. Term of Contract; Construction Period

Overview:

The term of the contract is defined in years, beginning on the Guarantee Period Start Date. The contract and technical schedules are negotiated and executed prior to the Guarantee Period Start Date.

The Construction Period begins with financial contract signing and typically runs for 12, 18 or 24 months. During the Construction Period, savings accrue and are retained by the Owner. Interest only payments from the escrow account, as set up by the financing company, will be due at the end of this period; interim payments may be due if the term greater than 12 months. These interest only payments are usually capitalized since no guaranteed savings are available to pay them. The start of the financing period begins at this time and is date specific.

Subject to the following sentence, the term of this Contract shall be no greater than _____ years [20 years for Nevada State Governments – NRS 333A.100; 25 years for Nevada Local Governments– NRS 332.380(2)], measured beginning with the Guarantee Period Start Date, no greater than the useful lifetime of the equipment, and no greater than the amortized period.

Nonetheless, the Contract shall be effective and binding upon the parties immediately upon its execution, and the period from Contract Execution until the Guarantee Period Start Date shall be known as the Construction Period. All savings resulting from installation of the measures during the Construction Period will be fully credited to Owner.

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

Section 3.1. Energy and Cost Savings Guarantee

Overview: This section establishes an annual guarantee to cover all annual payments (principle and interest, lease payment and ESCO fees, including M&V and maintenance fees). The ESCO's savings guarantee will, at a minimum, cover annual project financing costs (principal and interest) as well as all annual ESCO service fees including M&V and maintenance for the term of the guarantee period.

The annual guarantee is required for the entire financing term (Nevada State Governments – NRS 333A.090, .150; Nevada Local Governments – NRS 332.370, .440), with the option for Owner to terminate after a sufficient period that demonstrates savings. (Nevada State Governments – NRS 33A.090; Nevada Local Governments – NRS 332.370) Measurement and verification services are required to be conducted by the ESCO each year of the guarantee period in order for the ESCO to guarantee savings.

ESCO has formulated and, subject to the adjustments provided for in **ARTICLE 15 (Material Changes)**, has guaranteed the annual level of energy, demand, water and operating cost savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract in accordance with the methods of savings measurement and verification as set forth in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements)**. The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract as specified in **Schedule A (Savings Guarantee)** and has been structured by the ESCO to be sufficient to cover any and all annual payments required to be made by the Owner as set forth in **Schedule J (Compensation to ESCO for Annual Services)** and **Schedule I (Financing Agreement and Payment Schedule)**.

Section 3.2. Annual Review and Reimbursement/Reconciliation

Overview: At the end of each contract year the ESCO will verify actual savings. The ESCO will reimburse the Owner for any shortfall related to the savings guarantee. A Owner best practice is to retain all excess savings, rather than to apply excess savings to past or future shortfalls. **Tips:** In the event of a shortfall, consider negotiating to receive cash, equipment or services equivalent to any deficiency in savings. Ensure that the make-up funds are provided in the needed budget year. The ESCO needs at least 60 days to review, approve and submit a check. Consider negotiating the use of excess savings for future or prior shortfalls in the event shortfalls are due to Owner operational deficiencies. The guarantee period needs to conform to state laws.

Energy-related cost savings shall be [verified] measured and/or calculated as specified in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting)** and **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)** and a report provided within ninety (90) days of the end of the year for the previous year for each anniversary of the Guarantee Period Start Date.

In the event the Energy and Cost Savings achieved during such guarantee year are less than the Guaranteed Energy and Cost Savings as defined in **Schedule A (Savings Guarantee)**, ESCO shall pay the Owner an amount equal to the deficiency.

The ESCO shall remit such payments to the Owner within days of written notice by the Owner of such monies due. In no event shall credit for excess savings be used to satisfy saving guarantees in past or future years of the Contract

Section 3.3. ESCO Compensation and Fees

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

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

The annual Measurement and Verification scope and related cost may be changed, upon a notice 60 days in advance of the start of the next year.

Section 3.4. Billing Information Procedure

Overview: Establish the frequency of invoices and the time period for these steps: a) The Owner provides the utility bills to the ESCO, b) the ESCO calculates savings per agreed verification protocol, c) the ESCO invoices the Owner and d) the Owner makes payment. **Tips:** Structure the payments to suit the needs of the Owner. Determine the time for each step and set-up a process to provide utility bills and respond in a timely manner. The billing schedule for on-going ESCO services can be set up on a monthly or quarterly basis.

Payments due to ESCO under this Section 3 shall be calculated each _____ in the following manner:

- (i) By the _____ day after receipt, Owner shall provide ESCO with copies of all energy bills for the Project Site(s) which it shall have received for the preceding month;
- (ii) Upon receipt of the required information, ESCO shall calculate the savings in accordance with the agreed-upon calculation formulae in **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements)**.
- (iii) Based upon paragraphs (i) and (ii) above, ESCO shall prepare and send to Owner a _____ invoice which shall set forth for each _____ the amounts of the energy and operations dollar savings calculated in accordance with **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Report Requirements)** and for the services as provided for in **Schedule J (Compensation to ESCO for Annual Services)**. The invoice will set forth the total _____ payment due from Owner.

Section 3.5. Payment

Overview: This establishes the time to approve the invoice and make payment to the ESCO during construction and for annual ESCO services. **Tips:** Establish a reasonable amount of time to process ESCO invoices.

Owner shall pay ESCO within _____ days of receipt of ESCO's invoice.

Section 3.6. Effective Date of Payment Obligation

Overview: ESCO fees for ongoing maintenance, M&V or other services are not paid until the Certificate of Acceptance of Installed Equipment has been signed. **Tip:** Consider making progress payments during the Construction Period to reduce interest costs.

Notwithstanding the above provisions in Section 3, Owner shall not be required to begin any payments to ESCO under this Contract unless and until all equipment installation is completed by ESCO in accordance with the provisions of **Article 8 (Construction and Equipment Installation; Approval)** and **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**, and accepted by Owner as evidenced by the signed Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**, and unless and until said equipment is fully and properly functioning.

Section 3.7. Open Book Pricing

Overview: The ESCO will fully disclose all costs, provide access to records for all labor and material costs, and make them available for three years beyond final payment.

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

Contributing funds shall be documented separately with clear tracking of expenditures.

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

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

ARTICLE 4. FISCAL FUNDING

Section 4.1. Non-appropriation of Funds

Overview: The Owner is protected in the event of non-appropriation of funds or insufficient appropriated funds required to make payments, which would effectively terminate the contract with no penalty to the Owner (for those buildings/projects involved). This is a standard Owner provision and is generally accepted by ESCOs since it is unlikely that funding for utilities would be withheld.

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

Section 4.2. Non-substitution

Overview: In the case of non-appropriation of funds or Owner default, the ESCO is protected by ensuring that the Owner cannot secure other funding for the same purpose for one year following contract termination. **Tips:**

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by ESCO due to a default by the Owner, the Owner agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the

same and unique services performed by ESCO under the terms of this Contract for a period of three-hundred sixty five (365) calendar days following such default by Owner, or termination of this Contract due to non-appropriations.

AUDIT AND CONSTRUCTION PHASE

ARTICLE 5. ENERGY USAGE RECORDS AND DATA

Overview: The ESCO is ensured access to historical energy consumption, facility operations and occupancy data in order to develop baseline utility consumption. The baseline is a record of the building configuration, operation and utility use prior to project installation. It provides for measurement of future savings and future adjustment of the baseline to accurately reflect savings when conditions change. Also provide any prior technical studies and energy audits for the ESCO's review. **Tips:** At a minimum, 24 months of data should be provided, however, 36 months is recommended. Existing facility conditions, operations and equipment need to be recorded to establish an accurate baseline.

Section 5.1. Data Provided by Owner

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

Owner agrees to provide ESCO direct access to utility bill information, by automated data transfer as feasible.

Section 5.2 Data Collection and Reporting by ESCO – Using eProject Builder (ePB)

ESCO shall collect and report project data, on behalf of Institution and with approval by Institution, as identified in **Schedule D: Data Collection and Reporting – Using eProject Builder** and as amended on the LBNL website (<http://eprojectbuilder.lbl.gov>) and at the specified times.

eProject Builder ("ePB") is a web-based tool managed on behalf of the Department of Energy by The University of California/Lawrence Berkeley National Laboratory (LBNL). ePB enables ESCO and their contracting agencies or other entities to:

- (1) upload and track project-level information;
- (2) generate basic project reporting materials (e.g. task order schedules) that may be mandated by local, state, and/or federal Owner requirements; and
- (3) benchmark proposed Performance Contract for Operating Cost-Savings projects against historical project data.

Based on information provided by the ESCO, the parties agree that the data required to be delivered to LBNL under this clause has commercial value whose disclosure would cause competitive harm to the commercial value or use of the data. LBNL intends to withhold such data from disclosure under 10 C.F.R. 1004.3(e)(2). The use of this data is governed by the provisions of this contract. Unless compelled by a court of competent jurisdiction, there may be no release of this data to the public without the written consent of the Recipient and DOE. Aggregate data that does not identify project-specific metric information may be released as set forth in the contract. Other information required to be delivered under this contract, but not covered under this Commercially Valuable Project Data clause, shall be delivered in accordance with this contract.

ARTICLE 6. LOCATION AND ACCESS

Overview: The Owner is required to provide adequate space and protection for the installed equipment and authorizes the ESCO's access to the facility to perform routine and emergency operations. **Tips:**

ESCO acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Owner shall take reasonable steps to protect such Equipment from harm, theft and misuse

during the term of this Contract. Owner shall provide access to the Project Site(s) for ESCO to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to the Owner. ESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The ESCO's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Owner. ESCO shall immediately notify the Owner when emergency action is taken and follow up with written notice with three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Project Site(s), if any.

ARTICLE 7. PERMITS AND APPROVALS; COORDINATION

Section 7.1. Permits and Approvals

Overview: As a standard construction practice, the ESCO is required to comply with all code requirements, pay all associated permit fees and provide the Owner with copies of each permit and license required to do the work. The Owner agrees to assist the ESCO to obtain all required permits and approvals.

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

Section 7.2. Coordination during Installation

Overview: As a standard practice, the Owner and ESCO will coordinate the equipment installation activities to avoid interfering with the Owner's business activities. If an installation requires interference, the ESCO must obtain the Owner's written approval to proceed. If a facility generates revenue for the Owner (e.g. civic center, theater, arena etc.) and scheduled revenue-producing activities are interrupted due to the fault of the ESCO, either during project installation or operation, then a provision for the collection of damages may be negotiated.

Tips:

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

ARTICLE 8. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; APPROVAL

Section 8.1. Construction Schedule; Equipment Installation

Overview: The construction/installation will be managed in compliance with individual Owner requirements and governing statutes. **Tips:** Since construction is just one component of the overall project, a separate construction contract may be desirable and in some cases necessary. The construction contract would then be referenced in the contract and attached.

Construction and equipment installation shall proceed in accordance with the construction schedule approved by Owner and attached as **Schedule S (Construction and Equipment Installation Schedule)**.

Section 8.2. Systems Startup and Equipment Commissioning

Overview: The ESCO is required to conduct performance testing and verification of each system to ensure proper operation, as specified in its Commissioning Plan, **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**. The ESCO is required to notify the Owner when testing will

take place to provide the Owner the right to be present during all tests. **Tips:** Ensure compliance with the Commissioning Plan and manufacturer startup information, participate in testing, and identify any post-acceptance testing required. Include manufacturer's startup and performance sheets in the commissioning plan. If any testing is negotiated to occur after Project Acceptance, state that fact in the contract or attachments.

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

ARTICLE 9. EQUIPMENT WARRANTIES

Overview: This requires new equipment with minimum one-year warranties on parts and performance and requires new warranty replacement equipment with function for one year. Equipment warranties will be transferred to the Owner after project installation. The ESCO responsible for pursuing any necessary remedies during the warranty period. If the ESCO fails to exercise the warranty and damages occur, the ESCO is responsible for all costs of repair and any lost savings. The Owner handles maintenance after the warranty or first-year period.

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

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

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

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

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

ARTICLE 10. STANDARDS OF COMFORT

Overview: The ESCO is required to meet standards of comfort identified in **Schedule U (Standards of Comfort)** throughout the term of the contract. These standards are negotiated between the ESCO and Owner to reflect realistic ranges of heating, cooling and hot water temperatures, lighting levels, chilled water requirements, etc. **Tips:** Establish comfort ranges and ensure full documentation in the schedule.

ESCO will maintain and operate the Equipment in a manner which will provide the standards of heating, cooling, ventilation, hot water supply, and lighting quality and levels as described in **Schedule U (Standards of Comfort)**. During the term of this Contract, ESCO and Owner will maintain, according to **Schedule BB (ESCO's Maintenance Responsibilities)** and **Schedule CC (Owner's Maintenance Responsibilities)**, and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in **Schedule U (Standards of Comfort)**.

ARTICLE 11. ENVIRONMENTAL REQUIREMENTS

Section 11.1. Excluded Material and Activities

Overview: The ESCO is not responsible for identifying, handling or working on hazardous materials encountered. In the event the ESCO discovers such materials, the ESCO will stop work and notify the Owner. The Owner is responsible for corrective action at its expense. Neither the ESCO's stoppage of work nor the Owner's discovery are grounds for default. If work can commence, any lost time will be added to the time schedule. The ESCO is responsible for any hazardous materials related to equipment it brings to the site. **Tips:** Provide any studies or inspections related to hazardous waste that could aid decision-making.

Owner recognizes that in connection with the installation and/or service or maintenance of Equipment at Owner's Project Site(s), ESCO may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, (ii) fungus (any type of form of fungi, including mold or mildew, and myotoxins, spores, scents or by-products produced or released by fungi), (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement, or (iv) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities". Owner agrees that if performance of work involves any Excluded Materials and Activities, Owner will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. In the event ESCO discovers Hazardous or Excluded Materials, ESCO shall immediately cease work, remove all ESCO personnel or subcontractors from the site, and notify the Owner. The Owner shall be responsible to handle such Materials at its expense. ESCO shall undertake no further work on the Project Site(s) except as authorized by the Owner in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Owner shall not constitute a default by the Owner. In the event of such stoppage of work by ESCO, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by ESCO as a result will be added by Change Order.

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

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

Overview: The ESCO is required to have an agreement with an approved PCB ballast disposal company and approved lamp recycling firm that will properly handle transport, recycle, and incinerate, providing information for site handling and a Certificate of Destruction. The Owner must sign a manifest of ownership.

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

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

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

ARTICLE 12. TRAINING BY ESCO

Overview: The ESCO typically trains facility personnel prior to the Certificate of Acceptance and may continue training post-installation. **Tips:** Document the training hours and schedule for training, noting if there are charges for unscheduled training.

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

POST-CONSTRUCTION PHASE

ARTICLE 13. EQUIPMENT SERVICE

Section 13.1. Actions by ESCO

Overview: Maintenance and service responsibilities of the ESCO and the Owner are specified in **Schedule BB (ESCO's Maintenance Responsibilities)** and **Schedule CC (Owner's Maintenance Responsibilities)**. When the Owner causes additional maintenance or repair to the equipment, the Owner will be charged by the ESCO for the cost of the required maintenance or repair.

ESCO shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to **Schedule BB (ESCO's Maintenance Responsibilities)**. Owner shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in **Schedule J (Compensation to ESCO for Annual Services)**, provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of the Owner or any employee or other agent of Owner, and ESCO can so

demonstrate such causal connection, ESCO may charge Owner for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

Section 13.2. Malfunctions and Emergencies

Overview: This Owner is required to notify the ESCO of any situation that could impact equipment performance. The impacts cover both pre-existing and newly installed equipment that relate to system performance, including equipment malfunction or modification, interruption of power supply or any emergency situation. If the Owner delays in notifying the ESCO and doesn't correct the situation, it will be treated as a Material Change and the baseline will be adjusted accordingly. If the Owner makes an effort to assess the situation and incorrectly determines it doesn't have an impact, then the ESCO will not fault the Owner, although an adjustment to the baseline may still be warranted. **Tips:** Exercise due diligence.

Owner shall use its best efforts to notify the ESCO or its designated subcontractors within 24 hours after the Owner's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings, (ii) any interruption or alteration to the energy supply to the Project Site(s), or (iii) any alteration or modification in any energy-related equipment or its operation.

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

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

Section 13.3. Actions by Owner

Overview: The Owner may not make any changes to the operation and maintenance of the equipment without the prior written approval of the ESCO, unless in an emergency when the ESCO cannot be reasonably notified or unless otherwise indicated in **Schedule CC (Owner's Maintenance Responsibilities)**. In the case of such emergency, the Owner should follow instructions provided by the ESCO for emergency action. **Tips:**

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

ARTICLE 14. MODIFICATION, UPGRADE OR ALTERATION OF THE EQUIPMENT

Section 14.1. Modification of Equipment

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

Section 14.2. Upgrade or Alteration of Equipment

Overview: This terms and conditions are described under which the ESCO may make changes to the equipment, operating procedures or take other energy savings actions. The Owner needs to approve any changes. The ESCO has the right to make changes to achieve efficiency savings. Any replaced equipment must be new and have the potential to produce at least as much or more savings. For computer software, licensing provisions apply. **Tips:**

ESCO shall at all times have the right, subject to Owner's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions in the Project Site(s), provided that: (i) the ESCO complies with the standards of comfort and services set forth in **Schedule U (Standards of Comfort)** herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the guaranteed energy and cost savings at the Project Site(s) and; (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the ESCO.

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

ARTICLE 15. MATERIAL CHANGES

Overview: Material Change is defined as any condition other than weather that affects building energy use by more than the negotiated percentage (see above discussion). **Tips:** Typically the range is between 2% and 5% based on aggregate consumption costs. The lower value (2%) may be appropriate for large facilities (over \$20,000/month utility bills) and the higher value (5%) may be appropriate for small facilities (less than \$5,000/month utility bills).

Section 15.1. Material Change Defined

A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Owner, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)** and **Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Report Requirements)** by at least ___% after

adjustments for climatic variations. Actions by the Owner which may result in a Material Change include but are not limited to the following:

- (i) manner of use of the Project Site(s) by the Owner; or
- (ii) hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s); or
- (iii) Permanent changes in the comfort and service parameters set forth in **Schedule U (Standards of Comfort)**; or
- (iv) occupancy of the Project Site(s); or
- (v) structure of the Project Site(s); or
- (vi) types and quantities of equipment used at the Project Site(s) or
- (vii) modification, renovation or construction at the Project Site(s); or
- (viii) the Owner's failure to provide maintenance of and repairs to the Equipment in accordance with **Schedule CC (Owner's Maintenance Responsibilities)**; or
- (ix) any other conditions other than climate affecting energy use at the Project Site(s) including but not limited to the replacement, addition or removal of energy and water consuming devices whether plug in or fixed assets,
- (x) casualty or condemnation of the Project Site(s) or Equipment, or
- (xi) changes in utility provider or utility rate classification, or
- (xii) any other conditions other than climate affecting energy or water use at the Project Site(s).
- (xiii) Modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.

Section 15.2. Reported Material Changes; Notice by Owner

Overview: The Owner is required to notify the ESCO in writing of any actual or planned changes to the facility which would impact utility use by more than the specified percentage. In the event of an emergency or situation that would prevent advance notification, the Owner has a specified number of hours to inform the ESCO that a Material Change has occurred. **Tips:** Negotiate the percentage when Material Change applies.

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

Section 15.3. Other Adjustments

Overview: If all building conditions and operations stay the same, utility use will not vary more than the negotiated percentage during any month when compared to the baseline use for that month and after adjustments for weather are made. When a variation occurs, the ESCO will determine the cause of the deviation and report findings to the Owner. The ESCO and Owner will determine what adjustments will be made to the baseline as described in **Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline)**. **Tips:**

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

any such adjustment shall be resolved in accordance with the provisions of **Schedule JJ (Alternative Dispute Resolution Procedures)** hereto.

ARTICLE 16. PERFORMANCE BY ESCO

Section 16.1. Corrective Action; Accuracy of the Services

Overview: The ESCO is directed to protect the Project Site(s) and repair any damage caused by the ESCO and absorb the costs. The ESCO is solely responsible for the technical professional accuracy of all work performed under this Contract including work done by subcontractors or others. **Tips:**

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

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

Section 16.2. Annual Reporting Requirements; Annual ENERGY STAR Rating

Overview: At the end of each annual guarantee period, the ESCO will submit a report as required in **Schedule C (C.4 Annual M&V Reporting Requirements)**. The ESCO will provide an ENERGY STAR score for each eligible facility for each year of the guarantee period if applicable.

ADMINISTRATION

ARTICLE 17. OWNERSHIP OF CERTAIN PROPRIETARY RIGHTS; EXISTING EQUIPMENT

Section 17.1. Ownership of Certain Proprietary Property Rights

Overview: This addresses the ESCO's proprietary rights over customized (or exclusive) software and grants the Owner a continuing license (at no charge) to use and operate the project without violating any ESCO's proprietary rights.

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

Section 17.2. Ownership of Existing Equipment

Overview: The Owner retains ownership of all existing equipment and the ESCO will notify the Owner of any equipment and materials to be replaced. If the Owner chooses to keep the equipment to be replaced, the ESCO

will be notified and the Owner responsible for identifying the location of where the property is to be stored or relocated. The ESCO is responsible for all equipment and materials to be disposed (excepting hazardous waste or environmentally sensitive materials as described above).

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

ARTICLE 18. PROPERTY/CASUALTY/INSURANCE; INDEMNIFICATION

Overview: This section needs to reflect the individual Owner's standard requirements with regard to insurance and indemnification.

Section 18.1 Insurances.

Overview: The Owner's insurance requirements include damages to equipment or property, indemnification and liabilities. **Tips:** Provide standard requirements for insurance and indemnification.

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

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

Section 18.2. Damages to Equipment or Property.

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

Section 18.3. Indemnification.

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

Section 18.4. Liabilities.

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

ARTICLE 19. CONDITIONS BEYOND CONTROL OF THE PARTIES

Overview: The Owner's standard contract language should be included here.

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

ARTICLE 20. EVENTS OF DEFAULT

Section 20.1. Events of Default by Owner

Overview: This addresses failure to pay the ESCO, the Owner's material failure to comply with the contract, and false or misleading representation. **Tips:**

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

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

Section 20.2. Events of Default by ESCO

Overview: This addresses standards of comfort, if not corrected, false or misleading representation or warranty, failure to install equipment or comply with the contract, lien upon the equipment by any subcontractor of the ESCO, ESCO bankruptcy, and failure to pay the Owner. **Tips:**

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

- (i) the standards of comfort and service set forth in **Schedule U (Standards of Comfort)** are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within ___ days after written notice by Owner to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract.
- (ii) any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in **Schedule R (Equipment to be Installed by ESCO)** and **Schedule S (Construction and Installation Schedule)**;
- (iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in **Schedule U (Standards of Comfort)** are maintained, any failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within ___ days after written notice by the Owner to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
- (v) any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of ESCO;

- (vi) the filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within _____ days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO.
- (vii) failure by the ESCO to pay any amount due the Owner or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in **Schedule A (Savings Guarantee)**.

ARTICLE 21. REMEDIES UPON DEFAULT

Section 21.1. Remedies upon Default by Owner

If an Event of Default by Owner occurs, ESCO may, without a waiver of other remedies which exist in law or equity, elect one of the following remedies:

- (i) exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Owner, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy;

Section 21.2. Remedies Upon Default by ESCO

In the Event of Default by ESCO, Owner shall have the choice of either one of the following remedies in law or equity:

- (i) exercise and any all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees;

ARTICLE 22. ASSIGNMENT

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

Section 22.1. Assignment by ESCO

Overview: This acknowledges that the Owner selected the ESCO for its unique expertise and qualifications to perform the services specified in the contract. The ESCO may not assign this contract to another ESCO without the written approval of the Owner and any ESCO assigned this contract must fully comply with all terms and conditions. The ESCO and any assignee remain contractually liable to the Owner for fulfilling all of the ESCO's obligations as specified in the contract.

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

Section 22.2. Assignment by Owner

Overview: The Owner is allowed to transfer or assign this contract to a new building owner or occupant. The Owner and the assignee remain responsible to the ESCO for the Owner's obligations as specified in the contract.

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

ARTICLE 23. REPRESENTATIONS AND WARRANTIES

Overview: Each party has the requisite authority and ability to enter into this contract.

Each party warrants and represents to the other that:

- (i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
- (ii) its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
- (iii) its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or
- (iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

ARTICLE 24. ADDITIONAL REPRESENTATIONS OF THE PARTIES

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

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

Owner hereby warrants, represents and promises that:

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

ESCO hereby warrants, represents and promises that:

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

ARTICLE 25. MICELLANEOUS DOCUMENTATION PROVISIONS

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

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

Section 25.2. Further Documents

Overview: Both parties will provide documents necessary to affect contract provisions.

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

Section 25.3. Owner's Responsibilities

Overview: Both the ESCO and the Owner are protected through a method for the ESCO to supervise the Owner's compliance with routine and preventive maintenance activities performed by the Owner. A checklist will be developed for newly installed and pre-existing equipment.

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

(a) Methods of Operation by Owner

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

(b) Owner Maintenance Responsibilities

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

(c) Inspection of Project Site(s)

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

Section 25.4. Waiver Of Liens

Overview: The ESCO will provide a Waiver of Liens from each vendor, including the material manufacturer and laborer in supply, as well as installation and servicing of each piece of equipment.

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

ARTICLE 26. CONFLICTS OF INTEREST

Overview: This confirms that neither party – employee nor agent – has a conflict of interest.

Section 26.1. Conflicts of Interest

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

ARTICLE 27. COMPLETE CONTRACT

Overview: The executed contract with its attachments is complete and may not be amended except by written contract.

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

ARTICLE 28. APPLICABLE LAW

Overview: The laws of the state and jurisdiction apply.
This Contract and the construction and enforceability thereof shall be interpreted under the laws of the State of Nevada.

ARTICLE 29. INTERPRETATION OF CONTRACT

Overview: The Owner has authority to determine questions of fact in relation to interpretation of the contract, subject to dispute resolution procedures in the attached schedule.

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

ARTICLE 30. NOTICE

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

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

TO OWNER: *Owner Name, Attention: Complete address.*
Include COPY TO: information for OWNER, if applicable.

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

(Corporate Seal)

ATTEST:

(OWNER)

_____ By _____ Date _____

(ESCO)

_____ By _____ Date _____

CONTRACT ATTACHMENT I: Schedules, Exhibits, and Appendices

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

Schedules

Savings Guarantee

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

Payments and Schedule

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

Design and Construction Phase

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

Post-Construction

Schedule BB	ESCO's Maintenance Responsibilities
Schedule CC	Owner's Maintenance Responsibilities
Schedule DD	Facility Maintenance Checklist
Schedules EE – III	Left blank for optional schedules

Administration

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

Optional Schedules

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

Exhibits

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

Appendices

Appendix A	RFP for ESCO Solicitation (Pre-qualification Phase; Final Selection Phase)
Appendix B	ESCO Proposal (Pre-qualification Phase; Final Selection Phase)
Appendix C	Financial Grade Operational Audit and Project Development Contract
Appendix D	Financial Grade Operational Audit Report