

# PERFORMANCE CONTRACT

This Performance Contract (this "Agreement") is made this 8<sup>th</sup> day of JUNE, 2016 between:

## PARTIES

JOHNSON CONTROLS, INC. ("JCI")  
6 Aerial way  
Syosset, NY 11791

and

THREE VILLAGE CENTRAL SCHOOL DISTRICT ("Customer")  
100 Suffolk Avenue  
Stony Brook, NY 11790

## RECITALS

**WHEREAS**, Customer desires to retain JCI to perform the work specified in Schedule 1 (Scope of Work) hereto (the "Work") relating to the installation of the improvement measures (the "Improvement Measures") described therein; and

**WHEREAS**, Customer is authorized and empowered under applicable Laws (as defined below) to enter into this Agreement, and has taken all necessary action under applicable Laws to enter into this Agreement; and

**WHEREAS**, Customer has selected JCI to perform the Work after it determined JCI's proposal was the most advantageous to Customer in accordance with all applicable procurement and other Laws.

**NOW, THEREFORE**, in consideration of the mutual promises set forth herein, the parties agree as follows:

## AGREEMENT

- 1. SCOPE OF THE AGREEMENT.** JCI shall perform the Work set forth in Schedule 1. After the Work is Substantially Complete (as defined below) and the Certificate of Substantial Completion is executed by Customer, the JAG Architect of Record (as defined below in paragraph 3) and JCI, JCI shall provide the assured performance guarantee (the "Assured Performance Guarantee") and the measurement and verification services (the "M&V Services") set forth in Schedule 2 (Assured Performance Guarantee). Customer shall make payments to JCI for the Work and the M&V Services in accordance with Schedule 4 (Price and Payment Terms). JCI shall pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper installation, execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work. JCI shall supervise and direct the Work and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Agreement. JCI shall be responsible for and shall provide all construction management services for the Work as described and set forth in Schedule 1. All equipment installed and/or capital improvement(s) integrated by JCI to the Customer's property, buildings, or facilities shall become the sole and exclusive property of the Customer upon JCI's receipt of payment for the specific equipment and/or specific capital improvement.
- 2. AGREEMENT DOCUMENTS:** In addition to the terms and conditions of this Agreement, the following Schedules are incorporated into and shall be deemed an integral part of this Agreement:

Schedule 1 – Scope of Work

- Schedule 2 – Assured Performance Guarantee
- Schedule 3 – Customer Responsibilities
- Schedule 4 – Price and Payment Terms
- Attachment 1 – Notice to Proceed
- Attachment 2 – Change Order
- Attachment 3 – Certificate of Substantial Completion; Certificate of Final Completion
- Attachment 4 – Line x Line
- Attachment 5 – Request for Proposal (RFP) and Response to RFP by JCI
- Attachment 6 – Solar / PV Panel and Inverter Manufacturers' Warranties

In the event of any direct conflict between or among any of the Agreement Documents, the order of precedence shall be as follows: Agreement terms and conditions; Schedule 1; Schedule 2; Schedule 3; Schedule 4, Attachment 5 and Attachment 6.

3. **ARCHITECT/ENGINEER OF RECORD.** The Customer has identified John A. Grillo ("JAG") from JAG Architects as the certified Architect/Engineer of Record ("Architect/Engineer") to provide architectural and engineering services in connection with the Work to be performed by JCI ("Architectural/Engineering Services"). The fees and total compensation for such Architectural/Engineering Services shall be \$343,286 and are the sole responsibility of JCI. JCI shall indemnify and hold the Customer harmless from any and all claims made against the Customer by the Architect/Engineer for fees for Architectural/Engineering Services. Both JCI and Customer agree and acknowledge that the Architect/Engineer owes its/his/her professional obligations and duties, including duties of care to JCI and the Customer. The Architect/Engineer shall remain free from any financial interest in the Agreement which conflicts with the proper completion of its/his/her responsibilities under this Agreement and which conflicts with its/his/her responsibilities and duties to the Customer.
4. **NOTICE TO PROCEED; SUBSTANTIAL COMPLETION; M&V SERVICES.** The term of this Agreement is eighteen (18) years or the useful life of the energy facilities and equipment being provided by JCI pursuant to this Agreement, whichever is less. This Agreement shall become effective on the date of the last signature on the signature page below. The parties' obligations hereunder are contingent upon written approval of the New York State Education Department ("SED") and the Customer's ability to secure financing, financing terms and/or other payment methods acceptable to Customer in its reasonable discretion, and compliance with the requirements of the Regulations of the Commissioner of Education, Section 155.20. After receipt of written approval of the Project from SED, and after Customer has secured financing in accordance with this Agreement, the Customer shall issue a Notice to Proceed, a form of which is attached hereto as Attachment 1 and which is in form acceptable to SED. JCI shall commence performance of the Work within ten (10) business days of receipt of Customer's Notice to Proceed, and shall achieve Substantial Completion of the Work by the Substantial Completion date, which shall be the date on which Customer and the Architect/Engineer execute a Certificate of Substantial Completion substantially in the form attached hereto as Attachment 3.

For purposes of this Agreement, "Substantial Completion" means that JCI has provided sufficient materials and services to permit Customer to operate the Improvement Measures and utilize the Work to obtain savings as set forth in this Agreement. After an on-site inspection of the Work, the Architect/Engineer shall certify the date that the Work has been substantially completed by JCI. Substantial completion of the project shall be completed within one year of execution by both parties of the Notice to Proceed (Attachment 1). The Engineer shall also provide Customer and JCI in writing a description of all items that remain to be completed. Substantial Completion shall not be attained if it is determined by the Architect/Engineer that JCI must correct any condition(s) which impairs the reliability or safety of the Work. No Improvement Measure will be considered substantially complete until it is actually capable of generating the savings it is designed to generate. In the case of control improvements, any associated operator interface must be complete and operable by the Customer before Substantial Completion is attained. The Project Benefits shall begin to be achieved at the date of Substantial Completion.

As a condition to the issuance of the Certificate of Substantial Completion, JCI must provide to the Customer a complete list of all manuals and training sessions provided by JCI to Customer which shall include a description of the manual or training provided, the date, and location where the manual or training was provided, the name of the person providing the manual or training, and the name of the person receiving the manual or training.

Customer shall review the list and description provided by JCI and if Customer agrees that such manuals and training were provided as set forth herein, Customer will provide acknowledgement of receipt of manuals and training by executing the Certificate of Substantial Completion. Prior to the issuance of the Certificate of Substantial Completion, the Customer and Architect/Engineer will provide JCI a punch list of items remaining to be completed by JCI. All punch list items shall be completed within 90 days, unless otherwise agreed to by the parties in writing.

The M&V Services shall commence on the first day of the month following the month in which Customer executes a Certificate of Substantial Completion and shall continue throughout the Guarantee Term, subject to earlier termination of the Assured Performance Guarantee as provided herein. The final completion date shall be the date when all Work is completed, including all punch list items, as evidenced by the execution of the Certificate of Final Completion by the Customer and Architect/Engineer. Customer acknowledges and agrees that if, for any reason during the agreed-upon period of M&V Services, it (i) cancels or terminates receipt of M&V Services, or (ii) cancels or terminates this Agreement, it shall be assumed (in accordance with Option A of the North American Energy Measurement and Verification Protocol (NEMVP), and based upon the equipment continuing to operate in accordance with specified criteria) that the Annual Project Benefits will be met during each year of the Guarantee Period. Customer further acknowledges and agrees that if, for any reason, it (i) fails to pay for M&V Services in accordance with Schedule 4 – Price and Payment Terms, (ii) fails to fulfill any of Customer's responsibilities necessary to enable JCI to complete the Work and provide the M&V Services, including but not limited to Customer's failure to reasonably operate and maintain the equipment and/or systems as stipulated by JCI, or (iii) otherwise materially breaches this Agreement, JCI shall issue a written notice to the Customer stating the nature of the alleged breach or failure to act, the date upon which it arose and the remedy sought and shall provide Customer with a ten (10) day period to cure such breach and/or failure to act. In the event of a dispute, both parties will act in a good faith to mitigate damages with a reservation of rights as to damages. If the Customer unilaterally terminates or cancels this Agreement without cause or fails to cure such breach/failure to act within such ten (10) day period, Customer acknowledges and agrees that the Assured Performance Guarantee shall automatically terminate.

5. **DELAYS AND IMPACTS.** If JCI is delayed in the commencement, performance, or completion of the Work and/or M&V Services by causes beyond its control and without its fault, including but not limited to inability to access property; concealed or unknown conditions encountered at the project, differing from the conditions represented by Customer in the bid documents or otherwise disclosed by Customer to JCI prior to the commencement of the Work (unless JCI should have discovered those conditions through reasonable visual inspection of the property and/or facilities and/or through a reasonable review of specifications, drawings, and/or plans regarding the Project); a Force Majeure (as defined below) condition; failure by Customer to perform its obligations under this Agreement; or failure by Customer to cooperate with JCI in the timely completion of the Work, JCI shall provide written notice to Customer of the existence, extent of, and reason for such delays and impacts. Under such circumstances, an equitable adjustment in the time for performance, price and payment terms, and the Assured Performance Guarantee shall be made, subject to the mutual written agreement of the parties.
6. **ACCESS.** Customer shall provide JCI, its subcontractors, and its agents reasonable and safe access to all facilities and properties in Customer's control that are subject to the Work and M&V Services. JCI shall not perform the Work in areas where classes or student activities are in progress while such classes or student activities are in progress, except as agreed to by both parties. Customer further agrees to assist JCI, its subcontractors, and its agents to gain access to facilities and properties that are not controlled by Customer but are necessary for JCI to complete the Work and provide the M&V Services. An equitable adjustment in the time for performance, price and payment terms, and Assured Performance Guarantee shall be made as a result of any failure to grant such access, subject to the mutual written agreement of the parties.
7. **PERMITS, TAXES, AND FEES.** JCI shall comply with and be responsible for obtaining, at its expense, all licenses and permits required by Federal, State and local laws, rules, and ordinances in connection with the Work. Unless otherwise specified in Schedule 3 (Customer Responsibilities), JCI shall be responsible for obtaining all building permits required for it to perform the Work. JCI shall not be obligated to provide any changes to or improvement of the facilities or any portion thereof required under any applicable building, fire, safety, sprinkler or other applicable code, standard, law, regulation, ordinance or other requirement unless the

same expressly regulates the installation of the Improvement Measures. Without limiting the foregoing, JCI's obligations with respect to the Work is not intended to encompass any changes or improvements that relate to any compliance matters (whether known or unknown) that are not directly related to the installation of the Improvement Measures or which have been imposed or enforced because of the occasion or opportunity of review by any governmental authority. Customer shall be responsible for and shall pay when due all assessments, charges and sales, use, property, excise, or other taxes now or hereafter imposed by any governmental body or agency upon the provision of the Work or the M&V Services, implementation or presence of the Improvement Measures, the use of the Improvement Measures or payments due to JCI under this Agreement, other than taxes upon the net income of JCI. Customer shall also be responsible for real or personal property taxes relating to equipment or material included in the Improvement Measures. Any fees, taxes, or other lawful charges paid by JCI on account of Customer shall become immediately due from Customer to JCI.

8. **WARRANTY.** JCI will perform the Work in a professional, workman-like manner. JCI will promptly re-perform any non-conforming Work for no charge, as long as Customer provides written notice to JCI within the shorter of two (2) years following Substantial Completion or such other period identified in Schedule 1. If JCI installs or furnishes goods or equipment under this Agreement, and such goods or equipment are covered by an end-user warranty from their manufacturer, JCI will transfer the benefits of such warranty to Customer. JCI shall provide Customer with manufacturer's warranties for the solar/PV panels and inverters as provided in Attachment 6 hereto. The foregoing remedy with respect to the Work, together with any remedy provided by goods or equipment manufacturers, shall be Customer's sole and exclusive remedies for warranty claims. Customer agrees that the greater of two (2) years period following Substantial Completion, or such other period identified in Schedule 1, shall be a reasonable time for purposes of submitting valid warranty claims with respect to the Work. This remedy shall not have failed of their essential purpose so long as JCI transfers the benefits of any goods or equipment end-user warranty to Customer and remains willing to re-perform any non-conforming Work for no charge within the two (2) year period described above or such other period identified in Schedule 1. NO OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE PROVIDED BY JCI. This warranty does not extend to any Work that has been abused, altered, or misused, or repaired by Customer or third parties without the supervision or prior written approval of JCI. Except with respect to goods or equipment manufactured by JCI and furnished to Customer hereunder, for which JCI shall provide its express written manufacturer's warranty, JCI shall not be considered a merchant or vendor of goods or equipment.

Notwithstanding any provision herein to the contrary, JCI agrees and acknowledges that it is the intention of the parties that the Work shall not interfere with or affect the validity of the existing warranty(ies) on the Customer's properties and that the Work shall be performed using existing roofing manufacturer standards to maintain the current roof warranty(ies). JCI agrees that the Work will not interfere with or affect the validity of such warranty(ies) and that upon completion of the Work, JCI shall obtain an assurance on behalf of the District from the provider of such warranty(ies) that the such warranty(ies) remain in effect. In the event that JCI is unable to obtain such an assurance, JCI agrees to assume full responsibility for the warranty(ies).

9. **CLEANUP.** JCI shall keep the premises and the surrounding area free from accumulation of waste materials or rubbish caused by the Work and, upon completion of the Work, JCI shall remove all waste materials, rubbish, tools, construction equipment, machinery, and surplus materials.
10. **SAFETY; COMPLIANCE WITH LAWS.** JCI shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Work and M&V Services. Each of JCI and Customer shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities (collectively, "Laws") in connection with its performance hereunder.
11. **ASBESTOS-CONTAINING MATERIALS AND OTHER HAZARDOUS MATERIALS.**

Asbestos-Containing Materials: Neither party desires to or is licensed to undertake direct obligations relating to the identification, abatement, cleanup, control, removal or disposal of asbestos-containing materials ("ACM"). Consistent with applicable Laws, Customer shall supply JCI with any information in its possession relating to

the presence of ACM in areas where JCI undertakes any Work or M&V Services that may result in the disturbance of ACM. It is JCI's policy to seek certification for facilities constructed prior to 1982 that no ACM is present, and Customer shall provide such certification for buildings it owns, or aid JCI in obtaining such certification from facility owners in the case of buildings that Customer does not own, if JCI will undertake Work or M&V Services in the facility that could disturb ACM. If either Customer or JCI becomes aware of or suspects the presence of ACM that may be disturbed by JCI's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other. As between Customer and JCI, Customer shall be responsible at its sole expense for addressing the potential for or the presence of ACM in conformance with all applicable Laws and addressing the impact of its disturbance before JCI continues with its Work or M&V Services, unless JCI had actual knowledge that ACM was present and acted with intentional disregard of that knowledge, in which case (i) JCI shall be responsible at its sole expense for remediating areas impacted by the disturbance of the ACM, and (ii) Customer shall resume its responsibilities for the ACM after JCI's remediation has been completed.

Other Hazardous Materials: JCI shall be responsible for removing or disposing of any Hazardous Materials (as defined below) that it uses in providing Work or M&V Services ("JCI Hazardous Materials") and for the remediation of any areas impacted by the release of JCI Hazardous Materials. For other Hazardous Materials that may be otherwise present at Customer's facilities ("Non-JCI Hazardous Materials"), Customer shall supply JCI with any information in its possession relating to the presence of such materials if their presence may affect JCI's performance of the Work or M&V Services. If either Customer or JCI becomes aware of or suspects the presence of Non-JCI Hazardous Materials that may interfere with JCI's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other. As between Customer and JCI, Customer shall be responsible at its sole expense for removing and disposing of Non-JCI Hazardous Materials from its facilities and the remediation of any areas impacted by the release of Non-JCI Hazardous Materials, unless JCI had actual knowledge that Non-JCI Hazardous Materials were present and acted with intentional disregard of that knowledge, in which case (i) JCI shall be responsible at its sole expense for the remediation of any areas impacted by its release of such Non-JCI Hazardous Materials, and (ii) Customer shall remain responsible at its sole expense for the removal of Non-JCI Hazardous Materials that have not been released and for releases not resulting from JCI's performance of the Work or M&V Services. For purposes of this Agreement, "Hazardous Materials" means any material or substance that, whether by its nature or use, is now or hereafter defined or regulated as a hazardous waste, hazardous substance, pollutant or contaminant under applicable Law relating to or addressing public or employee health and safety and protection of the environment, or which is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, mutagenic or otherwise hazardous or which is or contains petroleum, gasoline, diesel, fuel, another petroleum hydrocarbon product, or polychlorinated biphenyls.

Environmental Indemnity: To the fullest extent permitted by Law, Customer shall indemnify and hold harmless JCI and JCI's subcontractors, and their respective directors, officers, employees, agents, representatives, shareholders, affiliates, and assigns and successors, from and against any and all losses, costs, damages, expenses (including reasonable legal fees and defense costs), claims, causes of action or liability, directly or indirectly, relating to or arising from the Customer's use, or the storage, release, discharge, handling or presence of ACM, or Non-JCI Hazardous Materials on, under or about the facilities, or Customer's failure to comply with this Section 10. This environmental indemnity shall not apply to any claims, causes of action, and/or suits to the extent they arise out of JCI's handling, removing and/or disposing of ACM or any Hazardous Materials pursuant to this Agreement.

**12. CHANGE ORDERS.** The parties, without invalidating this Agreement, may request changes in the Work to be performed under this Agreement, consisting of additions, deletions, or other revisions to the Work ("Change

Orders"). The price and payment terms, time for performance and, if necessary, the Assured Performance Guarantee, may be equitably adjusted in accordance with the Change Order. Such adjustments shall be determined by mutual written agreement of the parties. JCI may delay performance relating to the Work subject to the Change Order until adjustments arising out of the Change Order are clarified and agreed upon, if the Customer requests such Change Order. Any Change Order must be signed by an authorized representative of each party and the Architect/Engineer, and be acceptable to SED. If concealed or unknown conditions are encountered at the project, differing from the conditions represented by Customer in the bid documents or otherwise disclosed by Customer to JCI prior to the commencement of the Work, or of which JCI could not have become aware during a reasonable visual inspection of the conditions, price and payment terms, time for performance and, if necessary, the Assured Performance Guarantee, may be equitably adjusted upon mutual written agreement of the parties. Claims for equitable adjustment may be asserted in writing within a reasonable time from the date a party becomes aware of a change to the Work by written notification. Failure to promptly assert a request for equitable adjustment, however, shall not constitute a waiver of any rights to seek any equitable adjustment with respect to such change.

**13. CUSTOMER FINANCING; TREATMENT; TAXES.** The parties acknowledge and agree that JCI is not making any representation or warranty to Customer with respect to matters not expressly addressed in this Agreement, including, but not limited to:

- (a) Customer's ability to obtain or make payments on any financing associated with paying for the Improvement Measures, related services, or otherwise;
- (b) Customer's proper legal, tax, accounting, or credit rating agency treatment relating to this Agreement; and
- (c) the necessity of Customer to raise taxes or seek additional funding for any purpose.

Customer is solely responsible for its obligations and determinations with respect to the foregoing matters. In addition, the parties acknowledge and agree that Customer shall be responsible to comply, at its cost and expense, with all Laws that may be applicable to it relating to performance contracting, including, without limitation, any requirements relating to the procurement of goods and/or services and any legal, accounting, or engineering opinions or reviews required or obtained in connection with this Agreement.

**14. INSURANCE.** Prior to commencement of the Work, JCI shall maintain insurance in the amounts set forth below in full force and effect at all times until the Work has been completed. Prior to commencement of the Work, JCI shall provide Customer with a certificate of insurance that evidences the coverages provided below, and such certificate shall list the Customer and the Architect/Engineer as additional insureds on the policies listed below (but excepting Workmens' compensation insurance) with its standard additional insured manuscript endorsement form A2 and A2A.

COVERAGES	LIMITS OF LIABILITY
Workmen's Compensation Insurance or self insurance, including Employer's Liability	Statutory
Commercial General Liability Insurance	\$5,000,000 Per Occurrence \$5,000,000 Aggregate
Comprehensive Automobile Liability Insurance	\$5,000,000 Combined Single Limit

The above limits may be obtained through primary and excess policies and may be subject to self-insured retentions.

Proof of workers' compensation insurance must be on a C-105.2 form.

JCI must ensure that the Architect/Engineer has named the District as additional insured. for the following insurance at no additional cost to the Customer.

- a) Comprehensive General Liability with policy limits of not less than one million dollars (\$ \$1,000,000) for each occurrence and two million dollars (\$2,000,000) in the aggregate for bodily injury and property damage.
- b) Automobile Liability covering owned and rented vehicles operated by the Architect/Engineer with policy limits of not less than «one million dollars » (\$1,000,000) combined single limit and aggregate for bodily injury and property damage.
- c) The Architect/Engineer may use umbrella or excess liability insurance to achieve the required coverage for Comprehensive General Liability and Automobile Liability, provided that such umbrella or excess insurance results in the same type of coverage as required for the individual policies.
- d) Workers' Compensation at statutory limits and Employers Liability with a policy limit of not less than «one million dollars » (\$1,000,000).
- e) Professional Liability covering the Architect/Engineer's negligent acts, errors and omissions in its performance of professional services with policy limits of not less than one million dollars (\$ 1,000,000) per claim and two million dollars (\$2,000,000) in the aggregate.
- f) Prior to the provision of services pursuant to this Agreement, the Architect/Engineer shall provide to the Customer certificates of insurance evidencing compliance with the requirements in this Section
- g) The certificates will show the Customer, (including its Board, officers, employees, and volunteers), as an additional insured on the Comprehensive General Liability, Automobile Liability, umbrella or excess policies. Said coverage shall be primary coverage for the Customer, its Board, officers, employees, and volunteers.
- h) With respect to the insurance requirements pursuant to this paragraph 14, the following shall apply:
  - The Architect/Engineer shall maintain such insurance in full force and effect and uninterrupted during the term of this Agreement and for three (3) years from the date of completion of the Project or three (3) years from the termination of the Architect/Engineer's services under this Agreement, whichever is earlier.
  - All insurance policies must be obtained from companies licensed to do business in the State of New York by the New York State Department of Insurance. Such companies must have an A.M. Best rating of "secured" or better.
  - The effective date of each insurance policy must pre-date the commencement of the Architect/Engineer's services pursuant to this Agreement.
  - All insurance policies shall be written on an occurrence basis, if available, and on a claims-made basis only if occurrence basis insurance is not available.
  - All insurance policies must contain a provision giving the Customer thirty (30) days written notice of cancellation of the policy or a material change in coverage.
  - In the event any such insurance policies are canceled or not renewed, the Architect/Engineer shall provide a substitute insurance policy(ies) with terms and conditions and in amounts which comply with the terms of this Agreement and, specifically with regard to "claims made" policies, which provide for retroactive coverage to the date of cancellation or nonrenewal to fill any gaps in coverage which may exist due to the cancellation or nonrenewal of the prior "claims made" policy(ies). With respect to all "claims made" policies which are renewed, the Architect/Engineer shall provide coverage retroactive to

the date of commencement of work under this Agreement. All said substitute or renewed "claims made" policies shall be maintained in full force and effect for three (3) years from the date of completion of the Project or three (3) years from the termination of the Architect/Engineer's services, whichever is earlier.

- All such policies shall include a waiver of subrogation in favor of the Customer.
- The Architect/Engineer agrees to indemnify the Customer for all deductibles applicable to insurance furnished by the Architect/Engineer.
- The Architect/Engineer acknowledges that failure to procure and/or maintain such insurances constitutes a material breach of this Agreement and subjects it to liability for damages, indemnification and all other legal remedies available to the Customer.

In accordance with Section 142 of the State Finance Law, this Agreement shall be void and of no force and effect unless JCI shall provide and maintain coverage during the life of this Agreement for the benefit of such employees as are required to be covered by the provisions of the Workers' Compensation Law.

Customer shall be responsible for obtaining builder's risk insurance coverage for the Improvement Measures and shall at all times be responsible for any loss or casualty to the Improvement Measures. Customer shall also maintain insurance coverage, of the types and in the amounts customary for the conduct of its business, throughout the term of this Agreement.

**16. INDEMNIFICATION.** The Customer shall indemnify and hold harmless JCI, its employees, agents, and assigns from and against all claims, actions, damages, liabilities and expenses, including attorneys' fees, arising out of or related to this Agreement to the extent such claims, actions, damages, liabilities and expenses are caused by the negligence or intentional misconduct of the Customer's employees, agents, officers, Board of Education Members and/or assigns.

JCI shall indemnify and hold harmless Customer, its Board of Education, employees, agents, officers, directors and/or assigns against any and all claims, suits, actions, fines, charges, penalties, costs, damages, losses, liabilities and expenses, including reasonable attorneys' fees, arising out of or related to this Agreement to the extent caused by the negligence or intentional misconduct of JCI's employees, agents, officers, subcontractors and/or assigns. JCI shall also indemnify and hold harmless the Customer, its employees, agents, officers, subcontractors and/or assigns against all loss, damages, liabilities and expenses including attorneys' fees, arising out of this Agreement that are related to any claims of patent infringement and any claims of construction or materialman's lien made by any subcontractor or materialman.

A condition precedent to any obligation of a party to indemnify the other pursuant to this Section 16 shall be for the indemnified party to advise the indemnifying party within a reasonable time of the claim pursuant to the notice provision of this Agreement.

**17. LIMITATION OF LIABILITY.** NEITHER JCI NOR CUSTOMER WILL BE RESPONSIBLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, REMOTE, PUNITIVE, EXEMPLARY, LOSS OF PROFITS OR REVENUE, LOSS OF USE, OR SIMILAR DAMAGES, REGARDLESS OF HOW CHARACTERIZED AND REGARDLESS OF A PARTY HAVING BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSSES OR RELIEF, ARISING IN ANY MANNER FROM THIS AGREEMENT, THE WORK, THE IMPROVEMENT MEASURES, THE PREMISES, THE M&V SERVICES, OR OTHERWISE. Notwithstanding anything to the contrary, the foregoing waiver of consequential damages shall not be construed as a limitation on either party's right to contract damages, including, but not limited to Customer's right to receive payments and/or substitute performance pursuant to the Assured Performance Guarantee. Nothing in this waiver of consequential damages shall be construed to limit the recovery for compensatory or actual damages suffered by either party resulting from a party's or its agent's negligent, grossly negligent, reckless, or intentional acts or omissions.



WITHOUT LIMITING JCI'S EXPRESS OBLIGATIONS UNDER THE ASSURED PERFORMANCE GUARANTEE, JCI'S LIABILITY UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, SHALL IN NO EVENT EXCEED THE AMOUNT OF JCI'S COMPENSATION SET FORTH IN SCHEDULE 4. If this Agreement covers fire safety or security equipment, Customer understands that JCI is not an insurer regarding those services, and that JCI shall not be responsible for any damage or loss that may result from fire safety or security equipment that fails to prevent a casualty loss. The foregoing waivers and limitations are fundamental elements of the basis for this Agreement between JCI and Customer, and each party acknowledges that JCI would not be able to provide the work and services contemplated by this Agreement on an economic basis in the absence of such waivers and limitations, and would not have entered into this Agreement without such waivers and limitations.

18. **FORCE MAJEURE.** Neither party will be responsible to the other for damages, loss, injury, or delay caused by conditions that are beyond the reasonable control, and without the intentional misconduct or negligence of that party. Such conditions (each, a "Force Majeure") include, but are not limited to: acts of God; acts of government agencies; strikes; labor disputes; fires; explosions or other casualties; thefts; vandalism; riots or war; acts of terrorism; electrical power outages; interruptions or degradations in telecommunications, computer, or electronic communications systems; changes in Laws; or unavailability of parts, materials or supplies.
19. **JCI'S PROPERTY.** All materials furnished or used by JCI personnel and/or JCI subcontractors or agents at the installation site, including documentation, schematics, test equipment, software and associated media remain the exclusive property of JCI and/or JCI's subcontractor(s) and/or agent(s) or third parties, as applicable. Customer agrees not to use such materials for any purpose at any time without the express authorization of JCI. Customer agrees to allow JCI personnel and/or JCI subcontractors or agents to retrieve and to remove all such materials remaining after installation or maintenance operations have been completed. Notwithstanding the above, all software furnished or installed as part of the Work and which is needed to operate the systems installed as part of the Work or any part thereof shall remain in place and shall not be removed from the site except upon the mutual written agreement of the parties. All data generated as a result of the M&V services shall be the property of the Customer. Customer acknowledges that any software furnished in connection with the Work and/or M&V Services is proprietary and subject to the provisions of any software license agreement associated with such software.
20. **DISPUTES.** JCI and Customer will attempt to settle any controversy, dispute, difference, or claim between them concerning the performance, enforcement, or interpretation of this Agreement (collectively, "Dispute") through direct discussion in good faith.
21. **GOVERNING LAW.** This Agreement and the construction and enforceability thereof shall be interpreted in accordance with the laws of the state of New York. Venue shall only be proper in either the New York State Courts located in Suffolk County, New York, or the U.S. District Court for the Eastern District of New York, Central Islip Courthouse.
22. **MODIFICATIONS.** Additions, deletions, and modifications to this Agreement may be made upon the mutual agreement of the parties in writing subject to SED review and approval where necessary. The parties contemplate that such modifications may include, but are not limited to, the installation of additional improvement measures, energy conservation measures, facility improvement measures, and operational efficiency improvements or furnishing of additional services within the identified facilities, as well as other facilities owned or operated by the Customer. These modifications may take the form of additional phases of work or modifications to the original scope of Work or Services.
23. **CONSENTS; APPROVALS; COOPERATION.** Whenever Customer's consent, approval, satisfaction or determination shall be required or permitted under this Agreement, and this Agreement does not expressly state that Customer may act in its sole discretion, such consent, approval, satisfaction or determination shall not be unreasonably withheld, qualified, conditioned or delayed, whether or not such a "reasonableness" standard is expressly stated in this Agreement. Whenever JCI's consent shall be required or permitted under this Agreement, and this Agreement does not expressly state that JCI may act in its sole discretion, such consent shall not be unreasonably withheld, qualified, conditioned or delayed, whether or not such a

"reasonableness" standard is expressly stated in this Agreement. Whenever Customer's cooperation is required by JCI in order to carry out JCI's obligations hereunder, Customer agrees that it shall act in good faith and reasonably in so cooperating with JCI and/or JCI's designated representatives or assignees or subcontractors. Customer shall furnish decisions, information, and approvals required by this Agreement in a timely manner so as not to delay the performance of the Work or M&V Services. Whenever JCI's cooperation is required by Customer in order to carry out Customer's obligations hereunder, JCI agrees that it shall act in good faith and reasonably in so cooperating with Customer and/or Customer's designated representatives or assigns.

**24. FURTHER ASSURANCES.** The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

**25. INDEPENDENT CONTRACTOR.** The relationship of the parties hereunder shall be that of independent contractors. Nothing in this Agreement shall be deemed to create a partnership, joint venture, fiduciary, or similar relationship between the parties.

Nothing in this Agreement shall be construed as reserving to the Customer any right to exercise any control over or to direct in any respect the conduct or management of business or operations of JCI on the Customer's property. The entire control or direction of such business and operations shall be in and shall remain in JCI, subject only to JCI's performance of its obligations under this Agreement. Neither JCI nor any other person performing any duties or engaged in any work on Customer's property on behalf of JCI shall be deemed an employee or agent of the Customer.

Nothing in this Section shall be deemed to be a waiver of the Customer of the right to use its property. The Customer and JCI are independent of one another and shall have no other relationship relating to or arising out of this Agreement. Neither party shall have or hold itself out as having the right or omission, or to make any contract or otherwise assume any obligation or responsibility in the name of or on behalf of the other party.

It is understood and agreed that JCI, its employees, agents, subcontractors and employees of such agents and subcontractors, shall adhere to Customer's policies with respect to conduct on school property as well as any and all Federal, State, and local laws, rules, ordinances, and Customer policies and procedures applicable to construction projects on school premises.

**26. POWER AND AUTHORITY.** Each party represents and warrants to the other that (i) it has all requisite power and authority to execute and deliver this Agreement and perform its obligations hereunder, (ii) all corporate, board, body politic, or other approvals necessary for its execution, delivery, and performance of this Agreement have been or will be obtained, and (iii) this Agreement constitutes its legal, valid, and binding obligation.

**27. SEVERABILITY.** In the event that any clause, provision, or portion of this Agreement or any part thereof shall be declared invalid, void, or unenforceable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Agreement unless the result would be manifestly inequitable or materially impair the benefits intended to inure to either party under this Agreement.

**28. COMPLETE AGREEMENT.** It is understood and agreed that this Agreement contains the entire agreement between the parties relating to all issues involving the subject matter of this Agreement. No binding understandings, statements, promises or inducements contrary to this Agreement exist. This Agreement supersedes and cancels all previous agreements, negotiations, communications, commitments and understandings with respect to the subject matter hereof, whether made orally or in writing. Each of the parties to this Agreement expressly warrants and represents to the other that no promise or agreement which is not herein expressed has been made to the other, and that neither party is relying upon any statement or representation of the other that is not expressly set forth in this Agreement. Each party hereto is relying exclusively on the terms of this Agreement, its own judgment, and the advice of its own legal counsel and/or other advisors in entering into this Agreement. Customer acknowledges and agrees that any purchase order issued by Customer associated with this Agreement is intended only to establish payment authority for Customer's internal accounting purposes. No purchase order shall be considered a counteroffer, amendment, modification, or other revision to the terms of this Agreement.

- 29. HEADINGS.** The captions and titles in this Agreement are for convenience only and shall not affect the interpretation or meaning of this Agreement.
- 30. COUNTERPARTS.** This Agreement may be executed in any number of counterparts, all of which when taken together shall constitute one single agreement between the parties.
- 31. NOTICES.** All notices or communications related to this Agreement shall be in writing and shall be deemed served if and when sent by facsimile or mailed by certified or registered mail: to Johnson Controls, Inc. at the address listed on the first page of this Agreement, ATTN: Regional Solutions Manager, with a copy to Johnson Controls, Inc., ATTN: General Counsel – Building Efficiency Americas, 507 East Michigan Street, Milwaukee, Wisconsin, 53202; and to Customer at the address listed on the first page of this Agreement.

**32. STATE SPECIFIC PROVISIONS.**

- A. Pursuant to NYS Energy Law 109-3, this Agreement shall be deemed executory only to the extent of the monies appropriated and available for the purpose of the Agreement, and no liability on account therefore shall be incurred beyond the amount of such monies. It is understood that neither this Agreement nor any representation by any public employee or officer creates any legal or moral obligation to request, appropriate or make available monies for the purpose of the Agreement.
- B. According to the Regulations of the Commissioner of Education, Section 155.20(d), this Agreement shall not be executory until approval of the Commissioner is obtained in writing. The Customer's obligations within this Agreement are contingent upon and subject to prior review and written approval of SED, pursuant to the laws and regulations of the State of New York and are also contingent upon and subject to the Customer's securing of financing, terms and conditions of financing and other means of payment acceptable to Customer in its sole discretion. In the event approval of said financing or other means of payment has not been secured by the Customer within 180 days after SED approval, then this Agreement shall terminate with no further obligation of Customer to JCI or any other party. This Agreement may be extended beyond 180 days if such extension is in writing signed by both parties.
- C. It is understood and agreed that, except as otherwise provided in this Agreement, the Customer shall not be responsible for any costs incurred by JCI, including, but not limited to, costs associated with the audit and/or costs associated with the Architect/Engineer of record and/or costs incurred by JCI in attempting to obtain SED approval, should SED not approve this Agreement.
- D. Neither party shall assign, transfer or otherwise dispose of this Agreement or its rights, title or interests as set forth herein or its power to execute this Agreement to any other person, entity or corporation without the prior written permission of the other party. Nothing within this provision shall be construed to limit, restrict and/or preclude the subrogation rights of any insurer(s) of either the Customer or JCI.
- E. This Agreement is subject to prevailing wage requirements. All workers will be paid according to the prevailing wage rates set forth by the New York Department of Labor
- 33. TERMINATION.** If at any time prior to the issuance of the Notice to Proceed, JCI discovers that the Project Benefits (as such term is used in Schedule 2) cannot be attained as set forth in Schedule 2, JCI shall promptly notify Customer in writing of such determination. In such event, Customer shall have the right to terminate this Agreement upon written notice to JCI, given within 10 working days of Customer's receipt of notice from JCI, whereupon this Agreement shall terminate and Customer shall have no obligation to pay any cost or expense associated with the Work. If Customer fails to timely exercise this termination right, such termination right shall be deemed to be waived.

In addition to the termination right described in the paragraph above, Customer may also terminate this Agreement for any reason, or no reason whatsoever, upon thirty (30) days prior written notice. In the event of such termination, Customer will pay the Termination Compensation (described below), and JCI will undertake no additional work and shall only work to close up any ongoing construction activities in a safe and orderly

manner. Upon any such termination, both Customer and JCI shall endeavor in an orderly manner to wind down activities hereunder. As used herein, "Termination Compensation" shall consist of (a) compensation earned for any Work completed prior to the effective date of termination; (b) any Work undertaken to "wind down" the Work and demobilize from the project as provided herein, (c) the cost of any custom "works in progress" that have not yet been completed or installed, but cannot otherwise be used on other projects or restocked, and (d) any restocking charges for goods that can be restocked; provided, however, that Customer's obligation to pay such amounts is contingent upon JCI timely producing a sufficiently detailed invoice to Customer for such amounts. Notwithstanding the foregoing, if after submission and written approval of the design work from the State Education Department, but prior to the issuance of the Notice to Proceed, Customer decides not to go forward with the Work for reasons other than discovery that Project Benefits cannot be attained (as described in the first paragraph of this Section 33), then the Termination Compensation to JCI shall be limited the project development fee, if any, identified and explained in JCI's written proposal to Customer in Attachment 5.

34. **BONDS.** JCI shall secure a performance bond to cover the Work to be performed under this Agreement and a payment bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to JCI or any subcontractors in the prosecution of the Work provided for in this Agreement in accordance with New York State Finance Law § 137. Prior to the commencement of the Work, JCI shall deliver to Customer said performance and payment bonds in a sum equal to \$7,707,518 with sureties licensed by the State of New York and satisfactory to Customer, conditional upon the faithful performance by JCI, for the implementation of the Improvement Measures as may be from time to time modified by Change Orders, such bonds to be in such form and otherwise contain such provisions which are reasonably satisfactory to Customer. JCI shall deliver to Customer the payment and performance bonds promptly upon Customer's issuance of the Notice to Proceed. A rider including the following provisions shall be attached to each bond:
- (a) Surety hereby agrees that it consents to and waives notice of any addition, alteration, omission, change, or other modifications of the Agreement documents, or a forbearance on the part of either the Owner or JCI to the other, shall not release the Surety of its obligations hereunder and notice to the Surety of such matter is hereby waived.
  - (b) Surety further agrees that in the event of any default by the Owner in the performance of the Owner's obligations to JCI under the Agreement, JCI or Surety shall cause written notice of such default (specifying said default in detail) to be given to the Owner, and the Owner shall have thirty (30) days from time after receipt of such notice within which to cure such default, or such additional reasonable period of time as may be required in the nature of such default is such that it cannot be cured within thirty (30) days. Such Notice of Default shall be sent by certified or registered U.S. Mail, return receipt requested, first class postage prepaid, to Lender and the Owner.
35. **WAGE AND HOUR PROVISIONS.** This project is subject to prevailing wage and hour requirements. JCI understands and agrees that the Work must be performed in accordance with New York State Labor Law section 220 *et seq.* All workers will be paid according to the prevailing wage rates set forth by the New York Department of Labor. Neither JCI's employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in Articles 8 and/or 9 of the Labor Law and as set forth in prevailing wage and supplement schedules issued by the New York Department of Labor.
36. **NON-DISCRIMINATION.** JCI agrees not to discriminate against any employee, or applicant for employment, to be employed in the performance of this Agreement, including the Work and M&V Services, with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to the employment, because of age, sex, race, disability, color, religion, national origin, military service or ancestry in accordance with applicable Federal, New York State or local laws, rules, and ordinances.
37. **WAIVER.** The failure of either party to require compliance with the provisions of this Agreement shall not affect the party's right to later enforce the same. It is agreed that the waiver by either party of performance of any other terms of this Agreement or any breach thereof will not be held or deemed to be a waiver by that party of any subsequent failure to perform the same or any other term or condition of this Agreement or any breach thereof.

38. **THIRD PARTY BENEFICIARIES.** Except as may be specifically provided for in this Agreement, the parties hereto do not intend to create any rights for, or grant any remedies to, any third party beneficiary of this Agreement.
39. **INTERNATIONAL BOYCOTT PROHIBITION.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, JCI agrees, as a material condition of the Agreement, that neither JCI nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the Federal Export Administration Act of 1979 (50 U.S.C. App. Sections 2401 et seq.) or regulations thereunder. If JCI, or any of the aforesaid affiliates of JCI, is convicted or is otherwise found to have violated said laws or regulations under the final determination of the U.S. Commerce Department or any other appropriate agency of the United States subsequent to the execution of this Agreement, such Agreement, amendment or modification thereto shall be rendered forfeit and void. JCI shall notify the Customer within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR § 105.4).
40. **SET-OFF RIGHTS.** The Customer shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, the Customer's option to withhold for the purposes of set-off any moneys due to JCI under this Agreement up to any amounts due and owing to the Customer with regard to this Agreement, any other contract between Customer and JCI, including any contract for a term commencing prior to the term of this Agreement, plus any amounts due owing to the Customer for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. The Customer shall exercise its set-off rights in accordance with normal school district practices including, in cases of set-off pursuant to an audit, the finalization of such audit by the State agency, its representatives, or the State Comptroller.
41. **RECORDS.** JCI will maintain cost accounting records on the Work performed under actual costs for labor and material. JCI shall establish and maintain complete and accurate books, records, documents, and other evidence directly pertinent to performance under this Agreement (hereinafter, collectively "the Records"). The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. If requested by the State Comptroller, the Attorney General or the Commissioner of Education, then JCI will, subject to Section 87 of the New York Public Officer's Law, produce the Records for examination, and fully disclose all costs relating to the Work, including all costs of any subcontractors during the normal business hours at an office of JCI within the State of New York for the purposes of inspection, auditing and copying. Nothing contained herein shall diminish, or in any way adversely affect the Customer's right to discovery in any pending or future litigation.
42. **SERVICE OF PROCESS.** In addition to the methods of service allowed by the State Civil Practice Law and Rules ("CPLR"), JCI hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon JCI's actual receipt of process or upon the Customer's receipt of the return thereof by the United States Postal Service as refused or undeliverable. JCI must promptly notify the Customer, in writing, of each and every change of address to which service of process can be made. Service by the Customer to the last known address shall be sufficient. JCI shall have thirty (30) calendar days after service hereunder is complete in which to respond.

**CUSTOMER: THREE VILLAGE CENTRAL SCHOOL DISTRICT**

Signature: William F. Connors, Jr.  
 Printed Name: WILLIAM F. CONNORS, JR.  
 Title: PRESIDENT, BOARD OF EDUCATION

**JOHNSON CONTROLS, INC.**

Signature: James B. Cotton  
 Printed Name: JAMES B. COTTON  
 Title: AGM

Date: 6/8/16

Date: 6/2/16

## **Construction Management**

### **Construction Management Services**

1. JCI will prepare and maintain an overall Project Management Plan and Construction Schedule. Updates will be provided to the district on an on-going basis.
2. JCI will Maintain a staff to administer the contract terms and conditions with project subcontractors.
3. JCI will Provide coordination and supervision of the work of separate FIMs ensuring enforcement of contract provisions, compliance with energy initiatives, and timely completion of the project.
4. JCI will Establish and maintain coordination procedures, e.g. project meetings, documentation process.
5. JCI will Coordinate site accessibility for the Owner and contractors for continuous operation of school services and activities.
6. JCI will Perform inspection work necessary to assure the conformity to the plans and specifications until final completion and acceptance of the project by the owner.
7. JCI will Coordinate post-completion activities including the assembly of guarantee, manuals, as-built drawings of project trade and subcontractors, and the Owner's final acceptance. Coordinate training of the Owner's personnel by installers and vendors for the operations of the project.
8. JCI shall subcontract with a District-approved Architectural/engineering firm of John A Grillo to prepare and submit necessary design work to the New York State Education Department for approval.
9. JCI and its subcontractors will be required to wear photo identification at all times while on School District property. Work will commence upon NYSED approval. Hours of work are 7Am to 4PM Monday thru Friday and the work will not interfere with the operations of Three Village Central School District. It is anticipated that Customer will be required to provide consent to perform lighting work during evening hours. If work is required off-hours; all custodial overtime costs are the responsibility of the school district.
10. Three Village CSD will provide JCI with at least an eight (8) hour day to perform construction activities at no cost to JCI.

**SCOPE OF WORK**

**FIM 1 - Renewable Energy – Photovoltaic Electric Generation**

Johnson Controls shall furnish and install 2,279.200 kWDC of PV arrays aggregated over 9 buildings, namely Ward Melville HS, Murphy JHS, Gelinus JHS, Three Village Academy, Mount ES, Setauket ES, Nessakeag ES, Minnesauke ES and Arrowhead ES as outlined in the attached drawings. Attachment 1

The flat roof PV systems shall use self-ballasted racking equipment manufactured by Genmounts or UniRac, and the pitched roof PV systems shall use penetrating post-and-rail racking equipment manufactured by UniRac (or JCI approved equal). The PV System shall use string inverters manufactured by Solectria with Solectria data monitoring (or JCI approved equal) and SolarWorld or Hyundai PV modules (or approved equal).

The PV System shall comply with NEC 2011 and the electrical interconnection to the building system will be done inside of the main building distribution panel as a buss tap on the utility line-side of the main service breaker or switch. A 480VAC to 208VAC step-down transformer shall be installed where the existing facility distribution voltage is 208VAC. The district shall provide an internet connection for data monitoring. In the event that any of the 9 roofs or portions of any roofs are determined to be unsuitable for the roof-mounted PV module array(s), Johnson Controls will attempt to move the array(s) or portions of the array(s) to another location that is suitable at any of the 9 buildings outlined above.

Johnson Controls shall install the new PV systems using existing roofing manufacturer standards to maintain current roof warranty(ies) as it relates to the PV module array installation as more fully described in paragraph 8 of this Agreement . At all 9 locations, existing structural steel, joists and roofing decks are anticipated to be adequate for solar panel installation. If during the design phase, John A Grillo Architect Engineers (AE) encounters structural issues with the roof framing, JCI shall relocate the problem areas of solar arrays to a different location in order to maintain the 2,279.200 kWDC of total system size. In the event that any of the 9 roofs at customer's site(s) are determined to not be a viable option, the scope of work for this FIM shall be reduced subject to owner's written approval by deduct change order and the costs associated with the reduced scope shall be credited to the customer. The guaranteed savings would also be adjusted accordingly by a formal written amendment to the agreement.

Site Name & Number	PV System Sizes (kWDC)	Pitched Roof Construction
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#	Site Name	Flat	Pitched	Total	
1	Ward Melville HS	326.480	0.000	326.480	N/A
2	Murphy JHS	123.200	0.000	123.200	N/A
3	Gelinas JHS	154.000	0.000	154.000	N/A
4	Three Village Academy	61.600	0.000	61.600	N/A
5	Mount ES	0.000	264.880	264.880	Conc. Deck
6	Setauket ES	0.000	301.840	301.840	Wood Truss
7	Nessakeag ES	0.000	240.240	240.240	Wood Truss
8	Minnesauke ES	0.000	381.920	381.920	Conc. Deck
9	Arrowhead ES	0.000	425.040	425.040	Wood Truss
<b>Project Totals</b>		<b>665.280</b>	<b>1,613.920</b>	<b>2,279.200</b>	

**Exclusions:**

- Repair or replacement of defective electrical equipment, other than the equipment specifically described in the FIM scope of work. Johnson Controls will identify the location of defective equipment and notify the customer.
- Engineering services, studies or analysis associated with any exclusions or work outside of the scope definition. Resolution of existing transformer design, service and/or distribution conditions, known or unknown.
- Modifications to electrical feeds and grounding systems that are not fully functional and/or do not meet current codes unless specified in the scope of work.
- Modifications or redesign of the existing electrical system are excluded.
- Temporary Power is excluded

Dated \_\_\_\_\_, 2015

CUSTOMER: THREE VILLAGE CENTRAL SCHOOL DISTRICT

Signature: *William F. Connors, Jr.*  
 Printed Name: WILLIAM F. CONNORS, JR.  
 Title: PRESIDENT, BOARD OF EDUCATION

JOHNSON CONTROLS, INC.

Signature: *James B. Cotton*  
 Printed Name: JAMES B. COTTON  
 Title: AGM





**ASSURED PERFORMANCE GUARANTEE****A. Certain Definitions**

For purposes of this Agreement, the following terms have the meanings set forth below:

**Annual Project Benefits** are the portion of the projected Total Project Benefits to be achieved in any one year of the Guarantee Term.

**Annual Project Benefits Realized** are the Project Benefits actually realized for any one year of the Guarantee Term.

**Annual Project Benefits Shortfall** is the amount by which the Annual Project Benefits exceed the Annual Project Benefits Realized in any one year of the Guarantee Term.

**Annual Project Benefits Surplus** is the amount by which the Annual Project Benefits Realized exceed the Annual Project Benefits in any one year of the Guarantee Term.

**Baseline** is the mutually agreed upon data and/or usage amounts that reflect conditions prior to the installation of the Improvement Measures as set forth in Section IV below.

**Guarantee Period** is eighteen (18) years or the useful life of the equipment being installed pursuant to this Agreement, whichever is less.

**Guarantee Term** will commence on the first day of the month next following the Substantial Completion date and will continue through the duration of the M&V Services, subject to earlier termination as provided in this Agreement.

**Installation Period** is the period beginning on JCI's receipt of Customer's Notice to Proceed and ending on the commencement of the Guarantee Term.

**Measured Project Benefits** are the utility savings and cost avoidance calculated in accordance with the methodologies set forth in Section III below.

**Project Benefits** are the Measured Project Benefits plus the Non-Measured Project Benefits to be achieved for a particular period during the term of this Agreement. The cost of the M&V Services is included in the Total Project Benefits guaranteed to be achieved during the entire term of this Agreement.

**Total Project Benefits** are the projected Project Benefits to be achieved during the entire term of this Agreement.

**B. Guarantee Details**

The following Exhibits are attached and made part of this Schedule 2, Section B:

**Table 1: Exhibits Summary**

Exhibit 1	Total Project Benefits
Exhibit 2	Measurement and Verification Methodologies
Exhibit 3	Measured Project Benefits
Exhibit 4	Change in Use or Condition
Exhibit 5	Baseline Calculations and Utility Rates
Exhibit 6	Measurement and Verification Services

**EXHIBIT 1: TOTAL PROJECT BENEFITS**

Subject to the terms and conditions of this Agreement, JCI and Customer agree that Customer will be deemed to achieve a total of \$10,081,966 in Measured Project Benefits during the term of this Agreement, for Total Project Benefits of \$10,081,966 as set forth in the Total Project Benefits table below.

**Table 1.1: Total Project Benefits**

Year	Utility Cost Avoidance* Measurable Savings	Total Guaranteed Project Benefits
1	\$430,588	\$430,588
2	\$443,505	\$443,505
3	\$456,810	\$456,810
4	\$470,515	\$470,515
5	\$484,630	\$484,630
6	\$499,169	\$499,169
7	\$514,144	\$514,144
8	\$529,568	\$529,568
9	\$545,456	\$545,456
10	\$561,819	\$561,819
11	\$578,674	\$578,674
12	\$596,034	\$596,034
13	\$613,915	\$613,915
14	\$632,332	\$632,332
15	\$651,302	\$651,302
16	\$670,841	\$670,841
17	\$690,967	\$690,967
18	\$711,696	\$711,696
<b>Totals</b>	<b>\$10,081,966</b>	<b>\$10,081,966</b>

\*Utility Cost Avoidance is a Measured Project Benefit. Utility Cost Avoidance figures in the table above are based on anticipated 3% increase in unit energy costs as set forth in the table in Exhibit 6

**Annual Measurement and Verification (M&V) Services**

JCI shall provide M&V Services for a period of 3 years starting on the first day of the month next following the Substantial Completion date. Within sixty (60) days of the commencement of the Guarantee Term, JCI will calculate the Measured Project Benefits achieved during the Installation Period plus any Non-Measured Project Benefits applicable to such period and advise Customer of same. Any Project Benefits achieved during the Installation Period may, at JCI's discretion, be allocated to the Annual Project Benefits for the first year of the Guarantee Term. Within sixty (60) days of each anniversary of the commencement of the Guarantee Term, JCI will calculate the Measured Project Benefits achieved for the applicable year plus any Non-Measured Project Benefits applicable to such period and advise Customer of same.

As set forth in the Certification provided by JCI to the NY State Education Department, JCI guarantees recovery of costs of the Agreement from energy savings realized by the Customer during a period of 18 years, or the useful life of the equipment being installed, whichever is less.

**C. Project Benefits Shortfalls or Surpluses.**

(1) During the period in which JCI is providing M&V Services, the following shall apply:

- (a) Project Benefits Shortfalls. If an Annual Project Benefits Shortfall occurs for any one year of the Guarantee Term, JCI shall, subject to Customer's agreement, which shall not be unreasonably withheld, (a) set off the amount of such shortfall against any unpaid balance Customer then owes to JCI, (b) where permitted by applicable law, increase the next year's amount of Annual Project Benefits by the amount of such shortfall, (c) pay to Customer the amount of such shortfall, or (d) subject to Customer's agreement, provide to Customer additional products or services, in the value of such shortfall, at no additional cost to Customer.
- (b) Additional Improvements. Where an Annual Project Benefits Shortfall has occurred, JCI may, subject to Customer's approval (which approval shall not be unreasonably withheld, conditioned, or delayed), implement additional Improvement Measures, at no cost to Customer, which may generate additional Project Benefits in future years of the Guarantee Term.

(2)

**EXHIBIT 2: MEASUREMENT AND VERIFICATION METHODOLOGIES**

The following is a brief overview of the measurement and verification methodologies applicable to the Improvement Measures set forth below. JCI shall apply these methodologies, as more fully detailed in the guidelines and standards of the North American Energy Measurement and Verification Protocol (NEMVP), in connection with the provision of M&V Services hereunder.

**Option A**

**Performance Verification, End-Use Retrofits - Measured Capacity, Stipulated Consumption Approach.**

The verification techniques for Option A determine savings by measuring the performance of a system before and after a retrofit, and multiplying the difference by an agreed-upon or “stipulated” factor, such as hours of operation

Measured Project Benefits from the following Improvement Measures will be calculated using Option A:

**Table 2.2.1: Option A Measures**

FIM #	Facility Improvement Measure	M&V Option
FIM 1	Renewable Energy- Photovoltaic Electric Generation	A

**FIM 1 Renewable Energy- Photovoltaic Electric Generation**

**M&V Option:** NEMVP-A (One-time measurement)

**Verification Boundary:** Retrofit isolation – Project savings will be determined within the measurement boundary that encompasses only the items that are subject to this photovoltaic electric generation project.

**Interaction:** Electrical System

**Measurement Variable:** Peak KW on a design day

**Measuring Equipment:** Inverter digital reader

**Measurement Period:** instantaneous.

The PKW measurement from the first year will be used for all subsequent guarantee years. The Effective Full Load Hours (EFLH) is from published weather data from (NREL) and is stipulated to be used in the calculation as given in the DEA.

**EXHIBIT 3: MEASURED PROJECT BENEFITS**

Table 2.3 below defines and describes the FIMs included in this guarantee that comprise Measured Utility Cost Avoidance savings:

**Table 2.3: Measured Project Benefits Summary**

FIM #	Proposed Measures	Electricity Savings			Total Savings (\$/yr)
		kW	kWh/yr	\$/yr	
FIM 1	Renewable Energy – Photovoltaic Electric Generation		2,831,088	\$430,588	\$430,588
	<b>Totals</b>		<b>2,831,088</b>	<b>\$430,588</b>	<b>\$430,588</b>

**EXHIBIT 4: CHANGES IN USE OR CONDITION****ADJUSTMENT TO BASELINE  
AND/OR ANNUAL PROJECT BENEFITS**

Customer agrees to notify JCI, within fourteen (14) days, of (i) any actual or intended change, whether before or during the Guarantee Term, in the use of any facility, equipment, or Improvement Measure to which this Schedule applies; (ii) any proposed or actual expansions or additions to the premises or any building or facility at the premises; (iii) a change to utility services to all or any portion of the premises; or (iv) any other change or condition arising before or during the Guarantee Term that reasonably could be expected to change the amount of Project Benefits realized under this Agreement.

Such a change, expansion, addition, or condition would include, but is not limited to: (a) changes in the primary use of any facility, Improvement Measure, or portion of the premises; (b) changes to the hours of operation of any facility, Improvement Measure, or portion of the premises; (c) changes or modifications to the Improvement Measures or any related equipment; (d) changes to the M&V Services provided under this Agreement; (e) failure of any portion of the premises to meet building codes; (f) changes in utility suppliers, utility rates, method of utility billing, or method of utility purchasing; (g) insufficient or improper maintenance or unsound usage of the Improvement Measures or any related equipment at any facility or portion of the premises (other than by JCI); (h) changes to the Improvement Measures or any related equipment or to any facility or portion of the premises required by building codes or any governmental or quasi-governmental entity; or (i) additions or deletions of Improvement Measures or any related equipment at any facility or portion of the premises.

Such a change or condition need not be identified in the Baseline in order to permit JCI to propose an adjustment to the Baseline and/or the Annual Project Benefits. If JCI does not receive the notice within the time period specified above or travels to either Customer's location or the project site to determine the nature and scope of such changes and JCI can prove the the change has a material change in the Baseline, Customer agrees to pay JCI, in addition to any other amounts due under this Agreement, the applicable hourly consulting rate for the time it took to determine the changes and to make any adjustments and/or corrections to the project as a result of the proposed changes, plus all reasonable and documented out-of-pocket expenses, including travel costs. Upon receipt of such notice, or if JCI independently learns of any such change or condition, JCI shall calculate and send to Customer a notice of adjustment to the Baseline and/or Annual Project Benefits to reflect the impact of such change or condition. Should Customer fail to promptly provide JCI with notice of any such change or condition, JCI may make reasonable estimates as to the impact of such change or condition and as to the date on which such change or condition first arose in calculating the proposed impact of such change or condition. No change in the Baseline or Annual Project Benefits may be made without Customer's agreement., such agreement not to be unreasonably withheld, conditioned or delayed.

**EXHIBIT 5: BASELINE CALCUALTIONS AND UTILITY RATES**

The unit utility costs for the Baseline period are set forth below as "Base Utility Cost" and shall be used for all calculations made under this Schedule. The Base Utility Cost shall be escalated annually by the actual utility cost escalation but such escalation shall be no less than the mutually agreed "floor" escalation rate of three percent (3%). The Base Utility Cost for each type of utility represents the 12 month average utility costs from July 2010 to June 2011.

**Table 6.1: Baseline Electrical Consumption Data & Rates**



Name	Electric Usage and Cost						
	Avg Monthly Demand kW	Avg kW Cost	Electric Usage kWh	Usage kWh Cost	Unblended \$/kWh	Total Electric Cost	Cost per kWh (BEER)
Ward Melville High School	894	\$ 9.16	3,128,400	\$ 407,526	\$ 0.130	\$ 505,785	\$ 0.162
Paul J. Gelinus Jr. High School	350	\$ 8.59	801,600	\$ 109,042	\$ 0.136	\$ 145,136	\$ 0.181
Robert C. Murphy Jr. High School	320	\$ 9.42	961,650	\$ 128,765	\$ 0.134	\$ 164,925	\$ 0.172
Arrowhead School	273	\$ 9.32	781,920	\$ 104,812	\$ 0.134	\$ 135,363	\$ 0.173
Minnesauke School	222	\$ 7.96	554,720	\$ 75,920	\$ 0.137	\$ 97,092	\$ 0.175
William Sidney Mount School	235	\$ 8.06	619,120	\$ 85,746	\$ 0.138	\$ 108,527	\$ 0.175
Nassakeag School	233	\$ 11.06	724,400	\$ 99,477	\$ 0.137	\$ 130,351	\$ 0.180
Setauket School	293	\$ 8.24	782,080	\$ 107,434	\$ 0.137	\$ 136,383	\$ 0.174
North Country Learning Center	173	\$ 9.67	618,400	\$ 84,585	\$ 0.137	\$ 104,611	\$ 0.169

The above rates shown in Table 6.1 will be known as **Floor Electrical Rates**, for the purpose of the Assured Performance Guarantee. The annual calculated electric rates are expected to increase every year. In the event that the annual rates are lower than the above baseline rates, the 3% escalated floor rates will be substituted for the annual calculated rate.

The Electric Rates will be averaged over the course of the one-year baseline period, as provided by customer. In turn, the Incremental Electric Rate (IER), and the Demand Rate (DR) will be averaged annually over the course of the reporting periods, as reflected on utility invoices, for equitable cost avoidance savings reporting.

The following formula will be used to calculate the current reporting period Incremental Energy Rate (IER):

**FORMULA B-2**

<b>IER = <math>\Sigma TKC_{1-12} \div \Sigma TKWH_{1-12}</math></b>	
Where:	
IER:	Incremental Electrical Rate (Dollars per kWh)
$\Sigma TKC_{1-12}$ :	Sum Total of Monthly Electrical Utility Costs (Dollars) for kWh included Fuel Adjustment Cost and other related Energy Charges for Months 1 Through 12 of the current reporting period.
$\Sigma TKWH_{1-12}$ :	Sum Total of Monthly Electrical Incremental Use (kWh) for Months 1 Through 12 of the current reporting period.

The following formula will be used to calculate the current reporting period Incremental Demand Rate (DR):

**FORMULA B-3**

$$DR = \Sigma TKC_{1-12} \div \Sigma TKWH_{1-12}$$

Where:

DR: Demand Electrical Rate (Dollars per kW)

$\Sigma TKC_{1-12}$ : Sum Total of Monthly Electrical Utility Costs (Dollars) for kW included Fuel Adjustment Cost and other related Energy Charges for Months 1 Through 12 of the current reporting period.

$\Sigma TKW_{1-12}$ : Sum Total of Monthly Electrical Demand Use (kW) for Months 1 Through 12 of the current reporting period.

**EXHIBIT 6: MEASUREMENT & VERIFICATION SERVICES**

JCI will provide the M&V Services set forth below in connection with the Assured Performance Guarantee.

1. During the Installation Period, a JCI Performance Assurance Specialist will track Measured Project Benefits. JCI will report the Measured Project Benefits achieved during the Installation Period, as well as any Non-Measured Project Benefits applicable to the Installation Period, to Customer within 60 days of the commencement of the Guarantee Term.
2. Within 60 days of each anniversary of the commencement of the Guarantee Term, JCI will provide Customer with an annual report containing:
  - A. an executive overview of the project's performance and Project Benefits achieved to date;
  - B. a summary analysis of the Measured Project Benefits accounting; and
  - C. depending on the M&V Option, a detailed analysis of the Measured Project Benefits calculations.
3. During the Guarantee Term, a JCI Performance Assurance Specialist will monitor the on-going performance of the Improvement Measures, as specified in this Agreement, to determine whether anticipated Measured Project Benefits are being achieved. In this regard, the Performance Assurance Specialist will periodically assist Customer, on-site or remotely, with respect to the following activities:
  - A. review of information furnished by Customer from the facility management system to confirm that control strategies are in place and functioning;
  - B. advise Customer's designated personnel of any performance deficiencies based on such information;
  - C. coordinate with Customer's designated personnel to address any performance deficiencies that affect the realization of Measured Project Benefits; and
  - D. inform Customer of opportunities to further enhance project performance and of opportunities for the implementation of additional Improvement Measures.
4. For specified Improvement Measures, JCI will:
  - A. conduct pre and post installation measurements required under this Agreement;
  - B. confirm the building management system employs the control strategies and set points specified in this Agreement; and
  - C. analyze actual as-built information and adjust the Baseline and/or Measured Project Benefits to conform to actual installation conditions (e.g., final lighting and water benefits calculations will be determined from the as-built information to reflect the actual mix of retrofits encountered during installation).
  - D. confirm that the appropriate metering and data points required to track the variables associated with the applicable Improvement Measures' benefits calculation formulas are established; and
    - E. set up appropriate data capture systems (e.g., trend and totalization data on the facility management system) necessary to track and report Measured Project Benefits for the applicable Improvement Measure.

**CUSTOMER RESPONSIBILITIES**

In order for JCI to perform its obligations under this Agreement with respect to the Work, the Assured Performance Guarantee, and the M&V Services, Customer shall be responsible for:

1. Providing JCI, its subcontractors, and its agents reasonable and safe access to all facilities and properties that are subject to the Work and/or M&V Services;
2. Providing for shut down and scheduling of affected locations during installation, including timely shutdowns of chilled water and hot water systems as needed to accomplish the Work and/or M&V Services;
3. Providing timely reviews and approvals of design submissions, proposed change orders, and other project documents;
4. Providing the following information with respect to the project and project site as soon as practicable following JCI's request:
  - a. surveys describing the property, boundaries, topography and reference points for use during construction, including existing service and utility lines;
  - b. geotechnical studies describing subsurface conditions, and other surveys describing other latent or concealed physical conditions at the project site;
  - c. a legal description of the project site;
  - d. as-built and record drawings of any existing structures at the project site; and
  - e. environmental studies, reports and impact statement describing the environmental conditions, including hazardous conditions or materials, in existence at the project site.
5. Providing assistance to JCI in obtaining any permits, approvals, and licenses that are JCI's responsibility to obtain as set forth in Schedule 1;
6. Properly maintaining, and performing appropriate preventative maintenance on, all equipment and building systems affecting the Assured Performance Guarantee in accordance with manufacturers' standards and specifications;
7. Providing the utility bills, reports, and similar information reasonably necessary for administering JCI's obligations under the Assured Performance Guarantee within seven (7) days of Customer receipt and/or generation or JCI's request therefor;
8. Providing all records relating to energy and/or water usage and related maintenance of the premises and relevant equipment requested by JCI;
9. Providing and installing utility sub-meters on all new construction and/or additions built during the Guarantee Term as recommended by JCI or, alternatively, paying JCI's applicable fees for calculating necessary adjustments to the Assured Performance Guarantee as a result of the new construction;
10. Providing and maintaining a dedicated telephone line and/or TCP/IP remote connection to facilitate remote monitoring of relevant equipment;
11. Promptly notifying JCI of any change in use or condition described in Section III of Schedule 2 or any other matter that may impact the Assured Performance Guarantee;
12. Taking all actions reasonably necessary to achieve the O&M Project Benefits;

In addition to the foregoing, Customer is responsible for the items set forth below in connection with utility meter projects:

1. Isolating the utility system to allow for meter/valve change out, including identification of all shut-off valves;
2. Scheduling shutdowns, downtimes, and relocation of new commercial vaults;
3. Traffic safety during installation;
4. Ongoing care and maintenance of the utility system, including all meters, AMR equipment and systems, meter boxes, and meter vaults at or above manufacturers' specifications and recommendations;

## PRICE AND PAYMENT TERMS

Customer shall make payments to JCI pursuant to this Schedule 4.

Customer shall make payments to JCI pursuant to this Schedule 4.

1. Total Project Costs. The total cost of the Project, including payment for JCI and the Engineer is \$7,707,518. Payments (including payment for materials delivered to JCI and work performed on and off-site) shall be made to JCI as follows:

First payment due: 30% down payment due upon SED approval, customer's securing of acceptable financing, and the issuance of the notice to proceed. Balance shall be invoiced monthly using AIA Invoice format.

2. M&V Services. Measurement & Verification services for the project from the construction period through Year 1 are included in the price of the agreement as detailed above in Section 1 'Work'. The District can request additional years of M&V service beyond Year 1 before the end of that report year. The price for continued M&V services will be negotiated upon request at that time.