

# EXECUTION COPY

## PERFORMANCE CONTRACT

This Performance Contract (this "Agreement") is made this 9 th day of October 2017 between:

### PARTIES

ECOSYSTEM ENERGY SERVICES USA, INC. ("ESCO")  
501 7<sup>th</sup> Avenue Suite 1605  
New York, NY 10018

and

WILLIAM FLOYD SCHOOL DISTRICT ("CUSTOMER" or "OWNER")  
240 Mastic Beach Road  
Mastic Beach, New York 11951

### RECITALS

**WHEREAS**, Customer desires to retain ESCO to perform the work specified in Schedule 1 (Scope of Work) hereto (the "Work") relating to the installation of the energy conservation measures (the "ECMs") described therein (the "Project"); and

**WHEREAS**, Customer is authorized and empowered under applicable Laws (as defined below) to enter into this Agreement, subject to the approval of the Commissioner of Education of the State of New York, and has taken all necessary action under applicable Laws to enter into this Agreement; and

**WHEREAS**, Customer has selected ESCO to perform the Work in accordance with the provisions of Customer's Request for Proposals for an Energy Project ("RFP") and 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.** ESCO shall provide construction, supervision, inspection, labor, materials, tools, construction management, construction equipment, installation and subcontracted items necessary for the execution and completion of the Work. ESCO shall perform the Work set forth in Schedule 1, which will result in Project Benefits as set forth in the Assured Performance Guarantee. ESCO shall pay for the third-party architectural/engineering services necessary for the execution and completion of the Work as part of the total cost to be paid by the Customer. After the Work is Substantially Complete (as defined below) and the Certificate of Substantial Completion is executed by Customer, the Engineer of Record (as defined below in paragraph 3) and ESCO, ESCO 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 ESCO for the Work and the M&V Services in accordance with Schedule 4 (Price and Payment Terms).

ESCO acknowledges that the Customer is a party to an Energy Savings Contract dated December 15, 2015 with Cenergistic LLC relating to the provision of an energy management and conservation program (the "Cenergistic Contract"). As long as the Total Project Benefits quantified and identified in Table 2.1.2 of this Agreement remain attributed to the ESCO scope, and as long as CUSTOMER will hold ESCO accountable to the Assured Performance Guarantee as determined by the July 2015 to June 2016 baseline Reference Year identified in the Comprehensive Energy Audit attached as Attachment 4, ESCO agrees that none of its compensation shall be derived, in whole or in

part, from any benefits or energy savings the Customer has received, or will receive in the future, from the Cenergistic Contract.

## **2. SERVICES TO BE PROVIDED BY THE PARTIES**

ESCO will install the Equipment identified on Schedule 1 of this Agreement (Work) and provide services detailed on Schedule 4 of this Agreement (M&V Services). ESCO shall supervise, direct and inspect the Work and Services and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work and M&V Services under this Agreement. ESCO shall be responsible for all labor, materials, equipment, tools, construction management, construction equipment and machinery, installation, subcontracted items, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work and Services. All work undertaken by ESCO must be in strict accordance with the plans and specifications developed by the Engineer of Record (as defined below in paragraph 3) and approved by the New York State Education Department ("NYSED").

**AGREEMENT DOCUMENTS:** In addition to the terms and conditions of this Agreement, the following Schedules, Attachments and Appendices are incorporated into and shall be deemed an integral part of this Agreement (collectively, the "Agreement Documents"):

Schedule 1 – Scope of Work  
Schedule 2 – Assured Performance Guarantee  
Schedule 3 – Customer Responsibilities  
Schedule 4 – Price and Payment Terms  
Schedule 5 – Baseline Operating Conditions

Attachment 1 – Notice to Proceed  
Attachment 2 – Change Order  
Attachment 3 – Certificate of Substantial Completion; Certificate of Final Completion  
Attachment 4 – Comprehensive Energy Audit  
Attachment 5 – Project Financials  
Attachment 6 – Project Record Documents  
Attachment 7 – Closeout Procedures

Appendix 1 - Scope of Architectural/Engineering Services  
Appendix 2 - Scope of Construction Services

In the event of any direct or indirect conflict, inconsistency or ambiguity between or among any of the Agreement Documents, the order of precedence shall be the following: Agreement terms and conditions, Schedules, Appendices and Attachments.

- 3. ENGINEER OF RECORD.** The Customer has identified and designates Tetra Tech Architects & Engineers as the certified Engineer of Record (the "Engineer") to provide architectural and engineering services in connection with the Work to be performed by ESCO, and the Customer has entered into a direct contract with the Engineer for such services on this Project. The Engineer shall certify that to the best of its knowledge it is free from financial interest in ESCO which conflicts with the proper completion of the audit and design work associated with this Agreement and that full disclosure has been made to the Customer (school district) detailing all financial compensation received from ESCO. The fees and total compensation for such Engineering Services shall be paid by ESCO to the Engineer in accordance with Schedule 4 Price and Payment Terms. The Engineer's fee is included in the Total Project Benefits. ESCO shall indemnify and hold harmless the Customer from any and all claims made against the Customer by the Engineer for fees and/or compensation charged by the Engineer for services performed in connection with this Agreement beyond those fees identified in Schedule 4 of this Agreement. Both ESCO and Customer agree and acknowledge that the Engineer owes their professional obligations and duties, including duties of care to the Customer. The Engineer shall remain free from any financial interest in the Agreement which

conflicts with the proper completion of their responsibilities under this Agreement and which conflicts with their responsibilities and duties to the Customer. ESCO must coordinate all Work and activities under this Agreement with the Engineer.

4. **NOTICE TO PROCEED; SUBSTANTIAL COMPLETION; M&V SERVICES.** This Agreement shall become effective upon, and the parties' obligations are contingent upon, written approval of the Commissioner of Education of the State of New York, meeting the requirements of section 155.20 of the Regulations of the Commissioner of Education of the State of New York, the issuance of a building permit by the NYSED and after Customer has secured financing, financing terms, and/or other payment methods acceptable to Customer, in its sole discretion, in accordance with Paragraphs 14, 19 and 31 of this Agreement. After receipt of written approval from NYSED, and after the Customer has secured financing,, the Customer shall issue a Notice to Proceed in a form acceptable to NYSED, a proposed form of which is attached hereto as Attachment 1. ESCO shall commence performance of the Work within ten (10) business days of receipt of Customer's Notice to Proceed. ESCO shall achieve Substantial Completion of the Work by the Substantial Completion date, which shall be the date on which Customer and Engineer execute a Certificate of Substantial Completion substantially in the form attached hereto as Attachment 3.

If it considers that the Work with regards to a specific ECM in an Installation is complete, ESCO shall deliver to the Engineer a Certificate of Completion of an ECM. Within thirty (30) days following receipt of this Certificate, the Engineer must (i) issue a countersigned and dated copy of said Certificate and deliver it to ESCO if the Engineer considers that the Work is completed for the ECM in question, or (ii) notify ESCO in writing of any objection, as well as the reasons for refusal of the Certificate of Completion of an ECM. Simultaneously, Engineer shall provide a copy of either (i) or (ii) in the preceding sentence to Customer, who shall have an additional fifteen (15) days to provide any comments or object to the issuance of (i) or (ii), as applicable to a specific ECM. Only upon resolution of Customer comments, if any, or objection, shall the Work described in the Certificate of Completion be deemed approved. If within ten (10) days after the expiration of Customer's fifteen (15) day period, no response or similar objection is raised, the Customer is deemed to have approved the Work performed with regards to the ECM in question, as described in the Certificate of Completion of an ECM. As each additional ECM is completed ESCO shall deliver to the Customer a new Certificate of Completion for each ECM, until each ECM is completed. All ECMs must be substantially complete prior to preceding with the issuance of the Certificate of Substantial Completion. As of the date of signing by the Customer of the Certificate of Completion of an ECM, the Customer shall be solely responsible for the ECM in question, its operation, its maintenance and any necessary repair, subject to Paragraph 8. It is understood that the ESCO shall from time to time validate the operating instructions for such ECM with the Customer in order to ensure optimum energy efficiency. Substantial Completion shall be achieved when ESCO has provided sufficient materials and services to permit customer to operate all of the improvement measures, and when the following items are completed by ESCO and approved by Customer and the Engineer:

- a. A written acknowledgement by the Customer that the ECMs have been installed by ESCO and completed to the satisfaction of the Customer and the Engineer;
- b. A written acknowledgment by the Customer of receipt of manuals and training provided by ESCO under the Agreement;
- c. A written acknowledgement by the Customer of the warranty start date and warranty period;
- d. The receipt of a punch list of items remaining to be completed by ESCO;
- e. A written acknowledgement by the Customer of receipt of warranties, release of liens, and proof of payment to subcontractors; and
- f. ESCO is responsible for obtaining fire marshal approval, if such is required for this Project. ESCO shall be responsible for any costs related to its failure to secure such approval. If ESCO fails to obtain such required approval, the Customer or Engineer shall give notice to ESCO and, if ESCO does not obtain such approval within fifteen (15) days of receipt of such notice, the Customer or Engineer may obtain such approval on ESCO's behalf and be compensated for any associated costs.

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. Customer acknowledges and agrees that if, for any reason, it (i) cancels or terminates receipt of M&V Services, (ii) fails to pay for M&V Services in accordance with Schedule 4, after written notice thereof to Customer and a 30 day period to cure, (iii) fails to fulfill any of Customer's responsibilities necessary to enable ESCO to complete the Work and provide the M&V Services, after written notice thereof to Customer and a 30 day period to cure, or (iv) otherwise cancels, terminates or materially breaches this Agreement, the Assured Performance Guarantee shall automatically terminate.

5. **DELAYS AND IMPACTS.** If ESCO is delayed in the commencement, performance, or completion of the Work and/or M&V Services by causes beyond its reasonable 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 in writing to ESCO prior to the commencement of the Work (unless ESCO should have discovered those conditions through reasonable visual inspection of the property and/or facilities and/or through a reasonable review of the specifications, drawings, and/or plans regarding the Project); a Force Majeure (as defined below) condition; failure by Customer to perform its material obligations under this Agreement; or failure by Customer to cooperate with ESCO in the timely completion of the Work, ESCO 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 and an equitable monetary adjustment shall be made subject to the mutual written agreement of the parties.
6. **ACCESS.** Customer shall provide ESCO, its subcontractors, and its agents reasonable access to all facilities and properties in Customer's control that are subject to the Work and M&V Services. Work to be performed by ESCO in accordance with this Agreement shall be performed from 7:00 am to 4:00 pm Monday through Friday or otherwise agreed by the parties during normally scheduled custodial shifts and will not occur in student occupied areas while classes or student activities are in progress, except as agreed to by the Customer, at its sole discretion. Customer reserves the right to further restrict project activities that would interfere with instruction or student events; provided, however, this section shall not impact the provisions of Section 5 above. Customer further agrees to assist ESCO, its subcontractors, and its agents in an effort to gain access to facilities and properties that are not controlled by Customer but are necessary for ESCO to complete the Work and provide the M&V Services. Inability to obtain such access shall not be considered a breach of this Agreement by Customer. An equitable adjustment in the time for performance and compensation shall be made as a result of any persistent and substantial failure to grant such access subject to the mutual written agreement of the parties. Furthermore, ESCO shall comply with all additional requirements for construction set forth in the Agreement Documents, including but not limited to, Appendix 2 – Scope of Construction Services.
7. **PERMITS, TAXES, AND FEES.** Unless otherwise specified in Schedule 3 (Customer Responsibilities), ESCO shall perform all work necessary to obtain, and shall comply with and be responsible for obtaining, at its expense, all licenses, permits and approvals required by Federal, State and local laws, rules and ordinances in connection with the Work, with the exception of a NYSED Building Permit, which shall be the only license, permit or approval to be obtained by the Customer. To the extent that ESCO agrees to perform operations and/or maintenance of specified ECMs or other equipment, ESCO shall comply with and obtain, at its expense, all licenses, permits and approvals which may be required by Federal, State and local laws, rules and ordinances in connection with the operation and/or maintenance of such specified ECMs. In the event that ESCO cannot procure any such license, permit or approval in light of a requirement that Customer is required to do so, Customer will utilize best efforts to procure the same at ESCO's expense. Customer represents that it is a governmental entity and that it will cooperate with ESCO and provide ESCO with appropriate documentation that Customer is not obligated to pay taxes associated with this Agreement. ESCO shall pay any applicable sales, consumer, use, and other similar taxes and shall secure and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper execution of the Work.

ESCO 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 regulates the installation of the ECMs and such applicable code, standard, law, regulation, ordinance or other requirement was in place prior to commencement of the Work. Without limiting the foregoing, ESCO's obligations with respect to the Work are 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 ECMs or which have been imposed or enforced because of the occasion or opportunity of review by any governmental authority. ESCO 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 ECMs, the use of the ECMs or payments due to ESCO under this Agreement.

8. **WARRANTY.** ESCO warrants that materials and equipment furnished by either it, or its subcontractors, will be of good quality and new; that the Work will be performed in a professional, workman like manner, will be free from defects; and that the Work and M&V Services will conform to the requirements of the Agreement Documents. ESCO warrants that the construction and installation services it performs will be performed consistent with good engineering practices and that all Work is subject to the warranty requirements set forth in Appendix C to the RFP (Minimum Standard Contract Clauses). If ESCO installs or furnishes goods or equipment under this Agreement, and such goods or equipment are covered by an end-user warranty from their manufacturer, ESCO will transfer the benefits of such warranty to Customer and will assist Customer in making any applicable warranty claims. These warranties do not extend to any Work that has been willfully abused, altered, misused, or repaired by the Customer or third parties without the supervision of and prior written approval of ESCO, which approval shall not be unreasonably withheld, except in the case of an emergency; or if ESCO serial numbers or warranty date decals have been removed or altered. If any Work is altered or repaired in an emergency, Customer will notify ESCO immediately of such alterations or repairs. The Customer must promptly report any failure of the Equipment to ESCO in writing. All replaced Equipment or parts remain Customer's property. ESCO shall not be considered a merchant or a vendor of goods or equipment.
9. **CLEANUP.** ESCO shall keep the premises and the surrounding area safe and free from accumulation of waste materials or rubbish caused by the Work on a daily basis and ESCO shall remove all waste materials, rubbish, tools, construction equipment, machinery, and surplus materials regularly and shall dispose of them in accordance with applicable law at a frequency of no less than weekly if such waste materials or rubbish are in student or staff occupied areas. Clean up shall be to the reasonable satisfaction of the Customer. In the event that ESCO fails to clean up the Work and the surrounding areas, upon twenty-four (24) hours written notice to ESCO, the Customer will have the same cleaned. All reasonable costs associated with such clean up shall be back charged to ESCO. ESCO shall take reasonable measures to secure waste materials, rubbish, tools, construction equipment, machinery, and surplus materials from the access of students.
10. **SAFETY; COMPLIANCE WITH LAWS.** ESCO 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. ESCO shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities (collectively, "Laws") in connection with its performance of the Work and provision of the M&V Services hereunder, including but not limited to 8 NYCRR 155.2, 155.5 and 155.20. If ESCO believes that implementation of any instruction received from the Customer would cause a violation of any Laws, ESCO shall notify the Customer in writing. Neither ESCO nor any subcontractor or the Engineer shall be obligated to perform any act which they believe will violate any Laws. ESCO shall be entitled to rely on the completeness and accuracy of the information contained in the RFP, but not that such information complies with Laws, which shall be the obligation of ESCO to determine. In the event that a specific requirement of the RFP conflicts with Laws, the Customer shall issue a Change Order to ESCO unless ESCO recognized such non-compliance prior to execution of this Agreement and failed to notify the Customer.

**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 has supplied ESCO with the AHERA Report dated November 2013 relating to the presence of ACM in areas where ESCO undertakes any Work or M&V Services that may result in the disturbance of ACM. ESCO has the obligation, upon receipt and review of the AHERA Report dated November 2013 provided by Customer and/or upon survey and inspection of the sites, to determine if ACM will be disturbed, handled, removed, remediated and/or disposed of in performing the Work identified in Schedule 1. Customer has provided or shall provide ESCO and/or its subcontractors reasonable opportunity to evaluate the AHERA Report dated November 2013 and/or cause to be evaluated whether ACM will be disturbed, handled, removed, remediated, and/or disposed of in performing the Work identified in Schedule 1. If it is determined that ACM must be disturbed, handled, removed, remediated, and/or disposed of in order for ESCO to perform the Work, ESCO must advise the Customer beforehand and, through a licensed contractor, perform such activities (including but not limited to abatement, clean up, control, removal, disposal, and air monitoring and project management services) in accordance with all federal and state regulations, at ESCO's sole expense, and pay for, at its sole expense, any and all applicable fees and permits to perform such activities. Except for ESCO's responsibilities to determine if ACM will be disturbed, handled, removed, remediated and/or disposed of in performing the Work, and ESCO's responsibilities to properly abate, clean up, control, remove, dispose of and provide air monitoring and project management services at ESCO's sole expense as set forth above, if either Customer or ESCO becomes aware of or suspects the presence of ACM not directly related to ESCO's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other, and the parties shall meet to discuss how to proceed. As between Customer and ESCO, Customer shall be responsible at its sole expense for maintaining ACM in conformance with all applicable Laws and addressing the impact of damaged ACM which is unrelated to the performance of the Work and which impedes ESCO's Work or M&V Services before ESCO continues with its Work or M&V Services. If ESCO failed to review documentation furnished by Customer and/or the Engineer indicating that ACM was present and/or disregarded such documentation or information and/or did not conduct a reasonable visual inspection of affected areas, and as a direct result of such failures, damaged ACM which resulted in a release of ACM, then: (i) ESCO shall be responsible at its sole expense for remediating areas impacted by the disturbance of the ACM, (ii) the Customer's obligations in the Environmental Indemnity paragraph set forth below shall not apply, and (iii) Customer shall resume its responsibilities for the ACM after ESCO's remediation has been completed.

Other Hazardous Materials: ESCO shall be responsible for removing or disposing of any Hazardous Materials (as defined below) that it uses in providing Work or M&V Services ("ESCO Hazardous Materials") and for the remediation of any areas impacted by the release of ESCO Hazardous Materials. ESCO also has the obligation to determine, upon receipt and review of the documentation and information provided by Customer and/or upon survey and inspection of the sites, if Hazardous Materials will be disturbed, handled, removed, and/or disposed of in performing the Work. Customer has provided or shall provide ESCO reasonable opportunity to evaluate or cause to be evaluated whether Hazardous Materials will be disturbed, handled, removed, and/or disposed of in performing the Work. For other Hazardous Materials that may be otherwise present at Customer's facilities ("Non-ESCO Hazardous Materials"), Customer shall supply ESCO with any information in its possession relating to the presence of such Non-ESCO Hazardous Materials if their presence may affect ESCO's performance of the Work or M&V Services. If, after receipt and review of the documentation and information provided by Customer and/or upon survey and inspection of the sites, it is determined that Hazardous Materials must be disturbed, handled, removed, remediated, and/or disposed of in performing the Work, ESCO must advise the Customer beforehand and perform such activities (including but not limited to abatement, clean up, control, removal, disposal and air monitoring and project management services) in accordance with all federal and state regulations, at ESCO's sole expense, and to pay for, at ESCO's sole expense, any and all applicable fees and permits to perform such activities. Except for ESCO's responsibilities to determine if Hazardous Materials will be disturbed, handled, removed, and/or disposed of in performing the Work, and ESCO's responsibilities to properly abate, clean up, control, remove, dispose of and provide air monitoring and project management services at ESCO's sole expense as set forth above, if either Customer or ESCO

becomes aware of or suspects the presence of Non-ESCO Hazardous Materials that may interfere with ESCO'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 ESCO, Customer shall be responsible at its sole expense for removing and disposing of Non-ESCO Hazardous Materials unrelated to the scope of ESCO's Work and/or unrelated to the performance of the Work and the remediation of any areas impacted by the release of said Non-ESCO Hazardous Materials before ESCO resumes Work or M&V Services in the affected area, unless ESCO had actual knowledge that Non-ESCO Hazardous Materials were present and disregarded that knowledge, in which case (i) ESCO shall be responsible at its sole expense for the remediation of any areas impacted by its release of such Non-ESCO Hazardous Materials, and (ii) the Customer's obligations in the Environmental Indemnity paragraph set forth below shall not apply with respect to such Non-ESCO Hazardous Materials. 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. "Hazardous Materials" specifically includes mold and lead-based paint and specifically excludes ACM.

12. **ENVIRONMENTAL INDEMNITY.** To the fullest extent permitted by Law, the Parties to this Agreement shall indemnify and hold harmless each other, 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 (collectively, "claims"), directly or indirectly, relating to or arising from the release or disposal of ACM or ESCO Hazardous Materials or Non-ESCO Hazardous Materials, or non-compliance with applicable Laws relating to protection of the environment or human health, to the extent that either Party's culpable conduct gave rise to the claims. Further, ESCO shall indemnify and hold harmless the Engineer and the Clerk of Works, and their employees, agents, officers, directors, Board members and/or assigns against any and all claims directly or indirectly, relating to or arising from the release or disposal of ACM or ESCO Hazardous Materials or Non-ESCO Hazardous Materials, or non-compliance with applicable Laws relating to protection of the environment or human health, to the extent that ESCO's culpable conduct gave rise to the claims.
13. **CHANGE ORDERS.** Unless agreed to by the Customer in writing, ESCO shall not be entitled to any Change Orders for work or materials that are necessary to install and/or operate any equipment set forth in Schedule 1. There will be no Change Orders issued for additional work due to omissions or errors in the plans, specifications, and/or drawings for the Project. ESCO will review the plans, specifications and drawings prior to construction to ensure that all necessary work and materials are included. Notwithstanding the above, 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 and, if necessary, the time for performance and the Assured Performance Guarantee ("Change Orders"). The price and payment terms, time for performance and, if necessary, the Assured Performance Guarantee, shall be equitably adjusted in accordance with the Change Order. Such adjustments shall be determined by mutual agreement of the parties and shall be subject to availability of funds and written approval of the Board of Education, the Engineer and NYSED, if necessary. No Change Order will be considered effective until it is signed by an authorized representative of each party and the Engineer. Further, any contract changes must be submitted, together with all supporting documentation to NYSED for review and approval. ESCO may delay performance of Work subject to the Change Order until adjustments arising out of the Change Order are clarified and agreed upon. If concealed or unknown conditions are encountered at the Project, differing from the conditions represented by Customer in the RFP or otherwise disclosed by Customer to ESCO in writing prior to the commencement of the Work, price and payment terms time for performance and, if necessary, the Assured Performance Guarantee, may be equitably adjusted subject to the availability of funds and written approval of the Board of Education, the Engineer and the NYSED. 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.

14. **TREATMENT; TAXES.** The parties acknowledge and agree that ESCO is not making any representation or warranty to Customer with respect to matters not expressly addressed in this Agreement, including, but not limited to Customer's proper legal, tax, accounting, or credit rating agency treatment relating to this Agreement.

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.

15. **INSURANCE.** ESCO shall not commence work under this Agreement until it has obtained all the insurance required hereinafter and proof of such insurance has been returned to and approved by the Customer, nor shall the ESCO allow any subcontractor to commence any work on the subcontract until all similar insurance required by the subcontractor has been obtained and approved. All contracts with subcontractors must include language requiring the subcontractor to provide additional insured status to the Customer. Subcontractors must provide proof of additional insured status for the Customer with the use of ISO endorsements CG 20 28 and CG 20 37. Approval of the insurance by the Customer shall not relieve or decrease the liability of the ESCO or its subcontractors.

A. Worker's Compensation and other Mandated Insurance: ESCO shall take out and maintain during the term of this Agreement the statutory Worker's Compensation and Employer's Liability Insurance, and all other insurance required by law, for all of his employees engaged in the Work under this Agreement.

B. Bodily Injury and Property Damage Liability Insurance: ESCO shall take out and maintain during the term of this Agreement a Comprehensive General Liability Insurance Policy for Bodily Injury, including Accidental Death, and Property Damage shall protect the ESCO from claims for damage which may arise from operations under this Agreement, whether such operations be by ESCO, or by any subcontractor or by anyone directly or indirectly employed by them.

C. The hazards insured against are listed below:

Premises-Operations  
Project & Completed Operations  
Explosion & Collapse  
Underground  
Contractual Insurance  
Broad Form Property Damage  
Independent Contractors  
General Liability, including personal and advertising liability  
Automobile Liability, including owned, hired and non-owned vehicles  
Professional Liability  
Umbrella Liability

Coverages shall be maintained without interruption from the date of commencement of the work until the ~~date of final payment and termination of any coverage required to be maintained after final payment.~~ The insurance required to be procured by the ESCO shall be purchased from and maintained by an insurance carrier licensed to do business in the State of New York, with an A.M. Best rating of "secured" or better. The ESCO must submit insurance to the Customer for its approval prior to the commencement of any work. All insurance coverage to be provided by the ESCO and subcontractors shall include a cancellation notice to the Customer in accordance with policy terms.

All insurance coverage to be provided by the ESCO shall name the Customer, Tetra Tech A/E and CM as an additional insured. Likewise, subcontractor insurance coverage shall name the Customer as an additional insured. Additionally, the insurance coverage to be provided by the ESCO shall state that the ESCO's



coverage shall be the primary and noncontributory coverage for the ESCO's work. Additional insured status shall be provided with endorsements that provide both ongoing and completed operations coverage. The decision to accept an endorsement rests solely with the Customer. In addition, any subcontractor doing work shall provide a completed copy of the ACORD 855 certificate. In the event that any of the insurance coverage to be provided by the ESCO to the Customer contains a deductible or self-insured retention, the ESCO shall indemnify and hold the Customer harmless from the payment of such deductible, which deductible shall in all circumstances remain the obligation and expense of the ESCO. The ESCO acknowledges that its failure to obtain or keep current the insurance coverage required and/or its failure to ensure that its subcontractors maintain the required coverage, shall constitute a material breach of contract and shall subject the ESCO to liability for damages, including but not limited to direct, indirect, consequential, special and such other damages the Customer sustains as a result of such breach. In addition, the ESCO shall be responsible for the indemnification to the Customer of any and all costs associated with the aforementioned lapse in coverage, including but not limited to reasonable attorney's fees.

The ESCO shall require all subcontractors to carry similar insurance coverages and limits of liability as set forth herein and adjusted to the nature of subcontractors' operations and submit same to the Customer for approval prior to start of any work. In the event the ESCO fails to obtain the required certificates of insurance from its subcontractors, and a claim is made or suffered, the ESCO shall indemnify, defend, and hold harmless the Customer, its board, officers, agents or employees from any and all claims for which the required insurance would have provided coverage. This indemnity obligation is in addition to any other indemnity obligation that will be provided for in this Agreement. The ESCO assumes responsibility for all injury or destruction of the ESCO's materials, tools, machinery, equipment, appliances, shoring, scaffolding, false and form work, and personal property of ESCO's employees from whatever cause arises. Any policy of insurance secured covering the ESCO or subcontractors leased or hired by them and any policy of insurance covering the ESCO or subcontractors against physical loss or damage to such property shall include an endorsement waiving the right of subrogation against the Customer for any loss or damage to such property. The Customer in good faith may adjust and settle a loss with the ESCO's insurance carrier.

The ESCO waives all rights against the Customer, its board, officers, agents and employees for damages caused by fire or other perils to the extent of actual recovery of any insurance proceeds under any insurance policy procured or other property insurance applicable to the ESCO's work. Before commencement of its work, the ESCO and its subcontractors shall obtain and pay for such insurance as may be required to comply with this Agreement. In the event that the Project involves removal of asbestos or other hazardous materials, the ESCO shall coordinate any asbestos/hazardous material testing and sampling with the Customer's Environmental Consultant. All costs associated with such testing/sampling shall be the responsibility of the ESCO. Under no circumstances shall the ESCO limit its liability to the amount of its primary general comprehensive policy limits.

D. The required limits of liability coverage on the above listed shall be:

**General Liability**

**Bodily Injury and Property Damage Liability**

Each Occurrence	\$1,000,000
Aggregate	\$2,000,000

**Automobile Liability**

**Automobile Liability including Hired/Non-owned Autos**

Combined Single Limit	\$1,000,000
-----------------------	-------------

### **Umbrella Liability**

Providing Coverage over General and Automobile Liability on a follow form basis

Each Occurrence	\$3,000,000
Aggregate	\$3,000,000

- E. Cancellation of Insurance. The insurance certificates and policies required by this Agreement shall contain a provision that coverage afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to and confirmed as received by the Customer. No work may continue and no payments to the ESCO will be made after the expiration date noted on the latest insurance certificate on file with the Customer.

## **16. INDEMNIFICATION.**

To the fullest extent permitted by applicable Law, each party shall indemnify the other with respect to any third party claim alleging bodily injury, including death, or property damage to the extent such injury or damage is caused by the negligence or willful misconduct of the indemnifying party. Further, ESCO shall indemnify and hold harmless the Customer, the Engineer, the Clerk of Works, and their employees, agents, officers, directors, Board members 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 such claims, suits, actions, fines, charges, penalties, costs, damages, losses, liabilities and expenses are caused by the negligence or intentional misconduct of ESCO's employees, agents, officers, subcontractors and/or assigns. ESCO shall also indemnify, hold harmless, and defend at its own expense the Customer, the Engineer, the Clerk of Works, and their employees, agents, and assigns against all loss, damages, liabilities, and expenses, including reasonable attorneys' fees, arising out of or related to any claims of patent infringement and any claims of construction or materialman's lien made by any subcontractor or materialman to the extent relating to the Work and M&V Services provided by ESCO. 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 promptly advise the indemnifying party of the claim pursuant to the notice provision of this Agreement.

17. **LIMITATION OF LIABILITY.** NEITHER ESCO NOR CUSTOMER WILL BE RESPONSIBLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, REMOTE, PUNITIVE, EXEMPLARY, LOSS OF PROFITS OR REVENUE, LOSS OF USE (EXCEPT AS SET FORTH BELOW), 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 limitation of liability herein shall not be construed as a limitation on Customer's right to contract damages, including, but not limited to the right to recover the energy performance guarantee and/or substitute performance. Nothing in this provision shall be construed to limit the recovery for compensatory or actual damages suffered by Customer resulting from ESCO's, ESCO's agents', or ESCO's subcontractors' negligent, grossly negligent, reckless, or intentional acts or omissions, provided, however, that actual damages shall not include consequential damages. In addition, the foregoing limitation of liability shall not limit Customer's right to seek reasonable damages related to the loss of use of its facilities. If this Agreement covers fire safety or security equipment, Customer understands that ESCO is not an insurer regarding those services, and that ESCO 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 ESCO and Customer, and each party acknowledges that ESCO 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. **PAYMENT AND PERFORMANCE BOND.** ESCO shall, prior to the commencement of construction, deliver to the Customer Performance and Payment Bonds in a sum equal to the contract amount from sureties authorized and licensed to do business in the State of New York, listed in the latest issue of the United States Treasury Circular 570 (the "Circular") and satisfactory to the Customer. Bonds shall be conditioned upon the faithful performance by ESCO, for the implementation of the ECMs, and such bonds shall be in such form of AIA Document A312, and contain such provisions as are reasonably satisfactory to the Customer. The sufficiency of the bonds is subject to Customer's approval and bonds deemed insufficient by Customer may be rejected. All bonds shall be executed by a surety company rated at least "A minus" by Best's Key Rating Guide, with a financial size category of "VII" or higher. The bonding limit shall not exceed the amount listed on the Circular for the surety issuing the bond. A certified and current copy of the power of attorney for the attorney-in-fact who executes the required bonds on behalf of the surety must be affixed to the bond. These Performance and Payment Bonds shall apply only to the Installation Period, as defined in Schedule 2. A rider including the following provisions shall be attached to each Bond:

1. Surety hereby agrees that it consents to and waives notice of any addition, alteration, omission, change, or other modification of the Agreement Documents. Such addition, alteration, change, extension of time, or other modification of the Agreement Documents, or a forbearance on the part of either the Customer or ESCO to the other, shall not release the Surety of its obligations hereunder and notice to the Surety of such matters is hereby waived.
2. Surety further agrees that in the event of any default by the Customer in the performance of the Customer's obligations to ESCO under the Agreement, ESCO shall cause written notice of such default (specifying said default in detail) to be given to the Customer, and the Customer 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 if 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 the Customer.

19. **REVIEW BY THE NEW YORK STATE EDUCATION DEPARTMENT/APPROVAL OF CONTRACT.** ESCO and Customer acknowledge that this Agreement is subject to 8 NYCRR 155.20 and, as such, requires the approval of the Commissioner of NYSED. This Agreement shall not be executory until Commissioner's approval is obtained in writing. The Customer's obligations within this Agreement are contingent upon and subject to prior review and written approval of NYSED, pursuant to the laws and regulations of the State of New York. Upon receiving NYSED approval and building permits, the cash flow for the Project will be recalculated with current interest rates. Moreover, in the event that building aid for this Project is reduced and/or eliminated, the Customer, it is sole discretion, shall have the right to reduce the scope of Work as necessary to achieve a positive cash flow for the Customer during the term of the Agreement. The Price and Payment Terms set forth at Schedule 4 of this Agreement will be adjusted by amendment to this Agreement to reflect any necessary modifications resulting therefrom.

In addition, this Agreement shall not be executory until the Customers' attorneys' approval is obtained. Prior to NYSED approval, it shall be ESCO's sole responsibility to validate each ECM with Customer and gain the final approval of the savings outlined in Schedule 2. This process may include the providing of mock-ups and/or site visits as well as delivering additional presentations if necessary. Without final Customer approval of Schedule 2 and any requested mock-ups, this Agreement shall not be executory. If NYSED approval is not obtained within 180 days of the date of the Engineer's submittal to NYSED, ESCO reserves the right to propose modifying the terms of this Agreement, including but not limited to the cost to be financed under this Agreement, subject to Customer's approval in writing, which shall not be unreasonably withheld. ESCO agrees to cooperate with Customer in obtaining necessary approvals, including approval by the Commissioner of NYSED. This shall include providing the certifications pursuant to 155.20 (d) (7) (ii), (iii) and (iv) of the Regulations of the Commissioner of NYSED. Notwithstanding the above, should any portion of this Agreement fail to be approved by NYSED, or, if the Scope of Work contained in this Agreement is not approved by NYSED in its entirety, Customer may, in

its sole discretion, elect to terminate this Agreement. ESCO shall have no remedy at law or in equity for such termination or for any costs incurred by ESCO up to the date of termination.

20. **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 culpable conduct 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; theft; vandalism; riots or war; acts of terrorism; electrical power outages; or interruptions or degradations in telecommunications, computer, or electronic communications systems; changes in Laws; or unavailability of parts, materials or supplies.
21. **ESCO'S PROPERTY.** Except as set forth in Schedule 1 – Scope of Work regarding materials to be furnished or installed as part of the Work, all materials and tools owned by ESCO and furnished and used by ESCO personnel and/or ESCO subcontractors or agents at the installation site, including documentation, schematics, test equipment, software and associated media, remain the exclusive property of ESCO or such other third party. Customer agrees not to use such materials for any purpose at any time without the express authorization of ESCO. Customer agrees to allow ESCO personnel and/or ESCO subcontractors or agents to retrieve and to remove all such materials remaining after installation or maintenance operations have been completed upon appointment during normal business hours. Notwithstanding the above, all software which is owned by ESCO and furnished, installed, or used by ESCO's personnel and/or subcontractors or agents at the installation site and which is needed or intended to operate Customer's systems 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. 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. All data generated as a result of the M&V Services shall be the property of Customer.
22. **DISPUTES.** Disputes involving this Agreement, including the breach or alleged breach thereof, may not be submitted to binding arbitration. ESCO and Customer will attempt to settle any controversy, dispute, difference, or claim between them concerning the performance, enforcement, or interpretation of this Agreement through direct discussion in good faith. Notwithstanding the foregoing, if good faith efforts to resolve a dispute are unsuccessful, disputes involving this Agreement, including the breach or alleged breach thereof, must be brought in any state or federal court of competent jurisdiction located in the County of Suffolk in the State of New York.
23. **GOVERNING LAW.** The Agreement shall be governed and construed in accordance with the laws of the State of New York without regard to choice of law principles. The parties agree that the sole jurisdiction and venue for actions related to the subject matter hereof shall be the State courts in the County of Suffolk, New York and the federal courts in the Eastern District of New York. Both parties consent to the jurisdiction of such courts and waive any objections regarding venue in such courts.
24. **MODIFICATIONS.** Additions, deletions, and modifications to this Agreement may be made upon the mutual agreement of the parties in writing, subject to NYSED 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.
25. **TERMINATION.** Customer reserves the right to terminate this Agreement for any reason, or no reason whatsoever, upon thirty (30) days written notice to ESCO. In the event of such termination, the parties will adjust the accounts due, and ESCO will undertake no additional expenditures not already required. Upon any such termination, the parties shall endeavor in an orderly manner to wind down activities hereunder. In the event of termination, all reports and services due to the Customer must be completed by ESCO, its employees, and/or agents within thirty (30) days of the date of the written notice. Customer shall pay to ESCO all undisputed amounts due for Work satisfactorily completed up to the date of termination. If at any time during the project development phase of the Work it is discovered that savings cannot be attained as

set forth and certified by ESCO, upon such discovery, Customer shall have no obligation to pay any cost or expense associated with the Work. ESCO shall immediately notify Customer in writing upon such determination that the savings cannot be attained as set forth and certified by ESCO. If, after submission and written approval of the Work from the NYSED Customer decides not to go forward with the Work for reasons other than discovery that savings cannot be attained, Customer will pay ESCO an amount not to exceed the cost of the Comprehensive Energy Audit ("CEA") (\$1.146 million, as set forth in Section C-1 of the RFP) plus \$668,666 (50% of the Architect's design fee to achieve submittal to NYSED).

ESCO may terminate the Agreement if the Work is stopped for a period of 60 consecutive days through no act or fault of ESCO or a subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with ESCO, for any of the following reasons:

- a. issuance of an order of a court or other public authority having jurisdiction which requires all Work to be stopped;
- b. an act of government, such as a declaration of national emergency which requires all Work to be stopped; or
- c. the Customer has failed to make payment to ESCO in accordance with the Agreement Documents.

ESCO may terminate the Agreement if, through no act or fault of ESCO or a subcontractor, or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with ESCO or a subcontractor or their agents or employees or any other persons or entities performing portions of the Work under direct or indirect contract with ESCO, repeated suspensions, delays or interruptions of the entire Work by the Customer, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

If one of the reasons described herein exists, ESCO may, upon seven days' written notice to the Customer, terminate the Agreement and recover from the Customer payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages.

If the Work is stopped for a period of 60 consecutive days through no act or fault of the ESCO or a Contractor or their agents or employees or any other persons performing portions of the Work under a direct or indirect contract with ESCO because the Customer has persistently failed to fulfill the Customer's obligations under the Agreement Documents with respect to matters important to the progress of the Work, ESCO may, upon seven additional days' written notice to the Customer, terminate the Agreement and recover from the Customer as provided herein.

26. **WAGE AND HOURS PROVISIONS.** This is a public work contract covered by Article 8 of the Labor Law. Neither ESCO'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 said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, ESCO and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law. Accordingly, ESCO and each of its subcontractors shall comply with Prevailing Wage Rates as issued by the State of New York Department of Labor for the location and duration of this Project and shall comply with all requirements governing its payments to its employees as set forth in section 220 et. seq. of the New York State Labor Law. ESCO must submit the required certified payrolls with its requests for payment. The Customer will not make any payment to ESCO unless ESCO submits the required certified payrolls in accordance with New York State Labor Law section 220(3-a)(a).
27. **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 ESCO’s consent, approval, satisfaction or determination shall be required or permitted under this Agreement, and this Agreement does not expressly state that ESCO 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 Customer’s cooperation is required by ESCO in order to carry out ESCO’s obligations hereunder, Customer agrees that it shall act in good faith and reasonably in so cooperating with ESCO and/or ESCO’s designated representatives or assignees or subcontractors. Whenever ESCO’s cooperation is required by Customer in order to carry out Customer’s obligations hereunder, ESCO agrees that it shall act in good faith and reasonably in so cooperating with Customer and/or Customer’s designated representatives or assignees. ESCO and 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. Furthermore, whenever Customer shall render a decision or make any action under this Agreement which is subject to and requires NYSED approval, it covenants and warrants to ESCO that it has obtained all the proper and prior authorization in need to do so from NYSED or, failing that, agrees to indemnify and keep ESCO harmless from and against any and all Claims arising or resulting from said failure to obtain proper and prior authorization or to act without proper and prior authorization.

28. **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.

29. **INDEPENDENT CONTRACTOR.** ESCO is an independent contractor in all respects with regard to this Agreement. Nothing contained in this Agreement shall be deemed to create a partnership, joint venture, fiduciary, or similar relationship between the parties. Neither ESCO nor any person performing any duties or engaged in any Work on the Customer’s property on behalf of ESCO shall be deemed an employee or agent of Customer. Nothing in this Section shall be deemed to be a waiver of the Customer’s right to use its property. Customer and ESCO 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 authority to bind or create liability for the other by its intentional or negligent act 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 ESCO, 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.

30. **COMPLIANCE WITH LAW.** ESCO shall comply with all Laws in connection with the installation of the ECMs and the Work at time of execution of this Agreement. ESCO shall comply with all authorities in applicable Laws of public connection with its performance hereunder.

31. **NON-APPROPRIATION.** Pursuant to NYS Energy Law 9-103(2), 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.

32. **ASSIGNMENT.** The parties agree not to assign, transfer, convey or sublet or otherwise dispose of this Agreement nor any duties or obligations hereunder or rights, title and interest therein or power to execute such Agreement, to any other person, firm or corporation without the previous consent in writing of the other party; provided, however, that ESCO may subcontract any portion of the Work to be performed hereunder in accordance with the provisions set forth herein. ESCO may not assign any monies due or to become due to it pursuant to its Agreement with Customer without Customer’s prior written consent. Any such assignment shall be in a form acceptable to Customer. If ESCO attempts to make such an assignment without such consent from Customer, ESCO shall nevertheless remain legally responsible for all obligations under its Agreement with Customer.

33. **SUBCONTRACTING.** ESCO may elect to use subcontractors in meeting its obligations hereunder. All subcontractors must be approved by Customer. Customer reserves the right to reject the use of any subcontractor at the time ESCO proposes such subcontractor, and to revoke Customer's prior approval of a subcontractor, in either case for any reason and in Customer's sole discretion. ESCO and its subcontractors will be required to wear photo identification and yellow safety vests at all times while on School District property. ESCO's employees, agents, subcontractors etc. shall not interact with Customer's students. ESCO and its subcontractors as necessary shall attend any meetings when reasonably required during the construction of the Project. By appropriate agreement, ESCO shall require each subcontractor to be bound to ESCO by the terms of this Agreement.
34. **NOTIFICATIONS OF GOVERNMENTAL ACTION - Occupational Safety and Health.** The parties agree to notify each other as promptly as is reasonably possible upon becoming aware of an inspection under, or any alleged violation of, the Occupational Safety and Health Act or any other provision of Laws relating in any way to the undertakings of either Party under this Agreement. ESCO represents and warrants that it will meet all applicable OSHA requirements applicable to this Agreement, including any required certification and training requirements for its employees and its subcontractors.
35. **TRAINING.** ESCO shall provide adequate training to Customer's employees to allow Customer or its employees to have sufficient knowledge with respect to the proper use and operation of the equipment and ECMs.
36. **WAIVER.** The failure of either Party to require compliance with any provision of this Agreement shall not affect that 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 of 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.
37. **NON-DISCRIMINATION.** ESCO agrees not to discriminate against any employee, or applicant for employment, to be employed in the performance of this Agreement, with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to 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.
38. **INTERNATIONAL BOYCOTT.** In accordance with Section 220-f of the Labor Law and Section 139-h of the State Finance Law, if this Agreement exceeds \$5,000, ESCO, as a material condition of the Agreement, represents that neither ESCO 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 USC App. Sections 2401 et seq.) or regulations thereunder. If ESCO, or any of the aforesaid affiliates of ESCO, is convicted or is otherwise found to have violated said laws or regulations under the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contractors execution, such contract, amendment or modification thereto shall be rendered forfeit and void. ESCO shall so notify Customer within five (5) business days of such conviction, determination or disposition of appeal (2 NYCRR 105.4).
39. **NON-COLLUSION.** ESCO warrants, under penalty of perjury, that its proposal was arrived at independently and without collusion aimed at restricting competition.
40. **SET OFF RIGHTS.** Either party shall have the right and option to withhold for the purposes of set-off any moneys due to the other party under this Agreement up to any amounts due and owing to other party with regard to this Agreement, plus any amounts due and owing for any reasons of tax delinquencies, fee delinquencies or monetary penalties relative thereto. Both parties shall exercise its set-off rights in accordance with normal practices including, in cases of set-off pursuant to an audit, the finalization of such audit by a State agency and its representatives.

41. **BOOKS; RECORDS.** ESCO shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this Agreement (hereinafter, collectively the "Records"). Records shall conform to the requirements of Attachment 6, "Project Record Documents." The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter or such longer period as may be required by applicable Law. The State Comptroller, the Attorney General, the Commissioner of NYSED, and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this Agreement, shall have access to the Records during normal business hours at an office of ESCO within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. Customer shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law provided that: (i) ESCO shall timely inform an appropriate Customer official, in writing, that said Records should not be disclosed; and (ii) said Records shall be sufficiently identified; and (iii) designation of said Records as exempt under the statute is reasonable. Customer may, however, determine that ESCO's records are not exempt from disclosure. Nothing contained herein shall diminish, or in any way adversely affect, either party's right to discovery in any pending or future litigation.
42. **THIRD PARTY BENEFICIARIES.** This Agreement does not create, and shall not be construed as creating, any rights or interests enforceable by any person not a Party to this Agreement.
43. **CUSTOMER POLICIES.** It is understood and agreed that ESCO, its employees, agents, subcontractors and employees of such agents and subcontractors, shall adhere to Customer's policies with respect to conduct on the Customer's property as well as any and all Federal, state, and local laws, rules, ordinances, regulations, Customer's policies and procedures applicable to construction projects on Customer's premises, to the extent such policies are provided to ESCO in writing.

In the event a lien is filed against the School District and ESCO has been paid any undisputed amounts, ESCO shall within thirty (30) days provide proof of bonding and/or satisfaction of any such lien against the School District, and will use commercially reasonable efforts to assist the School District in order to have the lien removed.

44. **POWER AND AUTHORITY.** Subject to the provisions in Sections 19 and 31, 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.
45. **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.
46. **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.

47. **HEADINGS.** The captions and titles in this Agreement are for convenience only and shall not affect the interpretation or meaning of this Agreement.
48. **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.
49. **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 ESCO at the address listed on the first page of this Agreement, ATTN: Regional Business Manager, with a copy to ESCO, ATTN: General Counsel – Energy Efficiency Contracts, 501 7<sup>th</sup> Avenue, Suite 1605, New York, NY 10018; and to Customer, ATTN: Superintendent of Schools and Assistant Superintendent for Finance and Operations, at the address listed on the first page of this Agreement. Address information may be changed by providing written notice to the other party.
50. **APPLICATION FOR REBATES/INCENTIVES.** ESCO will apply for utility company rebate programs and NYSERDA and other applicable rebates and incentives at the time of application. All rebates and incentives shall inure to the benefit of Customer. All rebates and/or incentives shall be payable to Customer. It is understood that:

In case of difference between the amount of guaranteed subsidies in the Comprehensive Energy Audit and that actually received by the Customer, due to changes in incentive or subsidy programs administered by the local utility or NYSERDA, such difference will not be attributable to the ESCO and shall reduce the ESCO's liability for the amount of the guaranteed subsidy by a corresponding amount.

a. In the event said difference in the amount of subsidies received is for a cause not attributable to the Customer, the loss of earnings shall be compensated by the ESCO, up to its amount. If the Reserve is not sufficient to cover the shortfall in the subsidies received by the Customer, the ESCO shall pay the Customer the difference between the guaranteed subsidies and the subsidies received by the Customer.

b. In the event of the loss or reduction of any subsidy or portion of subsidy caused by a delay or act attributable to the Customer (of which the ESCO has advised the Customer in writing and which the Customer has not remedied within a reasonable time), any guarantee given by the ESCO relative to such a subsidy or portion of subsidy shall become null and void.

51. **EXECUTION.** This Agreement may be executed in counterparts. Further, a copy of a signature on a facsimile and/or electronic transmission of this Agreement shall have the same force and effect as if it were an original signature.
52. **OWNERSHIP OF DOCUMENTS.** The Agreement Documents, whether prepared by the Engineer or furnished by the ESCO are Instruments of Service. ESCO, the Engineer and other providers of professional services individually shall retain all common law, statutory and other reserved rights, including copyright in those Instruments of Services furnished by them. However, Customer shall have a permanent, paid up license and rights to use the Instruments of Service, including all drawings, specifications, and other documents and materials and electronic data that are furnished for use solely with respect to this Project.

Upon execution of this Agreement, ESCO grants to the Customer a non-exclusive license to reproduce and use the Instruments of Service solely in connection with the Project, including the Project's further development by the Customer and others retained by the Customer for such purposes, provided that the Customer shall comply with all obligations, including prompt payment of sums when due, under the Agreement Documents. Subject to the Customer's compliance with such obligations, such license shall extend to those parties retained by the Customer for such purposes, including other design professionals. ESCO shall obtain similar non-exclusive licenses from its design professionals, including the Engineer. The

Customer shall not otherwise assign or transfer any license herein to another party without prior written agreement of ESCO, except to its successors by merger, purchase of equity or purchase of assets or to its affiliates. Any unauthorized reproduction or use of the Instruments of Service by the Customer or others shall be at the Customer's sole risk and expense without liability to the ESCO and its design professionals. Termination of this Agreement prior to completion of the ESCO's services to be performed under this Agreement shall terminate this license.

Prior to any electronic exchange by the parties of the Agreement Documents or any other documents or materials to be provided by one party to the other, the Customer and ESCO shall agree in writing on the specific conditions governing the format thereof, including any special limitations or licenses not otherwise provided in the Agreement Documents.

Unless this Agreement is terminated solely as a result of the default of the Customer including failure to make payment of undisputed amounts, each of ESCO's design professionals, including the Engineer, shall be contractually required to convey to the Customer a non-exclusive license to use that design professional's Instruments of Service for the completion, use and maintenance of the Project, conditioned upon the Customer's written notice to that design professional of the Customer's assumption of ESCO's contractual duties and obligations to that design professional and payment to that design professional of all amounts due to that design professional and its consultants. If the Customer does not assume the remaining duties and obligations of ESCO to that design professional under this Agreement, then the Customer shall indemnify and hold harmless that design professional from all claims and any expense, including legal fees, which that design professional shall thereafter incur by reason of the Customer's use of such Instruments of Service.

Submission or distribution of the Agreement Documents to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the rights reserved herein.

IN WITNESS WHEREOF, the duly authorized officers or representatives of the Parties have set their hand on the date first written above with the intent to be legally bound.


**WILLIAM FLOYD SCHOOL DISTRICT**

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

  
**Robert Vecchio**  
**Board of Education President**

10/12/17

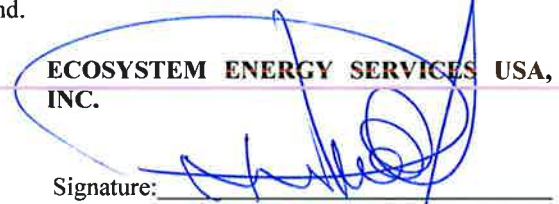
**ECOSYSTEM ENERGY SERVICES USA, INC.**

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

  
**Patrick Raby**  
**Vice president**  
October 4th, 2017

## Schedule 1 – Scope of Work

**SCOPE OF WORK**

1. **SUMMARY OF WORK:** The following summarizes the Work to be provided by ESCO under this Agreement, as further defined below:

Please review attachment 4 Comprehensive Energy Audit for a detailed scope of work.

## **CONSTRUCTION MANAGEMENT**

### **Construction Management Services**

All work set forth in the Agreement shall be coordinated with the Customer, approved by the Engineer as set forth in the Agreement and attachments thereto and be carried out in accordance with this Agreement and all attachments and appendices hereto.

1. ESCO will prepare and maintain an overall Project Management Plan and Construction Schedule which shall be provided to the Customer and Engineer for approval. Updates will be provided by ESCO to the Customer and the Engineer on an on-going basis.
2. ESCO shall maintain a staff to administer the contract terms and conditions with all Project related subcontractors.
3. ESCO will provide coordination and total supervision of the work of separate ECMs ensuring enforcement of all contract provisions, compliance with energy initiatives, and timely completion of the Project. All such work must be coordinated with the Customer and the Engineer. Furthermore, the Customer has the right to engage other contractors to perform work related to the ECMs, and the ESCO shall coordinate its work with any others at the location of the work. ESCO shall be responsible for scheduling and coordinating all work identified within Schedule 1 with the ongoing bond referendum project(s) and capital improvement projects at the Customer's facilities.
4. ESCO shall establish and maintain coordination procedures, including Project meetings and documentation process. ESCO shall attend all Project meetings as required by the Customer and/or the Engineer.
5. ESCO shall submit a site accessibility plan to the Customer, Engineer and contractors/subcontractors to ensure continuous operation of school services and activities. All schedules and site accessibility plans require approval by the Customer and Engineer, in their sole discretion.
6. ESCO shall perform inspection work necessary to assure the conformity to the plans and specifications until final completion and acceptance of the Project by the Customer.
7. In accordance with the Closeout Procedures at Attachment 7, ESCO shall coordinate post-completion activities including the assembly of guarantees, manuals, as-built drawings of Project trade and subcontractors, and the Customer's final acceptance with the Engineer. ESCO shall coordinate training of the Customer's personnel by installers and vendors for the operations of the Project with the Customer's Representative and Engineer.
8. ESCO shall coordinate the Project with the District-approved Engineering firm, Tetra Tech Architects & Engineers("Tetra Tech"). Tetra Tech will prepare and submit all necessary design work to NYSED for approval in accordance with the terms of the Agreement between the District and Engineer attached hereto at Appendix 1, Scope of Architectural/Engineering Services.

## **Schedule 1**

9. In addition to the terms set forth herein, Appendix 2, Scope of Construction Services delineates the terms and conditions of the construction services to be provided by ESCO. ESCO represents that it is aware of and bound by the terms and conditions of the services as provided in said Appendix.
10. ESCO and its subcontractors will be required to wear photo identification and a yellow vest at all times while on School District property and shall have no interactions with Customer's students.
11. ESCO and its subcontractors shall attend Customer Committee meetings at the request of the Customer, if any, during the construction of the Project and meetings related to other work that might be performed and is in conjunction to their work.
12. Construction phase services will be performed according to the terms and conditions of Appendix 1, Scope of Architectural/Engineering Services and Appendix 2, Scope of Construction Services.
13. Work will commence upon NYSED approval and the Customer's receipt of the necessary financing for the Project. Hours of work shall be as set forth in paragraph six (6) of this Agreement. Costs incurred by the Customer related to this Project, including overtime costs for District personnel, to make the facilities available during evening and weekends shall be borne solely by ESCO.

## **Schedule 2 – Assured Performance Guarantee**

## Schedule 2

### 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 ECMs as set forth in the M&V plan of the CEA.

**CEA** means the Comprehensive Energy Audit dated May 29<sup>th</sup> 2017, for which a copy is attached hereto in Attachment 4.

**ECM** means the energy conservation measure(s) explained in the Comprehensive Energy Audit and consisting of the equipment, materials, machinery, procedures and systems to be designed, constructed, installed and implemented in each Installation and, when there is more than one Measure, any reference to "Measures" means collectively all these measures.

**Guaranteed Energy Cost Savings** means, in dollars, the energy cost savings guaranteed by the ESCO, for each Installation, ~~and resulting directly from the ECM, as calculated by the ESCO according to the method established, in~~ order to respect the reimbursement over the Guarantee Payback Period.

**Guaranteed Payback Period** means the period of time needed for all of the costs of the Project (including Project financing fees and any adjustment to take into account the percentage of increase in consumer prices) to be completely amortized by the Guaranteed Energy Cost Savings and Maintenance and Operating Costs, all as more fully detailed in the CEA.

**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 three years (3) of M&V Services, subject to earlier termination as provided in this Agreement.

**Installation(s)** means the building(s) and the structure(s) in or on which the ECM must be designed, constructed, installed and implemented, as described in the Comprehensive Energy Audit and, when there is more than one Installation, any reference to "Installations" means collectively all these installations.

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

**Interim Savings** means all savings monitored between the date of the commencement of the implementation of the ECM and the Starting Date, for each Installation, and resulting directly from the ECM.

**Maintenance and Operating Costs** means all of the costs connected with the maintenance and the operation of each ECM, excluding energy.



## Schedule 2

**Measured Project Benefits** are the utility savings and cost avoidance calculated in accordance with the methodologies set forth in Exhibit 2 below.

**Monitored Year** means the year targeted, during the Guaranteed Payback Period, by a given Reconciliation Report.

**Monitored Period** means the total number of Monitored Years included in the Contract as detailed in the CEA and which is not necessarily equal to the GPP.

**Project Benefits** are the Measured Project Benefits plus the Variation in Actual Maintenance and Operating Cost 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.

**Reconciliation Report** means the annual report delivered by the ESCO to the Owner during the Guarantee Term and which reports the value, in dollars, of the overall energy cost savings realized.

**Reserve** means, in dollars, the Interim Savings, the Annual Project Benefits Surplus and the Surplus Subsidies.

**Starting Date** means the date on which the Guaranteed Energy Cost Savings begin to be recorded.

**Surplus Subsidies** means any surplus subsidy or portion of a subsidy exceeding the amount of subsidies guaranteed in the CEA.

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

**Variation in Actual Maintenance and Operating Costs** means the difference, in dollars, between the Maintenance and Operating Costs of the Baseline and the Maintenance and Operating Costs of the Monitored Year in question.

Schedule 2

Guarantee Details

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

Table 2.1.1: Exhibits Summary

Exhibit 1	Total Project Benefits
Exhibit 2	Measurement and Verification Methodologies
	PERFORMANCE CONTRACT .....
	Construction Management [SERVICES TO BE CONFIRMED BY CLIENT] .....
	SCOPE OF WORK.....
	ASSURED PERFORMANCE GUARANTEE.....
	CUSTOMER RESPONSIBILITIES .....
	PRICE AND PAYMENT TERMS .....
	CHANGE ORDER .....
	CERTIFICATE OF SUBSTANTIAL COMPLETION.....
	Lighting Survey line-by-line.....

## Schedule 2

### EXHIBIT 1: TOTAL PROJECT BENEFITS

Subject to the terms and conditions of this Agreement, ESCO guarantees that Customer will achieve a total of \$1,370,214 in Measured Project Benefits (Utility Cost Avoidance Measurable Savings), \$-120,396 in Operations and Maintenance Cost Avoidance, and \$1,647,832 in Energy Rebate-Non-Recurring Savings during the term of this Agreement.

Annual Total Guaranteed Project Benefits are as set forth in the Total Project Benefits Table 2.1.2 below.

Interim Savings will be divided by the number of years included in the Guarantee Period and considered in the yearly reconciliation report. Interim Savings shall be indexed through the duration of the Guarantee Period in order to compensate for the inflation rate.

As long as the Total Project Benefits quantified and identified in Table 2.1.2 of this Agreement remain attributed to the ESCO scope, and as long as CUSTOMER will hold ESCO accountable to the Assured Performance Guarantee as determined by the July 2015 to June 2016 baseline Reference Year identified in the Comprehensive Energy Audit attached as Attachment 4, CEA, in no circumstances will Total Project Benefits include any savings or benefits which are attributable to the Cenergistic Contract, whether such savings or benefits have already accrued or will accrue in the future.

**Table 2.1.2: Total Project Benefits**

<b>Year</b>	<b>Utility Cost Avoidance* Measurable Savings</b>	<b>Operations &amp; Maintenance Cost Avoidance**</b>	<b>Energy Rebate-Non Recurring Savings</b>	<b>Total Guaranteed Project Benefits</b>
Implem.	\$685,107	\$0	\$ 823,916	\$1,509,023
1	\$1,370,214	-\$120,396	\$ 823,916	\$2,073,734
2	\$1,397,618	-\$122,804	0	\$1,274,814
3	\$1,425,571	-\$125,260	\$ 0	\$1,300,311
4	\$1,454,082	-\$127,765	\$ 0	\$1,326,317
5	\$1,483,164	-\$130,321	\$ 0	\$1,352,843
6	\$1,512,827	-\$132,927	\$ 0	\$1,379,900
7	\$1,543,084	-\$135,585	\$ 0	\$1,407,498
8	\$1,573,945	-\$138,297	\$ 0	\$1,435,648
9	\$1,605,424	-\$141,063	\$ 0	\$1,464,361
10	\$1,637,533	-\$143,884	\$ 0	\$1,493,648
11	\$1,670,283	-\$146,762	\$ 0	\$1,523,521
12	\$1,703,689	-\$149,697	\$ 0	\$1,553,992
13	\$1,737,763	-\$152,691	\$ 0	\$1,585,071
14	\$1,772,518	-\$155,745	\$ 0	\$1,616,773
15	\$1,807,968	-\$158,860	\$ 0	\$1,649,108

## Schedule 2

16	\$1,844,128	-\$162,037	\$ 0	\$1,682,090
17	\$1,881,010	-\$165,278	\$ 0	\$1,715,732
18	\$1,918,630	-\$168,583	\$ 0	\$1,750,047
<b>Totals</b>	<b>\$30,024,557</b>	<b>-\$2,577,957</b>	<b>\$ 1,647,832</b>	<b>\$29,094,432</b>

\*Utility Cost Avoidance is a Measured Project Benefit. Utility Cost Avoidance figures in the table above are based on anticipated 2% increase in unit energy costs as set forth in the table in Exhibit 6

\*\*Operational and maintenance cost avoidance figures in the table above are based on anticipated 2% increase in labor and material cost.

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

ESCO shall provide M&V Services for a period of Three (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, ESCO will calculate the Interim Savings achieved during the Installation Period. Any Interim Savings achieved during the Installation Period shall be added to the Reserve. Within sixty (60) days of each anniversary of the commencement of the Guarantee Term, ESCO 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 in writing.

As set forth in the Certification provided by ESCO to NYSED, ESCO 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.

*Customer acknowledges and agrees that if, for any reason during the agreed-upon period of M&V Services for years 1-3, 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 C 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 material responsibilities necessary to enable ESCO to complete the Work and provide the M&V Services, including but not limited to Customer's failure to operate and maintain the equipment and/or systems exactly as stipulated by ESCO, or (iii) otherwise materially breaches this Agreement, ESCO shall issue a written notice to the Customer stating the nature of the alleged breach and shall provide Customer with a thirty (30) day period to cure such breach. If the Customer fails to cure such breach within such thirty (30) day period, Customer acknowledges and agrees that the Assured Performance Guarantee shall automatically terminate.*

### Project Benefits Shortfalls or Surpluses.

- (1) During the period in which ESCO is providing M&V Services, the following shall apply:
  - (a) In the event a Reconciliation Report shows a positive Reconciliation Value, any Reserve surplus shall be shared equally between the Owner and the ESCO
  - (b) In the event a Reconciliation Report shows a negative Reconciliation Value, the following rules shall apply:
    - a. The difference between the Reconciliation Value and the Guaranteed Energy Cost Savings shall be compensated from the Reserve, until the latter is exhausted;
    - b. If the Reserve is sufficient to compensate the negative Reconciliation Value deficit for the remaining year(s) of the Guaranteed Term, any Reserve surplus, shall be shared equally between the Owner and the ESCO;

## Schedule 2

- c. If the Reserve is not sufficient to compensate the negative Reconciliation Value deficit for the remaining year(s) of the Guaranteed Term, the ESCO shall pay the Owner a sum equal to the difference between the Guaranteed Energy Cost Savings and the overall energy cost savings realized during the year that is being monitored.

### EXHIBIT 2: MEASUREMENT AND VERIFICATION METHODOLOGIES

*The following is a brief overview of the measurement and verification methodologies applicable to the ECMs set forth below. ESCO 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.*

#### Measurement and verification services

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

1. During the Installation Period, an ESCO Performance Assurance Specialist will track Measured Project Benefits. ESCO will report the Measured Project Benefits achieved during 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, ESCO will provide Customer with an annual written 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 ESCO Performance Assurance Specialist will monitor the on-going performance of the ECMs, 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 ECMs.
4. For specified ECMs using M&V protocol Option C, ESCO will:
  - A. collect all energy invoices;

## **Schedule 2**

- B. adjust reference year according to heating degree days and to any changes that may occur in the building/equipment's operation or to any building/equipment additions or modifications;
- C. apply contractual rates to reference year and follow up years and determine the savings by subtracting the installations post-Project energy costs to baseline costs;

Trend data records maintained in the ordinary course of system operation shall be used and relied upon by ESCO in connection with Project Benefit calculations. ESCO will use commercially reasonable efforts to ensure the integrity of the data collected to calculate the required metrics. In the event data are lost due to equipment failure, power failure or other interruption in data collection, transmission or storage, ESCO will use reasonable engineering methods to estimate or replace the lost data.

## Schedule 3 – Customer Responsibilities

## Schedule 3

### CUSTOMER RESPONSIBILITIES

In order for ESCO 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 ESCO, its subcontractors, and its agents reasonable 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 in coordination with ESCO so not to affect regular school activities;
3. Providing assistance to ESCO in obtaining any permits, approvals, and licenses required under this Agreement [Note: ESCO is responsible for obtaining all permits, etc. as per the terms of the Agreement] that are ESCO's responsibility to obtain as set forth in Schedule 1;
4. 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;
5. Providing the utility bills, reports, and similar information reasonably necessary for administering ESCO's obligations under the Assured Performance Guarantee within fifteen (15) days of Customer receipt and/or generation or ESCO's request therefor;
6. Providing all records relating to energy and/or water usage and related maintenance of the premises and relevant equipment requested by ESCO.
7. If any equipment under control is changed out, it is the responsibility of the Customer to move the controls and control programming to the new equipment. This includes, but is not limited to, HVAC, refrigeration, boilers, vending machines, plug loads and computers.
8. If needed, customer will provide space for a dumpster and a trailer.
9. Customer to provide remote VPN access as necessary to complete EMS and computer ~~power management scope.~~
10. The Customer hereby undertakes to repair or replace, at its own expense, the existing equipment (or authorize its repair or replacement) if:
  - (a) The failure to do so prevents the implementation of a Portion of a Measure or of a Measure and if the ESCO establishes the need to do so in order to perform the Work;
  - (b) The failure to do so prevents the Work from meeting all applicable Laws due to failure of existing equipment to meet applicable Laws, whether or not these



### Schedule 3

nonconformities are uncovered during or after the performance of the Work. It is understood that the Work to be performed by the ESCO shall meet all applicable Laws and the Customer shall carry out any repair or replacement of existing equipment in order to meet such Laws.

11. The Customer shall provide the following information or services:

- (a) Information or services required of the Customer by the Agreement Documents shall be furnished by the Customer with reasonable promptness. Any other information or services relevant to the ESCO's performance of the Work under the Customer's control shall be furnished by the Customer after receipt from ESCO of a written request for such information or services.
- (b) The Customer shall be responsible to provide surveys, to the extent already existing and available to the Customer and if not required by the Agreement Documents to be provided by ESCO, describing physical characteristics, legal limitations, and utility locations for the site of this Project, and a written legal description of the site. The surveys and legal information shall include, as applicable, grades and lines of streets, alleys, pavements, and adjoining property and structures; adjacent drainage; rights-of-way, restrictions, easements, encroachments, zoning, deed restriction, boundaries, and contours of the site; locations, dimensions, and necessary data pertaining to existing buildings, other improvements and trees; and information concerning available utility services and lines, both public and private, above and below grade, including inverts and depths. All the information on the survey shall be referenced to a Project benchmark.
- (c) The Customer shall provide, to the extent available to the Customer and if not required by the Agreement Documents to be provided by ESCO, the results and reports of prior tests, inspections or investigations conducted for the Project involving structural or mechanical systems, chemical, air and water pollution, hazardous materials or environmental and subsurface conditions and information regarding the presence of pollutants at the Project site, but only to the extent necessary for ESCO to perform the Work.
- (d) The Customer shall cooperate with ESCO in securing building and other permits, licenses and inspections. The Customer shall not be required to pay the fees for such permits, licenses and inspections, and such fees shall be solely paid by ESCO.
- (e) The services, information, surveys and reports required to be provided by the Customer under this Section, shall be furnished at the Customer's expense, and unless and to the extent Customer advises ESCO to the contrary in writing, ESCO shall be entitled to rely upon the accuracy and completeness thereof, except as otherwise specifically provided in the Agreement Documents.
- (f) If the Customer observes or otherwise becomes aware of a fault or defect in the Work or non-conformity with the Agreement Documents, the Customer shall give prompt written notice thereof to ESCO.
- (g) The Customer shall communicate through the ESCO with persons or entities employed or retained by the ESCO, unless otherwise directed by the ESCO.

## Schedule 4 – Price and Payment Terms

## Schedule 4

### PRICE AND PAYMENT TERMS

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

*Total Project Costs. The total cost of the Project, including payment for ESCO, the Engineer of Record, and Clerk of the Works is*

*Clerk of the Works \$445,778*

*ESCO: \$ 22,288,889*

*TetraTetra Tech: \$ 1,337,333*

1. Payments shall be made to ESCO as follows: within thirty (30) days after execution of this Agreement, ESCO shall submit for the Engineer's review and approval a Schedule of Values for all of the Work to be performed under the Agreement. Such Schedule will (i) subdivide the Work into its respective parts; (ii) include values for all items comprising the Work; and (iii) serve as the basis for monthly progress payments made to ESCO throughout the Work. The Work will commence upon approval of NYSED, the securing of the necessary financing by the Customer for the Work and the Customer's receipt of all necessary documents, including the final cash flow statement.
2. All requests for payment shall be submitted by ESCO to Engineer fourteen (14) days before submission to Customer. Submissions to Engineer shall be in draft form using AIA Document G702 (Application and Certificate for Payment) and G703 (Continuation Sheet). A retainage of 5% of each payment request shall be withheld until Final Completion.
3. The ESCO's request for final payment (as set forth above) shall be submitted to Engineer together with using AIA Document G706 (Affidavit of Payment of Debts and Claims), AIA Document G706a (Affidavit of Release of Liens) and AIA Document G707 (Consent of Surety for Final Payment).
4. Customer shall make payment to ESCO against monthly invoices (at the end of the month) for work completed and approved during the previous month in accordance with the agreed upon Schedule of Values. Payments will be made on a progress payment basis for work completed and accepted by the Customer and the Engineer using the AIA format. ESCO must attach certified payrolls to each application for payment, together with supporting documents as required by the Customer and Engineer.

Payments may be withheld on account of any material breach of this Agreement by ESCO, and claims by third parties (including ESCO subcontractors and material suppliers), but only to the extent that written notice has been provided to ESCO and ESCO has failed, within ten (10) days of the date of receipt of such notice, to provide adequate security to protect Customer from any loss, cost or expense related to such claims.

This Contract shall be deemed executory only when the Customer has successfully secured adequate financing for this Project.

2. *Payments for Engineering Services. ESCO shall be responsible for making payments for Engineering services to the Customer as set forth herein. The total fee to be paid to the Engineer is \$ 1,337,333. ESCO will make payments to Customer who will then make payment to the Engineer. Once ESCO*

## **Schedule 4**

*transmits payment to Customer for the Engineer, it shall have no further obligation with respect to that payment.*

3. M&V Services. Measurement & Verification services for the Project from the construction period through Year 3 is included in the price of the agreement as detailed above. The District can request additional years of M&V service beyond Year 3 before the end of that report year. In this event, the ESCO shall submit a proposal. Such proposal shall be mutually agreed between both parties before any addition to the M&V service.

## Schedule 5 – Baseline Operating Conditions

## Schedule 5 – Baseline Operating Conditions

**For all the base line energy consumption and rates to calculate the saving, please refer to the M&V plan in the CEA report.**

### **Building occupation:**

<b>Building</b>	<b>Students</b>	<b>Building Hours</b>
WF Hobart ES	795	6:00 AM to 6:00 PM
WF Moriches ES	948	6:00 AM to 6:00 PM
WF Nathaniel ES	744	6:00 AM to 6:00 PM
WF Tangier ES	772	6:00 AM to 6:00 PM
WF Elementary school	755	6:00 AM to 6:00 PM
WF High school	2720	6:00 AM – 11:00 PM
WF Paca MS	936	6:00 AM to 8:00 PM
WF MS	1047	6:00 AM to 8:00 PM

### **Paca Complex:**

#### **CHP (Combined Heat and Power):**

The CHPs are running during period 2 of rate 284 (PSEG), from June 1<sup>st</sup> to September 30<sup>th</sup> on weekdays from noon to 8 pm. There is a substantial demand charge penalty if the CHP is down during that period. In the baseline year, there were no interruptions of the CHP operation indicative of efficient operations by the existing staff. It is the responsibility of the WFSD staff to continue to operate the CHP without interruption during this period. Failure to operate the CHP may incur a cost penalty which will impact the savings of the proposed Project. In case of such penalties, Ecosystem will be allowed to adjust for such costs in that particular year's M&V report.

#### **High School Cooling Load:**

During the CEA process (Summer 2016), only the direct fire absorption chiller (288-Ton capacity) was in operation. The chiller could carry the full load of the building.

#### **Paca Rooftops:**

There are 10 rooftop units with DX cooling, most of the cooling systems are not in operating condition.

### **Moriches Elementary School:**

#### **Ice Bank:**

The ice bank is not able to handle the cooling peak demand, the staff at MES has to operate the electric chiller during electric peak period.

## Attachment 1

### NOTICE TO PROCEED

ESCO

ATTN:

Re: Notice to Proceed for SCHOOL DISTRICT

Dear Mr.:

This Notice to Proceed is being issued by SCHOOL DISTRICT ("Customer") to ESCO ("ESCO") pursuant to that certain Performance Contract entered into between Customer and ESCO for the purpose of notifying ESCO to commence work under such contract. This Notice to Proceed shall not relieve ESCO of its responsibility to perform any and all duties, tasks and/or obligations required by the Agreement, as may be amended, that may be required prior to commencement of the Work.

By signing and dating this Notice to Proceed, the parties hereto agree to these terms and represent and warrant they have the authority to execute this Notice to Proceed on behalf of their respective organizations.

**SCHOOL DISTRICT**

Signature: 

Printed Name: **Robert Vecchio**

Title: **Board of Education President**

Date: **10/12/17**

**ACKNOWLEDGED & AGREED TO:**

**ESCO**

Signature: 

Printed Name: **Patrick Raby**

Title: **Vice president**

Date: **10/20/2017**

1. **Office/Inch**  
 2. **Address/Phone/Fax**



## Attachment 2 – Change Order

## Attachment 2

CHANGE ORDER

**AIA G701 Change Order Form to be used**

**Attachment 3 – Certificate of Substantial Completion;  
Certificate of Final Completion**

## **Attachment 3**

### **CERTIFICATE OF SUBSTANTIAL COMPLETION**

**AIA G704 Form to be used**

**CERTIFICATE OF FINAL COMPLETION**

**PARTIES:** ESCO ("ESCO")

SCHOOL DISTRICT ("Customer")

**PROJECT:**[Insert Project Name]; Performance Contract dated \_\_\_\_\_, 20\_\_ between ESCO and Customer

By executing this Certificate of Final Completion, Customer acknowledges the following:

- a. The work set forth in the Performance Contract has been reviewed and determined by Customer to be fully complete.
- b. Customer accepts the work as complete and hereby releases ESCO's obligations under any performance and payment bonds posted for the Project as of the date set forth below.
- c. Unless otherwise defined in this Agreement, Customer is solely responsible for the operation, maintenance and preventative maintenance of work completed and equipment installed.

The Work performed under this performance contract has been reviewed and found to be complete. The date of final completion of the Project designated above is hereby established as \_\_\_\_\_. In accordance with the Agreement documents, based upon on-site observations and all data submitted in connection with the Project, the Architect certifies to Customer that to the best of the Architect's knowledge, information and belief, the Work has progressed as indicated, the quality of the Work is in accordance with the Agreement documents, and ESCO is entitled to payment in accordance with the Agreement documents.

Amount Certified: \_\_\_\_\_

ECG Engineering P.C.

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

Printed Name: \_\_\_\_\_

Dated \_\_\_\_\_, 20\_\_ .

**SCHOOL DISTRICT**

**ESCO**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

## Attachment 4 – Comprehensive Energy Audit

## Attachment 5 – Project Financials

## PROJECT FINANCIAL COST &amp; SAVINGS

	Energy Savings	O&M Savings	Total Savings	Total Incentives	CM/Clerk of the Works Services	Architect / Engineer Services (TAE)	Construction (Equipment, Material & Labor) Cost	CEA Cost	Total Cost	Simple Payback Excluding State Aid (Years)
<b>Capital Measures</b>										
Measure 1: Interior Lighting Upgrade	\$252,665	\$11,491	\$264,156	\$1,134,955	\$92,790	\$278,369	\$4,421,522	\$235,760	\$5,010,639	14.73
Measure 2: Exterior Lighting Upgrade	\$56,522	\$63,458	\$119,980	\$0	\$9,477	\$28,432	\$451,606	\$22,094	\$511,778	4.27
Measure 3: Paca Complex Optimization	\$530,268	-\$170,547	\$359,721	\$0	\$37,400	\$112,201	\$1,760,602	\$87,450	\$2,019,622	5.61
A. Electrical Expansion									\$402,079	
B. CCHP Control Optimization									\$188,168	
C. Heat Rejection Optimization									\$0	
D. Chilled Water System Upgrade									\$1,429,375	
Measure 4: Pump and Network Optimization	\$105,611	\$576	\$106,187	\$0	\$19,695	\$59,884	\$948,006	\$49,806	\$1,074,317	10.12
Measure 5: Boiler Replacement	\$94,997	\$42,063	\$137,060	\$61,177	\$93,759	\$261,278	\$4,413,666	\$244,298	\$5,063,004	36.49
Measure 6: Ventilation and Controls Upgrade	\$99,210	\$14,470	\$113,680	\$0	\$150,160	\$450,481	\$7,155,296	\$387,348	\$8,108,658	71.33
Measure 7: DHW Heater Upgrade	\$13,003	\$0	\$13,003	\$7,200	\$4,283	\$12,849	\$201,622	\$11,160	\$231,285	17.23
Measure 8: New Combined Heat & Power Units	\$150,667	-\$44,343	\$106,524	\$441,950	\$32,709	\$98,128	\$1,539,778	\$85,227	\$1,766,310	12.43
<b>Total Capital Measures</b>	<b>\$1,303,143</b>	<b>-\$62,833</b>	<b>\$1,220,310</b>	<b>\$1,645,282</b>	<b>\$448,474</b>	<b>\$1,321,423</b>	<b>\$20,892,099</b>	<b>\$1,133,142</b>	<b>\$23,785,613</b>	<b>18.14</b>
<b>Non-Capital Measures</b>										
Measure 1: Interior Lighting Upgrade (screw-in lamps)	*	*	*	\$2,550	\$334	\$1,003	\$15,933	\$850	\$18,056	*
Measure 9: Computer Energy Management	\$67,071	-\$37,563	\$29,508	\$0	\$4,969	\$14,907	\$233,917	\$12,947	\$268,331	9.09
<b>Total Non-Capital Measures</b>	<b>\$67,071</b>	<b>-\$37,563</b>	<b>\$29,508</b>	<b>\$2,550</b>	<b>\$5,303</b>	<b>\$15,910</b>	<b>\$249,850</b>	<b>\$13,797</b>	<b>\$286,387</b>	<b>9.09</b>
<b>Total Project</b>	<b>\$1,370,214</b>	<b>-\$120,396</b>	<b>\$1,249,818</b>	<b>\$1,647,832</b>	<b>\$445,778</b>	<b>\$1,337,333</b>	<b>\$21,141,950</b>	<b>\$1,146,939</b>	<b>\$24,072,000</b>	<b>17.94</b>



## Attachment 6 – Project Record Documents

**SECTION 01 78 39 - PROJECT RECORD DOCUMENTS**

PART 1 - GENERAL

1.1 SUMMARY

- A. Section includes administrative and procedural requirements for Project record documents, including the following:
  - 1. Record Drawings.
  - 2. Manuals
  - 3. Miscellaneous record submittals.

1.2 INFORMATIONAL SUBMITTALS

- A. Closeout Submittals:
  - 1. Record Drawings: Submit set of marked-up record drawings. Provide each drawing, whether or not changes and additional information were recorded. Comply with the following:
    - a. One (1) full size set of the original, marked-up record drawings.
    - b. Two (2) electronic copies, in color, in PDF format on flash drives. PDFs to be saved and submitted as one file.

PART 2 - PRODUCTS

2.1 RECORD DRAWINGS

- A. Record Drawings:
  - 1. Preparation: Mark record drawings to show the actual installation where installation varies from that shown originally.
    - a. Give particular attention to information on concealed elements that would be ~~difficult to identify or measure and record later.~~
    - b. Accurately record information in an acceptable drawing technique.
    - c. Record data as soon as possible after obtaining it.
    - d. Record and check the markup before enclosing concealed installations.
  - 2. Content: Types of items requiring marking include, but are not limited to, the following:
    - a. Dimensional changes to Drawings.
    - b. Revisions to details shown on Drawings.
    - c. Revisions to routing of piping and conduits.

## Attachment 6

- d. Revisions to electrical circuitry.
  - e. Locations of concealed internal utilities.
  - f. Changes made by Addendum.
  - g. Changes made by Engineer's Supplemental Instruction (ASI) forms.
  - h. Changes made by Change Order or Construction Change Directive.
  - i. Changes made following Engineer's written orders.
3. Mark record sets with red, permanent marker.
- B. Format: Identify and date each record Drawing; include the designation "PROJECT RECORD DRAWING" in a prominent location. Indicate name of contractor.
- C. Manual: provide three ring binder with all operational and warranty items. Include tabs identifying each piece of equipment. Include in the binder listing of all passwords to access all controls associated with the equipment and programs. Owner must be able to access all equipment on their own.

### PART 3 - EXECUTION

#### 3.1 RECORDING AND MAINTENANCE

- A. Maintenance of Record Documents and Samples: Store record documents in the field office apart from the Contract Documents used for construction. Do not use Project record documents for construction purposes. Maintain record documents in good order and in a clean, dry, legible condition, protected from deterioration and loss. Provide access to Project record documents for Engineer's, ESCO's and Owner's reference during normal working hours.

END OF SECTION 01 78 39

## Attachment 7 – Closeout Procedures

**SECTION 01 77 00 - CLOSEOUT PROCEDURES**

PART 1 - GENERAL

1.1 RELATED DOCUMENTS

- A. Drawings and general provisions of the Agreement, apply to this Section.

1.2 SUMMARY

- A. Section includes administrative and procedural requirements for contract closeout, including, but not limited to, the following:
  - 1. Substantial Completion procedures.
  - 2. Final completion procedures.
  - 3. Warranties.
  - 4. Final cleaning.
  - 5. Repair of the Work.

1.3 SUBSTANTIAL COMPLETION PROCEDURES

- A. Submittals prior to Substantial Completion complete the following before Agreement-scheduled date of Substantial Completion:
  - 1. Certificates of Release: Obtain and submit releases from authorities having jurisdiction permitting Owner unrestricted use of the Work and access to services and utilities. Include occupancy permits, operating certificates, electrical inspection reports, preliminary balance reports, and similar releases.
  - 2. Submit notarized letter on ESCO's letterhead certifying no asbestos containing building materials have been used in the Work. Also include a copy in the O&M Manuals.
  - 3. Submit test/adjust/balance records. Also include a copy in the O&M Manuals.
  - 4. Submit changeover information related to Owner's occupancy, use, operation, and maintenance.
- B. **Procedures Prior to Substantial Completion:** Complete the following before Agreement-scheduled date of Substantial Completion:
  - 1. Advise Owner of pending insurance changeover requirements.
  - 2. Make final changeover of permanent locks and deliver keys to Owner. Advise Owner's personnel of changeover in security provisions.
  - 3. Complete startup and testing of systems and equipment.

## Attachment 7

4. Perform preventive maintenance on equipment used prior to Substantial Completion. Maintenance to be performed by a factory authorized service representative so as not to void the equipment warranty.
  5. Advise Owner of changeover in heat and other utilities.
  6. Terminate and remove temporary facilities from Project site, along with mockups, construction tools, and similar elements.
  7. Complete all items on any Field Observation and Construction Deficiency Reports and submit a copy of the reports to the Engineer identifying how each item was addressed in detail, including the date of completion.
  8. Complete final cleaning requirements as specified below, including touchup painting.
  9. Repair and restore marred exposed finishes to eliminate visual defects.
- C. Inspection: No later than 14 days prior to the Agreement-scheduled date of Substantial Completion, ESCO shall issue a letter to the Engineer confirming their work is ready for the Substantial Completion inspection. No later than seven days after Agreement-scheduled date of Substantial Completion (including authorized adjustments), the Engineer will make an inspection to determine whether the Work or designated portion thereof is substantially complete. Absence of ESCO's letter confirming readiness of Work, the Engineer may elect to postpone the Substantial Completion inspection.
1. Additional inspections: Request additional Substantial Completion inspections when the work that was not complete for the scheduled Substantial Completion Inspection is now ready to inspect.
    - a. ~~Costs for such additional Substantial Completion Inspections will be deducted from sums otherwise due ESCO by deduct Change Order~~
  2. Results of completed inspection will form the basis of requirements for final completion.
- 1.4 FINAL COMPLETION PROCEDURES
- A. Submittals Prior to Final Completion: Before final inspection for determining final completion, complete the following:
1. Submit copy of Engineer's Substantial Completion inspection list of items to be completed or corrected. The copy of the list shall state that each item has been completed or otherwise resolved for acceptance, what corrective action was taken, and the date of completion. Items that are in dispute shall have an explanation attached.
  2. Instruct Owner's personnel in operation, adjustment, and maintenance of products, equipment, and systems. Submit demonstration and training video recordings specified.
  3. Submit closeout submittals, including Project record documents, operation and maintenance manuals, property surveys, and similar final record information.
  4. Submit a final Application for Payment according as follows:

## Attachment 7

- a. Final Payment Application: Submit final Application for Payment with releases and supporting documentation not previously submitted and accepted, including, but not limited to, two originals and two copies each of the following:
    - 1) AIA Document G706, "Contractor's Affidavit of Payment of Debts and Claims."
    - 2) AIA Document G706A, "Contractor's Affidavit of Release of Liens."
    - 3) AIA Document G707, "Consent of Surety to Final Payment."
  - B. Inspection: No later than seven days after the Agreement-scheduled date for Final Completion, Engineer will proceed with the Final Completion Inspection. The Engineer will review the final Certificate for Payment after the inspection or will notify ESCO of the outstanding items that must be completed or corrected before the certificate will be processed.
    1. Re-inspection: ESCO will request re-inspection when the Work identified in previous inspections as incomplete has been completed or corrected. The Owner, Engineer, and ESCO reserve the right to add items to the Substantial / Final Completion Inspection list as long as it is part of ESCO's Work. ESCO is required to complete all contract requirements prior to the Final Completion Inspection to avoid any further re-inspection cost.
      - a. Costs for such re-inspections and any costs for extension of the Engineer's services will be deducted from sums otherwise due ESCO.
- 1.5 SUBMITTAL OF PROJECT WARRANTIES
- A. Organize warranty documents into an orderly sequence based on the table of contents of Project Manual. Regardless of phasing, warranties for all equipment and systems on the Project are to start no sooner than the **Completion and Acceptance** of all items on the Substantial Completion Inspection Report. ESCO is required to provide the extended warranties for all equipment / materials that has been turned over and accepted by the owner for use regardless of the phased completion of the Project.
    1. Bind warranties and bonds in heavy-duty, three-ring, vinyl-covered, loose-leaf binders, thickness as necessary to accommodate contents, and sized to receive 8-1/2-by-11-inch paper.
    2. Provide heavy paper dividers with plastic-covered tabs for each separate warranty. Mark tab to identify the product or installation. Provide a typed description of the product or installation, including the name of the product and the name, address, and telephone number of Installer.
    3. Identify each binder on the front and spine with the typed or printed title "WARRANTIES," Project name, and ESCO's name.
    4. Provide in formats as indicated below:
      - a. Two (2) hard copies as listed above.
      - b. Two (2) electronic copies, PDF format on DVD.

- B. Provide additional copies of each warranty to include in operation and maintenance manuals.

## **PART 2 - PRODUCTS**

### **2.1 MATERIALS**

- A. **Cleaning Agents:** Use cleaning materials and agents recommended by manufacturer or fabricator of the surface to be cleaned. Do not use cleaning agents that are potentially hazardous to health or property or that might damage finished surfaces.

## **PART 3 - EXECUTION**

### **3.1 FINAL CLEANING**

- A. **General:** Perform final cleaning. Conduct cleaning and waste-removal operations to comply with local laws and ordinances and Federal and local environmental and antipollution regulations.
- B. **Cleaning:** Employ experienced workers or professional cleaners for final cleaning. Clean each surface or unit to condition expected in an average commercial building cleaning and maintenance program. Comply with manufacturer's written instructions.
  - I. Complete the following cleaning operations before inspection for certification of Substantial Completion for entire Project or for a designated portion of Project:
    - a. Clean Project site, yard, and grounds, in areas disturbed by construction activities, including landscape development areas, of rubbish, waste material, litter, and other foreign substances.
    - b. Sweep paved areas broom clean. Remove petrochemical spills, stains, and other foreign deposits.
    - c. Rake grounds that are neither planted nor paved to a smooth, even-textured surface.
    - d. Remove tools, construction equipment, machinery, and surplus material from Project site.
    - e. Clean exposed exterior and interior hard-surfaced finishes to a dirt-free condition, free of stains, films, and similar foreign substances. Avoid disturbing natural weathering of exterior surfaces. Restore reflective surfaces to their original condition.
    - f. Remove debris and surface dust from limited access spaces, including roofs, plenums, shafts, trenches, equipment vaults, manholes, attics, and similar spaces.
    - g. Sweep concrete floors broom clean in unoccupied spaces using sweeping compound that is compatible with new finishes.



## Attachment 7

- h. Vacuum carpet and similar soft surfaces, removing debris and excess nap; clean according to manufacturer's recommendations if visible soil or stains remain.
  - i. Clean transparent materials, including mirrors and glass in doors and windows. Remove glazing compounds and other noticeable, vision-obscuring materials. Polish mirrors and glass, taking care not to scratch surfaces.
  - j. Remove labels that are not permanent.
  - k. Wipe surfaces of mechanical and electrical equipment and similar equipment. Remove excess lubrication, paint and mortar droppings, and other foreign substances.
  - l. Clean plumbing fixtures to a sanitary condition, free of stains, including stains resulting from water exposure.
  - m. Replace disposable air filters and clean permanent air filters. Clean exposed surfaces of diffusers, registers, and grills.
  - n. Clean ducts, blowers, and coils if units were operated without filters during construction or that display contamination with particulate matter on inspection.
  - o. Clean light fixtures, lamps, globes, and reflectors to function with full efficiency.
  - p. Leave Project clean and ready for occupancy.
- C. Construction Waste Disposal: At Substantial Completion, repair, renovate, and clean permanent facilities used during construction period."

### 3.2 REPAIR OF THE WORK

- A. Complete repair and restoration operations before inspection for determination of Substantial Completion.
- B. Repair or remove and replace defective construction. Repairing includes replacing defective parts, refinishing damaged surfaces, touching up with matching materials, and properly adjusting operating equipment. Where damaged or worn items cannot be repaired or restored, provide replacements. Remove and replace operating components that cannot be repaired. Restore damaged construction and permanent facilities used during construction to condition acceptable to Owner.
  - 1. Remove and replace chipped, scratched, and broken glass, reflective surfaces, and other damaged transparent materials.
  - 2. Touch up and otherwise repair and restore marred or exposed finishes and surfaces. Replace finishes and surfaces that already show evidence of repair or restoration.
    - a. Do not paint over "UL" and other required labels and identification, including mechanical and electrical nameplates. Remove paint applied to required labels and identification.

## **Attachment 7**

3. Replace parts subject to operating conditions during construction that may impede operation or reduce longevity.
4. Replace burned-out bulbs, bulbs noticeably dimmed by hours of use, and defective and noisy starters in fluorescent and mercury vapor fixtures to comply with requirements for new fixtures.

END OF SECTION 01 77 00

## Appendix 1 - Scope of Architectural/Engineering Services

## Appendix 2 - Scope of Construction Services

### SCOPE OF CONSTRUCTION SERVICES

- A. **STORAGE:** The Owner has NO available space for storage within the existing facility. ESCO is responsible for all storage of their equipment and materials as required. Coordinate with Clerk of Works and/or Engineer.
- B. **Temporary Facilities and Controls:** In addition to specific responsibilities for temporary facilities and controls indicated in this Section, ESCO is responsible for the following:
  - 1. Installation, operation, maintenance, and removal of each temporary facility necessary for its own normal construction activity, and costs and use charges associated with each facility, except as otherwise provided for in this Section.
  - 2. Temporary utilities, as follows:
    - a. Drinking water for its own construction personnel.
    - b. Provisions for dust, fume and odor control for its own activities.
    - c. Plug-in electric power cords and extension cords, supplementary plug-in task lighting, and special lighting necessary exclusively for its own activities.
  - 3. Support facilities, as follows:
    - a. Sanitary facilities for its own personnel.
    - b. Its own storage sheds.
    - c. Traffic controls for its own construction activities.
    - d. Dewatering facilities and drains for its own construction activities.
    - e. Waste disposal facilities for collection and legal disposal of its own hazardous waste materials.
    - f. Shoring and bracing for its own construction activities.
    - g. Staging and scaffolding for its own construction activities.
    - h. Lifts and hoists for its own construction activities.
  - 4. Security and protection facilities, as follows:
    - a. Environmental protection for its own construction activities.
    - b. Temporary erosion and sedimentation control for its own construction activities.
    - c. Security enclosure and lockup of its own tools, materials, and equipment.
    - d. Temporary enclosures for its own construction activities.
    - e. Temporary fire protection for its own construction activities.
  - 5. Moisture and mold control.
  - 6. Construction aids and miscellaneous services and facilities necessary exclusively for its own construction activities.
- C. **Cleaning and Protection:** ESCO is responsible for the following:
  - 1. Progress cleaning of work areas affected by its operations on a daily basis.
  - 2. Protection of its own installed construction.
  - 3. Final cleaning of its work and of work areas affected by its operations.

## Appendix 2

- D. Use of Site: Limit use of Project site to only areas of Work. Do not disturb portions of Project site beyond areas in which the Work is indicated.
1. Driveways, Walkways and Entrances: Keep driveways, loading areas, and entrances serving premises clear and available to Owner, Owner's employees, and emergency vehicles at all times. Do not use these areas for parking or storage of materials.
    - a. Schedule deliveries to minimize use of driveways and entrances by construction operations.
    - b. Schedule deliveries to minimize space and time requirements for storage of materials and equipment on-site.
    - c. ESCO parking – Review and verify with Clerk of Works for approval of area for vehicles of ESCO labor to park.