

PERFORMANCE CONTRACT

This Performance Contract (this "Agreement") is made this 20 day of Oct, 2021 between:

PARTIES

ECOSYSTEM ENERGY SERVICES USA, INC. ("ESCO")
462 7th Avenue, Floor 22
New York, New York 10018

and

GLEN COVE CITY SCHOOL DISTRICT ("Customer")
Dosoris Lane
Glen Cove, New York, NY 11542

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 ("ECM") and improvement measures (collectively, the "Improvement Measures") described therein; and

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

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

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

AGREEMENT

1. **SCOPE OF THE AGREEMENT.** ESCO shall provide construction, supervision, inspection, labor, materials, tools, design, 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 architectural/engineering services necessary for the execution and completion of the Work as part of the total cost to be paid by the Customer, subject to the terms set forth herein and as set forth in the Agreement between the Customer and its Engineer of Record for this Project, ECG Engineering, P.C. at Attachment 6 to this Agreement. 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).

2. **SERVICES TO BE PROVIDED BY ESCO.** ESCO will install the Equipment identified on Schedule 1 of this Agreement (Work) and provide services detailed on Schedule 2 of this Agreement (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, design, 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.
3. **AGREEMENT DOCUMENTS.** In addition to the terms and conditions of this Agreement, the following Schedules are incorporated into and shall be deemed part of this Agreement:
 - Schedule 1 - Scope of Work
 - Schedule 2 - Assured Performance Guarantee
 - Schedule 3 - Customer Responsibilities
 - Schedule 4 - Price and Payment Terms
 - Attachment 1 - Notice to Proceed
 - Attachment 2 - Change Order
 - Attachment 3 - Certificate of Substantial Completion; Certificate of Final Completion
 - Attachment 4 - Comprehensive Energy Audit dated Oct. 20, 2021, with Appendices ("CEA")
 - Attachment 5 - Project Financials
 - Attachment 6 - Contract between Customer and ECG Engineering, P.C.
 - Attachment 7 - Customer's Request for Proposals ("RFP")
 - Attachment 8 - ESCO's proposal in response to RFP
 - Attachment 9 - General Conditions
 - Appendix 1 - Scope of Engineering / Architectural Services
4. **CUSTOMER INFORMATION.** The Customer shall provide the following information:
 - a. Information in the Customer's possession required by the Agreement Documents shall be furnished by the Customer to ESCO with reasonable promptness. Any other information relevant to the ESCO's performance of the Work under the Customer's control, as deemed necessary by the Customer and its Engineer of Record, shall be furnished by the Customer after receipt from ESCO of a written request for such information, at no cost or expense to the Customer.
 - b. The Customer shall provide, to the extent in the Customer's possession 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. ESCO hereby acknowledges receipt of the Customer's AHERA Reports and Ceiling Tile Surveys as included in the CEA at Appendix 6.

c. The Customer shall reasonably cooperate with ESCO in securing building and other permits, licenses and inspections. The Customer shall not be required to pay any fees or related costs for such permits, licenses and inspections. Said fees and costs shall be the sole responsibility of the ESCO.

d. The information and any requested existing 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.

e. 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 written notice thereof to ESCO and ESCO shall remedy the default with all reasonable promptness and at ESCO's sole cost and/or expense and to the reasonable satisfaction of the Customer.

f. The Customer shall communicate through the ESCO with persons or entities employed or retained by the ESCO. The ESCO Account Manager assigned to this project shall be Ahmed Ibrahim. The Project Manager shall be approved by the Customer in writing before the commencement of the Work.

5. **ENGINEER OF RECORD.** The Customer has identified and designates ECG Engineering, P.C. as the certified Engineer of Record (the "Engineer") to provide engineering services in connection with the Work to be performed by ESCO. The fees and total compensation for such Engineering Services shall be \$376,770 and shall be paid by ESCO to the Engineer in accordance with the terms of the contract between the Customer and ECG as attached hereto as Attachment 6 and as set forth Schedule 4 Price and Payment Terms. The Engineer's fee is included in the Total Project Benefits and shall be covered by the Guaranteed Savings in all respects. Both ESCO, the Engineer 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 will coordinate all Work and activities under this Agreement with the Engineer. ESCO will utilize the services of the Engineer of Record and issue payment as set forth herein and in Attachment 6.

6. **NOTICE TO PROCEED; SUBSTANTIAL COMPLETION; M&V SERVICES.** Pursuant to 8 NYCRR §155.20, this Agreement is subject to the approval of the Commissioner of Education of the State of New York. After receipt of written approval from the New York State Education Department ("SED"), and after Customer has secured financing subject to Section 34 of this Agreement, the Customer shall issue a Notice to Proceed, a form of which is attached hereto as Attachment 1 and which is in a form acceptable to SED. ESCO shall commence performance of the Work within ten (10) business days of receipt of Customer's Notice to

Proceed, and shall achieve Substantial Completion of the Work by the Substantial Completion date, which shall be the date on which Customer, ESCO and Engineer execute a Certificate of Substantial Completion in the form attached hereto as Attachment 3.

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, to the best of the Customer's and Engineer's knowledge and belief, the Improvement Measures 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.

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 for all ECMs 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 other than for material breach of this Agreement, (ii) fails to pay for M&V Services in accordance with Schedule 4, after written notice thereof to Customer and a thirty (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 thirty (30) day period to cure, or (iv) otherwise cancels, terminates or materially breaches this Agreement, the Assured Performance Guarantee shall automatically terminate.

7. **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 proposal documents or otherwise disclosed by Customer in writing to ESCO prior to the commencement of the Work; a Force Majeure (as defined below) condition; failure by Customer to perform its material obligations under this Agreement; or failure by Customer to reasonably 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 any equitable monetary adjustment decreasing the cost of the project may be made, subject to the mutual written agreement of the parties.

8. **ACCESS.** Customer shall provide ESCO, its subcontractors, and its agents reasonable and safe access to all facilities and properties in Customer's control that are subject to the Work and M&V Services. Customer reserves the right to restrict project activities that would interfere with instruction or student events. Customer further agrees to reasonably assist ESCO, its subcontractors, and its agents 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. An equitable adjustment in the time for performance shall be made as a result of any persistent and substantial failure to grant such access to the facilities and properties in Customer's control, subject to the mutual written agreement of the parties may be made as a result of any failure to grant such access, subject to the mutual written agreement of the parties. ESCO shall be required to perform its Work between the hours of 2:30 p.m. to 10:30 p.m., Monday through Friday on school days when the buildings are open. During the summer, ESCO shall be required to perform its work between the hours of 7:00am and 3:30pm Monday through Friday with no interruption to the District's operations, including its educational, administrative, business, special events and summer operations. All schedules must be approved by the District and its Architect in writing prior to commencing any work. Any work which will interfere with the District's operations and/or which is to be performed when the District's facilities are in operation shall be performed on evenings and weekends. Additionally, ESCO shall conduct its Work during hours that are in compliance with federal, state, county or local, laws, rules, regulations, codes and ordinances. Provided that Customer allows ESCO continuous access to the applicable facilities during normally scheduled custodial shifts, all costs incurred by the District, including overtime costs for District personnel, to make the facilities available during evening and weekends (Saturday and Sunday) shall be borne by ESCO. The District reserves the right to determine what work will interfere with its operations and said determination shall be final. In addition, all overtime work that may be necessary must be pre-approved in writing by the Customer's Superintendent and the Assistant Superintendent. ESCO shall be solely responsible for all costs associated with its failure to obtain such prior written approval. The Customer reserves the right to reject the use of any proposed subcontractors.

No drinking of alcoholic beverages, smoking or use of controlled substances is permitted on the grounds. ESCO shall ensure that none of its employees, agents, consultants, or its Subcontractors' employees, agents, and/or consultant's report to the site impaired by alcohol or controlled substances. ESCO bears the responsibility of determining if its employees, or its subcontractors', employees are in any way impaired and whether the safety of the public, the employees of ESCO and its subcontractors, the Owner, Architect, or Construction Manager are jeopardized. Each contractor shall provide drinking water for its own employees. ESCO's employees, representatives, agents and consultants, and all of its subcontractors' employees, representatives, agents and consultants at the site are to refrain from using indecent language. All doing so will be removed from the site. Artwork or decoration found on vehicles belonging to Contractor or Subcontractor employees parked on or near the school property which contain indecent language or pictures shall either be covered or removed from the location.

9. **PERMITS, TAXES, AND FEES.** ESCO shall be responsible for obtaining all building permits and paying all related permit fees associated with the Work and Services. Customer represents that it is a governmental entity and that it will cooperate with ESCO and provide

ESCO with appropriate documentation to the extent that Customer is not obligated to pay any 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. The Customer shall be responsible for securing any necessary approvals, easements or assessments required for the Work or the ownership and use of the Improvement Measures. 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 to existing equipment and systems not pertaining to this project or agreement. Notwithstanding the foregoing, all Work performed under this agreement shall be in accordance with all applicable building, fire, safety, sprinkler or other applicable codes, standards, laws, regulations, ordinances or other requirements. . 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 Improvement Measures, the use of the Improvement Measures or payments due to ESCO under this Agreement.

10. **WARRANTY.** ESCO warrants that materials and equipment furnished by ESCO will be of good quality and new and of recent manufacture, unless otherwise required or permitted by the Agreement documents; that the Work will be performed in a professional, workmanlike manner, free from defects not inherent in the quality required or permitted; and that the Work and M&V Services will conform to the requirements of the Agreement Documents. Work not conforming to these requirements including substitutions not properly approved and authorized may be considered defective.

ESCO warrants that the work shall be free from defects in material and workmanship for a period of two (2) years from Substantial Completion and that its M&V Services will be free from defects in workmanship, design and material until the end of the term, or for two years, whichever is later. If within two (2) years following Substantial Completion (except where longer periods of time are specified in Schedule 1 and/or the Detailed Energy Audit or provided for in any manufacturer's warranties or special warranties issued or obtained following the commencement of the Work, in which case such longer periods shall apply) any of the work is found to be not in accordance with the requirements of the Agreement, ESCO shall correct it promptly after receipt of written notice from the District and/or the Engineer to do so, unless the District has previously given ESCO a written acceptance of such condition. The obligation set forth hereunder shall survive acceptance by the District of the work, and/or termination of ESCO's agreement with the District. The District shall give such notice within a reasonable period of time after discovery of the condition.

Upon written notice from the Customer, ESCO shall, promptly repair or replace any defective Work or re-perform defective Services to the reasonable satisfaction of the Customer, as long as Customer provides written notice to ESCO within two (2) years following Substantial Completion of each measure or such other period identified in Schedule 1 and Contract Documents. These warranties do not extend to any Work that has been abused, altered, misused, or repaired by the Customer or third parties without the supervision of and prior written approval of ESCO, 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.

Customer understands that ESCO is a provider of services under this Agreement. ESCO shall not be considered a merchant or a vendor of goods. However, ESCO will warranty all installed equipment and materials for two (2) years from their commissioning date unless the warranty for individual items is listed as longer in the specifications. For all HVAC equipment including but not limited to boilers, pumps and air handling units the warranty will include one complete contiguous heating and one complete contiguous cooling season. If ESCO installs or furnishes a piece of equipment under this Agreement, and that equipment is covered by a warranty from the manufacturer, ESCO will transfer the benefits of that manufacturer's warranty to Customer prior to execution by Customer of Certificate of Final Completion. Notwithstanding anything herein to the contrary, it is understood and agreed that the warranty of all equipment and ECMs shall commence upon Substantial Completion; however, in the event that ECM 3 (Boiler Upgrades) and ECM 5 (Ventilator Upgrade) are completed, commissioned and accepted by Customer during the Summer of 2022 and the remaining ECMs not completed until Summer of 2023 or thereafter, the manufacturer's warranty period for ECM 3 and ECM 5 only, shall commence once said ECMs completed, commissioned and accepted by Customer. In the event that ECMs 3 and 5 are not completed during the Summer of 2022 as described hereinabove, the warranty of all equipment and ECMs shall commence upon Substantial Completion.

ESCO further warrants that the design, engineering, and installation services it performs will be performed consistent with good engineering practices and that all Work performed by ESCO is warranted to be free from defects in materials and workmanship for a period of two (2) years from the date of execution of the Certificate of Substantial Completion by Customer. Any manufacturers' warranties which exceed this two (2) year period shall be assigned to Customer to the extent allowed by the manufacturer. The warranty provided in this Agreement shall be in addition to and not in limitation of any other warranty required by the contract documentation or otherwise prescribed by law. ESCO shall procure and deliver to the District, no later than the date claimed by ESCO as the date of final completion, all normal and special warranties required by the contract documents.

Prior to the commencement of the Work and issuance of the final cash flow statement as set forth herein and prior to financing the Project, ESCO shall be fully responsible for reviewing any and all existing warranties of equipment, fixtures and appurtenances located at the Customer's facilities, including but not limited to roofs, windows, doors, and boilers that may be directly and/or indirectly impacted by the work performed under the Agreement and any amendment to the Agreement to verify that the Work will not void any such existing warranties. In the event that its review uncovers a potential issue, ESCO will notify the Customer in writing and the parties will agree upon a resolution. ESCO shall coordinate with the existing manufacturers, including the roofing manufacturers for all roof PV installations, and have a pre-inspection of the equipment and/or materials performed prior to installation of any ECM, including the PV system. Further, ESCO shall comply with all roof manufacturer, boiler, window, door manufacturers and other manufacturer warranty(ies) continuation

procedures and will be responsible for all fees, inspections and additional materials to maintain the roof warranty(ies) or any other warranty(ies) that is directly and/or indirectly impacted by the work performed under the Agreement and any amendment. All inspections must be coordinated with the Customer and its Architect. Pre-inspection shall occur during the NYSED review phase. In the event that said work has any negative impact on the validity of any warranty, as determined by the applicable manufacturer(s), the Customer in its sole discretion shall have the right to terminate the Agreement or to reduce the scope of Work as necessary to achieve a positive cash flow for Customer during the term of the Agreement. In the event that the work proceeds as authorized by the manufacturer and said work is not installed in accordance with any manufacturer's requirements as set forth in the manufacturers' pre-inspection, ESCO shall be full responsible for performing the necessary work to achieve the requirements of the manufacturer(s) for purposes of maintaining the existing warranties. ESCO shall coordinate all pre and post installation inspections with the Customer's Architect of Record. In addition, all pre-inspection and post-inspection costs shall be borne solely by ESCO. Notwithstanding the foregoing, if ESCO (a) proceeds with any work that will impair or nullify any existing warranty(ies) and (b) the Customer has not been notified in writing of the potential issue and agreed to the performance of such work, ESCO shall be fully liable for the warranty(ies). Upon completion of the work/services of the Agreement and any amendment thereto, ESCO shall be fully responsible for reviewing and informing Customer of all warranties for equipment installed and/or replaced during the installation.

11. **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, upon completion of the Work, ESCO shall remove all waste materials, rubbish, tools, construction equipment, machinery, and surplus materials and shall dispose of them in accordance with applicable law, and shall clean up the Work, including any dust from the materials, and surrounding areas to the reasonable satisfaction of the Customer in a timely manner and shall dispose of them in accordance with applicable law. 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.
12. **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 Federal, New York State and/or local municipal laws, ordinances, rules, regulations, and lawful orders of public authorities (collectively, "Laws") in connection with its performance 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 applicable law, statute, ordinance, building code, rule or regulation, ESCO shall immediately notify the Customer in writing.

13. ASBESTOS-CONTAINING MATERIALS AND OTHER HAZARDOUS MATERIALS.

Asbestos-Containing Materials:

ESCO shall be responsible for the abatement, cleanup, control, removal or disposal of asbestos-containing materials ("ACM") as identified in the Agreement, attachments and appendices. ESCO hereby represents and warrants that it has reviewed the Customer's AHERA 2016 Report, asbestos ceiling tile surveys and any and all other testing results or documentation related to such materials that have been provided to ESCO by Customer and shall ensure that its subcontractors review said Report, surveys and other documentation. ACM removal, abatement or clean-up identified therein or in the attached schedules or Attachments and Appendices hereof is being undertaken as part of the Agreement. ESCO shall cause to be performed such removal/abatement and clean-up in accordance with all applicable Federal, State and local laws, codes, rules, regulations and ordinances. ESCO shall be fully responsible for the failure of ESCO and/or its subcontractors to perform the Work in accordance with said requirements. ESCO shall defend and hold harmless Customer, its officers, trustees, and employees from any and all actions, claims, costs, causes of action, damages, fines, fees, penalties, suits of any kind arising directly or indirectly from the performance of ACM related work and shall further cause its subcontractors to defend and hold harmless Customer, its officers, trustees, and employees from any and all actions, claims, costs, causes of action, damages, fines, fees, penalties, suits of any kind arising directly or indirectly from the performance of ACM related work.

Customer shall provide in writing, and ESCO and its subcontractors must review and become familiar with, the Customer's Asbestos Management Plan, AHERA 2016 Report, ceiling tile surveys and any other testing results or documentation provided to ESCO. Consistent with applicable Laws, Customer shall supply ESCO with any information in its possession relating to the presence of ACM that has not previously been identified in Customer's AHERA 2016 Report, the Customer's asbestos ceiling tile surveys, and other testing results or documentation set forth above and that may be disturbed by 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. Customer may request that ESCO provide a calculation of the cost of enclosing, removing, encapsulating or otherwise abating such ACM in the areas in which Work or M&V Services are to be performed in accordance with applicable code, laws, rules, regulations, ordinances and guidelines. Upon receiving said calculation, the parties will meet and mutually agree upon how to proceed, including but not limited to the following options: (i) arranging to have said ACM abated at the Customer's cost; or (ii) Customer paying ESCO to cause such ACM to be abated; and/or (iii) revising the scope of work to include additional ACM abatement subject to review and approval of NYSED.

Other Hazardous Materials: ESCO shall be solely responsible for abating, 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. All costs for said abatement, disposal and/or removal of ESCO Hazardous Materials, including all necessary and required testing, are solely the responsibility of ESCO. 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 materials if their presence may affect ESCO's performance of the Work or M&V Services. 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 other than those Non-ESCO Hazardous Materials already identified by Customer and ESCO in writing as part of this Agreement and identified in AHERA 2016 report, it shall promptly stop the Work or M&V Services in the affected area and notify the other orally and in writing. Unless otherwise specified in Schedule 1, as between Customer and ESCO, Customer shall be responsible at its sole expense for removing and disposing of Non-ESCO Hazardous Materials from its facilities and the remediation of any areas impacted by the release of Non-ESCO Hazardous Materials. Customer shall remain responsible at its sole expense for the removal of Non-ESCO Hazardous Materials that have not been released and for releases not resulting from ESCO's performance of the Work or M&V Services. For purposes of this Agreement, "Hazardous Materials" means any material or substance that, whether by its nature or use, is now or hereafter defined or regulated as a hazardous waste, hazardous substance, pollutant or contaminant under applicable Law relating to or addressing public or employee health and safety and protection of the environment, or which is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, mutagenic or otherwise hazardous or which is or contains petroleum, gasoline, diesel, fuel, another petroleum hydrocarbon product, polychlorinated biphenyls or mercury. "Hazardous Materials" specifically includes mold and lead-based paint. Should ESCO and/or its subcontractors become aware of the presence of Non-ESCO Hazardous Materials that may be disturbed by ESCO's Work or M&V Services, ESCO shall promptly notify Customer, and the parties shall meet to discuss how to proceed. Customer may request that ESCO provide a calculation of the cost of remediating such Non-ESCO Hazardous Materials in the areas in which Work or M&V Services are to be performed in accordance with applicable code, laws, rules, regulations, ordinances and guidelines. Upon receiving said calculation, the parties will meet and mutually agree upon how to proceed, including but not limited to the following options: (i) arranging to have said Non-ESCO Hazardous Materials remediated at the Customer's cost; or (ii) Customer paying ESCO to cause such Non-ESCO Hazardous Materials to be remediated; and/or (iii) revising the scope of work to include additional ACM abatement subject to review and approval of NYSED.

Except as otherwise set forth herein, ESCO shall not be responsible for any losses, costs, damages, expenses (including reasonable legal fees and defense costs), claims, causes of action or liability, directly or indirectly, relating to or arising from the Customer's use, or the storage, release, discharge, handling or presence of ACM, mold (actual or alleged) or Non-ESCO Hazardous Materials on, under or about the facilities, or Customer's failure to comply with this Section 13, unless it is caused by the negligence or willful acts of ESCO, its subcontractors and their respective directors; officers; employees; agents; assigns; and successors. Notwithstanding the foregoing, ESCO shall indemnify and hold harmless the District from any and all liability associated with the removal, abatement and/or disposal of asbestos containing and hazardous materials undertaken by ESCO, its employees, agents, representatives or its subcontractors or agents pursuant to this Agreement.

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 ESCO.

14. **CHANGE ORDERS.** The parties, without invalidating this Agreement, may request changes in the Work to be performed under this Agreement, consisting of additions, deletions, or other revisions to the Work ("Change Orders"). The price and payment terms, time for performance and, if necessary, the Assured Performance Guarantee, shall be equitably adjusted in accordance with the Change Order. Such adjustments shall be determined by mutual written agreement of the parties and shall be subject to the availability of funds and prior written approval of the Board of Education for Customer, the Engineer, NYSED and, if necessary, leasing company. Any Change Order will not be considered effective until it is signed by an authorized representative of each party and the Engineer. Upon written consent of the Customer, 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 proposal documents 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, shall be equitably adjusted subject to the availability of funds and written approval of the Customer's Board of Education, the Engineer and NYSED. Claims for equitable adjustment may be asserted in writing within twenty (20) business days 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.
15. **TITLE TO THE EQUIPMENT.** Title to all completed or partially completed work at the job site, all materials to be used in connection with the work, and all materials delivered to and/or stored at said job site which are intended to become a part of the completed work covered by this Agreement shall be in the name of the Customer. Notwithstanding the foregoing, and prior to acceptance of the completed work by the Customer, ESCO shall be liable for all loss of or damage to said completed work, partially completed work, materials furnished by ESCO, and/or materials or equipment furnished by others, the custody of which has been given to ESCO, arising from any cause other than those against which the Customer herein undertakes to carry insurance. In the event of loss or damage from cause other than those against which the Customer undertakes to carry insurance, ESCO shall replace or repair the said work or materials at its own cost and expense, to the complete satisfaction of the Customer and its Architect.
16. **CUSTOMER FINANCING; 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:
- (a) Customer's ability to obtain or make payments on any financing associated with paying for the Improvement Measures, related services, or otherwise; and
 - (b) Customer's proper legal, tax, accounting, or credit rating agency treatment relating to this Agreement.
17. **INSURANCE.** ESCO shall maintain insurance in amounts no less than those set forth below in full force and effect at all times until the Work has been completed, and shall provide a

certificate evidencing such coverage promptly to Customer prior to commencing work hereunder.

COVERAGES	LIMITS OF LIABILITY
Errors & Omissions Policy	\$5,000,000.00 per occurrence \$5,000,000.00 aggregate
Workers' Compensation Insurance or self-insurance, including Employer's Liability	Statutory Workers' Compensation (C-105.2 or U-26.3); and NYS Disability Insurance (DB-120.1) for all employees. Proof of coverage must be on the approved specific form, as required by the New York State Workers' Compensation Board. ACORD certificates are not acceptable. A person seeking an exemption must file a CE-200 Form with the state. The form can be completed and submitted directly to the WC Board online. \$1,000,000 each accident, disease each employee and disease policy limit
Professional Liability/Combined Single Limit	\$5,000,000.00
Commercial General Liability Insurance, including Contractual.	\$1,000,000 Per Occurrence \$10,000,000 Product & Completed Operations Aggregate on a per project basis
Products - Completed/Operations	\$10,000,000
Personal & Advertising Injury	\$10,000,000 each occurrence
Fire Damage (any one fire)	\$1,000,000
Medical Expenses (any one person)	\$5,000
Comprehensive Commercial Automobile Liability Insurance	\$10,000,000 Combined

Single Limit for owned, hired, borrowed and non-owned motor vehicles.

Installation floater insurance

Amount sufficient to repair or replace the work. The Customer must be listed as a loss payee on this policy.

ESCO shall name the Customer, its officers, employees and agents, as an additional insured under its general liability insurance policy with respect to liability arising out of operations performed for them by or on behalf of ESCO but only to the extent of damages caused by the negligence or willful acts of ESCO, its officers, employees, directors, agents, assigns and successors.

The above limits are obtained through primary and excess policies.

Coverages shall be maintained without interruption from the date of commencement of the Work and for three (3) years following the completion of the contract.

- A. The insurance required to be procured by ESCO pursuant to paragraph A of this section 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 "A" or better. ESCO must submit the Certificate of Insurance to the Customer for its approval prior to the commencement of any work as well as any endorsement pages requested by Customer or its representatives.
- B. All insurance coverage to be provided by ESCO pursuant to paragraph A of this section shall include a cancellation pursuant to the terms of the policy(ies).
- C. All commercial general and automobile liability insurance coverage to be provided by ESCO shall include the Customer and its Architect and Construction Manager as additional insureds on the policy(ies) with respect to operations performed for Customer by or on behalf of ESCO. Additionally, the insurance coverage to be provided by ESCO pursuant to paragraph A of this section shall state that ESCO's coverage shall be the primary coverage for ESCO's work. Additional insured status will be provided by both ISO additional insured endorsement CG 2033 and CG 20 37 or equivalent.
- D. In the event that any of the insurance coverage to be provided by ESCO to the Customer contains a deductible, ESCO shall indemnify and hold the Customer, Architect, Consultant or Sub-Consultants and agents and employees of Customer, Architect, Consultant or Sub-Consultants harmless from the payment of such deductible, which deductible shall in all circumstances remain the sole obligation and expense of ESCO.
- E. ESCO acknowledges that its failure to obtain or keep current the insurance coverage required by paragraph A of this section shall constitute a material breach of contract and subjects ESCO to liability for damages the Customer sustains as a result of such breach. This indemnity obligation is in addition to any other indemnity obligation provided in the Agreement. In addition, ESCO shall be responsible for the

indemnification to the Customer of any and all costs associated with such lapse in coverage, including but not limited to reasonable attorney's fees.

- F. ESCO shall require all subcontractors to carry insurance coverages and limits of liability similar to those set forth in paragraph A of this section. Notwithstanding the foregoing, said insurance coverage limitations may be adjusted to the nature of subcontractors' operations, subject to the approval of the Customer in consultation with its insurance carrier. All subcontractors shall submit proof of insurance coverage to the Customer for approval by the Customer prior to start of any work and all subcontractor insurance policies shall name the Customer, its officers, employees and agents, as an additional insured. In the event that ESCO fails to require its subcontractors to carry such insurance and a claim is made or suffered, ESCO shall indemnify, defend, and hold harmless the District, Engineer, Consultants, and Sub-Consultants, Board, officers and their agents and 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 in this Agreement, including attachments and appendices.
- G. ESCO assumes responsibility for all injury or destruction of ESCO's materials, tools, machinery, equipment, appliances, shoring, scaffolding, false and form work, and personal property of ESCO's employees. Any policy of insurance secured covering ESCO or Subcontractors leased or hired by them and any policy of insurance covering 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.
- H. The Customer in good faith may adjust and settle a loss with ESCO's insurance carrier.
- I. 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 ESCO's work.
- J. In addition to the coverages required and under the same terms and requirements of such coverages, in the event that ESCO undertakes any asbestos and/or hazardous material work under this Agreement, ESCO shall provide hazardous material liability insurance as follows: \$2,000,000/occurrence/\$2,000,000 aggregate, including products and completed operations. Such insurance shall name the Customer, its Architect and Construction Manager as additional insureds and include coverage for ESCO's operations including, but not limited to, removal, replacement, enclosure, encapsulation and/or disposal of asbestos, or any other hazardous material, along with any related pollution events, including coverage for third party liability claims for bodily injury, property damage and cleanup costs. If a retroactive date is used, it shall predate the inception of the Agreement. If motor vehicles are used for transporting hazardous materials, shall provide pollution liability broadened coverage (ISO endorsement CA 9948) as well as proof of MC90. Coverage shall fulfill all requirements set forth herein and shall extend for a period of three (3) years following acceptance by the Customer of the Certificate of Completion. In the event that ESCO engages an environmental subcontractor for removal, replacement, enclosure, encapsulation and/or disposal of asbestos, or any other hazardous material, along with any related pollution events, ESCO shall require said

environmental subcontractor to provide the hazardous material liability insurance as described herein.

- K. In addition to the coverages required and under the same terms and requirements of such coverages, ESCO shall require its environmental subcontractor to provide hazardous material liability insurance as follows: \$2,000,000/occurrence/\$2,000,000 aggregate, including products and completed operations. Such insurance shall name the Customer and its Architect as an additional insured and include coverage for the subcontractor's operations including, but not limited to, removal, replacement, enclosure, encapsulation and/or disposal of asbestos, or any other hazardous material, along with any related pollution events, including coverage for third party liability claims for bodily injury, property damage and cleanup costs. If a retroactive date is used, it shall predate the inception of the Agreement. If motor vehicles are used for transporting hazardous materials, ESCO's environmental subcontractor shall provide pollution liability broadened coverage (ISO endorsement CA 9948) as well as proof of MC90. Coverage shall fulfill all requirements set forth herein and shall extend for a period of three (3) years following acceptance by the Customer of the Certificate of Completion.
- L. Before commencement of its work, ESCO shall obtain and pay for such insurance as may be required to comply with the provisions outlined under the Agreement.
- M. Under no circumstance, shall ESCO limit its liability to the amount of its primary general comprehensive policy limits.

18. **INDEMNIFICATION.** To the fullest extent permitted by applicable Law, ESCO agrees to defend, indemnify and hold Customer, its Board, officers, agents, representatives, employees and assigns, harmless from and against any and all claims, liabilities, actions, judgments, losses, costs, damages or expenses (including reasonable attorneys' fees), suits, actions or damages ("Claims") arising by reason of bodily injury, death or damage to property to the extent caused by the negligence, misconduct or wrongful act of ESCO, its officers, agents, subcontractors or employees. ESCO shall indemnify and hold harmless the Customer, its Board, officers, employees, agents, representatives and assigns against any and all Claims, actions, damages, liabilities, and expenses, including reasonable attorney's fees as determined by court order, 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, provided Customer has paid ESCO for any undisputed amounts owed.

ESCO shall indemnify and hold harmless the District, its Board, officers, employees, agents and assigns from and against all claims, actions, damages, liabilities and expenses, including reasonable attorney's fees, arising out of or related to ESCO's, its officers, employees, agents, representatives, or its subcontractor's performance of this Agreement.

This paragraph 18 shall survive termination of this Agreement.

19. **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 with sureties licensed by the State of New York and satisfactory to the Customer, conditioned upon the faithful performance by ESCO, for the implementation of the ECMs, such bonds to be in such form of AIA Document A312, and shall contain such

provisions as are reasonably satisfactory to the Customer. These Performance and Payment Bonds shall apply only to the Installation Period, as defined in Schedule 2. Such bonds shall not apply to the Assured Performance Guarantee. A rider including the following provisions shall be attached to each Bond:

- a. Surety hereby agrees that it consents to and waives notice of any addition, alteration, omission, change, or other modification of the Contract Documents, or a forbearance on the part of either the Owner or the Energy Performance Contractor to the other, shall not release the Surety of its obligations hereunder and notice to the Surety of such matter is hereby waived.
- b. Surety further agrees that in the event of any default by the Owner in the performance of the Owner's obligations to the Energy Performance Contractor under the Contract, the Energy Performance Contractor or Surety shall cause written notice of such default (specifying said default in detail) to be given to the Owner, and the Owner shall have thirty (30) days from time after receipt of such notice within which to cure such default, or such additional reasonable period of time as may be required 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 Lender and the Owner.
- c. Surety shall be liable for the costs of litigation expenses, including but not limited to, reasonable attorneys' fees, as well as reasonable litigation expenses incurred by the District in prosecuting a claim against, or defending a claim by, either ESCO or the Surety.

In addition to the payment and performance bond described herein, ESCO shall deliver to the Customer an Energy Savings Guarantee Bond annually during the first three years of the Guarantee Term at the commencement of the M&V term and annually on the M&V Anniversary date in an amount equal to 100% of the total cost of the guaranteed savings as set forth in this Agreement. In the event that the Customer extends the M&V term beyond year three of the Guarantee Term, the Customer shall have the option to require the ESCO to provide an Energy Savings Bond for each additional year of the Guarantee Term at a cost to be mutually agreed by the parties before the commencement of the fourth year of the Guarantee Term.

If the financial lending institution selected by the District requires a Dual Obligee Rider, such Rider shall be subject to review and approval by the District and its legal counsel. In addition, ESCO shall undertake all necessary efforts to expedite the issuance of said Dual Obligee Rider and the required modifications to said Rider, if any.

- 20. REVIEW BY THE 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 Education of the State of New York. This Agreement shall not be executory until Commissioner's approval is obtained. Upon receiving SED approval and building permits, state aid runs, and all necessary approvals, the cash flow

for the Project will be recalculated with current energy costs, utility rebates, building aid and current interest rates. If the recalculation of cash flow does not yield a positive cash flow for Customer, Customer reserves the right in its sole discretion and without any liability to ESCO whatsoever, to terminate this Agreement in its entirety or reduce the scope of the Work as necessary to achieve a positive cash flow for the Customer during the term of the Agreement. Moreover, in the event that building aid for the Project is reduced and/or eliminated or, the necessary approvals referenced herein are not received or are substantially modified, Customer, in its sole discretion and without any liability to ESCO whatsoever, shall have the right to terminate the Agreement or to reduce the scope of Work as necessary to achieve a positive cash flow for Customer during the term of the Agreement. Moreover, in the event that it is determined that any ECM included herein is prohibited from being included in the scope of work by SED and/or the Customer, in whole or in part, as a result of any Customer agreement or obligation, or it is determined by the Customer that it is not in its best interest to include any ECM in this project because of any Customer District agreement(s) or obligations, in whole or in part, Customer, in its sole discretion and without any liability to ESCO whatsoever, shall have the right to terminate the Agreement or to reduce the scope of Work as necessary to achieve a positive cash flow for Customer during the term of the Agreement. The Price and Payment Terms set forth at Schedule 4 of this Agreement will be adjusted by Change Order or amendment to this Agreement to reflect any necessary modifications resulting therefrom. Upon request by Customer, ESCO will assist Customer in obtaining additional aid for the Project which may include SED building aid and/or rebates. In addition, this Agreement shall not be executory until Customer's attorneys' approval is obtained. Prior to SED approval, it shall be ESCO's sole responsibility to validate each Improvement Measure 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 SED approval is not obtained within 365 days of the date of the Architect's submittal to SED, 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 Education. This shall include providing the certifications pursuant to 155.20 (d) (7) (ii), (iii) and (iv) of the Regulations of the Commissioner of Education. Notwithstanding the above, should any portion of this Agreement fail to be approved by SED, or, if the Scope of Work contained in this Agreement is not approved by SED 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 effective date of termination.

21. **CASH FLOW STATEMENTS.** It is understood and agreed that, at all times during the Guarantee Period, the annual savings set forth in the cash flow statements must remain positive. ESCO shall provide the District with the required cash flow statements as set forth herein. Such cash flow statements shall be appended to this Agreement. The cash flow statement shall list the guaranteed rebates; however, all rebates shall inure to and be payable to the District. In addition, ESCO shall provide the District with revised cash flow statements at the following intervals: (1) upon the New York State Education Department's approval of the Agreement and any amendment between the parties; (2) upon issuance of the State Aid

report identifying the aid that will be allocated for the project; (3) upon receipt of any utility rebate or incentive; (4) upon the District's finalization of its financing of the project (the "Financing Period"); (5) prior to the commencement of any work under the Agreement and any amendments; and (6) at any other time as may be requested by the District. All revised cash flow statements shall be attached and become part of the contract documents. If the Project does not yield a positive cash flow to the District for any year of the contract term (as identified by the cash flow statements provided during the Financing Period), the District shall be permitted to reduce the scope of the Project without liability of any type so as to achieve a positive cash flow in each year of the contract term. The Project shall not commence until the District provides its written acceptance of the final cash flow statement, which must include the eligible building aid for the Project as provided by the New York State Education Department in writing and the applicable interest rate for the Project. Under no circumstance, shall the Project commence without written authorization from the District approving the cash flow for the Project. In the event that ESCO commences without written approval of the final cash flow statement, ESCO shall be liable for any negative cash flow of the District for the entire term of the Agreement and for any other loss incurred by the District resulting from its failure to produce a positive cash flow for each year of the Project.

22. **CORRESPONDENCE.** ESCO shall provide copies of all correspondence and/or other communications by and/or between it, the Architect, Consultants and/or the New York State Education Department contemporaneously with its transmission or receipt of such communications. ESCO shall be responsible for assuring that the District received the transmittals and correspondence, maintaining all correspondence and turning over the same after project completion.
23. **FORCE MAJEURE.** Neither party will be responsible to the other for damages, loss, injury, or delay caused by conditions that are beyond the reasonable control, and without the intentional misconduct or negligence of that party. Such conditions (each, a "Force Majeure" event) include, but are not limited to: acts of God; acts of government officials or agencies; material changes in laws; natural disasters, fires, hurricanes, tornadoes, floods, or earthquakes; explosions or other casualties; riots or war; acts of terrorism or other public enemy; epidemics; pandemics; quarantines; electrical power outages; or interruptions or degradations in telecommunications, computer, or electronic communications systems.
24. **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 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, which authorization shall not be unreasonably withheld. 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. 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.

25. **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 Nassau, 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.
26. **MODIFICATIONS.** Additions, deletions, and modifications to this Agreement may be made upon the mutual agreement of the parties in writing. 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 work or modifications to or deletion of the original scope of Work or Services.
27. **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 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 termination date. Customer shall pay to ESCO all undisputed amounts due for Work satisfactorily completed in accordance with this Agreement up to the date of termination.
28. **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 the completed certified payrolls are submitted to the Customer.
29. **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 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. 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.

30. **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.
31. **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. Nothing in this Agreement shall be construed as reserving to Customer any right to exercise any control over or to direct in any respect the conduct or management of business or operations of ESCO on the Customer's property. The entire control or direction of such business and operations shall be in and shall remain in ESCO, subject only to ESCO's performance of its obligations under this Agreement. 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.
32. **NOTICE/SERVICE OF PROCESS.** In addition to the methods of service allowed by the New York State Civil Practice Law & Rules ("CPLR"), the parties hereby consent to service of process upon them by registered or certified mail, return receipt requested. Service hereunder shall be complete upon a party's receipt of process or upon the sending party's receipt of the return thereof by the United States Postal Service as refused or undeliverable. The parties must promptly notify each other, in writing, of each and every change of address to which service of process can be made. Service by a party to the last known address of the other party shall be sufficient.
33. **COMPLIANCE WITH LAW.** ESCO shall comply with and obtain, at its expense, all licenses and permits required by Federal, state and local laws, rules, regulations and ordinances in connection with the installation of the Improvement Measures. To the extent that ESCO agrees to perform operations and/or maintenance of specified ECMs or other equipment, it shall comply with and obtain, at its expense, all licenses and permits which may be required by Federal, state and local laws, rules, regulations and ordinances in connection with the operation and/or maintenance of such specified ECMs. In the event that ESCO cannot procure any such license or permit in light of a requirement that Customer is required to do so, Customer will procure the same at ESCO's cost and expense. ESCO shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities (collectively, "Laws") in connection with its performance hereunder.

34. **NON-APPROPRIATION.** Pursuant to NYS Energy Law 109-3 and 8 N.Y.C.R.R. 155.20, 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.
35. **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, which consent shall not be unreasonably conditioned, withheld or delayed; 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 and the financial lending institution selected by the Customer, if necessary. 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.
36. **SUBCONTRACTING.** ESCO may elect to use subcontractors in meeting its obligations hereunder. All subcontractors must be approved by Customer, in writing and in advance. Customer reserves ESCO shall meet with the Customer to review the list of proposed subcontractors before any work commences. Customer shall have the right to reject the use of any subcontractor in its sole discretion. Subcontractors will not be acceptable unless evidence is furnished that the proposed subcontractor has satisfactorily completed similar subcontracts as contemplated under this prime contract, and has the necessary experience, personnel, equipment, plant, and financial ability to complete the subcontract in accordance with the intent of this Agreement. 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 and shall further require its subcontractors to procure the required insurance as set forth herein at paragraph 17.
37. **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 Federal, state or local codes, laws, rule or regulation 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.

38. **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.
39. **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.
40. **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, Vietnam era military service or ancestry in accordance with applicable Federal, New York State or local laws, rules, and ordinances.
41. **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 there under. 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).
42. **NON-COLLUSION.** ESCO warrants, under penalty of perjury, that its proposal was arrived at independently and without collusion aimed at restricting competition. ESCO further warrants that at the time it submitted its response to the Customer's RFP an authorized and responsible person executed and delivered to the Customer a valid non-collusive, certification on ESCO's behalf.
43. **SET OFF RIGHTS.** Customer shall have all of its common law, equitable and statutory rights of setoff. These rights shall include, but not be limited to, Customer's 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 Customer with regard to this Agreement, any other contract with Customer, including any contract for a term commencing prior to the term of this Agreement, plus any amounts due and owing to Customer for any reasons of other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. Customer shall exercise its set-off rights in accordance with normal Customer practices including, in cases of set-off pursuant to an audit, the finalization of such Customer audit by a State agency and, its representatives, or the State Comptroller.

44. **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"). 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 Education, 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.
45. **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.
46. **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.
47. **POWER AND AUTHORITY.** Each party represents and warrants to the other that (i) it has all requisite power and authority to execute and deliver this Agreement and perform its obligations hereunder, (ii) all corporate, board, body politic, or other approvals necessary for its execution, delivery, and performance of this Agreement have been or will be obtained, and (iii) this Agreement constitutes its legal, valid, and binding obligation, except as provided in paragraph 34 hereof.
48. **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.
49. **COMPLETE AGREEMENT.** It is understood and agreed that this Agreement, together with all Schedules, Attachments and other documents incorporated herein by reference, contains

the entire agreement between the parties relating to all issues involving the subject matter of this Agreement. In the event that any of the terms of this Agreement, any schedule, attachment or appendix hereto, except for those terms of Attachment 6 which do not apply to ESCO, and except for any scope of work provisions in the RFP, conflict with one another or with the terms of the Customer's RFP for District-wide implementation of Energy Conservation Measures on a Performance Contracting basis, the terms more favorable to Customer shall prevail. Notwithstanding anything to the contrary contained in the RFP or any of the other attachments or appendices hereto, no third-party construction manager is required. 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.

50. **HEADINGS.** The captions and titles in this Agreement are for convenience only and shall not affect the interpretation or meaning of this Agreement.
51. **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.
52. **NOTICES.** All notices or communications related to this Agreement shall be in writing and shall be deemed served if and when sent by facsimile (914-593-5262) 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 7th 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.
53. **APPLICATION FOR REBATES/INCENTIVES.** ESCO will apply for utility company rebates programs at the time of application. ESCO hereby guarantees the rebate amount of \$21,100 and if the Customer receives a rebate less than the guaranteed amount then ESCO will pay the difference in rebates to the Customer within thirty (30) days. All rebates and incentives shall inure to the benefit of Customer. All rebates and/or incentives shall be payable to Customer. ESCO shall be responsible for assuring that said rebates/incentives and payments for rebate deficits are promptly distributed to Customer within the time periods specified in the cash flow statement included in the Comprehensive Energy Audit as approved by the Customer. In the event that the guaranteed rebates are not received by the Customer within the time periods specified in the cash flow statements, ESCO shall immediately pay to the

District the amount of such rebate within the time period specified in the cash flow statement. Notwithstanding the foregoing, if (a) the rebate is not distributed to the Customer within the specified time period, (b) ESCO therefore pays \$21,100 to the Customer and (c) the rebate is subsequently issued for the Project, the Customer shall transfer and pay to ESCO the amount of such rebate, provided that the Customer retains any rebate amount in excess of \$21,100.

Accordingly, if the rebate amount is greater than \$21,100, such excess shall inure to the benefit of the Customer and such excess shall not be counted toward the Annual Project Benefits for any year of the Agreement or the Total Project Benefits. ESCO shall be responsible for providing all documentation concerning rebates to the Customer and for providing the Customer with an accounting of all rebates applied for and received.

54. 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.

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.

**GLEN COVE CITY
SCHOOL DISTRICT**

Signature: Lia Leone

Printed Name: Lia Leone

Title: Board President

Date: 10/20/21

**ECOSYSTEM ENERGY SERVICES
USA, INC.**

Signature: Gabriel Teyssedou

Printed Name: Gabriel Teyssedou

Title: Regional General Manager

Date: 10/20/2021