

GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT

BY AND BETWEEN

[STATE AGENCY NAME]

AND

[ENERGY SERVICE PROVIDER]

Project #

SPECIMEN

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GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT

This Guaranteed Energy Savings Performance Contract (“Agreement”) is made and entered into by and between Owner (“Owner”) and ESP (“ESP”) under seal to provide energy conservation measures and related services to Owner’s premises, as more fully described in the Contract Documents.

ARTICLE 1. DEFINITIONS

Unless otherwise provided herein, the following terms¹ shall be defined as follows:

- 1.1** “Acceptance of the Work” shall mean a time when ESP’s performance of the entire scope of the ECM Installation Work is complete in accordance with the Contract Documents, in strict accordance with Section 13.1 of the GESPC.
- 1.2** “Act” shall mean the Guaranteed Energy Savings Performance Contracting Act, O.C.G.A. §§ 50-37-1 through 50-37-8.
- 1.3** “Agreement,” as used in the GESPC, shall mean the Guaranteed Energy Savings Performance Contract, or GESPC.
- 1.4** “Annual Review” shall mean the annual review, reconciliation, and verification of the Verified Savings in accordance with Section 5.2 of the GESPC.
- 1.5** “Audit” shall mean the Investment Grade Energy Audit performed by ESP pursuant to O.C.G.A. § 50-37-3(e), in accordance with the Audit Agreement.
- 1.6** “Audit Agreement” shall mean the Investment Grade Energy Audit Agreement pursuant to which, and in accordance with which, an ESP shall conduct the Audit.
- 1.7** “Audit Fee” shall mean the compensation to which ESP is entitled, if any, for performance of the Audit, as set forth in the Audit Agreement.*
- 1.8** “Audit Report” shall mean the report that ESP is required to produce pursuant to the Audit Agreement and which shall include a summary of ESP’s recommendations for ECMs resulting from the Audit.*
- 1.9** “Authority” shall mean the Georgia Environmental Finance Authority.
- 1.10** “Base Period” shall mean the period of time during for which ESP shall examine consumption and usage of electricity, fossil fuels, water, and other applicable utilities for the purpose of developing an appropriate Baseline.

¹ Definitions followed by a “*” indicates that the defined term is not used within this document but may be used in other related documents.

- 1.11** “Baseline” shall mean a base year of consumption and usage data that is representative of each month of the Base Period, established by agreement in the GESPC, and which is used to calculate Verified Savings in accordance with the GESPC.
- 1.12** “Change Order” shall mean a written order to ESP executed by the authorized representative of Owner, issued after execution of the GESPC, authorizing and directing a change in the Work or an adjustment in ECM Installation Payments or the Project Installation Schedule, or any combination thereof, in accordance with Article 9 of the GESPC.
- 1.13** “Contract Amendment” shall mean a written agreement that has been executed by Owner and ESP, in accordance with Article 9 of the GESPC.
- 1.14** “Contract Documents” shall consist of the documents identified in Section 8.1 of the GESPC that form the GESPC.
- 1.15** “Contract Time for Verified Savings” shall mean the period of time beginning on the later of (i) Acceptance of the Work or (ii) the date Owner provides a Notice of Commencement of Contract Time for Verified Savings, and shall end at the end of the fiscal year that is years thereafter.
- 1.16** “Contract Time for Work” shall mean the period of time beginning on the date that the Work under the GESPC is permitted to proceed, through the date established for Final Completion.
- 1.17** “ECM” shall mean energy conservation measures, as defined in the Act, that (i) are identified in Schedule A of the GESPC, (ii) are installed in accordance with the GESPC, and (iii) constitute capital expenditures for federal income tax purposes.
- 1.18** “ECM Continuing Services” shall mean annual services provided pursuant to the GESPC, including but not limited to training, operation, maintenance, monitoring, repairs, replacements, adjustments, measurement and verification, and the Annual Review.
- 1.19** “ECM Continuing Services Payments” shall mean compensation for ECM Continuing Services provided pursuant to the GESPC.
- 1.20** “ECM Installation Payments” shall mean compensation for ECM Installation Work provided pursuant to the GESPC.
- 1.21** “ECM Installation Work” shall mean work associated with the design, procurement, fabrication, construction, installation, testing, and commissioning of ECMs provided pursuant to the GESPC.
- 1.22** “ECM Modification” shall mean the modification or replacement of ECMs, installation of additional ECMs, revisions to procedures for the operation of ECMs, or implementation of other procedures at the Premises, in accordance with Section 3.5 of the GESPC.
- 1.23** “ECM Submittal Schedule” shall mean a schedule identifying the dates for submission of

all ECM Submittals as set forth in the GESPC.

- 1.24** “ESP” (i) as used in the Audit Agreement and GESPC, shall have the meaning set forth in the introductory paragraph thereof, and (ii) as used in the RFP, shall mean an Energy Service Provider. The term shall include companies that meet the definition of either an ESP or an Energy Service Company (“ESCO”) set by the National Association of Energy Service Companies (“NAESCO”). ESPs are not required to be accredited by or members of NAESCO. For the purposes of the RFP, an ESP is also required to possess:
- (A) a record of successful guaranteed energy savings performance contract projects with documented verified savings that meet or exceed their guarantees;
 - (B) technical and managerial competence to develop comprehensive energy efficiency projects, including lighting measures; efficient motors and drives; and measures involving heating, ventilation, and air conditioning systems;
 - (C) technical and managerial competence to provide a full range of energy services, including conducting investment grade energy audits; providing or arranging for project financing; design engineering; providing operations and maintenance services; and verifying energy savings according to accepted industry practice;
 - (D) experience in the design, implementation, and installation of ECMs and the technical capabilities to verify that such measures achieve guaranteed energy and operational cost savings or enhanced revenues, according to accepted industry practice; and
 - (E) the ability to secure or arrange the financing necessary to support energy savings guarantees.
- 1.25** “Event of Default” shall have the meaning set forth in Article 5 of the Audit Agreement, and Section 10.4 of the GESPC.
- 1.26** “Final Completion” shall mean that stage in the progression of the Work under the GESPC when ESP has fully performed the Work, including but not limited to the ECMs, in strict accordance with the Contract Documents, except for the warranty obligations and such other obligations that extend beyond Final Completion of the Work.
- 1.27** “Fiscal Year” (whether or not such term is capitalized) shall mean the fiscal year adopted by the State of Georgia. If a period of time begins on a date that is not the first day of the State of Georgia’s fiscal year, then the first fiscal year for such period of time shall be shortened so as to end on the day before the first day of the State of Georgia’s next fiscal year. If a period of time ends on a date that is not the last day of the State of Georgia’s fiscal year, then the last fiscal year for such period of time shall be shortened so as to end on the day the period of time ends.
- 1.28** “Guaranteed Energy Savings Performance Contract” or “GESPC” shall mean the contract for the evaluation, recommendation, and implementation of one or more ECMs, and

associated guaranty of Guaranteed Savings, in accordance with the Act and as more fully set forth in the terms of the GESPC.

1.29 “Guaranteed Savings” shall mean the level of energy savings, operational cost savings, and revenue enhancements identified in Schedule B of the GESPC.

1.30 “Industry Engineering Standards” shall mean

- (A) Life cycle costing;
- (B) The R.S. Means-estimated costing method developed by the R.S. Means Company;
- (C) Historical data;
- (D) Manufacturer's data;
- (E) American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) standards;
- (F) International Performance Measurement and Verification Protocol; and
- (G) Other applicable technical performance standards established by nationally recognized standards authorities, but only if Owner specifically consents in writing to the use of such standard.

1.31 “Issuing Officer” shall mean the person identified in the RFP who is the sole point of contact for the RFP.*

1.32 “Material Change” shall mean any change in or to the Premises after Acceptance of the Work, not covered by Schedule K of the GESPC, whether structural, operational or otherwise in nature, that results in an increase or decrease in Verified Savings by at least _____%, in the aggregate, after adjustments to account for variables that are not, in whole or in part, within ESP’s control. A change is not a Material Change if it results, in whole or in part, from ESP’s failure to perform any obligation in accordance with the Contract Documents, including but not limited to defective or deficient installation of ECMs and Work, failure to perform or properly perform maintenance, repairs, replacements, or similar tasks under Section 4.1, or failure to perform or properly perform any duty in connection with the Audit. A change is not a Material Change if it results, in whole or in part, from malfunction or nonperformance of an ECM.

1.33 “Notice of Award” or “NOA” shall mean a Notice of Award, which signifies Owner’s selection of one or more ESPs pursuant to the RFP.*

1.34 “Notice of Commencement of Contract Time for Verified Savings” shall mean the written document executed by Owner indicating that the Contract Time for Verified Savings shall begin. Such notice shall not relieve ESP of any obligation under the GESPC or the Audit Agreement.

- 1.35** “Notice of Intent to Award” or “NOIA” shall mean a Notice of Intent to Award, which signifies Owner’s preliminary selection of one or more ESPs pursuant to the RFP.*
- 1.36** “Owner” (i) as used in the Audit Agreement and GESPC, shall have the meaning set forth in the introductory paragraph thereof, and (ii) as used in the RFP, shall mean the State Agency that issued the RFP pursuant to the Act and which may enter into an Audit Agreement and a GESPC with an ESP for the proposed Project.
- 1.37** “Preliminary Technical Energy Audit Report” shall mean the report prepared in connection with an ESP’s Proposal and further described in Article 2 of Attachment C (Form of Preliminary Technical Proposal) of the RFP.*
- 1.38** “Preliminary Technical Proposal” or “Proposal” shall mean the proposal submitted in response to the RFP, in the form set forth in the Attachment C of the RFP, to the extent such proposal complies with the requirements and standards set forth in the RFP.*
- 1.39** “Premises” (i) as used in the Audit Agreement, shall mean the facilities listed in Attachment A of the Audit Agreement, (ii) as used in the GESPC, shall mean the facilities listed in Schedule D of the GESPC, and (iii) as used in the RFP, shall mean shall mean the facilities listed in Attachment A of the RFP.
- 1.40** “Prequalified ESPs” shall mean those ESPs listed on the Prequalification List.*
- 1.41** “Prequalification List” shall mean the list of Prequalified ESPs selected by the Authority in connection with the RFQ for Project #928-E-RFQC-0000007.*
- 1.42** “Project” shall mean the design and installation of ECMs, operation and maintenance of ECMs, and all other Work and services required under a GESPC.
- 1.43** “Project Installation Schedule” shall mean the schedule for Work contained in Schedule J of the GESPC.
- 1.44** “Proposed Savings” shall mean anticipated energy, operational, water, or waste-water savings, cost savings, savings or revenue increases, but only if such amounts are verifiable and appropriate, as set forth in the Audit Agreement.*
- 1.45** “Qualification Period” shall mean the three-year period beginning with the publication of the Prequalification List during which Prequalified ESPs will be eligible to receive RFPs under the Act.*
- 1.46** “Resident ESP” shall mean an ESP that has regularly maintained a place from which business is physically conducted in Georgia for at least one (1) year prior to the submission of its Statement of Qualifications, or a new business that is domiciled in Georgia which regularly maintains a place from which business is physically conducted in Georgia. A post office box, site trailer, or temporary structure is not a place of business for purposes of the RFP.*

- 1.47** “Request for Proposals” or “RFP” shall mean the document issued by Owner to elicit Preliminary Technical Proposals from selected Prequalified ESPs for the proposed Project.
- 1.48** “Request for Statements of Qualifications” or “RFQ” shall mean the document issued by the Authority to establish the Prequalification List.*
- 1.49** “Schedule of Events” shall mean the schedule identified in the RFP that lists the preliminary dates and times certain events in the RFP procurement process shall occur.*
- 1.50** “Statement of Qualifications” or “SOQ” shall mean the responses submitted by ESPs in response to the RFQ.*
- 1.51** “State Agency” or “State Agencies” shall mean every state agency, authority, board, bureau, commission, and department of the State of Georgia, including but not limited to the Board of Regents of the University System of Georgia and its universities.*
- 1.52** “Substantial Completion” shall mean that stage in the progression of the Work under the GESPC when the Work is sufficiently complete in accordance with the Contract Documents that Owner can enjoy beneficial use and occupancy of the Work, including but not limited to ECMs, and can utilize such Work for its intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion.
- 1.53** “Verified Savings” shall mean actual energy savings, operational cost savings, and revenue enhancements realized with reference to the Baseline set forth in Schedule E of the GESPC, and determined in accordance with the methods and procedures in Schedule M of the GESPC, in accordance with Section 5.2 of the GESPC. Verified Savings shall result solely from ECMs installed or performed by ESP in accordance with the GESPC.
- 1.54** “Work” shall mean all work and services required or implied by, or reasonably inferable from, the GESPC and Contract Documents, including but not limited to work associated with all ECMs identified in Schedule A of the GESPC and installed in or on the Premises listed in Schedule D of the GESPC, in accordance with Section 3.1 of the GESPC.

ARTICLE 2. THE PROJECT

2.1 Energy Conservation Measures

ESP shall design, procure, fabricate, construct, install, commission, and test the ECMs specified in Schedule A with respect to the Premises. ESP shall perform all activities and provide all materials, supplies, tools, and equipment necessary to install and operate the ECMs and perform all other Work with minimal interference with Owner’s operations.

2.2 Measurement and Verification

ESP shall measure and verify the Verified Savings resulting from the ECMs in accordance with the Methods of Savings Measurement and Verification set forth in Schedule M. At a minimum, the methods identified in Schedule M shall comply with the most recent version of the International Performance Measurement and Verification Protocol or other industry engineering standard (as such term is defined in the Act), but only if Owner consents to such other industry engineering standard.

Without diminishing ESP's obligation, Owner may hire a competent third party to measure and verify Verified Savings in accordance with this Agreement. If the Verified Savings determined by the third party differ from the amount determined by ESP, then Owner and ESP shall attempt to agree on the appropriate level of Verified Savings. If Owner and ESP agree on the appropriate Verified Savings, they shall execute a Contract Amendment in accordance with Article 9.

If Owner and ESP are unable to mutually agree on the appropriate level of Verified Savings, then ESP shall, within five (5) days of Owner's request, provide Owner with a list of at least five (5) third parties that are independent of ESP and all of its affiliates, and who are qualified to determine the appropriate level of Verified Savings. Owner may select a third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to determine the appropriate level of Verified Savings. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, Owner shall have the right to select the third party to determine the appropriate level of Verified Savings in its sole discretion.

2.3 Annual Energy Savings Guaranty and Bonds

ESP shall guarantee annual Guaranteed Savings as set forth in Article 5 and shall provide performance and payment bonds in accordance with Article 6.

2.4 Commissioning

ESP shall conduct a thorough and systematic performance test of each element and total system of the installed ECMs in accordance with Schedule N. ESP shall provide advance written notice of at least ten (10) business days to Owner of the scheduled test(s). Owner shall have the right to designate representatives to be present at any or all such tests including representatives of the manufacturers of the ECMs. ESP shall demonstrate that each ECM (and each element thereof) complies with the requirements of the Contract Documents. At no additional cost to Owner, ESP shall correct or adjust all deficiencies in the operation of the ECMs as necessary to bring each ECM into compliance with the Contract Documents.

2.5 Training, Maintenance, Monitoring, and Other Work

In accordance with Article 4, ESP shall provide training described in Schedule I, operation, maintenance, monitoring and related services described in Schedule F, and all other services and Work specified in the Contract Documents.

ARTICLE 3. ENERGY CONSERVATION MEASURES

3.1 Performance of the Work

ESP shall perform or cause to be performed the Work in strict accordance with the Contract Documents. The Work shall also include whatever is done by or required of ESP to perform and complete its duties under the Contract Documents, including but not limited to the following: the provision or furnishing of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, permits and licenses required, and fuel, heat, light, cooling and all other utilities as required by this Agreement.

No later than _____ days after execution of this Agreement, ESP shall provide detailed drawings and specifications concerning the ECMs and associated equipment and materials, and all impacted areas of the Premises, for Owner's review and comment. Such documents shall become the property of Owner without restriction. ESP shall make such reasonable modifications to the drawings and specifications as Owner may require. Upon Owner's approval of the drawings and specifications, ESP shall proceed to provide ECM Submittals as set forth in Section 3.4. Owner's approval of any drawings and specifications shall not be evidence that the drawings and specifications, and associated Work pursuant thereto, conform to the requirements of the Contract Documents, nor shall such approval relieve or diminish in any way ESP's obligation to comply with the Contract Documents.

Work shall be categorized as (1) ECM Installation Work and (2) ECM Continuing Services.

3.2 ESP's Responsibility for the Work

ESP shall perform all Work strictly in conformance with the Contract Documents. Compliance with the Contract Documents shall be and remain the responsibility of ESP. Owner or its representatives and consultants may review, inspect, and test the Work from time to time. Any review, approval, testing, or acceptance of, or payment for, any or all of the Work shall not relieve ESP of its responsibility for the Work and compliance with the Contract Documents.

3.3 Standards of the Work

ESP shall assure that all of the Work is accomplished in a workmanlike manner and in compliance with the Contract Documents and that all services which require the exercise of professional skills or judgment shall be accomplished by professionals qualified and competent in the applicable discipline and appropriately licensed in the State of Georgia, if required by law. All Contract Documents which are required to be prepared by ESP shall be in accordance with

all applicable codes, standards and regulations, and shall be prepared by qualified personnel. Where required by law, Contract Documents shall bear the stamp or seal of architects or engineers licensed in the State of Georgia.

3.4 ECM Submittal Process

3.4.1 Coordination With Owner

ESP recognizes that some or all of Owner's Premises are currently in operation and that ESP must coordinate with Owner to minimize any interference with such operation. Among other means, ESP will use the submittal process described in Section 3.4 as a means of minimizing interference. ESP recognizes that delays are to be expected from coordination required by this Section 3.4.1, and from Owner's review and approval of submittals. Accordingly, ESP shall not assert, and hereby waives, any claim for reasonable delays resulting from coordination of Work and Owner's review and approval of submittals.

In its sole discretion, Owner may designate representatives or retain consultants, including architects and engineers, to consult with and advise ESP regarding the Work and ECM Submittals on Owner's behalf. Such representatives shall not, however, have authority to bind Owner for purposes of Change Orders or other Contract Amendments, unless Owner specifically consents in writing. The provisions of Article 9 shall govern such Change Orders and Contract Amendments. ESP shall at all times provide access to the Work to Owner and its representatives and consultants. ESP agrees to comply with any reasonable demands of such representatives and consultants.

3.4.2 ECM Submittals

ESP shall submit to Owner all shop drawings, product data, samples, mock-ups, and other submittals related to each ECM ("ECM Submittals") for Owner's review in accordance with Section 3.4. ECM Submittals must be provided to Owner within such time as to not delay the Work and Project Installation Schedule.

ECM Submittals do not constitute Contract Documents. Their purpose is merely to demonstrate the manner in which ESP intends to implement the Work in conformance with information received from the Contract Documents. ESP shall not install any ECM unless and until an ECM Submittal specifically covering such ECM shall have been approved in writing by Owner. Approval of an ECM Submittal, however, shall not be evidence that the ECM Submittal and associated Work pursuant thereto conforms to the requirements of the Contract Documents, nor shall such approval relieve or diminish in any way ESP's obligation to comply with the Contract Documents.

3.4.3 Informational Requirements of ECM Submittals

ECM Submittals shall provide sufficient detail to allow Owner to complete its review and shall, at a minimum, include:

- (a) submittal date and revision dates;
- (b) project number and title;
- (c) the ECM or its component covered by the submittal;
- (d) names of ESP and any applicable subcontractors, manufacturers, suppliers, and dealers;
- (e) identity of product or material with models or products to be used and specifically each and every option that is to be included (options, features, models and other information not pertinent to this Project and its application shall be fully and clearly marked out of the submittal);
- (f) relation to adjacent structure or material;
- (g) clearly identified field dimensions;
- (h) drawings and specifications page and number (if applicable);
- (i) applicable standards, such as ASTM or ANSI, that the ECM Submittal satisfies;
- (j) identification of any applicable Change Order or Contract Amendment that relates to the ECM;
- (k) stamp or seal of the preparer of the ECM Submittal and ESP's certification that it has reviewed and approved the submittal as to its accuracy and compliance with the provisions of the Contract Documents;
- (l) shop drawings, product data, and, where appropriate or reasonably required, product samples; and
- (m) if a mock-up or demonstration occurred, the date when and location where same occurred, and Owner representatives who were present.

At the request of Owner, and where appropriate or reasonably required, ESP shall provide on-site mock-ups and demonstrations of the ECMs at the Premises which shall also be construed as ECM Submittals under the provisions of this Section, but only to the extent that Owner provides a written verification that mock-up was reviewed. As with written ECM Submittals, any written verification of mock-ups shall not be evidence that the mock-up and associated Work pursuant thereto conforms to the requirements of the Contract Documents, nor shall such approval relieve or diminish in any way ESP's obligation to comply with the Contract Documents.

3.4.4 Project Schedule and ECM Submittal Schedule

Within _____ days of commencing the Work, ESP shall submit to Owner for its information ESP's schedule for completing the Work in accordance with the Project Installation Schedule and by the date set forth herein for Substantial Completion and Final Completion. Additionally, within _____ days of commencing the Work, ESP shall submit to Owner an ECM Submittal Schedule. Each of these schedules required herein shall be revised no less frequently than every two weeks (unless the parties otherwise agree in writing) and shall be revised to reflect conditions encountered from time-to-time and shall be related to the entire Project. Each

such revision shall be furnished to Owner. The schedules, and all revisions, shall be in such form, and shall contain such detail, as Owner may require. THE PARTIES SPECIFICALLY AGREE THAT ANY FLOAT CONTAINED IN THE SCHEDULES SHALL BELONG TO THE PROJECT AND IN NO EVENT SHALL ESP MAKE CLAIM FOR ANY ALLEGED DELAY, ACCELERATION, OR EARLY COMPLETION SO LONG AS THE PROJECT IS COMPLETED WITHIN THE CONTRACT TIME FOR WORK. Strict compliance with the requirements of this Section is a condition precedent for payment to ESP, and failure by ESP to strictly comply with said requirements shall constitute a material breach of this Agreement.

ESP shall continuously maintain at the site, for the benefit of Owner, one record copy of this Agreement and other Contract Documents marked to record on a current basis changes, selections, and modifications made during construction. Additionally, ESP shall maintain at the site for the benefit of Owner the approved ECM Submittals.

3.4.5 Review and Approval of ECM Submittals

Within _____ business days after receipt, Owner shall complete its review of the submittals or revised submittals and provide written approval or, if the submittal or revised submittal has not been approved, written explanation as to the reason therefor. ESP shall submit to Owner a revised submittal within _____ business days after receipt of Owner's rejection. ESP may not commence any of the Work which requires the submittals without written approval by Owner.

Owner may reject submittals, among other reasons, on the basis that the Work associated with such submittal (i) might constitute or create a hazard to the Premises or to persons or property, (ii) does not comply with the Contract Documents, or (iii) would result in delay in scheduled completion of the Work.

3.5 ECMs Modifications

ESP may request Owner's permission to implement an ECM Modification. To request an ECM Modification, ESP shall submit a written request that identifies (i) the requested ECM Modification; (ii) the ECMs to be modified; (iii) the requested change in ECM Installation Payments, if any; and (iv) the requested adjustments, if any, to the Baseline set forth in Schedule E arising from ECM Modifications. ESP shall represent and warrant to Owner that (i) the ECM Modification does not result in modifying the standards of comfort and service set forth in Schedule H without the express written approval of Owner; (ii) the ECM Modification is necessary to enable ESP to achieve the Guaranteed Savings; (iii) any costs incurred due to any ECM Modification shall be the sole responsibility of ESP; (iv) any ECM Modification that is a replacement of an ECM shall be new and have equal or better potential to reduce energy consumption at the Premises than the ECM being replaced; (v) ESP shall update any and all software to be used in connection with the affected ECMs; and (vi) any ECM Modifications shall become the property of Owner. ESP shall provide all necessary backup analysis and documentation to support its request for ECM Modification.

If Owner consents to the requested ECM Modification, the parties will enter a Contract Amendment or follow the Change Order procedures and comply with Article 9, except that

Section 9.2.2 shall not apply because the change in ECM Installation Payments (if any) shall be agreed upon when the ECM Modification is approved by Owner. Owner has no obligation to accept the requested ECM Modifications.

All ECM Modifications approved by Owner under this Section shall become part of the ECMs described in Schedule A and shall become the property of Owner. Unless specifically provided in a Contract Amendment or Change Order, no ECM Modification shall relieve or diminish ESP’s obligation to achieve the Guaranteed Savings specified in Schedule B. This Section shall not affect the limitation of Owner’s payment obligations in Section 7.4.

3.6 ECM Malfunction

During the term of this Agreement, Owner shall use its best efforts to notify ESP or its designee within three (3) business days after Owner receives actual knowledge of the occurrence of a material malfunction in the operation of the ECMs or any pre-existing energy-related equipment, but only if Owner reasonably believes that such malfunction may lead to a Material Change. Such a material malfunction in the operation of an ECM shall not be deemed a Material Change unless such malfunction is caused by Owner’s failure to maintain such ECM in accordance with this Agreement, in which case Section 12.4(h) may apply solely to the extent such malfunction is caused by Owner. Except to the extent Section 12.4(h) applies, Owner shall have no obligation to modify the Baseline to account for any material malfunction in the operation of an ECM.

3.7 Supervision

ESP shall employ and maintain at the Project site only competent supervisory personnel. Absent written instruction from ESP to the contrary, the superintendent shall be deemed ESP’s authorized representative at the site and shall be authorized to receive and accept any and all communications from Owner.

Key supervisory personnel assigned by ESP to this Project are as follows:

<u>Name</u>	<u>Function</u>	<u>Email and Mobile Phone Number</u>

So long as the individuals named above remain actively employed or retained by ESP, they shall perform the functions indicated next to their names unless Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assumes one or more of those functions listed above, ESP shall be bound by the provisions of this Section 3.7 as though such individuals had been listed above.

3.8 Restoring and Cleaning the Site and the Project

On a daily basis, ESP shall keep the Premises clean so as not to interfere with the operations of Owner. Upon Final Completion of the Work, ESP shall thoroughly clean the Premises and the Project and remove all waste, together with all of ESP's property therefrom.

ESP shall ensure that all Work does not damage the existing conditions of the Premises. If ESP causes any damage to such existing conditions, ESP shall be responsible to repair and restore such conditions to their original condition, unless otherwise provided in a Change Order or Contract Amendment.

3.9 Means, Methods, Techniques, Sequences, Procedures and Safety

As long as ESP complies with the Contract Documents, ESP is fully responsible for, and shall have control over, all construction means, methods, techniques, sequences, procedures and safety, and shall coordinate all portions of the Work required by the Contract Documents.

3.10 Indemnity

To the fullest extent permitted by law, ESP shall indemnify, hold harmless, and defend Owner and its agents from and against liability, claims, damages, losses and expenses, including attorney fees, arising out of or resulting from performance of the Work, including loss of use resulting therefrom, but only to the extent caused in whole or in part by breaches of contract, or negligent or wrongful acts or omissions, of ESP, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such liability, claim, damage, loss, or expense is caused in part by a party indemnified hereunder.

If claims are asserted against any person or entity indemnified under this Section 3.10 by an employee of ESP, a subcontractor, any one directly or indirectly employed by them or anyone, the indemnification obligation under this Section 3.10 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for ESP or a subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

ARTICLE 4. OPERATING, MAINTENANCE, MONITORING, TRAINING, AND RELATED TASKS

4.1 ESP's Operation, Maintenance, Monitoring, and Related Tasks

ESP shall be responsible for providing the operation, maintenance, monitoring, repairs, replacements, and adjustments to the ECMs as set forth in Schedule F, which shall require

maintenance, monitoring, repairs, replacements, and adjustments to be performed during Contract Time for Work and Contract Time for Verified Savings.

ESP acknowledges that its obligation to identify all tasks and costs associated with operation, maintenance, monitoring, repairs, replacements, and adjustments of ECMs is of paramount importance. In addition to those tasks set forth in Schedule F, if any task related to operation, maintenance, monitoring, repairs, replacements, and adjustments required for any ECM was not identified by ESP and allocated to ESP in Schedule F, or Owner in Schedule G, before execution of this Agreement, then ESP shall perform such task without additional fees or increase in compensation. ESP's failure to identify such tasks before execution of this Agreement shall result in a waiver by ESP of any right to assert that failure to perform such tasks resulted in a Material Change.

All replacements of, and alterations or additions to, the ECMs shall become part of the ECMs and shall become the property of Owner. Any replacements of and alterations or additions made by ESP to Owner's pre-existing equipment, or equipment acquired by Owner, shall become part of said equipment and be owned by Owner. All costs associated with the performance of this Section 4.1, including but not limited to all services, labor, equipment, materials, and parts, shall be included in the ECM Continuing Services Payments pursuant to Schedule C-2 hereof.

4.2 Owner's Operation, Maintenance, Monitoring, and Related Tasks

Owner shall be responsible for providing operation, maintenance, monitoring, repairs, replacements, and adjustments to the ECMs as set forth in Schedule G. If Owner moves, modifies, removes, adjusts, alters, or changes the ECMs, or any part thereof, during the Contract Time For Guaranteed Savings, and if such modification results in a Material Change, then the provisions of Sections 12.4, 12.5, and 12.6 shall apply. Such provisions shall not apply, however, if Owner makes any such modification with prior written direction or approval from ESP, which shall not be unreasonably withheld, or if Owner makes such modification in the event of an occurrence reasonably deemed by Owner to constitute a bona fide emergency.

ESP shall provide any information, analysis, and guidance requested by Owner to assist Owner in fulfilling its obligations under Schedule G. Owner shall be permitted to rely on such information, analysis, and guidance. ESP waives any right to assert Owner's failure to comply with this Section to the extent such failure is caused, in whole or in part, by Owner's reliance on such information, analysis, and guidance.

Unless ESP is responsible for such tasks, Owner shall use its best efforts to maintain the Premises in good repair and to protect and preserve the ECMs in good repair and condition in accordance with the manufacturers' recommendations that are provided to Owner by ESP and to maintain the operating conditions of all mechanical systems and energy related systems located at the Premises. ESP shall notify Owner in writing of any improper operation, maintenance, monitoring, repairs, replacements, and adjustments as soon as ESP has knowledge of same.

4.3 Training by ESP

ESP shall conduct the training program described in Schedule I hereto.

4.4 Owner's Right to Self-Perform

Owner may elect to self-perform, or hire a third party to perform, any or all ECM Continuing Services, except the performance of the Annual Review, as long as such services are performed in conformance with the requirements of Schedule F. Owner shall provide written notice to ESP of its election. ESP shall cease performing such services upon receipt of such notice on the date set forth therein.

Upon the effective date of the election provided by this Section, Owner's obligations to pay ECM Continuing Services Payments associated with such services shall cease. In determining the amount of ECM Continuing Services Payments associated with such discontinued services, Owner may rely on any documentation provided by ESP, including but not limited to Schedule C-2 and documents provided in connection with the Audit, in determining the ECM Continuing Services Payments associated with the discontinued services.

An election under this Section is not, and shall not be deemed, a termination, breach, or default of this Agreement. Nothing in this Section shall affect Owner's right to hire a third party to perform the Annual Review in accordance with Section 10.3. Except as provided in this Section, ESP's obligations hereunder shall continue and this Agreement shall remain in full force and effect.

ARTICLE 5. ANNUAL ENERGY SAVINGS GUARANTY

5.1 Annual Energy Savings Guaranty

ESP guarantees that the Verified Savings will equal or exceed the Guaranteed Savings each fiscal year during the Contract Time for Verified Savings. In addition, ESP guarantees that the total dollar value of Verified Savings, established as provided in Schedule M, will equal or exceed the sum of all ECM Installation Payments and ECM Continuing Services Payments, as amended by Change Orders or Contract Amendments (if any).

ESP shall furnish to Owner an energy savings guarantee bond, a bank letter of credit, or other surety instrument acceptable to Owner, and under seal of the surety, in an amount equal to the dollar value of Guaranteed Savings for the Contract Time for Verified Savings. As Verified Savings are realized each fiscal year during the Contract Time for Verified Savings, and only if such Verified Savings exceed Guaranteed Savings for such fiscal year, the value of the energy savings guarantee bond, bank letter of credit, or other surety instrument may decrease proportionately in a reasonable amount determined by Owner. The surety instrument provided for under this Section shall not be subject to Chapter 10 of Title 13 of the O.C.G.A., and specifically shall not be subject to the one-year period of limitations set forth in O.C.G.A. § 13-10-42. The surety instrument shall provide that Owner may commence legal actions on the surety instrument at any time during, and no less than two years after, the Contract Time for Verified Savings.

5.2 Annual Review and Guaranty Payment

Within business days following the close of each fiscal year during the Contract Time for Verified Savings, ESP shall (1) perform an Annual Review of the Verified Savings in accordance with the methods and procedures in Schedule M, and (2) provide a written report of the Annual Review to Owner. If Verified Savings do not equal or exceed the Guaranteed Savings for such fiscal year, then in accordance with ESP's guaranty obligations of Section 5.1, ESP will pay Owner the difference between (i) the Guaranteed Savings and (ii) the Verified Savings, upon converting such amounts to dollar values in accordance with Schedule M. Such payment shall be made to Owner no later than the date that the written report of the Annual Review is due.

Owner may dispute the findings of the Annual Review and the amount due Owner under this Section at any time. Owner's receipt and deposit of any payment due under this Section shall not affect Owner's right to dispute the findings of the Annual Review or the amount due Owner under this Section.

Any excess of Verified Savings over Guaranteed Savings in a fiscal year shall not be used to offset deficiencies of Verified Savings in comparison to Guaranteed Savings in other fiscal years.

ARTICLE 6. SURETY BONDS AND INSURANCE

6.1 Payment and Performance Bonds

ESP shall furnish to Owner, as soon as practicable following the execution hereof and prior to commencement of any Work, separate performance and payment bonds. Each bond shall have a penal sum in an amount set forth in Schedule O, but not less than the total ECM Installation Payments, and shall secure all of ESP's obligations under this Agreement and the Contract Documents, except for those obligations secured by the surety instruction identified in Section 5.1.

Each bond furnished by ESP shall incorporate by reference the terms of this Agreement as fully as though they were set forth verbatim in such bonds. In the event that ECM Installation Payments are increased by Change Order or Contract Amendment, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by ESP shall be in a form suitable to Owner, shall comply with the provisions of O.C.G.A. Title 13, Chapter 10 (O.C.G.A. §§ 13-10-1 through 13-10-65), except the period of limitation thereof, and shall be executed by a surety or sureties reasonably suitable to Owner. Notwithstanding anything to the contrary herein, the performance bond provided by ESP shall provide a period of limitation for filing suit no earlier than two (2) years from completion of the Project and Acceptance of the Work.

6.2 ESP Insurance Requirement

ESP shall purchase, maintain, and provide evidence of insurance coverage of the types, in the amounts, and for the periods specified in Schedule O. Prior to the commencement of any

Work on the Project, ESP shall submit to Owner all certificates of insurance evidencing the insurance coverage required in Schedule O.

ESP may not commence performance of the Work or other services under this Agreement until Owner has received and approved in writing the certificates of insurance, but the absence of such approval shall not constitute a waiver of ESP's obligations under this Section 6.2.

Without prejudice to Owner's other remedies, including but not limited to those identified in Article 10, Owner shall have the right to stop the Work until evidence of the required coverage is provided. ESP shall require all subcontractors performing any portion of the Work to carry the insurance required in Schedule O and ESP may, at its option, provide the coverage for any or all subcontractors, and, if so, the evidence of insurance submitted shall so stipulate. ESP and each of its subcontractors agree that each insurer shall waive its rights of subrogation against Owner.

ESP shall timely renew the required insurance as necessary to keep such coverage in effect for the periods specified in Schedule O and shall supply Owner, not less than thirty (30) days prior to any expiration or renewal dates for such insurance policies, with evidence of all required insurance, including updated replacement certificates of insurance and amendatory riders or endorsements that clearly evidence the continuation of all required coverage.

ESP understands and agrees that any insurance protection furnished by ESP hereunder shall in no way limit its responsibility to indemnify and save harmless Owner under the provisions of this Agreement.

ARTICLE 7. PAYMENT OBLIGATIONS

7.1 Owner's Payment Obligations

Payments to ESP shall only include (1) ECM Installation Payments and (2) ECM Continuing Services Payments. Except as provided in this Article 7, payments shall be made in the amount and at the time set forth in Schedules C-1 and C-2. ECM Installation Payments and ECM Continuing Services Payments shall each be a fixed sum and shall include all costs and fees to be paid by Owner for all Work, services, and benefits provided by ESP pursuant to, or in any way related to, this Agreement. ECM shall complete and submit to Owner with all pay applications a schedule of values in conformance with Exhibit IV (Form of Schedule of Values).

As a condition precedent to the interim and final ECM Installation Payments identified in Schedule C-1, ESP shall provide Owner (i) if required by Owner, an interim or final lien waiver as set forth in O.C.G.A. § 44-14-366, and (ii) a sworn written statement in conformance with the provisions of O.C.G.A. § 44-14-361.2(a)(2) that the agreed price or reasonable value of all labor, services, or materials in connection with this Agreement have been paid.

In the event that Owner makes an election under Section 4.4 (Owner's Right to Self-Perform), Owner's payment obligations for ECM Continuing Services Payments shall be adjusted as set forth in Section 4.4.

7.2 Withholding ECM Installation Payments

Owner may decline to make ECM Installation Payments to ESP, and may demand the return of some or all ECM Installation Payments previously paid to ESP, because of:

- (a) the failure of ESP to achieve sufficient Verified Savings to equal or exceed the total amount payable in each fiscal year after Acceptance of the Work;
- (b) amounts due to Owner under the Annual Energy Savings Guaranty in Article 5;
- (c) defective Work not remedied by ESP nor, in the opinion of Owner, likely to be remedied by ESP;
- (d) claims of third parties against Owner or Owner's property;
- (e) failure by ESP to pay subcontractors or others in a prompt and proper fashion;
- (f) evidence that the balance of the Work cannot be completed in accordance with the Contract Documents for the unpaid balance of the ECM Installation Payments;
- (g) evidence that the Work will not be completed in the time required for Substantial Completion or Final Completion;
- (h) persistent failure to carry out the Work in accordance with the Contract Documents;
- (i) damage to Owner or a third party to whom Owner is, or may be, liable; or
- (j) the occurrence of an Event of Default.

In the event that Owner makes written demand upon ESP for amounts previously paid by Owner as provided by this Section 7.2, ESP shall comply with such demand within business days.

7.3 Withholding ECM Continuing Services Payments

Owner may decline to make ECM Continuing Services Payments, and may demand the return of some or all ECM Continuing Services Payments previously paid to ESP, because of:

- (a) the failure of ESP to achieve sufficient Verified Savings to equal or exceed the amount payable in each fiscal year after Acceptance of the Work;
- (b) amounts due to Owner under the Annual Energy Savings Guaranty in Article 5;
- (c) defective Work not remedied by ESP nor, in the opinion of Owner, likely to be remedied by ESP;
- (d) claims of third parties against Owner or Owner's property;
- (e) failure by ESP to pay subcontractors or others in a prompt and proper fashion;
- (f) evidence that the balance of the Work cannot be completed in accordance with the Contract Documents for the unpaid balance of the ECM Installation Payments;

- (g) evidence that the Work will not be completed in the time required for Substantial Completion or Final Completion;
- (h) persistent failure to carry out the Work in accordance with the Contract Documents;
- (i) damage to Owner or a third party to whom Owner is, or may be, liable; or
- (j) the occurrence of an Event of Default.

In the event that Owner makes written demand upon ESP for amounts previously paid by Owner as provided by this Section 7.3, ESP shall comply with such demand within business days.

7.4 Limitations of Owner’s Payment Obligations

Owner’s payment obligations are additionally subject to all restrictions and limitations imposed by law, including but not limited to those listed in O.C.G.A. §§ 50-37-2(5), and Article 15.

ARTICLE 8. CONTRACT DOCUMENTS

8.1 Contract Documents

The Contract Documents consist of the following:

- (a) this Agreement and, to the extent consistent with this Agreement, the schedules attached hereto and identified in Section 8.2;
- (b) written Change Orders or Contract Amendments that have been executed in accordance with Article 9;
- (c) drawings and specifications provided by ESP or on ESP’s behalf, but only if approved in writing by Owner and only to the extent such documents are consistent with this Agreement; and
- (d) the following documents:

Documents not listed in this Section 8.1 are not Contract Documents and do not form part of this Agreement.

8.2 Schedules and Exhibits

The following schedules, to the extent not inconsistent with this Agreement, are incorporated into this Agreement.

Schedule A	Energy Conservation Measures and Other Work
Schedule B	Guaranteed Savings
Schedule C-1	ECM Installation Payments
Schedule C-2	ECM Continuing Services Payments
Schedule D	Premises
Schedule E	Calculation of Baseline
Schedule F	ESP Maintenance Responsibilities
Schedule G	Owner Maintenance Responsibilities
Schedule H	Operating Parameters for ECMs/Standards of Comfort & Service
Schedule I	ESP Training Responsibilities
Schedule J	Project Installation Schedule
Schedule K	Current and Known Future Capital Projects at the Premises
Schedule L	Pre-Installation Equipment Inventory
Schedule M	Methods of Savings Measurement and Verification
Schedule N	Systems Startup and Commissioning of ECMs
Schedule O	Insurance and Bonds / Savings Guarantee Security
Schedule P	Warranties
Schedule Q	Proposed Project Cost Form; Form of Implementation Cost by Energy Conservation Measure; Form of First Year Estimated Annual Cost Savings by ECM
Schedule R	GEFA Annual Reporting Requirements

The following Exhibits shall be used as provided in this Agreement.

Exhibit I	Performance Bond/Construction Bond
Exhibit II	Certification of Acceptance
Exhibit III	Equipment Warranties
Exhibit IV	Schedule of Values

The following Appendix is incorporated herein by reference:

Appendix A	Application of Certain Labor Standards
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8.3 Entire Agreement

This Agreement, together with the other Contract Documents, constitutes the entire and exclusive agreement between Owner and ESP with reference to the Project. Specifically, but without limitation, this Agreement supersedes the Audit, the Audit Agreement, any bid documents, ESP's Proposal and related documents, and all prior written or oral communications, representations and negotiations, if any, between Owner and ESP. Notwithstanding the preceding sentence, Owner's rights arising from the Audit Agreement shall not be affected by this Section.

8.4 No Privity with Others

Except as provided in Section 8.5, nothing contained in this Agreement shall create, or be interpreted to create, privity or any other contractual agreement between Owner and any person or entity other than ESP.

8.5 Successors and Assigns

Owner and ESP bind themselves, their successors, assigns, and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements, and obligations contained in this Agreement. Owner may assign this Agreement, and any and all rights and obligations hereunder, but shall provide notice to ESP before such assignment. ESP shall not assign this Agreement without written consent of Owner. Any attempted assignment without the consent of Owner shall be void and of no force or effect.

8.6 Ownership of Contract Documents

The Contract Documents, and each of them, shall remain the property of Owner. ESP shall have the right to keep one record set of the Contract Documents upon completion of the Project; provided, however, that in no event shall ESP use, or permit to be used, any or all of such Contract Documents on other projects without Owner's prior written authorization.

8.7 Ownership of Certain Property Rights

Owner shall acquire no ownership interest in any software, formulas, patterns, devices, secret inventions or processes, or copyright, patents, and other intellectual and proprietary rights or similar items of property which are or may become used in connection with the ECMs. ESP shall grant to Owner a perpetual, irrevocable royalty-free license of any and all software or other intellectual property rights necessary for Owner to continue to operate, maintain, and repair the ECMs in a manner that will maximize Verified Savings beyond the expiration of this Agreement. ESP shall indemnify and hold harmless Owner for any claims by third persons arising from Owner's use of such software or other intellectual property.

8.8 Intent and Interpretation

8.8.1 The parties intend that this Agreement shall comply with the all applicable laws and regulations, including but not limited to the Act, and any applicable rules, regulations, and policies prescribed by the director of the Georgia Environmental Finance Authority, in effect as of the date of execution of this Agreement. ESP shall comply with, and shall contractually require its subcontractors and suppliers to comply with, all applicable requirements under O.C.G.A. § 13-10-91 (registration and participation in the Federal Work Authorization Program, as such term is defined in O.C.G.A. § 13-10-90).

8.8.2 The intent of this Agreement is to require complete, correct, and timely execution of the Work and realization of the Guaranteed Savings. Any Work that may be required or implied by, or inferred from, the Contract Documents, or any one or more of them, as necessary to produce the intended result shall be provided by ESP for the sum of ECM Installation Payments and ECM Continuing Services Payments.

8.8.3 This Agreement is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by this Agreement.

8.8.4 When a word, term or phrase is used in this Agreement, it shall be interpreted or construed, first, as defined herein; second, if not defined, according to its generally-accepted meaning in the construction industry; and third, if there is no generally-accepted meaning in the construction industry, according to its common and customary usage.

8.8.5 The words "include," "includes," or "including," as used in this Agreement, shall be deemed to be followed by the phrase, "without limitation."

8.8.6 The specification herein of any act, failure, refusal, omission, event, occurrence, or condition as constituting a material breach of this Agreement shall not imply that any other, non-specified act, failure, refusal, omission, event, occurrence, or condition shall be deemed not to constitute a material breach of this Agreement.

8.8.7 Words or terms used as nouns in this Agreement shall be inclusive of their singular and plural forms, unless the context of their usage clearly requires a contrary meaning.

8.8.8 ESP shall have a continuing duty to read, carefully study, and compare each of the Contract Documents and any documents provided by Owner and shall give written notice to Owner of any inconsistency, ambiguity, error, or omission which ESP may discover with respect to such documents before proceeding with the affected Work. The issuance or the express or implied approval by Owner of such documents shall not relieve ESP of the continuing duties imposed hereby, nor shall any such approval be evidence of ESP's compliance with the Contract Documents. If Owner provides, directly or indirectly, documents for the Project, including any drawings or specifications, OWNER MAKES NO REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER TO ESP CONCERNING SUCH DOCUMENTS. By the execution hereof, ESP acknowledges and represents that it has received, reviewed and carefully examined such Owner-provided documents; has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction; and that ESP has not, does not, and will not rely upon any representations or warranties by Owner concerning such documents because Owner has made no such representations or warranties.

8.8.9 In the event that ESP fails to properly prepare or review the Contract Documents or commences the Work without properly preparing or reviewing such documents, ESP shall remove all Work resulting from the conflict or portion thereof, and reinstall it as directed at no additional cost to Owner.

8.8.10 Neither the organization of any of the Contract Documents into divisions, sections, paragraphs, articles, or other categories, nor the organization or arrangement of the Design and Drawings, shall control ESP in dividing the Work or in establishing the extent or scope of the Work to be performed by subcontractors.

8.9 Hierarchy of Contract Documents

In the event of any conflict, discrepancy, or inconsistency among any of the Contract Documents, the following hierarchy shall control: (a) as between figures given on drawings and the scaled measurements, the figures shall govern; (b) as between large-scale drawings and small-scale drawings, the large-scale drawings shall govern; (c) as between drawings and specifications, the requirements of the specifications shall govern; and (d) as between this Agreement and the drawings and specifications, the requirements of this Agreement shall govern. Notwithstanding such hierarchy, the highest and most stringent standard will apply. As

set forth hereinabove, any and all conflicts, discrepancies, or inconsistencies shall be immediately reported to Owner in writing by ESP.

8.10 Governing Law

This Agreement shall be governed by the laws of the State of Georgia. ESP hereby consents to personal jurisdiction and venue of any dispute, action, or suit in the Superior Court of Fulton County, Georgia, which Court shall have exclusive jurisdiction of same. Except as otherwise provided herein, at the sole discretion of Owner, ESP agrees that any claim or dispute between the parties shall first be submitted to non-binding mediation. The cost of such non-binding mediation shall be shared equally by the parties.

ARTICLE 9. CHANGE ORDERS AND CONTRACT AMENDMENTS

9.1 Changes Permitted

9.1.1 Changes in the Work within the general scope of this Agreement, consisting of additions, deletions, revisions, or any combination thereof, may be ordered by Owner, without invalidating this Agreement, by Change Order.

9.1.2 Changes in the Work shall be performed under applicable provisions of this Agreement, and ESP shall proceed promptly with such changes.

9.2 Changes in ECM Installation Price and Baseline Adjustments

9.2.1 Any change in ECM Installation Payments and Baseline adjustments resulting from a Change Order shall be determined as follows: (a) by mutual agreement between Owner and ESP as evidenced by (1) the change in ECM Installation Payments and adjustments to the Baseline being set forth in the Change Order, together with any conditions or requirements related thereto, and (2) ESP's execution of the Change Order, or (b) if no mutual agreement occurs between Owner and ESP, then, as provided in Section 9.2.2 and Section 9.2.3 below.

9.2.2 If no mutual agreement occurs between Owner and ESP as provided in Section 9.2.1 above, then the change in ECM Installation Payments, if any, shall then be determined on the basis of the reasonable expenditures or savings arising from performing, deleting, or revising the Work attributable to the change, including, in the case of an increase or decrease in ECM Installation Payments, a reasonable allowance for direct job site overhead and profit in the total amount of ____%. In such case, ESP shall present, in such form and with such content as Owner requires, an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. The reasonable direct costs allowed hereunder shall solely include direct job costs and shall not include consequential damages of any kind or nature, nor any home office overhead (except to the extent included in the mark-up specifically provided hereinabove), loss of profit, loss of efficiency or productivity, loss of bonding capacity, loss of use of capital, or similar items of alleged cost, loss, damage, or expense.

9.2.3 If no mutual agreement occurs between Owner and ESP as provided in Section 9.2.1 above, then the adjustment to the Baseline, if any, arising solely from such change shall then be determined by a competent third party that is acceptable to both Owner and ESP. If Owner and ESP are unable to mutually agree on the third party identified in this Section, ESP shall, within five (5) days of Owner's request, provide Owner with a list of at least five (5) third parties that are independent of ESP and all of its affiliates, and who are qualified to determine the appropriate effect of the change on the Baseline. Owner may select a third party from such list. If Owner does not select a third party from such list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to make the determination. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, Owner shall, in its sole discretion, have the right to select the third party to make the determination. The findings of the measurement and verification performed by the third party selected pursuant to this Section shall be conclusive.

9.2.4 Any change in ECM Installation Payments shall be subject to the limitations set forth in Article 7.

9.3 Contract Amendments

Except as provided by Change Order in accordance with this Article, this Agreement may be modified only by a Contract Amendment.

9.4 Effect of Executed Change Order or Contract Amendment

This Agreement, the ECM Installation Payments and ECM Continuing Services Payments, and the Project Installation Schedule may be changed only by Change Order or by Contract Amendment as provided in this Article 9. The execution of a Change Order or Contract Amendment by ESP shall constitute conclusive evidence of ESP's agreement to the changes in the Work, this Agreement as thus amended, the ECM Installation Payments or ECM Continuing Services Payments, and the Project Installation Schedule, as applicable. ESP, by executing the Change Order or Contract Amendment, waives and forever releases any claim against Owner for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order or Contract Amendment.

Notwithstanding any other provision herein to the contrary, Owner's payment obligations under this Agreement shall be limited as provided in Section 7.4.

9.5 Notice to Surety; Consent

ESP shall notify and obtain the consent and approval of ESP's surety with reference to all Change Orders or Contract Amendments if such notice, consent, or approval is required by ESP's surety or by law. ESP's execution of the Change Order or Contract Amendment shall constitute ESP's warranty to Owner that the surety has been notified of and consents to such Change Order or Contract Amendment, and the surety shall be conclusively deemed to have

been notified of such Change Order or Contract Amendment and to have expressly consented thereto.

ARTICLE 10. PROJECT INSTALLATION SCHEDULE, CONTRACT TIME FOR WORK, TERMINATION, AND EVENTS OF DEFAULT

10.1 Project Installation Schedule; Contract Time for Work

10.1.1 ESP shall perform all Work in accordance with the Project Installation Schedule. ESP shall commence the Work INSERT DATE OR "NOTICE TO PROCEED ISSUED BY OWNER" and shall achieve Substantial Completion of the Work no later than TIME PERIOD OR DATE CERTAIN and shall achieve Final Completion no later than TIME PERIOD OR DATE CERTAIN.

10.1.2 ESP shall pay Owner the sum of \$ _____ per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion of the Work. Any sums due and payable hereunder by ESP shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by Owner, estimated at or before the time of executing this Agreement. When Owner reasonably believes that Substantial Completion will be inexcusably delayed, Owner shall be entitled, but not required, to withhold from any amounts otherwise due ESP an amount then believed by Owner to be adequate to recover liquidated damages applicable to such delays. If and when ESP overcomes the delay in achieving Substantial Completion, or any part thereof, for which Owner has withheld payment, Owner shall promptly release to ESP those funds withheld, but no longer applicable, as liquidated damages.

10.1.3 ESP shall pay Owner the sum of \$ _____ per day for each and every calendar day of unexcused delay in achieving Final Completion beyond the date set forth herein for Final Completion of the Work. Any sums due and payable hereunder by ESP shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by Owner, estimated at or before the time of executing this Agreement. When Owner reasonably believes that Final Completion will be inexcusably delayed, Owner shall be entitled, but not required, to withhold from any amounts otherwise due ESP an amount then believed by Owner to be adequate to recover liquidated damages applicable to such delays. If and when ESP overcomes the delay in achieving Final Completion, or any part thereof, for which Owner has withheld payment, Owner shall promptly release to ESP those funds withheld, but no longer applicable, as liquidated damages.

10.1.4 All limitations of time set forth in the Contract Documents are of the essence of this Agreement.

10.2 Contract Termination

10.2.1 Termination by Owner for Cause

Owner may terminate this Agreement if ESP refuses or fails to (a) remediate any Event of Default in accordance with, and within the time specified in, this Article, (b) cause the Work to be prosecuted in a timely manner, (c) cause defective or nonconforming Work to be timely corrected, (d) make prompt payment to subcontractors or suppliers, (e) obey laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or (f) properly perform any other material obligation it has under any of the Contract Documents. Owner may terminate this Agreement for any reason permitted by Georgia law, including but not limited to the Act. Termination under this Section shall be by written notice to ESP and shall be without prejudice to any other right or remedy of Owner. ESP's obligations of this Agreement shall continue as provided in Section 10.3.

Owner may take possession of the site and of all the Work and materials thereon and may finish the Project by whatever methods it deems expedient. Nothing herein shall require Owner to complete the Work. In the event of a termination under this Section, ESP hereby assigns to Owner all outstanding subcontracts and purchase orders, such assignment to be effective after termination of this Agreement and Owner's written acceptance of said assignment. In the event of a termination under this Section, ESP shall not be entitled to receive any payment on amounts otherwise due under this Agreement until the Work on the Project is finally complete. Owner shall be entitled to offset any amount due ESP by all damages, losses, cost, and expense incurred to complete the Work. If the reasonable cost to complete the Work exceeds the unused balance of the ECM Installation Payments, Owner shall be entitled to a return of such amount from ESP. ESP shall return such amount within _____ days upon Owner's request. The remedies specified herein are in addition to, and without prejudice to, other remedies available to Owner.

10.2.2 Termination by Owner for Convenience

Owner may, by written notice, and for any reason whatsoever, terminate this Agreement for convenience. ESP shall, as Owner may direct, terminate outstanding orders and subcontracts relating to this Agreement and settle the liabilities and claims arising out of the termination of such subcontracts and orders. ESP shall transfer, assign, and deliver title to Owner of all completed or partially completed work, materials, fixtures, equipment to be incorporated in the Work, and subcontract rights as ESP has in connection with the terminated Work.

10.2.2.1 During Contract Time for Work

If, at any time during the Contract Time for Work, Owner terminates this Agreement under Section 10.2.2, ESP shall be paid the portion of the ECM Installation Payments equal to the percentage of ECM Installation Work completed on the date such termination becomes effective. The total sum to be paid ESP under this Section shall not exceed the total ECM Installation Payments reduced by the amount of payments previously made, and shall in no event include duplication of payment, or anticipated profit or consequential damages of any kind or nature. Owner's right to withhold or demand the return of any or all payments, as set forth in Sections 7.2 and 7.3, made before or after termination shall not be affected by termination.

The amount of ESP's recovery under this Section 10.2.2.1 shall be subject to an absolute maximum of ESP's direct job costs. Such maximum amount shall be calculated based on reasonable expenditures arising from the performance of Work, including a reasonable allowance for direct job site overhead and profit in the total amount of ____%. In such case, ESP shall present, in such form and with such content as Owner requires, an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. The reasonable direct costs identified hereunder shall solely include direct job costs and shall not include consequential damages of any kind or nature, nor any home office overhead (except to the extent included in the mark-up specifically provided hereinabove), loss of profit, loss of efficiency or productivity, loss of bonding capacity, loss of use of capital, or similar items of alleged cost, loss, damage, or expense. This paragraph solely determines a maximum amount of recovery by ESP under the previous paragraph, and shall not give rise to additional recovery by ESP.

10.2.2.2 During Contract Time for Verified Savings

If, at any time during the Contract Time for Verified Savings, Owner terminates this Agreement under Section 10.2.2, ESP shall be paid, on a pro rata basis, the ECM Continuing Services Payments for such fiscal year up to and including the date such termination becomes effective. The total sum to be paid ESP under this Section shall not exceed the total ECM Continuing Services Payments for such fiscal year, and shall in no event include duplication of payment, or anticipated profit or consequential damages of any kind or nature. Owner's right to withhold or demand the return of any or all payments, as set forth in Sections 7.2 and 7.3, made before or after termination shall not be affected by termination.

10.2.3 Termination by ESP

If Owner shall persistently or repeatedly fail to remediate any Event of Default for a period of sixty (60) days after receiving written notice from ESP of its intent to terminate hereunder, ESP may, by written notice to Owner, terminate this Agreement. ESP's recovery shall be limited as provided in Article 14.

10.3 Survival of Obligations

Notwithstanding anything to the contrary in this Agreement, all obligations arising under the Annual Energy Savings Guaranty under Article 5 shall survive termination of this Agreement under any section and in any circumstance, except a termination under Section 10.2.2. ESP's obligations to correct defective, deficient, and non-conforming work shall survive any termination of this Agreement. No termination of this Agreement shall adversely affect Owner's rights under the performance and payment bonds provided by ESP.

Within _____ days after termination, except a termination pursuant to Section 10.2.2, Owner shall hire a third party that is acceptable to ESP, which acceptance shall not be unreasonably withheld, to perform the Annual Review in accordance with Section 5.2. If Owner and ESP are unable to mutually agree on the third party, ESP shall, within five (5) days of Owner's request, provide Owner with a list of at least five (5) third parties that are independent of ESP and all of its affiliates, and who are qualified to perform the Annual Review. Owner may

select a third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will, within ten (10) days of their selection by Owner and ESP, collectively select another independent third party to perform the Annual Review. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, Owner shall have the right to select the third party to perform the Annual Review in its sole discretion. The findings of the Annual Review performed by the third party selected pursuant to this Section shall be conclusive for purposes of this Agreement.

10.4 Events of Default by Owner

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

- (a) Except as otherwise provided by this Agreement, any failure to make payments to ESP in accordance with the provisions of Schedules C-1 or C-2, as amended in accordance with this Agreement, more than thirty (30) days after written notification by ESP that Owner is delinquent in making such payment, provided that ESP is not in default in its performance under the terms of this Agreement. The notice provided in this paragraph shall be a condition precedent to the occurrence of an Event of Default by Owner; or
- (b) Any other material failure by Owner to perform or comply with the terms and conditions of this Agreement, including breach of any material covenant contained herein, unless such failure is corrected or cured within thirty (30) days after written notice to Owner demanding that such failure to perform be cured, in which case no Event of Default shall be deemed to occur for all purposes under this Agreement. The notice provided in this paragraph shall be a condition precedent to the occurrence of an Event of Default by Owner.

10.5 Events of Default by ESP

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

- (a) ESP's failure to perform the Work, including furnishing and installing ECMs, in accordance with the provisions of this Agreement and within the time specified by this Agreement;
- (b) Failure by ESP to pay any amount owing to Owner due to ESP's failure to achieve the Guaranteed Savings throughout the Contract Time for Verified Savings or to perform any other obligation under the Annual Energy Savings Guaranty in Article 5;
- (c) The standards of comfort and service set forth in Schedule H are not provided due to failure of ESP to properly design, install, maintain, repair or adjust the ECMs, except that such failure shall be deemed cured if corrected or cured within _____ days after written notice to ESP demanding that such failure be cured;
- (d) Failure of ESP to perform its obligations in accordance with the terms of this Agreement, including failure to provide sufficient personnel, equipment, or material to ensure the performance required and failure to meet the Project Installation Schedule provided for in Schedule J;
- (e) ESP's failure to promptly re-perform within a reasonable time Work or services that were rejected as defective or nonconforming.

- (f) The filing of any lien or encumbrance upon Owner's property or property located at the Premises by any subcontractor, laborer, materialman, or other creditor of ESP;
- (g) Any change in ownership or control of ESP without the prior approval of Owner, which shall not be unreasonably withheld;
- (h) Default under any other agreement ESP may presently have or may enter into with Owner during the term of this Agreement;
- (i) Any material misrepresentation, whether negligent or willful and whether in the inducement or in the performance, made by ESP to Owner or a third party;
- (j) The filing of a bankruptcy petition whether by ESP or its creditors against ESP which proceeding shall not have been dismissed within sixty (60) days of its filing, or an involuntary assignment for the benefit of creditors or the liquidation or insolvency of ESP;
- (k) Any failure by ESP to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after notice to ESP demanding that such failure to perform be cured, shall be deemed cured for purpose of this Agreement; or
- (l) ESP's failure to purchase, maintain, and provide evidence of insurance coverage required under Section 6.2 herein.

10.6 Remedies upon Default by ESP

The occurrence of any Event of Default described in Section 10.5(g), (j), or (l) shall constitute an immediate default. Owner may declare ESP in default if any other Event of Default which ESP has not cured within the time specified herein, or if no time is specified, within thirty (30) calendar days after receipt of notice identifying such Event of Default. If a particular type of Event of Default occurs more than _____ time(s), Owner shall have the option, in its sole discretion, to treat an additional Event of Default as an immediate default, irrespective of ESP's subsequent cure.

Written notification of the Event of Default, and Owner's termination of this Agreement, shall be provided to ESP, and such decisions shall be final and effective upon ESP's receipt of such notice. Upon the giving of such notice as provided herein, ESP must discontinue any services, unless otherwise directed in the notice, and deliver all documents and materials accumulated in the performance of this Agreement.

Upon any termination by Owner, Owner may invoke any or all of the following remedies, without limitation:

- (a) The right to take over and complete the Work, or any part thereof;
- (b) The right to immediately terminate this Agreement as to any or all of the Work or other services yet to be performed by ESP;
- (c) The right of specific performance, injunctive relief, or any other appropriate equitable remedy;

- (d) The right to money damages;
- (e) The right to withhold or recover all or any part of ESP's compensation hereunder;
- (f) Any other right or remedy provided by law or equity.

All of Owner's remedies are cumulative and without prejudice to any other remedy existing now or hereafter, at law, in equity or otherwise. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power nor shall it be construed as a waiver of any Event of Default or acquiescence therein, and every such right and power may be exercised from time to time and as often as may be deemed expedient.

10.7 Right to Offset and Recover

Any damages or additional costs incurred by Owner arising from any Event of Default, termination of this Agreement, or otherwise resulting from ESP's breach or non-performance under this Agreement, including the exercise by Owner of any of the remedies available to it under Article 10, and any credits due to or overpayments made by Owner may be offset against any payment due ESP. If such amount is insufficient to cover such damages or excess costs, ESP shall be liable for and promptly remit to Owner the difference within _____ days of written demand therefor. This right to offset is in addition to and not a limitation of any other remedies available to Owner.

10.8 Suspension

Owner shall have the right at any time to direct ESP to suspend its performance, or any designated part thereof, for any reason whatsoever, or without reason, for a cumulative period of up to _____ calendar days. If any such suspension is directed by Owner, ESP shall immediately comply with same.

In the event Owner directs a suspension of performance under this Section, through no fault of ESP and if no Event of Default has occurred, then Owner shall pay ESP as full compensation for such suspension ESP's reasonable costs, actually incurred and paid, of:

- (a) demobilization and remobilization, including such costs paid to subcontractors;
- (b) preserving and protecting work in place; and
- (c) storage of materials or equipment purchased for the Project, including insurance thereon.

ARTICLE 11. WARRANTIES

11.1 ECM Warranties

11.1.1 ESP warrants that the ECMs are, and will continue to be, protected by written warranties covering all parts and equipment performance for the periods

specified in Schedule P and Exhibit III. ESP shall deliver to Owner all such written warranties as a condition precedent to final ECM Installation Payment.

11.1.2 ESP shall pursue all rights and remedies against the manufacturer and each prior seller of the ECMs under the warranties identified in this Section 11.1 in the event of equipment malfunction, improper or defective function, or defects in parts, workmanship, or performance (“ECM Warranty Events”). ESP shall be responsible for managing all warranty work and activities during the warranty periods set forth in Schedule P and Exhibit III. ESP shall notify Owner whenever an ECM Warranty Event occurs and when ESP exercises rights and remedies under the warranties. In its sole discretion, Owner shall have the right to pursue any warranty rights.

11.1.3 ESP shall be liable to, and shall indemnify and hold harmless, Owner for all damage, loss, or claims by any person arising out of the ECMs which would have been recoverable or compensable under the ECM warranties provided by third parties but for ESP’s failure to exercise such warranty rights on behalf of Owner. Without limitation, this Section shall apply to damage, loss, or claims arising out of the use or operation of the ECMs, damage to the ECMs and their performance, and damage to other property and equipment of Owner or the Premises.

11.1.4 All warranties, including but not limited to manufacturers’ warranties, shall be transferable and extend to Owner. The warranties shall specify that only new, and not reconditioned, parts may be used and installed when repair is necessary. ESP warrants that all workmanship, materials, and equipment used in conjunction with the warranty work will be in conformance with the Contract Documents and free from defects.

11.2 Warranty of the Work

11.2.1 ESP warrants that the Work designed, procured, constructed, fabricated, and installed pursuant to this Agreement is new, in good and proper working condition, of merchantable quality, and fit for the particular purposes, including the achievement of Guaranteed Savings. ESP warrants that all Work will be of good quality, free from faults and defects, and in strict conformance with the Contract Documents.

11.2.2 From the date of installation of each ECM and continuing for the warranty periods set forth in Schedule P and Exhibit III for each ECM, or for such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, ESP shall correct or replace all faulty, defective, or nonconforming Work (together with ECM Warranty Events, the “Warranty Events”) as soon as possible, but no later than the time set forth in Section 11.4. ESP shall remove from the Premises all portions of defective, deficient, and nonconforming Work, including other property damaged by such Work as soon as possible, but no later than the time set forth in Section 11.4.

11.3 Notification of Warranty Events

Notification of Warranty Events to ESP under Section 11.1 and Section 11.2 shall be in writing, but may be given by telephone in the event of an emergency.

11.4 ESP's Responsibility for Warranty Work

11.4.1 ESP shall bear all damages, losses, and cost associated with remediating Warranty Events, including but not limited to the removing, replacing, and correcting Warranty Events and other property damaged thereby, and storing other property not damaged thereby. ESP shall indemnify and hold harmless Owner for any damages, losses, and cost incurred by Owner arising from the claims of third parties.

11.4.2 ESP's obligation to achieve the Guaranteed Savings under Article 5 shall not be relieved or diminished as a result of any Warranty Event or warranty work.

11.4.3 If ESP fails to remedy a Warranty Event as provided in this Article 11 within twenty-four (24) hours in the case of emergency conditions, or within fifteen (15) business days in all other cases, after ESP receives notice from Owner as provided in Section 11.3, then (a) Owner may remediate such Warranty Event and (b) ESP shall be liable to Owner for all damages, losses, and cost incurred by Owner associated with the remediation of the Warranty Event, including but not limited to claims by third persons, cost incurred to remove, replace, and repair the affected Work and other property damaged thereby, cost incurred to remove and store equipment and materials, and cost incurred to remove, store, and reinstall property not damaged thereby.

11.4.4 Nothing contained in this Article 11 shall establish any period of limitation with respect to other obligations which ESP has under the Contract Documents. Owner's remedies under this Article 11 are in addition to, and without prejudice to, its remedies under other provisions in the Contract Documents.

ARTICLE 12. THE PREMISES

12.1 Description of the Premises

The Premises in which the Work will be performed under this Agreement are described in Schedule D.

12.2 Ownership of Existing Property

The Premises and all equipment and materials existing at the Premises at the time of execution of this Agreement shall remain the property of Owner.

12.3 Location and Access

Owner shall provide sufficient space at the Premises for the installation and operation of the ECMs, including access to office space with a telephone line, if necessary to allow ESP to perform all required ECM operation, maintenance, monitoring, repairs, replacements, and adjustments, and training services. Owner shall provide access to the Premises for ESP and its employees or subcontractors to install, inspect, operate, maintain, monitor, repair, replace, and adjust the ECMs in accordance with the terms of the Contract Documents during such reasonable hours as may be requested by ESP and acceptable to Owner. To avoid interference with Owner's operations, Owner may require ESP to perform Work during times other than normal business hours, and Contractor agrees that it will not request and shall not be entitled to any additional compensation therefor. ESP's access to correct any emergency condition shall not be unreasonably restricted by Owner.

12.4 Material Changes

Subject to the definition of Material Change as provided herein, actions by Owner that may constitute a Material Change subject to this Section 12.4 include, but are not limited to, the following:

- (a) Changes in the manner of use of the Premises by Owner; or
- (b) Changes in the hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or
- (c) Permanent changes in the comfort and service parameters set forth in Schedule H; or
- (d) Changes in the occupancy of the Premises; or
- (e) Changes in the structure of the Premises; or
- (f) Changes in the types and quantities of equipment used at the Premises; or
- (g) Modification, renovation or construction at the Premises; or
- (h) Owner's failure to maintain and repair the ECMs, unless ESP was responsible for such maintenance and repair, or unless ESP failed to identify and inform Owner in writing of such maintenance and repair before execution of this Agreement as required by the Audit Agreement; or
- (i) Any significant damage to the Premises or the ECMs caused by fire, flood, or other casualty or any condemnation affecting a significant portion of the Premises; or
- (j) The permanent or temporary closing of a building at the Premises; or
- (k) Any other substantially changed condition, other than weather, affecting energy use at the Premises.

12.5 Reported Material Changes; Notice by Owner.

Owner shall use its best efforts to deliver to ESP a written notice describing all actual or proposed Material Changes no less than thirty (30) days before any actual or proposed Material Change occurs. Owner shall use its best efforts to deliver to ESP a written notice describing Material Changes that result because of an emergency or other situation which precludes advance notification as soon as reasonably possible after Owner discovers that the Material Change occurred.

12.6 Reported Material Changes; Adjustments to Baseline

Any changes in energy usage which occur as the result of a Material Change reported in accordance with Section 12.5 shall be timely reviewed by ESP and Owner to determine what, if any, adjustments to the Baseline set forth in Schedule E are necessitated by such Material Change. Any adjustments made to the Baseline shall be in accordance with Industry Engineering Standards (as such term is defined in the Act). If the parties agree on an appropriate adjustment to the Baseline, such adjustment shall be reflected in a Change Order or Contract Amendment in accordance with Article 9.

If the parties are unable to agree on (1) whether a Material Change has occurred, (2) the appropriate variables to be accounted for as provided herein, or the proper adjustment arising from such variables, or (3) an acceptable adjustment to the Baseline resulting from a Material Change, then a mutually agreeable third party shall make such determinations in accordance with this Section. The Baseline shall be adjusted to reflect the adjustment, if any, determined by the third party.

If Owner and ESP are unable to mutually agree on a third party as provided in this Section, ESP shall provide, within five (5) days of Owner's request, a list of at least five (5) third parties that are independent from ESP and its affiliates, and who are qualified to make the determinations identified in this Section. Owner may select any third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to make the determinations identified in this Section. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, within the time required by this Section, Owner shall have the right to select the third party to make the determinations identified in this Section in its sole discretion. The determinations identified in this Section of the third party selected pursuant to this Section shall be conclusive for purposes of this Agreement.

12.7 Unreported Material Changes

During the Contract Time for Verified Savings, and in the absence of any reported Material Change, if Verified Savings deviate more than _____ % during any fiscal year from Guaranteed Savings for such fiscal year, after adjustment for variables that are not, in whole or in part, within ESP's control, then ESP shall timely ascertain the cause of such deviation. ESP shall report its findings to Owner in a timely manner, but ESP shall not be entitled to an extension of time to complete the Annual Review and written report, and pay for any deficiency, as provided in Section 5.2, unless so provided in a Contract Amendment pursuant to Article 9.

If Owner agrees that the deviation was caused by a Material Change, then Owner and ESP shall determine what adjustments, if any, to the Baseline set forth in Schedule E are appropriate. Any mutually agreeable adjustment to the Baseline shall be reflected in a Contract Amendment in accordance with Article 9. No adjustment to the Baseline shall be made for any fiscal year prior to the fiscal year before which an unreported Material Change is identified pursuant to this Section.

If the parties are unable to agree on (1) whether a Material Change has occurred, (2) the appropriate variables to be accounted for as provided herein, or the proper adjustment arising from such variables, or (3) an acceptable adjustment to the Baseline resulting from a Material Change, then a third party mutually agreeable to Owner and ESP shall make such determinations in accordance with this Section. If Owner and ESP are unable to mutually agree on a third party as provided in this Section, ESP shall provide, within five (5) days of Owner's request, a list of at least five (5) third parties that are independent from ESP and its affiliates, and who are qualified to make the determinations identified in this Section. Owner may select any third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to make the determinations identified in this Section. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, within the time required by this Section, Owner shall have the right to select the third party to make the determinations identified in this Section in its sole discretion. The determinations identified in this Section of the third party selected pursuant to this Section shall be conclusive for purposes of this Agreement.

12.8 Owner's Election Upon Material Changes

If a Material Change results from Owner vacating, abandoning, or transferring an entire Facility, then for purposes of determining the Verified Savings associated with the ECMs in such Facility for all future fiscal years, Owner may elect to assume that such future Verified Savings would equal the Verified Savings realized during the most current full fiscal year before the Material Change, even if such Verified Savings do not exceed the Guaranteed Savings for such fiscal year. At Owner's sole election, this provision may apply to any other Material Change that substantially changes the use or occupancy of the Premises.

12.9 Hazardous Materials

ESP shall comply with all applicable laws, rules, and regulations concerning hazardous materials, including but not limited to (i) asbestos, material containing asbestos, or the existence, use, detection, removal, containment, or treatment thereof, and (ii) pollutants, hazardous wastes, and contaminants. Without limitation, ESP shall comply with the National Emission Standard for Hazardous Air Pollutants as promulgated by the United States Environmental Protection Agency pursuant to Section 112 of the Clean Air Act, and with the standards set forth in 40 C.F.R. § 61.145. ESP shall observe all notification procedures established by the United States and Georgia environmental protection agencies.

If ESP or any of its subcontractors encounter any hazardous material on the Premises that has not been previously identified in connection with the Audit, in connection with the ECMs, or otherwise, then ESP shall, before disturbing such hazardous material, immediately notify Owner of such hazardous material and the location thereof. Within _____ days after ESP discovers such hazardous material, ESP shall inform Owner whether the Work can be modified to avoid such hazardous material.

In its sole discretion, Owner may elect whether to proceed with or without the modification of the Work or suspend or terminate this Agreement in accordance with Article 10. If Owner elects to modify the Work, it will issue a Change Order in accordance with Article 9. If Owner elects to not modify the Work, ESP shall proceed at Owner's direction. If Owner suspends the Work to remove hazardous materials, the Contract Time for Work may be extended, without any additional compensation to ESP other than as provided in Section 10.8, for the amount of time required to remove the hazardous materials.

Notwithstanding any other provision herein, ESP shall not be entitled to additional compensation or time for modifications or changes to the Work, or suspension or termination of this Agreement, resulting from the existence of hazardous materials on the Premises or Owner's election under this Section, if ESP could have reasonably discovered or anticipated such hazardous materials in connection with the Audit, site observations, or otherwise.

ARTICLE 13. ACCEPTANCE

13.1 Acceptance of the Work

Acceptance of the Work shall occur no earlier than the date that all of the following conditions are satisfied:

- (a) Final Completion has occurred;
- (b) the ECMs identified in Schedule A are installed and operable for their intended purpose;
- (c) No Event of Default under Article 10 exists;
- (d) the Annual Energy Savings Guaranty provided by ESP under Article 5 becomes effective;
- (e) all warranties, as-built drawings, and similar close-out documents have been provided to Owner;
and
- (f) Owner has executed a Certification of Acceptance as set forth in Exhibit II.

Acceptance of the Work shall not relieve ESP of any obligations hereunder, including but not limited to the obligations under the Annual Energy Savings Guaranty (as defined herein), ESP's reporting obligations, and obligations to correct defective, deficient, and non-conforming work; to maintain and monitor the ECMs; to measure and verify Verified Savings; and to perform the Annual Review.

13.2 Documents Provided With Notice of Final Completion

ESP shall submit the following documents to Owner with its notice of Final Completion:

- (a) All Contract Documents;
- (b) As-built drawings depicting actual ECMs installed and the condition of work performed;
- (c) Documentation of commissioning, including any certificates required by Schedule N;
- (d) Certificates of inspection for all ECMs which require local government inspection;
- (e) Any other certificate or document required by law to be provided by ESP to Owner; and
- (f) Asbestos abatement compliance records, if applicable.

13.3 Ownership of Documents

Owner shall retain or receive ownership of all documents related to the Project, including but not limited to the Contract Documents, drawings, specifications, reports, renderings, models, electronic media and all such other documents, and Owner shall have a license to use any copyrighted material contained in such documents.

ARTICLE 14. CLAIMS

14.1 Claim Procedures and Conditions

All ESP claims shall be initiated by written notice and claim to Owner. Such written notice and claim must be furnished within seven (7) days after occurrence of the event, or the first appearance of the condition, giving rise to the claim. The failure to give the notice of claim required by this Section shall constitute in a waiver of such claim and all damages, losses, and cost associated therewith.

Pending final resolution of any claim of ESP, ESP shall diligently proceed with performance of this Agreement and Owner shall continue to make payments to ESP in accordance with this Agreement. The resolution of any valid claim under this Article shall be reflected by a Change Order or Contract Amendment executed by Owner and ESP.

14.2 Claims for Concealed and Unknown Conditions

Should concealed and unknown conditions encountered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure be at variance with the conditions indicated in writing by Owner, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided for in this Agreement, be encountered, ECM Installation Payments may be increased or decreased by Change Order or Contract Amendment. Notwithstanding anything herein, conditions observable from a careful inspection shall not constitute a concealed or unknown condition. As a condition precedent to Owner having any liability to ESP, or any obligation to enter a Change Order or Contract Amendment, for

concealed or unknown conditions, ESP must give Owner written notice as required by Section 14.1, and an opportunity to observe and document, the condition prior to disturbing it.

14.3 Claims for Additional Costs

If ESP wishes to make a claim for an increase in the ECM Installation Payments, as a condition precedent to any liability of Owner therefor, ESP shall provide the notice required by Section 14.1, and before proceeding to execute any additional or changed Work. The failure by ESP to give such notice and to give such notice prior to executing the Work shall constitute a waiver of any claim for additional compensation.

14.4 Claims for Additional Time

If ESP is delayed in progressing any task which at the time of the delay is then critical or which during the delay becomes critical, as the sole result of any act or neglect to act by Owner or someone acting on Owner's behalf, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipatable, fire or any causes beyond ESP's control, then the date for achieving Substantial Completion of the Work shall be extended as provided in a Change Order or Contract Amendment pursuant to Article 9. Notwithstanding anything herein, the sole and exclusive remedy for any delay not caused by Owner shall be an extension of time.

The notice and claim for an extension of time by ESP shall be made in accordance with Section 14.1 and shall set forth in detail ESP's basis for seeking additional time in which to complete the Project. In the event the delay to ESP is a continuing one, only one notice and claim for additional time shall be necessary. If ESP fails to make such claim as required in Section 14.1 and this Section 14.4, any claim for an extension of time shall be waived.

14.5 Limitation on Claims and Owner's Liability

14.5.1 In connection with any valid claim by ESP against Owner, any liability of Owner shall be strictly limited to direct costs incurred by ESP and shall in no event include indirect costs or consequential damages of ESP, including but not limited to home office overhead, loss of profit, loss of efficiency or productivity, loss of bonding capacity, loss of use of capital, or similar items of alleged damage. Owner shall not be liable to ESP for claims of third parties, including subcontractors. ESP shall raise and assert any and all defenses which it may have to any claim of any subcontractor or other third party and, shall not "pass through" any such claims, without first raising and asserting such defenses, and litigating same in a court of competent jurisdiction.

14.5.2 ESP shall make no claims of any type when the basis of such claim resulted from ESP's breach of this Agreement, negligence, or failure to adequately observe, inspect, and test the existing conditions, or resulting from its failure to properly perform the Audit.

14.5.3 Any adjustment to the ECM Installation Payments or ECM Continuing Services Payments made by Change Order or Contract Amendment shall be subject

to the limitations of this Agreement, including but not limited to Article 9 and Section 7.4, and all other limitations provided by law.

ARTICLE 15. STATUTORY AND REGULATORY RULES

15.1 Approval by the Authority

This Agreement shall have no force and effect unless and until the Director of Georgia Environmental Finance Authority, or his or her delegate, approves this Agreement. Such approval is a condition precedent to Owner's obligations under, and execution of, this Agreement.

15.2 Appropriation

15.2.1 As expressly provided in the Act, the parties agree that the following statutory provision is incorporated herein:

At the beginning of each fiscal year, a governmental unit's appropriations shall be encumbered for the estimated payments for multiyear guaranteed energy savings performance contract work to be performed in the appropriation fiscal year. Payment for multiyear guaranteed energy savings performance contract work performed pursuant to contract in any fiscal year other than the current fiscal year shall be subject to appropriations by the General Assembly. Multiyear guaranteed energy savings performance contracts shall contain a schedule of estimated completion progress, and any acceleration of this progress shall be subject to the approval of the authority, provided funds are available. State agencies shall have the right to terminate without further obligation any multiyear guaranteed energy savings performance contract, provided that the cancellation is subject to the termination provisions of the multiyear guaranteed energy savings performance contract, if the state agency determines that adequate funds will not be available for all of the payment obligations of the state agency. The state agency's determination regarding the availability of funds for its obligations shall be conclusive and binding on all parties to the contract. In the event of termination of any contract, the contractor shall be given a written notice of termination at least 60 days before completion of scheduled work for which funds are available. In the event of termination, the contractor shall be paid for the work already performed in accordance with the contract specifications.

15.2.2 Nothing contained herein shall give ESP the right to recover when this Agreement is terminated for cause as provided in Section 10.2.1.

15.3 Benefits Inure to Owner

Unless Owner provides written consent otherwise, all benefits provided by, or arising out of, the Work, including but not limited to Verified Savings, utility rebates, and credits, belong to and inure to the benefit of Owner. All savings or other benefits of ECMs that accrue before the Contract Time for Verified Savings shall inure to the benefit of Owner and ESP shall receive no compensation therefor.

15.4 Owner's Limited Financial Obligation

Owner's financial obligations under this Agreement are limited to and cannot exceed the Verified Savings, as calculated using the Method of Measurement and Verification, actually generated by the ECMs, even if no Verified Savings are realized from the ECMs. Owner is obligated only for those sums payable and appropriated for payment during each fiscal year.

15.5 Notification to Owner's Utilities

Upon execution of this Agreement, ESP shall provide written notification to Owner for Owner's transmittal to its utility providers. The notice shall include a description of all ECMs to be installed under this Agreement.

15.6 Prompt Pay Act and Retention Law Inapplicable

To the greatest extent permitted by law, the provisions of the Georgia Prompt Pay Act, O.C.G.A. §§ 13-11-1 through 13-11-11, and any restrictions on retainage thereunder or under O.C.G.A. § 13-10-80, shall not apply to this Agreement and any payment obligation hereunder. ESP expressly waives any rights arising therefrom and agrees that this Agreement shall control ESP's rights and obligations.

15.7 Davis-Bacon Act

ESP acknowledges that the Project is funded, in whole or in part, by proceeds of one or more Qualified Energy Conservation Bonds, as defined in Section 54D of the Internal Revenue Code of 1986. As a result, Subchapter IV of Chapter 31 of Title 40, United States Code ("Davis-Bacon Act"), shall apply to all labor on or related to the Project. (Pub. L. 111-5, Division B, Section 1601). ESP is responsible for compliance with each and every provision of the Davis Bacon Act and all rules and regulations promulgated thereunder. ESP shall comply with Appendix , which is incorporated herein by reference.

15.8 Employment Authorization Program

In accordance with the Georgia Security and Immigration Compliance Act, as amended, ESP shall register and participate in the federal work authorization program, or E-Verify. All subcontractors and sub-subcontractors, as such terms are defined in O.C.G.A. § 13-10-90, shall also be required to comply with these E-Verify requirements. ESP and its subcontractors and sub-subcontractors will be required to execute an affidavit verifying their compliance with O.C.G.A. Section 13-10-91.

15.9 Generation of Electricity; Compliance with Laws

If an ECM results in the generation of electricity, ESP shall ensure that such generation complies with all applicable federal and state laws and regulations. Without limitation, ESP shall be responsible for compliance with the Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1 through 46-3-15; the High-Voltage Safety Act, O.C.G.A. §§ 46-3-30 through 46-3-40; and the Georgia Cogeneration and Distributed Generation Act of 2001, O.C.G.A. §§ 46-3-50 through 46-3-56; rules, regulations, and orders of the Georgia Public Service Commission, the Georgia Environmental Protection Division, the U.S. Environmental Protection Agency, the Federal

Energy Regulatory Commission, and all other governmental bodies with jurisdiction over the generation of electricity by the ECM.

ARTICLE 16. EXECUTION UNDER SEAL

IN WITNESS WHEREOF, the Parties have executed this Guaranteed Energy Savings Performance Contract under seal by their authorized signatures as of this _ day of _____, _____.

For Owner

For ESP

By: _____

By: _____

Title: _____

Title: _____

Under Seal

SPECIMEN