

PENNSYLVANIA SUSTAINABLE ENERGY FINANCE (PennSEF) PROGRAM

GUARANTEED SAVINGS AGREEMENT

between

[OWNER]

and

[CONTRACTOR]

Version 1.0

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GUARANTEED SAVINGS AGREEMENT

This Guaranteed Savings Agreement (this “**Agreement**”) is entered into as of [_____, ____] by [_____, ____], a [_____] (the “**Contractor**”), and [_____, ____], a [_____] (the “**Owner**”), for the purpose of installing certain energy saving equipment and providing other services designed to save energy for the Owner’s property and buildings described herein (together, the “**Project**”).

Background

A. The Owner desires to implement certain energy and water conservation measures at its facilities described in Schedule B (Description of Owner Facility; Pre-Existing Equipment Inventory) attached hereto.

B. The Pennsylvania Treasury Department has partnered with the Foundation for Renewable Energy and Environment (“**FREE**”), with financial support from the West Penn Power Sustainable Energy Fund, to develop a prudent, market-based investment vehicle that promotes energy and water efficiency, clean energy generation, economic development and environmental improvement. To achieve this goal, FREE has established a program to facilitate the implementation and financing of energy and water conservation measures by governmental units and non-profit organizations in the Commonwealth of Pennsylvania.

C. The Owner is a [“governmental unit” as defined in the Guaranteed Energy Savings Act (62 Pa C.S. §3751) (the “**Act**”) / [a non-profit organization under Section 501(c)(3) of the Internal Revenue Code] and has determined that it would be in its best interest to implement such measures by participating in the Program (as defined herein).

D. The Contractor has experience in successfully performing work such as the work to be performed by it pursuant to this Agreement [and the Owner has selected Contractor to implement the Project pursuant to its Request for Proposals dated _____].

E. As part of the selection process, the Owner and the Contractor proceeded with a preliminary audit (the “**Preliminary Audit**”) prior to entering into this Agreement to determine likely energy and water conservation measures, the associated energy and water savings, and estimates of the cost of installation. The Owner selected the Contractor based on the Preliminary Audit, a copy of which is attached as Appendix A (Preliminary Audit Report) hereto, and the Contractor and the Owner agreed to enter into this Agreement.

F. It is anticipated that the Owner will pay the Construction Price (as defined herein) to the Contractor from the proceeds of [_____] (the “**Bonds**”) to be issued by the Pennsylvania Economic Development Financing Authority (the “**Issuer**”) pursuant to a Trust Indenture (the “**Indenture**”) between the Issuer and [_____] (the “**Trustee**”), the proceeds of which will be deposited into various accounts established under the Indenture to fund the Project and similar projects being undertaken by other governmental units and non-profit organizations participating in the Program. In consideration of the undertaking of the Issuer to fund the cost of the Project, the Owner will enter into a Lease Agreement in the form

attached hereto as Exhibit 6 (Form of Lease Agreement) (the “**Lease Agreement**”), pursuant to which the Owner will make lease payments described therein to the Trustee.

Agreement

In consideration of the Background and the mutual covenants, undertakings and conditions set forth below, the parties, intending to be legally bound, agree as follows:

ARTICLE 1 DEFINITIONS; CONVENTIONS

1.1. Definitions. Unless otherwise expressly defined herein, each capitalized term in this Agreement has the meaning given to it in this Section 1.1.

Applicable Codes means codes, standards or criteria promulgated by nationally recognized technical standards institutions, which are applicable to or affect the Services as set forth in Schedule A (Scope of Construction Work).

Applicable Law means any law, regulation, requirement or order of any federal, state or local government agency, court or other governmental body, or the terms and conditions of any permit, license or governmental approval, applicable from time to time to the Work or the performance of any obligations under this Agreement.

Application for Payment means the application for payment submitted pursuant to Section 8.2, in substantially the form of Exhibit 4 (Form of Application for Payment).

Audit Services means the services provided by the Contractor to perform the Energy Audit and prepare the Investment Grade Audit Report pursuant to Article 2 below.

Baseline Energy Consumption is defined in, and is measured in accordance with, Schedule E (Baseline Energy Consumption).

Bonds is defined in the Background.

Change is defined in Section 6.1.

Change Order is defined in Section 6.1.

Commonwealth means the Commonwealth of Pennsylvania.

Construction Price is defined in Section 8.1.

Construction Schedule means the Construction Schedule set forth in Schedule G (Construction and Installation Schedule).

Construction Unit means one or more ECM Installations that will be constructed as an integrated unit of Construction Work and are capable of functioning and being tested independent of the balance of the Construction Work as set forth in Schedule O (Commissioning and Performance Tests).

Construction Unit Completion means, with respect to each Construction Unit, the conditions set forth in Section 5.2(a) have been met for such Construction Unit.

Construction Unit Completion Date means, with respect to each Construction Unit, the date on which Construction Unit Completion was achieved for such Construction Unit.

Construction Work is defined in Section 4.1.

Contractor is defined in the first paragraph of this Agreement.

Contractor Documents is defined in Section 4.10.

ECM means energy and water conservation measures, including equipment and software foundations and interconnections.

ECM Installations means ECMs to be installed at the Owner Facilities as described in the Investment Grade Audit Report and the Scope of Work.

ECM Installations Operation Manual means the manual meeting the requirements therefor set forth in Exhibit 2 (Contractor Documents).

Energy Audit is defined in Section 2.1.

Energy and Water Savings, means, for any Savings Year, the energy and water savings for such Savings Year, expressed in dollars, based on a comparison of actual metered data with Baseline Energy Consumption and using the energy and utility prices and an annual escalation rate for such prices set forth in Schedule F (Savings Measurement and Verification Plan; Methodology to Adjust Baseline), and as calculated in accordance with the Measurement and Verification Plan. Energy and Water Savings shall be adjusted to reflect the impact (positive or negative) of Uncontrollable Circumstances, Change Orders or Material Changes on actual meter reading to reflect the expected meter readings had such impacts not occurred. Energy and Water Savings do not include operational savings, savings from avoided maintenance or capital costs, or savings (or reduced savings) from changes in energy prices as compared to the escalated prices set forth in Schedule F (Savings Measurement and Verification Plan; Methodology to Adjust Baseline).

Expected Metered Savings means Energy and Water Savings reasonably expected to be achieved by the Owner over the term of this Agreement as calculated in accordance with Schedule C (Energy Saving Guarantee).

Final Completion means that conditions set forth in Section 5.3(a) have been met.

Final Completion Certificate is defined in Section 5.3(a)(vi).

Final Completion Date means the date on which Final Completion occurs.

FREE is defined in the Background.

Good Industry Practice means those practices, methods and acts that at any particular time, in the exercise of reasonable judgment, and consistent with current utility, telecommunications, data processing and software development industry practices, as applicable, would have been expected to accomplish the desired result in the manner consistent with Applicable Law, Applicable Codes, and standards of reliability, safety, efficiency and environmental protection in effect at such time, including the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced energy services contractor engaged in the same type of undertaking under the same or similar circumstances.

Guaranteed Final Completion Date means the date that is [___] days after the date of the Notice to Proceed, as it may be extended from time to time by a Change Order.

Guaranteed Savings means the Energy and Water Savings levels set forth in Schedule C (Energy Saving Guarantee).

Guaranteed Savings Payment is defined in Section 11.3(a).

Hazardous Substance means any substance, material, gas, or particulate matter that is regulated by any governmental authority as an environmental pollutant or dangerous to public health, public welfare, or the natural environment, including protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (a) defined as “toxic,” “polluting,” “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “solid waste” or “restricted hazardous waste” under any provision of local, state, or federal law; (b) petroleum, including any fraction, derivative or additive; (c) asbestos; (d) polychlorinated biphenyls; (e) radioactive material; (f) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. (33 U.S.C. § 1251); (g) defined as a “hazardous waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (42 U.S.C. § 6901); (h) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (42 U.S.C. § 9601); (i) defined as a “chemical substance” pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. (15 U.S.C. § 2601); or (j) defined as a pesticide pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (7 U.S.C. § 136).

Indenture is defined in the Background.

Investment Grade Audit Report is defined in Section 2.1.

Issuer is defined in the Background.

Late Payment Rate means, with respect to any amount due under this Agreement, a rate per annum equal to the lower of (a) the prime interest rate as published from time to time in The Wall Street Journal on the first day that such amount becomes past due plus [___]% and (b) the highest rate allowed by law.

Lease Agreement is defined in the Background.

Lease Payments means the schedule of payments to be made during the term of, and in accordance with, the Lease Agreement.

Material Change means any change in or to the Owner Facilities, whether structural, operational or otherwise in nature, that increases or decreases annual energy consumption at the Owner Facilities, as determined in accordance with the Measurement and Verification Plan, by more than 5% after adjustments for climatic variations, including the following:

- (a) manner of use of the Owner Facilities;
- (b) hours of operation of the Owner Facilities or of any equipment or energy using systems operating at the Owner Facilities;
- (c) occupancy of the Owner Facilities;
- (d) modification, renovation or construction at the Owner Facilities;
- (e) permanent changes in the Standards of Comfort;
- (f) a change in the types and quantities of equipment used at the Owner Facilities; and
- (g) the effect of any malfunction, emergency or other event or condition described in Section 9.5(a) as to which the Owner failed to notify the Contractor in accordance with Section 9.5(a).

Measurement and Verification Plan means the plan by which the Energy and Water Savings will be measured and verified as set forth in Schedule F (Savings Measurement and Verification Plan; Methodology to Adjust Baseline).

Measurement and Verification Services means the services described in Schedule F (Savings Measurement and Verification Plan; Methodology to Adjust Baseline).

Milestone Schedule means the schedule set forth in Schedule P (Milestone Schedule).

Notice to Proceed is defined in Section 3.2.

Owner is defined in the first paragraph of this Agreement.

Owner Facilities means the facilities identified as such in Schedule B (Description of Owner Facility; Pre-Existing Equipment Inventory).

Owner Property means the property identified as such in Schedule B (Description of Owner Facility; Pre-Existing Equipment Inventory).

Owner Project Account means the account established under the Indenture in the name of the Owner.

Person means any individual, partnership, corporation, association, business, trust, government or political subdivision thereof, governmental agency or other entity.

Preliminary Audit is defined in the Background.

Program Agreement means the Program Agreement among FREE, the Owner and the Contractor in substantially the form of Exhibit 3 (Form of Program Agreement).

Project is defined in the first paragraph of this Agreement.

Savings Estimate means the analysis undertaken pursuant to Section 2.8 using the form attached hereto as Exhibit 8 (Form of Savings Estimate).

Savings Year means the year beginning on the first day of the month following the Guaranteed Final Completion Date and each year thereafter, except that the final Savings Year will end on the last day of the term hereof.

Scope of Work means the descriptions of, and specifications for, the Construction Work set forth in Schedule A (Scope of Construction Work).

Sites means the locations for the performance of the Construction Work within the Owner Facilities identified as such in Schedule B (Description of Owner Facility; Pre-Existing Equipment Inventory).

Standard of Care is defined in Section 12.1.

Standards of Comfort means the standards for heating, cooling, hot water and lighting described in Schedule I (Standards of Comfort).

Subcontractors means those Persons at any tier of supply that supply services or materials to the Contractor in discharge of the Contractor's obligations under this Agreement.

Trustee is defined in the Background.

Uncontrollable Circumstance means, with respect to either party, an act, event or condition that has a material adverse effect on the rights or the obligations of such party under this Agreement and that is beyond the reasonable control of the party relying thereon as justification for not performing an obligation or complying with any condition required of such party under this Agreement, including:

(a) acts of God; labor disturbances; accidents; failure of a governmental entity to issue a permit or approval required for performance; civil disorders; acts of aggression; changes in any law or regulation adopted or issued by a governmental entity after the date of this Agreement; a court order; explosions; failure of utilities; material shortages;

(b) the adoption, promulgation, modification or reinterpretation after the date of this Agreement of any Applicable Law that was not adopted, and/or officially

published in The Congressional Record, The Federal Register or the legislative or regulatory publication of the jurisdiction of the Applicable Law on or before the date of this Agreement;

(c) as to a party, the negligence, willful misconduct or unexcused failure to perform of the other party; and

(d) as to the Contractor (i) any concealed condition at the Owner Facilities that the Contractor could not have reasonably been expected to anticipate or to discover before entering into this Agreement, and (ii) the discovery of Hazardous Substances on the Owner Facilities for which the Owner is responsible pursuant to Section 6.2, including the presence of asbestos-containing materials;

provided that Uncontrollable Circumstance does not include (A) strikes or other labor actions arising from labor relations issues involving the employees of the Contractor or Subcontractors in connection with the performance of the Work or (B) any Hazardous Substance for which the Contractor is responsible under Section 7.1.

Unit Completion Certificate is defined in Section 5.2(a)(iii).

Warranties is defined in Section 9.1(b).

Warranty Period is defined in Section 9.1(c).

Work means the Construction Work, the Audit Services and the Measurement and Verification Services, together with any other obligation or undertaking of Contractor hereunder.

1.2. Conventions. Unless otherwise expressly provided in this Agreement:

(a) references to Persons include their successors and permitted assigns;

(b) the term “include,” “includes” or “including” means include, includes or including without limitation (as the case may be);

(c) references to the Articles, Sections and Exhibits mean the articles and sections of, and the exhibits to, this Agreement;

(d) the term “day” means a calendar day and includes Saturdays, Sundays and holidays, except that, if any obligation for the payment of money under this Agreement falls due on a Saturday, Sunday or a holiday on which Commonwealth banks are not open for business, the payment will be due on the next business day thereafter;

(e) all references to a statute, regulation, law, agreement or instrument mean such statute, regulation, law, agreement or instrument as it may be amended, amended and restated or supplemented from time to time, including (in the case of statutes, regulations or laws) by successor statutes, regulations or laws and (in the case of agreements or instruments) by waiver or consent;

(f) references to a party means a party to this Agreement; and

(g) a reference to a governmental agency, department, board, commission or other public body or to a public officer includes an entity or officer that or who succeeds to or performs substantially the same functions as those performed by such governmental agency, authority, department, board, commission or other public body or to a public officer.

ARTICLE 2 INVESTMENT GRADE AUDIT

2.1. Scope of Energy Audit and Investment Grade Audit Report. The Contractor, with the cooperation of the Owner, will perform a comprehensive investment grade energy use and savings analysis (the “Energy Audit”) and prepare a detailed engineering and economic report (the “Investment Grade Audit Report”) to be attached hereto as Appendix B that specifically identifies the ECMs that the Contractor recommends to be installed or implemented at the Owner Facility. The Investment Grade Audit Report will contain detailed projections of energy and cost savings to be obtained at the Owner Facility as a result of the installation or implementation of the ECMs. The savings calculations will document and use assumptions, projections, and baselines that best represent the true value of future energy and water savings for the Owner Facility, including accurate marginal cost for each unit of savings at the time the Energy Audit is performed; documented material and non-staff labor costs actually avoided; adjustments to the baseline to reflect current conditions at the Owner Facility compared to the historic base period; calculations that account for the interactive effects of the recommended ECMs, etc. The Investment Grade Audit Report must clearly describe how utility tariffs were used to calculate savings for all ECMs. The Investment Grade Audit Report must describe the Contractor’s plan for installing or implementing the measures in the Owner Facility, including all anticipated costs associated with the installation and implementation. The primary purpose of the Investment Grade Audit Report is to provide the engineering and economic basis for the Construction Work and the Guaranteed Savings. Sections 2.2 through 2.10 below set forth the tasks the Contractor shall perform in performing the Energy Audit and preparing the Investment Grade Audit Report.

2.2. Collect General Owner Facility Information.

(a) The Contractor shall (i) collect general Owner Facility information, such as size, age, construction type, condition and general use of the Owner Facility, (ii) collect and summarize Owner Facility utility cost and consumption data for the most recent 36-month period and (iii) evaluate the impact on utility cost and consumption of any energy initiatives, currently being installed or currently contemplated to be installed by the Owner in the Owner Facility, which will not be subject to this Agreement.

(b) The Owner shall furnish or cause to be furnished:

(i) all available records and data concerning energy and water usage for the Owner Facility for the most current 36-month period, if available, including utility records; occupancy information; descriptions of any changes in the structure of the Owner Facility or its heating, cooling, lighting or other systems or energy requirements; descriptions of all major energy and water consuming or energy and water saving

equipment used in the Owner Facility; any comfort problems, code deficiencies, and a description of current energy management procedures;

(ii) a record of any energy-related improvements or modifications that have been installed during the past three years or are currently being installed or are currently contemplated to be installed by the Owner in the Owner Facility that would not be subject to this Agreement;

(iii) copies of drawings, equipment logs and maintenance work orders to the Contractor; and

(iv) Any constraints that may affect the audit process or savings analysis. This may include potential ECMs that the Owner does not want considered, the term of this Agreement and anticipated changes in the use, operation, or size of the Owner Facility.

2.3. Analyze Existing Systems and Equipment.

(a) The Contractor shall prepare an analysis based on a physical inspection of the major electrical and mechanical systems at the Owner Facility, including:

(i) cooling systems and related equipment;

(ii) heating and heat distribution systems;

(iii) automatic temperature control systems and equipment;

(iv) air distribution systems and equipment;

(v) outdoor ventilation systems and equipment;

(vi) kitchen and associated dining room equipment, if applicable;

(vii) laboratories and associated lab equipment, if applicable;

(viii) exhaust systems and equipment;

(ix) hot water systems;

(x) electric motors, transmission and drive systems;

(xi) interior and exterior lighting;

(xii) laundry equipment, if applicable;

(xiii) water consumption end uses, such as restroom fixtures, water fountains, irrigation, etc.;

(xiv) wall/roof/foundation insulation and energy loss through building structures; and

(xv) other major energy using systems, if applicable.

(b) The analysis must address the following considerations:

(i) the loads, proper sizing, efficiencies or hours of operation for each system (where Owner Facility operating or climatic conditions necessitate, engineering estimates may be used, but for large fluctuating loads with high potential savings appropriate measurements are required unless waived by the Owner); and

(ii) current operating condition for each system.

(c) The Contractor shall conduct interviews with Owner Facility operation and maintenance staff regarding the Owner Facility's mechanical systems operation, occupancy patterns and problems with comfort levels or equipment reliability.

(d) The Owner acknowledges that the Contractor's scope of work in the conducting the Energy Audit does not include or require the Contractor to identify hazardous substances at the Owner Facility. However, if the Contractor does identify or encounter any hazardous substances while conducting the Energy Audit, it will describe the type and location thereof in the Investment Grade Audit Report.

2.4. Establish Consumption and Reconcile with End Use Consumption Estimates.

(a) The Contractor shall examine the most recent 36 months of utility bills and establish consumption for electricity, fossil fuels and water by averaging or selecting the most representative consecutive 12 months. The Contractor shall consult with Owner Facility staff and account for any unusual or anomalous utility bills that may skew consumption from a reasonable representation.

(b) The Contractor shall analyze all major end uses representing more than 5% of total Owner Facility consumption including, but not limited to: (i) lighting, (ii) heating, (iii) cooling, (iv) HVAC motors (fans and pumps), (v) plug load, (vi) kitchen equipment, (vii) laboratory equipment, and (viii) other equipment.

(c) Where loading and/or usage are highly uncertain, the Contractor shall employ spot measurement and/or short term monitoring at its discretion, or at the request of the Owner. Reasonable applications of measurement typically include variable loads that are likely candidates for conservation measures, such as cooling equipment.

2.5. Develop List of Potential ECMs. The Contractor shall:

(a) identify and propose potential ECMs for installation or implementation at the Owner Facility, including cut sheets on proposed equipment;

- (b) for non-standard ECMs, provide information regarding product site installations;
- (c) provide a detailed estimate of the savings and life expectancy of each proposed ECM;
- (d) specify Owner Facility operations and maintenance procedures which will be affected by the installation/implementation of the proposed ECMs;
- (e) provide analysis methodology, supporting calculations and assumptions used to derive baselines (e.g., lighting operating hours) and estimate savings, including the disclosure of essential data, assumptions, formulas, etc. used in manual calculations such that a reviewer can replicate the calculations based on the data provided;
- (f) provide (i) the existing and proposed air and hot water temperatures, amount of outdoor air ventilation (CFMs) lighting and acoustic levels, and (ii) copies of the utility tariffs and commodity price histories used in savings calculations;
- (g) for savings estimates using computer simulations, provide access to the program and all inputs and assumptions used, if requested by the Owner;
- (h) provide a detailed preliminary savings measurement and verification plan for each proposed ECM;
- (i) provide a detailed preliminary commissioning plan for the proposed ECMs;
- (j) provide detailed calculations for any rate saving proposals;
- (k) provide evidence that proposed ECMs will not result in material increases in maintenance, material or other operational costs;
- (l) estimate for informational purposes any environmental costs or benefits of the proposed ECMs (e.g., disposal costs, avoided emissions), and provide (i) emissions reductions data for NO_x, CO₂ and SO₂, and (ii) segment emissions data for direct site emissions reductions (e.g., fossil fuels) and indirect emissions reduction data (e.g., electricity/water);
- (m) use the EPA's ENERGY STARTM tools and resources (information for which, and a list of eligible facility types, can be found at Energy Star Tools and Resources), or other tools and resources approved in writing by the Owner, for each eligible facility, to provide an estimated post-retrofit energy performance rating using the delta score estimator and to submit a completed cash flow opportunity spreadsheet using the cash flow opportunity calculator;
- (n) ensure that all proposed ECMs comply with all applicable state, federal and local codes and regulations as in effect on the date of the Investment Grade Audit Report.

2.6. Select Final Recommended ECMs. The Contractor shall, in consultation with the Owner, recommend specific ECMs from its preliminary compilation for installation and implementation at the Owner Facility.

2.7. Fixed Prices; Annual Service Fee. The Contractor shall propose a fixed price for the installation, implementation and commissioning (including training for Owner personnel) of each proposed ECM. The Contractor shall identify, for each proposed ECM, any hard cost that represents 10 percent or more of the proposed fixed price. Project cost data must be provided in the format set forth in Exhibit 7 (Form of ECM Price Proposal).

2.8. Savings Estimates.

(a) The Owner shall endeavor to provide the Contractor with sufficient general and specific guidance pursuant to this Article 2 to develop the savings estimates for the Investment Grade Audit Report. If questions arise as to the calculation of savings or whether certain items will be allowed as savings, the Contractor shall seek written guidance and instructions from the Owner. The Owner may reject items claimed as savings that do not reflect reductions to items currently included in the Owner's budget or that have been claimed contrary to the terms of this Agreement or contrary to the written guidance or instructions provided by the Owner. The Owner may reject the Contractor's calculation of savings if it determines that there is another more suitable or preferable means of determining or calculating such savings.

(b) For the purposes of completing the Savings Estimates, the following annual escalation rates for commodity prices may be allowed in the development of savings estimates:

- (i) [●] % for natural gas;
- (ii) [●] % for electricity;
- (iii) [●] % for oil;
- (iv) [●] % for steam;
- (v) [●] % for water; and
- (vi) [●] % for other fuel type (specify).

(c) The following items will not typically be credited as savings derived from a proposed ECM: (i) the Owner's in-house labor cost, (ii) the Owner's deferred maintenance cost, (iii) offset of future capital costs of the Owner and (iv) reduced operation and maintenance costs. The Contractor may seek written exemptions from the Owner on a case-by-case basis. However, the final determination of allowable savings in each case considered will reside with the Owner.

2.9. Investment Grade Audit Report Format.

(a) The Contractor shall prepare a two-volume report as follows:

(i) Each volume must be submitted using 8 1/2" x 11" sheets of paper and a font size no smaller than 10 point. The pages in each volume must be numbered sequentially, include a Table of Contents and tabbed with the visible titles of corresponding Schedules (Volume 1) or Sections (Volume 2).

(ii) Volume I shall include the presentation of information in the following schedules and exhibit to also be attached to the Investment Grade Audit Report to the extent the information has been requested and developed during the course of performing the Energy Audit.

- Schedule A Scope of Construction Work (identifying the proposed equipment to be installed by the Contractor, describing all work necessary for such installation and describing what obligations the Contractor proposes to undertake with respect to hazardous substances)
- Schedule B Description of Owner Facility; Pre-Existing Equipment Inventory
- Schedule C Energy Saving Guarantee
- Schedule D Proposed Monthly Operations and Maintenance Payments to the Contractor (including a proposed inflation adjustment factor)
- Schedule E Baseline Energy Consumption
- Schedule F Savings Measurement & Verification Plan; Methodology to Adjust Baseline
- Schedule G Construction and Installation Schedule (showing the date on which the Savings Guarantee will be effective)
- Schedule H Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
- Schedule I Standards of Comfort
- Schedule J Contractor's Maintenance Responsibilities
- Schedule K Owner's Maintenance Responsibilities
- Schedule L Owner Facility Maintenance Checklist
- Schedule M Contractor's Training Responsibilities
- Schedule N Lease Payment Schedule

- Schedule O Commissioning and Performance Tests
- Schedule P Milestone Schedule
- Schedule Q Approved Subcontractors
- Schedule R Measurement and Verification Fee

(b) Volume 2 must include all of the information required in Section 2.5 and the Sections below, and presented in the following format:

(i) *Executive Summary.* Provide an executive summary which describes the Owner Facility, ECMs evaluated, analysis methodology, results and a summary table presenting the cost and savings estimates for each recommended ECM. The executive summary is to include a summary of the recommended measures and costs.

(ii) *Measures Not Evaluated.* Include a discussion of measures not evaluated in detail and the explanation of why a detailed analysis was not performed.

(iii) *Baselines.* Provide a summary of all utility bills, consumption baselines and how they were established, and end use reconciliation with respect to the baselines including a discussion of any unusual characteristics and findings.

(iv) *ECMs.* Provide detailed descriptions for each ECM, including analysis method, supporting calculations (may be submitted in appendices), results, proposed equipment and implementation issues.

(v) *Price.* Provide a fixed price for each proposed ECM.

(vi) *Savings Estimate.* Provide the estimated and guaranteed savings for each proposed ECM.

(vii) *Term.* Provide a proposed term for this Agreement based on total project cost, proposed O&M payments and guaranteed savings.

(viii) *O&M Payments.* If requested by Owner, provide a proposed monthly amount to compensate the Contractor for performing the maintenance services to be set forth in Schedule K of the Investment Grade Audit Report, together with an inflationary adjustment factor.

(ix) *Milestones.* Describe milestones against which payments for the installation of the ECMs will be made.

(x) *Appendices.* Provide thorough appendices that document the data relied upon to prepare the analysis and how that data was collected.

2.10. Submission of the Investment Grade Audit Report. The Investment Grade Audit Report must be completed and submitted to Owner within [90] days of the date of execution of this Agreement. The Owner will notify the Contractor in writing of its acceptance of the Investment Grade Audit Report and of its determination regarding whether or not the Owner will go forward with the Construction Work within [90] days of its receipt of the Investment Grade Audit Report.

ARTICLE 3

CONDITIONS PRECEDENT TO COMMENCEMENT OF CONSTRUCTION WORK

3.1. Conditions Precedent.

(a) The obligations and liabilities of each party under this Agreement (except Articles 2, 3, 7, 9 and 13 and, to the extent applicable, Articles 1, 12 and 14) are subject to the satisfaction or waiver of each of the following conditions precedent:

(i) the Contractor shall have completed its Investment Grade Audit Report, the Investment Grade Audit Report shall offer to guarantee Energy and Water Savings that are equal to at least 90% of the savings projected in the Preliminary Audit and shall provide final detailed pricing to confirm the Guaranteed Savings, and the Owner and the Contractor shall have agreed upon the final terms of Schedules A through R thereto to be attached as Schedules A through R of this Agreement;

(ii) the amount of the Guaranteed Savings for each Savings Year set forth in Schedule C (Energy Savings Guarantee) exceeds the amount required to pay all Lease Payments payable with respect to such Savings Year in the absence of adjustments resulting from a Change Order or Material Change; provided that if the Lease Payment Schedule set forth in Schedule N (Lease Payment Schedule) is for a period of years less than the term of this Agreement, the condition in this Section 3.1(a)(ii) will be measured on an aggregate basis over the term of this Agreement and the Lease Agreement, respectively, rather than on an annual basis;

(iii) the Bonds have been issued, a portion of the net proceeds thereof have been deposited into the Owner Project Account, and all conditions to making the initial draw thereof have been satisfied;

(iv) all permits, licenses, authorizations and approvals required to be obtained to commence the Construction Work have been obtained;

(v) The Issuer, FREE, the Owner and the Contractor have entered into the Program Agreement;

(vi) the Owner shall have notified Contractor in writing of its acceptance of the Investment Grade Audit Report and of its determination to go forward with the Construction Work pursuant to Section 2.10 above;

(vii) no action, suit, proceeding or official investigation shall have been overtly threatened, publicly announced or commenced by any Person or any federal, State

or local governmental authority or agency, or in any federal, State or local court (excluding any action, suit, proceeding or official investigation which, in the opinion of counsel acceptable to the Owner and the Contractor, is without merit) that challenges the validity of this Agreement or any of the agreements contemplated hereby or seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree against either party hereto with respect to this Agreement or any of the transactions contemplated hereby; and

(viii) the representations of the other party set forth in Section 14.1(a) are true and correct in all material respects as of the date of the Notice to Proceed as if made on and as of such date; and such other party has delivered to such party a certificate of its authorized representative, dated the date of the Notice to Proceed, to such effect.

(b) The obligations and liabilities of the Owner under this Agreement (except Section 3.2) are further subject to the satisfaction or waiver of each of the following conditions precedent:

(i) the Contractor has delivered to the Owner payment and performance bonds, substantially in the form of Exhibit 1 (Forms of Payment and Performance Bonds) and issued by a surety reasonably acceptable to the Owner in support of the Contractor's obligation to perform the Construction Work and other obligations arising prior to Final Completion, in the amount of the Construction Price; and

(ii) the Contractor has submitted to the Owner certificates of insurance evidencing that the Required Insurance is in effect.

3.2. Satisfaction of Conditions Precedent.

(a) Each party shall exercise good faith and due diligence in satisfying the foregoing conditions precedent and giving prompt notice to the other party when such conditions precedent have been satisfied or waived in writing by the party whose obligation is conditioned thereon.

(b) Either party shall promptly notify the other party if any condition precedent is incapable of being satisfied.

(c) When (i) both parties agree that all conditions precedent are satisfied or that they are prepared to waive any conditions not so satisfied and (ii) the Owner has determined that the Contractor should begin the Construction Work, the Contractor and the Owner shall execute an instrument in which (A) each of them states that all of the conditions precedent to its obligations set forth in this Article 3 have been satisfied or waived and (B) the Owner directs the Contractor to begin the Construction Work (such instrument, the "**Notice to Proceed**").

(d) If either party delivers a notice that one or more conditions precedent cannot be satisfied pursuant to Section 3.2(b) above, or if any condition precedent is not satisfied or waived by [_____], in either case for reasons not due to the terminating party's failure to comply with its obligations under Section 3.2(a), then (i) either party may at any time

thereafter until such conditions have been satisfied or waived, by notice to the other party, terminate this Agreement, (ii) neither party will be liable to the other for any such termination and (iii) each party will bear its own expenses attributable to the transactions contemplated by this Agreement.

3.3. Owner's Right to Terminate Prior to Commencement of Construction Work.

(a) In addition to its rights under Section 3.2, the Owner shall have the right to terminate this agreement and not proceed with the Construction Work at any time prior to the issuance of the Notice to Proceed. Should the Owner exercise such right, other than for a reason specified in Section 3.2(d), the Owner agrees to pay the Contractor [__]% of the Contractor's documented and invoiced costs and expenses incurred in connection with this Agreement, including the costs incurred in conducting the Investment Grade Audit Report.

(b) If this Agreement is terminated pursuant to this Section 3.3, the Contractor agrees to provide the Owner with copies of any preliminary notes, reports and analyses that were produced prior to the effective date of the termination. Such documentation shall be used by the Owner to help determine the extent of work completed by the Contractor prior to termination and shall become the property of the Owner.

ARTICLE 4 CONSTRUCTION

4.1. Construction Work. The Contractor shall provide, in a good and workmanlike manner, all services, supervision, labor, materials and equipment, supplies, miscellaneous materials, and machinery necessary to design, engineer, procure, construct, install and commission the ECM Installations (the "Construction Work"). The Construction Work includes the following activities:

(a) the preparation and completion of a detailed design of the Construction Units;

(b) the acquisition, delivery, construction, assembly and installation of the ECM Installations at the Owner Facilities, including the procurement, expediting, inspection, installation, construction, assembly and erection of all required structures and ECM Installations in accordance with Schedule A (Scope of Construction Work) in such a manner so as to conform to the Standards of Comfort;

(c) the provision of the ECM Installations Operation Manual for each Site for the operation and maintenance of the ECM Installations located at such Site;

(d) commissioning and testing the ECM Installations; and

(e) the performance of each of the Contractor's other obligations under this Agreement, other than its obligations to provide the Measurement and Verification Services and to pay the Guaranteed Savings Payment, if any, and any obligations arising from or relating to such obligations.

4.2. Permits and Approvals. The Contractor shall, at its own expense, obtain all necessary permits and approvals for performance of the Construction Work. The Owner shall use its reasonable efforts to assist the Contractor in obtaining any such permits or approvals, including execution and delivery of applications required to be in the name of the Owner. The Owner will not be responsible for payment of any expenses or fees incurred in obtaining any such permit or approval. The Contractor shall deliver copies of each such permit or approval to the Owner before the Contractor commences the portion of the Construction Work to which such permit or approval relates.

4.3. Work Force. The Contractor shall furnish a competent and adequate staff as necessary for the proper administration, coordination and supervision of the Construction Work; organize the procurement of all materials and equipment so that they will be available at the time they are needed for the Construction Work; and ensure that an adequate force of skilled workers are available to complete the Construction Work in accordance with all requirements of this Agreement. All such workers will meet the minimum qualifications set forth in Exhibit 10 (Employee Qualifications), and will comply with Owners codes of conduct set forth in Exhibit 9 (Owner's Conduct Requirements).

4.4. Project Manager. The Contractor shall employ a competent individual to act as a project manager and be responsible for the coordination and performance of the Construction Work and be authorized to commit the Contractor with regard to manpower, schedule, coordination, and cooperation. The project manager must have at least two years of documented experience in responsible field supervision for projects of comparable size and complexity. The project manager or its designee must be present at the Owner Facilities during normal working hours. The Contractor shall give the Owner advance notice if it intends to remove or replace the project manager. In the event the project manager fails to perform its duties under this Agreement, the Contractor shall replace the project manager with an individual with the qualifications described in this Section 4.4.

4.5. Condition of the Owner Facilities. The Contractor (a) represents that it has satisfied itself as to the nature and location of the Owner Facilities, the suitability of the Owner Facilities for the performance by the Contractor of the Construction Work, the character of equipment and facilities needed before and during the performance of the Construction Work and all other matters relating to the Owner Facilities that could affect the Construction Work and (b) subject to paragraph (d) of the definition of Uncontrollable Circumstances, agrees that the Owner Facilities are sufficient in their current condition for the performance by the Contractor of the Construction Work.

4.6. Coordination. The Contractor and the Owner shall coordinate in advance the Contractor's use of spaces on the Owner Facilities to minimize loss of use of the Owner Facilities by the Owner while maintaining safety of all persons at the Owner Facilities or the Owner Property and avoiding delay of Construction Work.

4.7. Exclusive Use of Sites.

(a) If the parties agree pursuant to Section 4.6 that the Contractor will have exclusive use of all or a portion of any Site as a workspace for the Construction Work, the

Contractor shall maintain such workspace in a safe and orderly manner and take reasonable steps to protect equipment, tools and materials used in the Construction Work, the Owner's existing equipment, and the Owner Facilities from harm, theft and misuse.

(b) Notwithstanding subsection (a) above, the Owner's security, emergency or maintenance personnel will at all times have access to any portion of the Owner Facilities, provided that non-emergency access will not unreasonably interfere with the Construction Work.

4.8. Responsibility for Damages. The Contractor shall perform the Construction Work in such a manner so as not to harm the Owner Facilities or its operating systems. The Contractor shall, at its own cost, repair and restore to its original condition any area of damage, including to the building fabric or equipment that is intended to continue in service, caused by its performance of the Construction Work.

4.9. Inspections. The Owner and its designees will have the right to monitor and inspect the Construction Work. Such Persons may not unreasonably interfere with the performance of the Construction Work. At the request of the Owner, the Contractor shall uncover such portions of the Construction Work as the Owner may direct. If the exposed Construction Work meets the requirements of this Agreement, the Owner shall reimburse the Contractor for the costs of uncovering and replacing the Construction Work and the Guaranteed Final Completion Date will be extended by the number of days of delay, if any, caused by uncovering and replacing the Construction Work. If the exposed Construction Work does not meet the requirements of this Agreement, the costs of uncovering and replacing such Construction Work shall be borne by the Contractor and the Guaranteed Final Completion Date will not be extended.

4.10. Delivery and Review of Documents. The Contractor shall submit to the Owner the documents described in Exhibit 2 (Contractor Documents) in the form described in, and otherwise in accordance with, the requirements set forth in Exhibit 2 (Contractor Documents) (the "**Contractor Documents**"), along with all supporting materials reasonably necessary to review such Contractor Documents, before beginning any construction or installation of the portion of the Work that such documents address. The Owner shall provide to the Contractor its comments on any Contractor Document (other than as-built drawings) within [●] days of receiving it and the supporting materials; provided that, if more than one set of the Contractor Documents and supporting materials is delivered within any [●]-day period, the parties shall mutually agree on the Owner's review periods for each such set. If the Owner does not respond within such [●]-day period, the Contractor Documents will be deemed to have been reviewed and the Contractor will be entitled to proceed. The Contractor is not required to deliver and the Owner is not required to review shop drawings that are not part of the Contractor Documents.

4.11. Effect of Review and Inspection. The rights of the Owner to review the Contractor Documents and to monitor and inspect the Construction Work will not create the right to stop or otherwise impede the Construction Work. In no event will the exercise of, or failure to exercise, rights to monitor or inspect the Construction Work or to review the Contractor Documents constitute acceptance or approval thereof or relieve the Contractor of any of its obligations under this Agreement.

4.12. Project Meetings. The Contractor shall provide for regularly scheduled project meetings and shall give reasonable advance notice and an agenda of such meetings to the Owner. The Contractor shall record minutes and deliver copies of minutes of meetings to the Owner within five business days after each meeting. The Contractor shall schedule additional project meetings at the reasonable request of the Owner.

4.13. Progress Reports. The Contractor shall submit to the Owner by the fifth day of each month prior to the Final Completion Date (a) a written progress report in form and substance reasonably acceptable to the Owner, with respect to the prior month and (b) an updated Construction Schedule.

4.14. Uncontrollable Circumstances.

(a) If, as a result of an Uncontrollable Circumstance, either party is prevented from performing or is delayed in the performance of any of its obligations under this Agreement (other than an obligation to pay money), such prevention of or delay in performance will, subject to such party's satisfaction of the conditions precedent in subsection (b) below, be excused during any period in which such performance is prevented or delayed by an Uncontrollable Circumstance, and for such period thereafter as necessary to correct the adverse effect of such Uncontrollable Circumstance; provided that the failure to pay any amounts owed hereunder (whether accruing prior to or during the Uncontrollable Circumstance) in a timely manner will not be excused by an Uncontrollable Circumstance. In the case of an Uncontrollable Circumstance affecting the Contractor, the Contractor will be entitled to a Change Order pursuant to Section 6.2(d).

(b) A party will be excused from performance hereunder as a result of an Uncontrollable Circumstance subject to the following conditions:

(i) such party gives the other party prompt notice describing the particulars of the Uncontrollable Circumstance and the potential duration of the prevention of or delay in performance; and

(ii) such party uses its commercially reasonable efforts to (A) mitigate the impact of the Uncontrollable Circumstance on its performance, (B) pursue insurance and any other third-party reimbursement that may reasonably be expected to be obtained with respect to the Uncontrollable Circumstance and (C) overcome the prevention of or delay in performance, and performance is resumed at the earliest practicable time after cessation of the Uncontrollable Circumstance.

4.15. Training. The Contractor shall provide such training to employees or contractors designated by the Owner as is necessary to operate the ECM Installations in accordance with the ECM Installations Operation Manual.

4.16. Subcontractors.

(a) The Contractor may not enter into an agreement with a Subcontractor having a value greater than [●] without the Owner's consent, which it may not unreasonably withhold. Such consent will not relieve the Contractor of any of its obligations under this

Agreement. The Owner hereby consents to the Contractor entering into a subcontract with any Subcontractor identified in Schedule Q (Approved Subcontractors).

(b) The Contractor will be as fully responsible to the Owner for the acts and omissions of Subcontractors or persons directly or indirectly employed by them as it is for the acts or omissions of persons employed by the Contractor. Nothing in this Agreement will create any contractual relationship between any Subcontractor and the Owner. The Owner will have no obligation to pay directly, or cause the payment of, any Subcontractor.

(c) The Contractor hereby assigns to the Owner, its successors and assigns all of the Contractor's right, title, and interest in all agreements with Subcontractors having a value greater than [●], provided that such assignment will only be effective upon (i) acceptance of such assignment by the Owner by notice to the Subcontractor and (ii) the termination of this Agreement for an Event of Default by the Contractor. Until the time, if any, that such assignment is accepted, the Owner will not be responsible for performance under this assignment or under any agreement with any Subcontractor and no Subcontractor will have any claim or cause of action against the Owner. Upon the Owner's acceptance of any such assignment, the Contractor will have no further obligations under the assigned agreement except with respect to matters arising from the conduct of the Contractor and the applicable Subcontractor prior to the date of such acceptance. All such agreements with Subcontractors must include a provision agreeing to and acknowledging this assignment.

4.17. Access to the Owner Facilities.

(a) The Owner shall provide access to the Owner Facilities for the Contractor to perform the Construction Work during regular business hours, or such other reasonable hours as may be requested by the Contractor and agreed to by the Owner, provided the personnel performing the Construction Work perform in accordance with the Owner's written policies regarding contractor personnel, a copy of which has been provided to the Contractor.

(b) The Owner shall provide reasonable rent free space for the Contractor, or any of its Subcontractors, to mobilize and store its supplies, tools and equipment during the performance of the Construction Work for which such storage may be required. The Contractor shall maintain such space in a safe and orderly manner.

ARTICLE 5 START-UP AND COMMISSIONING; COMPLETION

5.1. Systems Startup and ECM Installations Commissioning. The Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed ECM Installations in accordance with Schedule O (Commissioning and Performance Tests). Testing must be designed to determine if each ECM Installation is functioning in accordance with both its published specifications and the requirements of this Agreement and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The Contractor shall provide notice to the Owner of each scheduled test and the Owner and its invitees will have the right to be present at any or all

such tests. The Contractor shall correct and adjust all deficiencies in the Construction Work that are observed during system commissioning procedures.

5.2. Construction Unit Completion.

(a) Construction Unit Completion for a Construction Unit will occur when the following conditions have been met:

(i) the performance of the Construction Work relating to such Construction Unit is complete, except for those items specified in a punch list for such Construction Unit, prepared by the Contractor and approved by the Owner, listing all items of the Construction Work relating to such Construction Unit that have not yet been completed, which items may not, during the period of time needed for their completion, materially impair the normal operation of the Construction Unit or activities at the Site or Sites on which such Construction Unit is located;

(ii) the Construction Unit has been commissioned and successfully tested in accordance with Schedule O (Commissioning and Performance Tests); and

(iii) The Contractor has delivered a certificate (the “**Unit Completion Certificate**”) certifying that all of the preceding conditions in this Section 5.2 have been satisfied; provided that, if the Owner subsequently raises any valid objection to such certificate in accordance with subsection (b) below, such certificate will not be deemed to be delivered until such objection is satisfied.

(b) Within 30 days of receipt of the Unit Completion Certificate, the Owner shall either approve the Unit Completion Certificate or state its objection and provide the Contractor with a detailed explanation therefor. Any such objection will be resolved in accordance with Section 12.7 below. If the Owner fails to approve or object to the Unit Completion Certificate within such 30-day period, the Unit Completion Certificate will be deemed to have been approved. If the Owner has approved or been deemed to have approved the Unit Completion Certificate, or the Owner has objected to the Unit Completion Certificate and such objection has subsequently been determined to be unsubstantiated, the approval or deemed approval will be considered to have been given as of the original date of delivery of the Unit Completion Certificate. If the Owner validly objects to the Unit Completion Certificate, then the date of approval will be considered to be the date that the Contractor has satisfied such objection.

5.3. Final Completion.

(a) Final Completion will be achieved as of the latest date that any of the following conditions has been satisfied or deemed to have been satisfied:

(i) each Construction Unit has achieved Construction Unit Completion;

(ii) the performance of the Construction Work is complete, including all punch list items;

(iii) the Owner Facilities and the Owner Property are clear of all liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Construction Work;

(iv) the Contractor has delivered all Contractor Documents and has completed the training program described in Section 4.15 above;

(v) there are no outstanding Contractor Events of Default or events that with the passage of time or the giving of notice would become Contractor Events of Default; and

(vi) the Contractor has delivered to the Owner a certificate (the “**Final Completion Certification**”), certifying that all of the preceding conditions in this subsection (a) have been satisfied; provided that, if the Owner subsequently raises any valid objection to such certificate in accordance with subsection (b) below, such certificate will not be deemed to be delivered until such objection is satisfied.

(b) Within 30 days of receipt of the Final Completion Certification, the Owner shall either approve the Final Completion Certification or state its objection and provide the Contractor with a detailed explanation therefor. Any such objection shall be resolved in accordance with Section 12.7 below. If the Owner fails to approve or object to the Final Completion Certification within such 30-day period, the Final Completion Certification will be deemed to have been approved. If the Owner has approved or been deemed to have approved Final Completion Certification, or the Owner has objected to Final Completion Certification and such objection has subsequently been determined to be unsubstantiated, the approval or deemed approval will be considered to have been given as of the original date of delivery of the Final Completion Certification. If the Owner validly objects to the Final Completion Certification, then the date of approval will be considered to be the date that the Contractor has satisfied such objection.

ARTICLE 6 CHANGES TO THE CONSTRUCTION WORK

6.1. General. Except as provided in Section 6.2(e) below, the Contractor may not implement any change to the Construction Work (a “Change”), unless the parties execute a written agreement (a “Change Order”).

6.2. Change Orders.

(a) As promptly as practicable after any proposal for a Change by the Owner or the Contractor, the Contractor shall prepare and deliver to the Owner an estimate of the financial, scheduling and performance impact of such Change.

(b) Upon the Owner’s written authorization following opportunity for Owner to review Contractor’s estimate pursuant to Section 6.2(a), the Contractor shall prepare a written proposal for the Change (a “**Change Proposal**”) setting forth (i) a description of the Change, (ii) the impact that such Change would have on (A) the Guaranteed Final Completion Date, (B)

Guaranteed Savings and (C) the Milestone Schedule and (iii) a firm price for implementing such Change.

(c) If the Owner proposes a Change and the parties cannot agree on a firm price for implementing a Change Order pursuant to Section 6.2(b), then, subject to agreement on the matters set forth in subsection (b)(ii) above, the Owner will have the right to require the Contractor to implement such Change for a price equal to (i) the Actual Cost of implementation times (ii) ____%. As used herein, “**Actual Cost**” means the total of (A) the amount of all wages and salaries that the Contractor directly pays to its permanent and temporary employees that are engaged in the performance of the Construction Work at the Owner Facilities plus (B) payroll taxes and employee benefits actually paid in addition to (rather than as a deduction from) the amount set forth in (A) at a rate of ____% plus (C) the cost of Subcontractors, materials and equipment. In no event will Actual Cost include any amounts paid to a Subcontractor that is an affiliate of the Contractor, which amounts are in excess of the price that would otherwise have been obtained from another Person in an arm’s length transaction.

(d) The Contractor will be entitled to a Change Order as a result of an Uncontrollable Circumstance. In such case, the Contractor shall prepare and submit a Change Proposal to the Owner. If the parties cannot agree on a firm fixed price for the Change Order, the Contractor will implement the Change under the terms set forth in subsection (c) above. Any amount payable to the Contractor pursuant to this subsection (d) will be reduced so as to prevent double recovery by the net proceeds of insurance or other third-party payments received by the Contractor in connection with the Uncontrollable Circumstance.

(e) If in connection with a proposed Change Order under either Section 6.2(c) or (d) the parties cannot agree on any matters set forth in Section 6.2(b)(ii), either party may seek resolution of the Dispute pursuant to Section 12.9 (Dispute Resolution).

(f) Notwithstanding the provisions of this Article 5 to the contrary, if an emergency arises due to an Uncontrollable Circumstance and the Contractor (i) after making a reasonable, good faith attempt to notify the Owner, is unable to communicate with, or fails to hear from, the Owner regarding such emergency and (B) reasonably believes a Change is necessary to mitigate adverse effects of such Uncontrollable Circumstance, the Contractor may proceed with such Change, the Actual Cost of which may not exceed [\$●]. Any such change shall constitute a Change Order unless the Owner disputes the reasonableness of the Contractor’s action or of the costs incurred by the Contractor in taking such action. Any such dispute shall be resolved in accordance with Section 12.7 below.

ARTICLE 7 HAZARDOUS SUBSTANCES

7.1. Contractor’s Responsibilities.

(a) The Contractor will have the exclusive responsibility for the detection, identification, monitoring, handling, removal, transport, storage and disposal of, and all remediation of the Owner Facilities and the Owner Property made necessary from (i) any Hazardous Substances that were deposited or discarded thereon by the Contractor or a

Subcontractor, (ii) any Hazardous Substances contained in lamps and ballasts that are replaced by the Contractor as part of the Construction Work and (iii) any other Hazardous Substances for which the Contractor has accepted responsibility in Schedule A (Scope of Construction Work).

(b) If the Contractor discovers Hazardous Substances at a Site for which the Owner is responsible under Section 7.2, the Contractor shall immediately cease Construction Work at such Site, remove all Contractor and Subcontractor personnel from such Site and notify the Owner. The Contractor may not undertake further Construction Work at such Site until authorized by the Owner.

(c) The Contractor shall enter into an agreement with an approved PCB ballast disposal company which will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts to the Contractor. All capacitors and asphalt potting compound materials removed from the Owner's PCB ballasts must be incinerated in a federally approved facility. The Contractor shall cause such disposal company to provide a Certificate of Destruction to the Owner. The Contractor will be responsible for the proper and legal management of any of the Owner's PCB ballasts removed as a result of the performance of the Construction Work until such time as the PCB ballasts are loaded onto an approved PCB ballast disposal company's vehicle for transportation.

(d) The Contractor shall enter into an agreement with an approved lamp disposal company for the disposal of lamps containing mercury which company will provide approved containers and materials required to label, transport, recycle or incinerate such lamps in accordance with Applicable Law, and provide the Owner with a copy of the manifest.

(e) The Owner shall designate in writing one or more individuals to sign manifests of ownership on the Owner's behalf for all PCB ballasts and mercury lamps removed from the Owner Facilities.

7.2. Owner's Responsibilities. The Owner will have the exclusive responsibility for the detection, identification, monitoring, handling, removal, transport, storage and disposal of, and all remediation of the Owner Facilities and the Owner Property made necessary by, any Hazardous Substances at the Owner Facilities and the Owner Property, other than Hazardous Substances for which the Contractor is responsible under Section 7.1(a) above.

7.3. Contractor's Representation. The Owner acknowledges that other than as is expressly stated in Section 7.1 above, the Work does not include the identification, abatement, cleanup, control, removal, or disposal of Hazardous Substances. However, the Contractor represents and warrants that any Hazardous Substances that it identified or knowingly encountered in conducting the Energy Audit in the Investment Grade Audit Report were reported by the Contractor to the Owner in the Investment Grade Audit Report pursuant to Section 2.3(d) above.

ARTICLE 8 CONSTRUCTION PRICE; PAYMENTS

8.1. Construction Price.

(a) In consideration for the performance of the Construction Work, the Owner shall cause the Trustee to pay to the Contractor \$[●] (as it may be adjusted by Change Orders from time to time, the “**Construction Price**”). The Construction Price will be paid as the Construction Work progresses in amounts determined in accordance with the Milestone Schedule.

(b) The parties acknowledge that the cost of completing the Energy Audit and the Investment Grade Audit Report will be included in the Construction Price and will be payable upon issuance of the Notice to Proceed.

8.2. Application for Payment.

(a) Not later than the 10th day of each month, the Contractor shall submit to the Owner for its approval an Application for Payment with respect to milestones completed with respect to each Construction Unit in the prior month in accordance with Schedule P (Milestone Schedule), accompanied by such supporting information as may be reasonably necessary to substantiate the Contractor’s right to payment of the amounts requested.

(b) Within 30 days of its receipt of an Application for Payment, the Owner shall, subject to Section 8.3 below, submit the Application for Payment to the Trustee for the payment of all undisputed amounts set forth thereon. If the Owner disputes any portion of the Application for Payment, the Owner shall authorize the Trustee to pay the undisputed amount and deliver notice to the Contractor stating its objections to the disputed amount and giving a detailed explanation therefor within such 30-day period. If the Contractor disputes any such objection, the dispute will be resolved pursuant to Section 12.7 below. If the dispute is resolved in favor of the Contractor, the Owner shall pay interest on the amount determined to be owed to the Contractor at the Late Payment Rate from the date on which such amount was originally due until the date paid.

8.3. Retainage. An amount equal to [●]% of the amount that would otherwise be due with respect to any Application for Payment relating to a Construction Unit (other than the Application for Payment for such retained amount) will be retained by the Trustee and will be payable to the Contractor on or after the date on which the Owner approves (or is deemed to have approved) a Unit Completion Certificate with respect to such Construction Unit. The Contractor may draw the total amount so retained by submitting an Application for Payment to the Owner.

ARTICLE 9 WARRANTIES; INTELLECTUAL PROPERTY; TITLE

9.1. Warranties.

(a) The Contractor warrants to the Owner that:

(i) all Work will be performed in accordance with this Agreement and conform to the Standard of Care; and

(ii) all Construction Work, including all materials and ECM Installations furnished as part of the Construction Work, will be new (unless otherwise specified in Schedule A (Scope of Construction Work), of good quality, free of defects or deficiencies in materials and workmanship and will be fit for its intended purpose.

(b) The foregoing warranties (the “**Warranties**”) are exclusive and, except as provided in Section 9.2(b) below, expressly given in lieu of all other warranties, whether statutory, oral or implied (including warranties of fitness for particular purpose, merchantability, custom or usage or otherwise), the existence of which are hereby disclaimed by the Contractor and waived by the Owner.

(c) The Warranties with respect to each Construction Unit will be effective for a period of two years following the Construction Unit Completion Date for such Construction Unit (the “**Warranty Period**”); provided that the Construction Unit is operated and maintained in accordance with the ECM Installations Operation Manual.

9.2. Defects.

(a) Following the discovery during the Warranty Period with respect to a Construction Unit of a defect or deficiency that is covered by the foregoing warranties (in either case, a “**Defect**”), the Contractor shall, as soon as practicable without materially interfering with the activities at the Owner Facilities, (i) correct such deficiency by, at its option, redesigning, repairing or replacing the defective Construction Work and (ii) demonstrate to the reasonable satisfaction of the Owner, by testing or otherwise, that the deficiency has been corrected.

(b) If the Contractor fails within a reasonable time following the discovery of any Defect during the Warranty Period and, after receipt of written notice from the Owner to begin, and to continue with diligence and promptness, to cure such Defect, the Owner may, without prejudice to any other remedy it may have and without the requirement to exercise any other remedy, cure such Defect. In such case, the Contractor will be liable to the Owner for the reasonably documented costs of correcting such Defect, together with interest thereon from the date incurred at the Late Payment Rate. The Contractor shall pay such amounts within 15 days of the Owner’s written demand therefor. The exercise by the Owner of any of its rights under this subsection (b) will not diminish any of the Contractor’s obligations hereunder or any other rights or remedies available to the Owner at law or in equity.

9.3. Extension of Warranty Period. The Warranty with respect to any portion of the Work in which a Defect was corrected during the Warranty Period for the relevant Construction Unit will be effective for a period ending on the later of (a) one year following the date of such correction or (b) the end of the original Warranty Period.

9.4. Assignment of Subcontractor Warranties. At the Owner’s request, the Contractor shall assign to the Owner any warranty from any Subcontractor with respect to any portion of the Construction Work that extends beyond the date that the Contractor’s Warranty with respect to such portion of the Construction Work expires.

9.5. Patent and Other Proprietary Rights.

(a) The Contractor represents and warrants that it has all title, or has licenses through its Subcontractors, to all patents, proprietary information, know-how, trade secrets, trademarks and copyrights necessary to perform the Work and operate the ECM Installations (“**Contractor Proprietary Information**”).

(b) The Contractor hereby grants to the Owner for use in connection with the ECM Installations an irrevocable, royalty-free, non-exclusive license to all Contractor Proprietary Information. Other than as granted in this subsection (b), the Contractor retains all rights to Contractor Proprietary Information.

(c) If use of any part of the equipment, material, process or software incorporated into the ECM Installations is limited or prohibited by judicial order or decree because such use would constitute an infringement of the rights of a third party, the Contractor, at its sole expense, shall either (i) procure the necessary rights to use the infringing equipment, material, process or software or (ii) after consultation with the Owner, replace the same with substantially equal but non-infringing equipment, material, process or software or modify the same to be non-infringing; provided that any such substituted or modified equipment, material, process or software must meet all the requirements and be subject to all the provisions of this Agreement, and that such replacements or modifications will not modify or relieve the Contractor of its obligations under this Agreement. This provision will survive Final Completion, or termination of this Agreement prior thereto, and the expiration of the Warranty Period.

9.6. Title.

(a) All documents and other deliverables to be furnished to the Owner by the Contractor or by any Subcontractor and all modifications made by the Contractor to any documents supplied by the Owner to the Contractor will be the property of the Owner and the Owner will hold the copyright and all other property rights with respect thereto. The Contractor warrants that it is the owner of all copyrights on such documents and other deliverables (i) as the employer-for-hire of the person(s) in its employ who contributed to the creation of these materials or (ii) as the assignee under a written assignment of any and all third parties that contributed to the creation of these materials. Notwithstanding the foregoing, to the extent the Contractor furnishes standard equipment manuals or similar materials not created specifically in connection with the Work, the Owner will obtain ownership only of the copies actually furnished and will not hold the copyright thereto.

(b) The Contractor, in consideration of the Owner’s execution of this Agreement and for other good and valuable consideration, receipt and sufficiency of which are hereby acknowledged, hereby assigns to the Owner all of the Contractor’s right, title, and interest in and to the copyright of the documents and deliverables described in subsection (a) above, and in all renewals and extensions of the copyright that may be secured now or hereafter in force and effect in the United States of America or in any other country or countries. In no case may the Contractor use any of the documents or deliverables on another project.

(c) The Contractor, in consideration of the Owner's execution of this Agreement and for other good and valuable consideration, receipt and sufficiency of which are hereby acknowledged, hereby assigns to the Owner all of the Contractor's right, title, and interest in and to each item of the Construction Work, effective upon the earlier of (i) the incorporation of such item into the Construction Work or (ii) the Contractor's receipt of payment against an Application of Payment on which such item is identified. All items of the Construction Work to which title has passed to the Owner and that are stored in any location other than the Owner Facilities must be segregated and clearly marked as the property of the Owner. The Contractor warrants that no Construction Work will have been acquired by the Contractor, or by any Subcontractor, subject to an agreement under which an interest therein or any encumbrance thereon is retained by the seller or otherwise imposed on the Construction Work. The Contractor shall warrant and defend such title, at the Contractor's expense, against the claims of third parties.

9.7. Ownership of Existing Equipment. Ownership of the equipment and materials existing at the Owner Facilities on the date of this Agreement will remain the property of the Owner even if they are replaced or its operation made unnecessary by the Work. The Contractor shall notify the Owner of all equipment and materials to be replaced at the Owner Facilities. The Contractor shall dispose of such equipment and materials off the Owner Property unless the Owner instructs otherwise by delivering notice to the Contractor within 10 days after receiving the Contractor's notice. The Owner will be responsible for and designate the location and storage for any equipment or materials to remain on the Owner Property.

ARTICLE 10 OPERATING PERIOD

10.1. Standards of Comfort. The Owner is entitled to operate the ECM Installations in a manner so as to maintain the Standards of Comfort.

10.2. Material Changes.

(a) If the Owner plans to undertake any activity, or otherwise becomes aware of a circumstance, that could reasonably be expected to result in a Material Change, it shall promptly deliver a notice to the Contractor describing such activity or circumstance. At the Owner's request and expense, the Contractor will provide to the Owner an estimate of the effect that such anticipated Material Change would have on the Owner's energy consumption. If an unanticipated Material Change occurs, the Owner shall notify the Contractor as soon as practicable thereafter.

(b) The Contractor and the Owner will work together to investigate, identify and, if applicable, correct the cause of any Material Change.

(c) If a Material Change occurs, the parties will agree on an adjustment to the Baseline Energy Consumption or the Standards of Comfort, or both, in accordance with the Measurement and Verification Plan, resulting in an adjustment to the Guaranteed Savings. In the event the parties cannot agree, either party may institute proceedings under Section 12.9 (Dispute Resolution).

10.3. Utility Bills. The Owner shall deliver to the Contractor copies of all invoices received by the Owner for energy consumption at the Owner Facilities promptly after receiving them.

10.4. Malfunctions and Emergencies.

(a) The Owner shall notify the Contractor as soon as practicable after the Owner learns of:

- (i) any malfunction in the operation of the ECM Installations or any other equipment that might materially affect Energy and Water Savings;
- (ii) any interruption or alteration to the energy supply to a Site;
- (iii) any alteration or modification in any ECM Installations or its operation; or
- (iv) any emergency condition affecting the ECM Installations.

Such notice may be given by telephone promptly followed by written notice.

(b) The Contractor shall promptly proceed with corrective measures if required, or may proceed with such measures if permitted, pursuant to this Agreement. The Contractor will have the right to rectify performance deficiencies that may be identified by measurements taken over the term of this Agreement at its own expense.

10.5. Actions by the Owner. Owner shall perform the maintenance obligations set forth in Schedule K (Owner's Maintenance Responsibilities). Except for performance of those obligations and the actions permitted by this Section 10.5, the Owner may not move, remove, modify, alter, or change in any way the ECM Installations or any part thereof without the approval of the Contractor. If, due to an emergency, it is not possible or reasonable to notify the Contractor before taking any such actions, the Owner shall take reasonable steps to protect the ECM Installations from damage or injury and follow instructions for emergency action contained in the ECM Installations Operation Manual for such ECM Installations.

10.6. ECM Installations Maintenance List. The Contractor will have the right once a month, with prior notice, to inspect the Owner Facilities to determine if the Owner is complying with its obligations under Section 10.5 above. The Owner shall make the Owner Facilities available to the Contractor for and during each such inspection and will have the right to accompany the Contractor during such inspections. The Contractor shall complete the checklist set forth in Schedule L (Owner Facility Maintenance Checklist) during each such inspection and provide a copy thereof to the Owner. If the Owner fails to notify the Contractor within 30 days after receiving a checklist that it does not agree with any assessment made thereon by the Contractor, the Owner will be deemed to have agreed with Contractor's assessments as set forth on such checklist.

ARTICLE 11 PAYMENTS DURING OPERATING PERIOD

11.1. Measurement and Verification Fee. The Contractor shall provide the Measurement and Verification Services for the Measurement and Verification Fee as set forth in Schedule R (Measurement and Verification Fee). Beginning on the Final Completion Date, the Owner shall make monthly payments to the Contractor in the amount set forth in Schedule R (Measurement and Verification Fee). The Measurement and Verification Fee will be prorated for any month that is less than a full calendar month.

11.2. Monthly Statements. On or before the first day of each month in a Savings Year, the Contractor shall submit a statement to the Owner for the Measurement and Verification Fee due with respect to such month. The Owner shall pay the amount due to the Contractor no later than the last day of such month.

11.3. Payments to the Owner. The Contractor shall pay to the Owner, for any Savings Year, the amount, if any, by which the Guaranteed Savings exceeds the total Energy and Water Savings for such Savings Year (the “**Guaranteed Savings Payment**”).

11.4. Adjustment to Savings Year. After Final Completion and with 90 days’ prior notice, the Owner may adjust the first day of the Savings Year to coincide with the first day of the Owner’s fiscal year, and the parties shall mutually agree on the changes to this Agreement to effect such adjustment. If the first day of the Savings Year is adjusted to coincide with the first day of the Owner’s fiscal year, the Guaranteed Savings for any Savings Year of other than 12 months will be prorated accordingly.

11.5. Energy and Water Savings Statements.

(a) For each quarter in each Savings Year other than the last quarter, within 60 days of its receipt from the Owner of copies of all invoices for such Savings Year, the Contractor shall deliver to the Owner a statement (the “**Quarterly Savings Statement**”) setting forth, with respect to each Site, the Energy and Water Savings for such Site and the total Energy and Water Savings for such quarter, together with all relevant calculations and supporting documentation. The Contractor shall provide such additional information as the Owner may reasonably request in connection with its review of the Quarterly Savings Statement.

(b) For each Savings Year, within 60 days of its receipt from the Owner of copies of all invoices for such Savings Year, the Contractor shall deliver to the Owner a statement (the “**Annual Savings Statement**”) setting forth, with respect to each Site, the Energy and Water Savings for such Site and the total Energy and Water Savings for such Savings Year, together with all relevant calculations and supporting documentation. The Contractor shall provide such additional information as the Owner may reasonably request in connection with its review of the Annual Savings Statement.

(c) Within 30 days of receiving the Annual Savings Statement, the Owner shall give the Contractor notice either (i) accepting the statement and requesting payment of the Guaranteed Savings Payment, if any, or (ii) rejecting the statement and stating its objections. If the Owner accepts the Annual Savings Statement, the Guaranteed Savings Payment, if any, will

be due upon the Contractor's receipt of such notice. If the Owner rejects the statement, the Contractor shall, within 30 days of receiving the Owner's notice, either (A) recalculate the Energy and Water Savings to satisfy the Owner's objections, or (B) if the Contractor reasonably disputes the Owner's objections, give the Owner notice of such dispute and pay any undisputed amounts. Any such dispute shall be resolved in accordance with Section 12.9 (Dispute Resolution) below.

11.6. Additional Monitoring. In addition to the Quarterly Savings Statements and Annual Savings Statement, the Owner may request that the Contractor prepare additional reports on a quarterly, semi-annual or annual basis, or may prepare such reports using its own personnel or by engaging a third party to prepare such reports, that analyze the savings achieved as a result of the implementation of one or more Construction Units with reference to actual Baseline Energy Consumption and ongoing metered data to determine if the Expected Metered Savings are at least equal to the aggregate of all Lease Payments, whether or not the dollar amounts of the Energy and Water Savings are currently being achieved as measured by the methodology set forth in Schedule F (Savings Measurement and Verification Plan; Methodology to Adjust Baseline). If the Owner requests such reports from the Contractor, the Contractor and the Owner shall mutually determine the amount to be paid by the Owner for such reports and such amount shall be submitted to the Owner for payment, together with the Measurement and Verification Fee in the monthly statement described in Section 11.2 above.

11.7. Remedial Work. If any report prepared pursuant to Section 11.6 above or any statement delivered pursuant to Section 11.5(a) above demonstrates that the Expected Metered Savings are reasonably expected to be less than the aggregate of all Lease Payments, the Contractor and the Owner will work together in good faith at no additional cost to the Owner to determine the reason for the discrepancy and ensure that the Owner achieves dollar savings for the term of this Agreement that are reasonably expected to equal or exceed the aggregate of all the Lease Payments. The Contractor may, at its sole cost and expense, modify installed ECM Installations or install additional energy and water conservation measures as agreed by the Owner to achieve Expected Metered Savings that meet or exceed the aggregate of all the Lease Payments. Modification of ECMs and installation of additional ECMs do not excuse payment of Guaranteed Savings Payments pursuant to Section 11.3, if Guaranteed Savings are not achieved by such modification or installation.

ARTICLE 12 TERM; FURTHER AGREEMENTS

12.1. Term. This Agreement will be effective on the date set forth in the first paragraph hereof and will continue in effect until the [●] anniversary of the Final Completion Date, unless sooner terminated in accordance with its terms.

12.2. Standard of Care. The Contractor shall perform, or cause to be performed, the Work in accordance with the Standard of Care. As used herein "**Standard of Care**" means performance of the Work in compliance with all of the following standards:

- (a) specific standards, methods and requirements set forth in this Agreement;

- (b) all Applicable Laws and all engineering codes applicable to the ECM Installations and the Construction Work;
- (c) the requirements of all manufacturers warranties;
- (d) the application of professional engineering judgment; and
- (e) prudent industry practices, methods, techniques, procedures and standards and using the degree of care and skill that would be expected to be exercised by a prudent, skilled and experienced contractor engaged in activities similar to the Work.

If a discrepancy arises between any of the foregoing standards, the most stringent standard will apply.

12.3. Interest on Overdue Obligations. An amount payable hereunder that is not paid when due will bear interest, from the date on which it was due to the date on which it is paid, at the Late Payment Rate.

12.4. Set-Off Rights. The Owner may set off any amount due and payable to it by the Contractor against any amount payable to the Contractor hereunder.

12.5. Recordkeeping; Audit Rights. The Contractor shall keep and maintain records, books, accounts and other documents sufficient to reflect accurately and completely evidence of completion of all milestones that are the basis for any Application of payment made by the Contractor and all amounts which are the basis of a claim by the Contractor for reimbursement of additional costs for Construction Work under this Agreement. Such records shall include construction records, payroll records, receipts, memoranda, inventories, and accounts of every kind and nature relating to the accounting for the portion of the Construction Work that is a basis for a progress payment or a claim. The Owner and its agents and accountants shall have access to all such records for the purposes of verifying all construction activities that are the basis of a progress payment and all amounts that are the basis of a claim for additional payment and to reproduce any such records. The Contractor shall keep and preserve all such records for a period of at least three years after the Final Completion Date (or earlier termination of this Agreement) or such longer period as may be required by Applicable Law or is necessary in connection with any tax audit or establishing any item on a future tax return. The Contractor shall retain all records with respect to its Investment Grade Audit Report and its Measurement and Verification Services for at least three years after the later of the Final Completion Date or the date such records are created.

12.6. Performance Standards. The Contractor shall perform, or cause to be performed, the Work in compliance with Applicable Law, Applicable Codes, Good Industry Practice and the Owner's conduct requirements set forth in Exhibit 9 (Owner's Conduct Requirements).

12.7. Damages; Limitation of Liability.

(a) The Guaranteed Savings Payment represents a liquidation of expected actual damages to the Owner if Energy and Water Savings are less than the Guaranteed Savings;

it is intended to avoid difficulties of proof with respect to such damages; and it is not intended as a penalty.

(b) Neither party will be liable under this Agreement to the other party for any indirect, special, punitive, incidental or consequential damages, including loss of anticipated profits, whether in contract or tort (including the negligence or strict liability of the party whose liability has been so limited) or otherwise except with respect to the Guaranteed Savings Payment.

12.8. Insurance.

(a) The Contractor, at its own expense, shall procure and maintain, during the term of this Agreement, the insurance described in Exhibit 5 (Required Insurance). All insurers must be licensed by the Commonwealth and rated A-minus or better by A.M. Best or a comparable rating service. At the Owner's request from time to time, the Contractor shall submit to the Owner (i) certificates of insurance evidencing that such insurance coverage is in effect and/or (ii) a certified copy of any applicable policy of insurance. The Contractor shall pay all deductibles under such policies.

(b) The Contractor shall obtain policies that provide that they cannot be canceled or reduced or lapse without at least 30 days' prior notice to the Owner, provided that, if the Contractor is unable to obtain any such policy and the policy is cancelled or reduced or lapses, the Contractor shall instead notify the Owner of such action within two business days of becoming aware of it. Nothing in this subsection (b) derogates from the Contractor's obligation to maintain the insurance described in subsection (a) above.

(c) The foregoing provisions will not be construed in any manner as waiving or restricting the liability of the Contractor under this Agreement.

12.9. Dispute Resolution.

(a) Any claim, dispute or other matters in controversy arising out of or relating to this Agreement (a "**Dispute**") will be resolved in accordance with this Section 12.9. Notwithstanding anything to the contrary in this Agreement, neither party will be required to await the resolution of dispute proceedings regarding the reasons for terminating this Agreement before exercising such party's termination rights.

(b) The parties shall endeavor to resolve a Dispute by mediation conducted by a mediator appointed by the American Arbitration Association under its Construction Mediation Rules. A request for mediation by a party must be made in a notice delivered to the other party, and filed with American Arbitration Association. The request may be made concurrently with the filing of any and all remedies at law or in equity but, in such event, mediation must proceed in advance of any other proceeding as filed in a court of law or equity in the Commonwealth, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or by court order. If the parties have chosen to arbitrate any Dispute and the mediation is stayed, they may nonetheless proceed to the selection of the mediator and agree upon a schedule for later proceedings.

(c) The parties shall share the mediator's fee and any non-court filing fees equally. The mediation shall be held in the Owner's offices, unless another location is mutually agreed upon. Agreements reached in mediation will be enforceable as settlement agreements in any court having jurisdiction thereof.

(d) If mediation is unsuccessful, the parties may proceed to address the Dispute at law or in equity as they deem appropriate.

(e) Pending final resolution of any Dispute (except a Dispute regarding the cause for terminating this Agreement), the parties shall continue to fulfill their respective obligations under this Agreement. During the pendency of any Dispute concerning the payment of money, the amount in controversy may not be paid or set off against unless and until the dispute is resolved in favor of the party claiming entitlement to the disputed payment.

12.10. Confidentiality. The Contractor's systems, means, cost, and methodologies of evaluating, implementing, accomplishing and determining energy and water savings and the terms of this Agreement shall be considered privileged and proprietary information. The Owner shall use the same level of effort to protect and safeguard such information as it employs to safeguard its own confidential information. The Owner shall not disclose such proprietary information without the express written consent of an officer of the Contractor unless required to do so by statute or regulation. When any request for disclosure of such information is made under any applicable freedom of information act, the Owner will provide prompt verbal and written notice to the Contractor of the request for production and the timetable for production. In the event that the Owner is required to make a filing with any agency or other governmental body, which includes such information, the Owner shall notify the Contractor and cooperate with the Contractor in order to seek confidential treatment of such information included within any such filing or, if all such information cannot be protected from disclosure, to request that the Owner be permitted to redact portions of such information, as the Contractor may designate, from the portion of such filing that is to be made available to the public.

12.11. No Liens. The Contractor may not directly or indirectly create, incur, assume or suffer to be created by it any lien or encumbrance on the Owner Facilities, the ECM Installations or the Owner Property arising from the performance of the Work (any such lien or encumbrance, a "**Lien**"). The Contractor shall pay or discharge all demands for payment for labor, materials, supplies or other charges that, if unpaid, might give rise to a Lien. The Contractor shall discharge immediately of record, by bond or otherwise, any Lien. The Contractor shall immediately notify the Owner of the threat or imposition of a Lien. Upon the failure of the Contractor to pay or discharge a Lien, the Owner may pay or discharge such Lien and immediately recover from the Contractor the expenses incurred by the Owner in connection with such payment or discharge (including its own reasonable processing costs) plus interest at the Late Payment Rate on the amount of such payment and other expenses from the date incurred.

12.12. [Public Policy Provisions.]

[To be inserted as relevant to any Owner that is a governmental unit.]

12.13. Taxes.

(a) The Owner shall cooperate reasonably with the Contractor to ensure that purchases of materials or equipment required under this Agreement will enjoy any reasonable favorable tax considerations available under Applicable Law.

(b) The Contractor will be entitled to all tax deductions available under Section 179D of the Internal Revenue Code and the Owner agrees to execute any documents and to provide additional reasonable cooperation to the Contractor related to the Contractor's tax filings under Internal Revenue Code Section 179D. The Contractor will be designated the sole Section 179D beneficiary.

12.14. Indemnification.

(a) The Contractor hereby agrees to defend the Owner and each agency, officer, employee, agent or any other party acting for or on behalf of the Owner (the "**Indemnified Parties**") from, and indemnify and hold each of them harmless against, any and all losses, liabilities (including settlement costs and amounts, transfer taxes, documentary taxes, or assessments or charges made by any governmental authority), claims, damages, interest judgments, costs, or expenses, including reasonable fees and expenses of the Indemnified Parties' legal counsel or other professionals ("**Losses**") and to defend the Indemnified Parties in any suit, including appeals, (i) brought by third parties to the extent arising from or based on the negligence or willful misconduct of the Contractor, any of its subcontractors or any employee, agent or other party acting for or on behalf of the Contractor or any such subcontractor in connection with this Agreement or (ii) arising from or based on (A) any claim by a third party that the Contractor has infringed ownership rights in intellectual property, (B) the Contractor's failure to comply with the Standard of Care or (C) the presence of Hazardous Substances at the Owner Facilities or the Owner Property for which the Contractor is responsible under Section 7.1 above; provided that the Contractor will not be liable to the extent such Losses arise from negligence or willful misconduct on the part of the Indemnified Parties as determined in a final and nonappealable judgment of a court or competent jurisdiction.

(b) If any action is brought against an Indemnified Party in respect of which indemnity may be sought against the Contractor, the Indemnified Party shall promptly notify the Contractor in writing, and the Contractor shall assume the defense thereof, including the employment of counsel, the payment of all expenses and the right to negotiate and consent to settlement with the consent of the Indemnified Party, which consent may not be unreasonably withheld or delayed. An Indemnified Party will have the right to employ separate counsel in any such action and to participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party unless the employment of such counsel has been specifically authorized by the Contractor, or unless the representation of both the Contractor and the Indemnified Party would represent a conflict of interest. The Contractor will not be liable for any settlement of any such action effected without its consent, but if any such action is settled with the consent of the Contractor, or if there is a final judgment for the plaintiff in any such action, the Contractor agrees to indemnify and does hereby hold harmless the Indemnified Parties from and against any and all loss or liability by reason of such settlement or judgment.

ARTICLE 13
EVENTS OF DEFAULT; TERMINATION

13.1. Events of Default by the Owner. Each of the following events or conditions will be a “Owner Event of Default”:

(a) a failure by the Owner to pay any undisputed amount due the Contractor hereunder within 30 days after such payment becomes due;

(b) any other material failure by the Owner to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein and any such failure is not cured within 30 days after notice to the Owner specifying the failure and demanding that the failure be cured or, if the failure cannot reasonably be cured within such 30-day period, such longer period not to exceed 90 days, so long as the Owner is attempting to remedy the default as quickly as practicable; and

(c) any representation or warranty made by the Owner in this Agreement or the Program Agreement was false or misleading in any material respect when made and the Owner fails to correct any material adverse consequences to the Contractor directly caused thereby within 30 days after notice of such failure has been given to the Owner by the Contractor.

13.2. Events of Default by the Contractor. Each of the following events or conditions will be a “Contractor Event of Default”:

(a) a failure by the Contractor to pay any undisputed amount due the Owner hereunder within 30 days after such payment becomes due;

(b) any other material failure by the Contractor to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein and such failure is not cured within 30 days after notice to the Contractor specifying the failure and demanding that the failure be cured or, if the failure cannot reasonably be cured within such 30-day period, such longer period not to exceed 90 days, so long as the Contractor is attempting to remedy the default as quickly as practicable; and

(c) any representation or warranty made by the Contractor in this Agreement or in the Program Agreement was false or misleading in any material respect when made and the Contractor fails to correct any material adverse consequences to the Owner directly caused thereby within 30 days after notice of such failure has been given to the Contractor by the Owner.

13.3. Remedies Available to Each Party. If an Event of Default of either party occurs and is continuing, the other party may, in its sole discretion, take any one or more of the following actions:

(a) terminate this Agreement;

(b) exercise any and all of its rights under this Agreement; and

(c) take any action or enforce any remedies available to it at law or equity to enforce its rights under this Agreement.

13.4. Payment for Completed Work Upon Termination. If this Agreement is terminated pursuant to Section 13.3 above, the Contractor will be entitled to payment for all Work completed by the Contractor up to the date of termination for which payment has not been made. If such termination occurs prior to Final Completion as result of a Contractor Event of Default, such payment will not be due until such time as the amount of the payment due to the Owner is determined pursuant to Section 13.5 below.

13.5. Termination for Contractor Default. If the Owner terminates this Agreement pursuant to Section 13.3 above for a Contractor Event of Default, the Owner will be entitled to complete the Construction Work with its own forces or with other contractors on a time-and-materials or other appropriate basis, and the Contractor shall pay to the Owner, within 30 days following demand, the excess, if any, of the commercially reasonable costs of completing the Construction Work over the Construction Price. Any such payment will not be due until the Owner can determine the amount of such payment.

13.6. Insolvency of the Contractor. It is recognized that if the Contractor becomes insolvent, or institutes or has instituted against it a case under Title 11 of the United States Code, or makes a general assignment for the benefit of its creditors, or if a receiver is appointed for the benefit of its creditors, or if a receiver is appointed on account of insolvency, such event or events could impair or frustrate the Contractor's performance of this Agreement. Accordingly, it is agreed that upon the occurrence of any such event, the Owner will be entitled to request of the Contractor or its successor assurances of future performance that are adequate in the opinion of the Owner. Failure to satisfy such requirement within 10 days following delivery of the request will entitle the Owner to terminate this Agreement under the terms of Section 13.5 above. Pending receipt of adequate assurances of performance and actual performance in accordance therewith, the Owner will be entitled to complete the Construction Work with its own forces or with other contractors on a time-and-materials or other appropriate basis, and the Contractor shall pay to the Owner, on demand, the excess, if any, of the reasonable costs of completing the Construction Work over the Construction Price.

ARTICLE 14 MISCELLANEOUS

14.1. Representations and Warranties.

(a) The Owner represents and warrants that:

(i) it is a [_____];

(ii) it has the power, authority and legal right to enter into and perform this Agreement and its execution and delivery of, and its performance under, this Agreement will not violate its **[organizational documents]** or any judgment, order, law or regulation;

(iii) no consent, permission or approval is required for the valid execution and delivery by the Owner of this Agreement or for such party's performance hereunder, except those that have been obtained;

(iv) this Agreement has been duly authorized, executed and delivered by the Owner and constitutes a legal, valid and binding obligation of the Owner, enforceable in accordance with its terms, except to the extent limited by bankruptcy or similar laws or by general equitable principles concerning remedies; and

(v) there is no litigation or proceeding pending or, to the knowledge of the Owner, threatened against or affecting it that (A) seeks to enjoin the performance of its obligations under this Agreement or (ii) if adversely determined, would materially adversely affect its ability to, perform such obligations.

(b) The Contractor represents and warrants that:

(i) it is duly organized and in good standing in the jurisdiction of its organization and, if not organized in the Commonwealth, is licensed to do business as a foreign corporation in the Commonwealth;

(ii) it has the power, authority and legal right to enter into and perform this Agreement and the Contractor's execution and delivery of, and its performance under, this Agreement will not violate the Contractor's organizational documents or any judgment, order, law or regulation;

(iii) no consent, permission or approval is required for the valid execution and delivery by the Contractor of this Agreement or for the Contractor's performance hereunder, except those that have been obtained;

(iv) this Agreement has been duly authorized, executed and delivered by the Contractor and constitutes a legal, valid and binding obligation of the Contractor, enforceable in accordance with its terms, except to the extent limited by bankruptcy or similar laws or by general equitable principles concerning remedies; and

(v) there is no litigation or proceeding pending or, to the knowledge of the Contractor, threatened against or affecting it that (i) seeks to enjoin the performance of its obligations under this Agreement or (ii) if adversely determined, would materially adversely affect its ability to, perform such obligations.

14.2. Representatives.

(a) The Contractor shall appoint a Contractor representative who is authorized to execute Change Orders and to act generally on behalf of the Contractor.

(b) The Owner shall appoint a Owner representative who is authorized to execute Change Orders and to act generally on behalf of the Owner.

(c) Each party shall provide notice to the other party setting forth the name, address, day and night telephone numbers, telecopier numbers and e-mail addresses of its representative.

14.3. Notices.

(a) Unless otherwise specifically provided in this Agreement, all notices, consents, waivers, authorizations and approvals given under this Agreement must be in writing and may be telecopied, delivered by hand, mailed by first class, registered mail (return receipt requested) or sent by FedEx or similar courier service and addressed as follows:

If to the Contractor:

With a copy to:

If to the Owner:

With a copy to:

(b) Each party may change the address to which its communications are delivered by giving notice to the other party. Any communication given in accordance with this Section will be deemed to have been given to a party upon its receipt thereof.

14.4. Relationship of the Parties.

(a) It is understood that, in the performance of the Work, the Contractor will be, and is, an independent contractor, and is not an agent or employee of the Commonwealth or any of its agencies and will furnish such services in its own manner and method except as required by this Agreement. The Contractor will be solely responsible for, and shall indemnify, defend and save the Commonwealth and the Owner harmless from all matters relating to the payment of its employees, including compliance with social security, withholding and all other wages, salaries, benefits, taxes, exactions, and regulations of any nature whatsoever.

(b) The Contractor acknowledges that the Contractor and any Subcontractors, agents or employees employed by the Contractor will not, under any circumstances, be considered employees of the Commonwealth or any of its agencies, and that they will not be entitled to any of the benefits or rights afforded employees of the Commonwealth, including sick leave, vacation leave, holiday pay, [Relevant Pension System] benefits, or health, life, dental, long-term disability or workers' compensation insurance benefits. Neither the Commonwealth nor the Owner will provide or pay for any liability or medical insurance, retirement contributions or any other benefits for or on behalf of the Commonwealth or the Owner or any of their respective officers, employees or agents.

(c) As an independent contractor, the Contractor has no authority to bind or commit the Commonwealth or the Owner. Nothing herein will be deemed or construed to create a joint venture, partnership, fiduciary or agency relationship between the parties for any purpose.

(d) The Owner acknowledges and agrees that the Contractor has not acted as a municipal financial advisor to the Owner and that the Owner has not relied on the Contractor for any matters relating to the financing of the Work.

14.5. Waivers. Any waiver of, or consent to depart from, the requirements of any provision of this Agreement will be effective only if it is in writing and signed by the party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of either party to exercise, and no delay in exercising, any right under this Agreement will operate as a waiver of such right.

14.6. Assignment. This Agreement may not be assigned by either party, directly or by merger or other operation of law, without the consent of the other party, which consent shall not unreasonably be withheld. Any purported assignment of this Agreement in violation of this Section 14.6 will be null and void.

14.7. Binding Effect. This Agreement will be binding upon, and inure to the benefit of, the parties and their respective successors and permitted assigns.

14.8. Severability. If any provision of this Agreement is determined to be invalid, illegal or unenforceable in any respect, the parties shall negotiate in good faith and agree to such amendments, modifications or supplements of or to this Agreement or such other appropriate actions as may, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the parties as reflected herein, and the other provisions hereof will, as so amended, modified or supplemented, or otherwise affected by such action, remain in full force and effect.

14.9. Complete Agreement. This Agreement and the Program Agreement constitute the entire agreement between the parties relating to the subject matter hereof and supersede all prior agreements (including the Energy Audit Agreement), negotiations, discussions and understandings, written or oral, between the parties as to the subject matter hereof.

14.10. Amendment. This Agreement may not be amended or modified except by a written instrument signed by the parties.

14.11. Survival. The following provisions will continue in full force and effect notwithstanding the termination of this Agreement pursuant to Section 12.1 or earlier termination in accordance with its terms: Section 4.8 (Responsibility for Damages), Section 12.3 (Interest on Overdue Obligations), Section 12.5 (Recordkeeping; Audit Rights); Article 9 (Warranties; Intellectual Property; Title), Sections 10.2, 10.3 and 10.4 (relating to indemnification), Article 13 (Events of Default; Termination), Section 12.7 (Damages; Limitation of Liability), Section 12.9 (Dispute Resolution), Section 12.10 (Confidentiality) and this Article 14.

14.12. No Third-Party Beneficiaries. Nothing in this Agreement provides any benefit to any third party or entitles any third party to any claim, cause of action, remedy or right of any kind.

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

14.14. Governing Law. This Agreement will be governed by, and interpreted and enforced in accordance with, the laws of the Commonwealth (excluding any conflict of laws rule or principle that might refer such interpretation to the laws of another jurisdiction). Each party consents to jurisdiction and venue in courts of the Commonwealth in jurisdictions in which the Owner is located.

14.15. Headings. Headings and subtitles used in this Agreement are for the purpose of convenience only, and no heading or subtitle may be construed to modify or be used to interpret the text of any section.

14.16. Counterparts. This Agreement may be executed in any number of counterparts that, taken together, will constitute one and the same agreement.

[Signature Page to Follow]

As evidence of their intent to be legally bound, the Contractor and the Owner have each caused this Guaranteed Savings Agreement to be duly executed by their respective duly authorized representatives as of the day and year first written above.

[OWNER]

By: _____
Name:
Title:

[CONTRACTOR]

By: _____
Name:
Title:

Exhibit 1

Forms of Payment and Performance Bonds

[See Exhibit 1 to the Investment Grade Audit Report]

Exhibit 2

Contractor Documents

ECM Installations

To the extent applicable, preliminary design documents consisting of design criteria, preliminary design drawings, outlining specifications and other documents to fix and describe the size, quality and character of the ECM Installations, their architectural, structural, mechanical and electrical systems, and the materials and other elements of the ECM Installations as may be appropriate.

To the extent applicable, construction documents including technical drawings, schedules, diagrams and specifications, job books containing calculations used in the final design, but excluding shop drawings, setting forth in detail the requirements for construction of the ECM Installations that—

- establish the scope of the ECM Installations in greater detail;
- provide information necessary for the use of those in the building trades; and
- include documents necessary for regulatory agency approval.

To the extent applicable, record or as-built drawings showing significant changes made during construction.

ECM Installation Operation Manual

The ECM Installation Operation Manual shall (a) include the full technical information and non-technical explanations so the Owner can use and operate each ECM Installation for its intended purpose, (b) the operation and maintenance requirements for each ECM Installation and (c) at a minimum, include the following to the extent applicable:

- operation and maintenance requirements applicable to all portions of the ECM Installations, and minimum and maximum operating ranges of all ECM Installations;
- sequence of events required for startup, operation and shutdown of all ECM Installations under normal and emergency conditions;
- interrelationship of items of equipment and processes;
- routine maintenance activities and schedule for all equipment and buildings necessary for the continuous safe and efficient operation of the ECM Installations, including the type, quantity and sources of materials required for such maintenance; and list of recommended spare parts.

Exhibit 3
Form of Program Agreement

[See attached]

Exhibit 4

Form of Application for Payment

To: [_____] (the “Owner”)

From: [_____] (the “Contractor”)

Pursuant to Section 8.2 of the Guaranteed Savings Agreement, dated as of _____, 20[___] between the Owner and the Contractor (the “**Guaranteed Savings Agreement**”), the Contractor hereby applies for Amount Payable set forth below, such amount representing the amount due for having achieved the milestones identified below.

Milestones [list separately]	Payment Amount [list separately]
Total Milestone Amounts	
Less [●]% Retainage	
Amount Payable	

On behalf of the Contractor, I hereby certify as follows:

1. the Construction Work for which payment is sought (a) has been performed to the extent indicated in this Application for Payment, as determined pursuant to Schedule 7 (Milestone Schedule) of the Guaranteed Savings Agreement, and substantially in accordance with the Guaranteed Savings Agreement and (b) has not been the subject of a previous Application for Payment;
2. there are no liens or encumbrances on the Owner Property or the Owner Facilities arising from the performance of the Construction Work; and
3. the Guaranteed Savings Agreement is in full force and effect and no event of default on the part of the Contractor exists thereunder and no event or condition exists that, with the giving of notice or the passage of time, would constitute such an event of default.

Capitalized terms used in this Application for Payment are defined in the Guaranteed Savings Agreement.

[CONTRACTOR]

By: _____
Authorized Representative

Exhibit 5

Required Insurance

The Contractor shall procure and maintain the following insurance:

1. Workers' Compensation and Employers' Liability.
2. Workers' Compensation—statutory limits.
3. Employers' Liability limits as follows:
 - a. Bodily Injury by accident \$1,000,000 each accident
 - b. Bodily Injury by disease \$1,000,000 policy limit
 - c. Bodily Injury by disease \$1,000,000 each employee
4. Commercial General Liability.
 - a. Occurrence form.
 - b. The limit shall not be less than \$5,000,000, comprised of (i) \$2,000,000 on a per-occurrence form and (ii) \$3,000,000 on either a per-occurrence or claims-made form, in the aggregate for bodily injury, property damage, personal injury and products/completed operations.

This limit may be satisfied by primary or excess insurance or any combination of primary or excess insurance.
 - c. Coverage shall:
 - i. by "Additional Insured" endorsement add as insureds the Owner, the Issuer, and the directors, officers, agents and employees of each of them with respect to liability arising out of the Work.
 - ii. be endorsed to specify that the Contractor's insurance is primary and that any insurance or self-insurance maintained by the Owner will not contribute with it.
 - iii. include a severability of interest clause.
5. Business Auto.
 - a. "Owned, Hired and Non-owned" basis.
 - b. The limit shall not be less than \$2,000,000 for each accident and in the aggregate for bodily injury and property damage. This limit may be

satisfied by primary or excess insurance or any combination of primary or excess insurance.

6. All Risk Builders Risk Insurance.
 - a. An All Risk Builders Risk insurance policy including earthquake and flood include start-up and testing for installed equipment, coverage for materials and equipment while under the care, custody and control of the Contractor during performance of the work, at the site, offsite or while in transit to the site.
 - b. Coverage shall be written to cover the full replacement cost of the property, except earthquake and flood, which may be subject to sublimits that are reasonably available.
7. Additional Insurance Provisions.
 - a. The Contractor shall use commercially reasonable efforts to make sure that the insurance documentation shall state that coverage shall not be cancelled, reduced or otherwise materially changed except after 30 days prior written notice (10 days for non-payment of premium), provided that, if the Contractor is unable to obtain such documentation and the policy is cancelled or reduced or lapses, the Contractor shall instead notify the Owner of such action within two business days of becoming aware of it.
 - b. The insurance carrier must be authorized to do business in the Commonwealth and carry an A.M. Best's Insurance Guide rating of "A-minus" or better.
8. Form and Content.

With respect to any additional insured, provide that such insurance will not be invalidated by any action or inaction of another insured and will insure each such insured regardless of any breach or violation of any warranty, declaration or condition contained in such insurance by the primary named insured.

Exhibit 6

Form of Lease Agreement

[To come.]

Schedule A through Schedule N

[See Schedules A through Schedule N of the Investment Grade Audit Report]

Schedule O

Commissioning and Performance Tests

- Commissioning of each item of equipment and each ECM Installation in accordance with manufacturer's requirements, Applicable Codes and applicable standards.
- Safety inspection and testing of all Unit connections and safety monitoring or risk prevention measures, including safety shut-off or pressure release equipment, for circulation or use of electricity, steam, water, fuel and other working fluids, and all mechanical systems.
- Testing of all equipment and each ECM Installation to demonstrate the full range of required function.
- Testing of each integrated system that includes one or more new ECM Installations to demonstrate performance consistent with achieving the Guaranteed Savings without interruption over a statistically significant period.
- Demonstrating compliance with all Applicable Law and permit requirements during the entire testing period.
- Demonstrating achievement of LEED or other agreed certification standards.

Schedule P

Milestone Schedule

This schedule lists construction milestones against which payment will be made. The list can be detailed so as to permit payment for small increments of construction. Each milestone must be capable of independent audit and not based on judgment. Percent complete is not an auditable standard unless based on installation of a specific number of units of identical material or equipment against a fixed total of such units in the Scope of Work.

Schedule Q
Approved Subcontractors

Schedule R

Measurement and Verification Fee