

Draft ESA

ENERGY SERVICES AGREEMENT
BETWEEN
THE CITY OF DOVER
AND
JOHNSON CONTROLS INCORPORATED

TABLE OF CONTENTS

RECITALS 3

SECTION 1: EQUIPMENT INSTALLATION AND COMMENCEMENT OF SERVICES 3

SECTION 1.1: EQUIPMENT INSTALLATION DATE 3

SECTION 1.2: FINAL NOTIFICATION DATE 4

SECTION 2: OWNERSHIP OF PROPERTY 4

SECTION 2.1: OWNERSHIP OF EQUIPMENT 4

SECTION 2.2: OWNERSHIP OF CERTAIN PROPRIETARY PROPERTY RIGHTS 4

SECTION 3: EQUIPMENT LOCATION AND ACCESS 4

SECTION 4: UPGRADING THE EQUIPMENT 5

SECTION 5: STANDARDS OF SERVICE 5

SECTION 6: EQUIPMENT MAINTENANCE 5

SECTION 6.1: PREVENTIVE MAINTENANCE SCHEDULE AND TRAINING 5

SECTION 6.2: MAINTENANCE STAFF 6

SECTION 6.3: EQUIPMENT ANALYSIS 6

SECTION 7: CONTRACT TERM 6

SECTION 8: PAYMENT PROVISIONS AND SAVINGS GUARANTEE 6

SECTION 8.1: SCHEDULE OF VALUES 7

SECTION 8.2: REQUEST FOR PAYMENT 7

SECTION 8.3: GUARANTY OF SAVINGS 8

SECTION 8.4: CALCULATION OF ENERGY COST SAVINGS 9

SECTION 8.5: RETROACTIVE ADJUSTMENTS 9

SECTION 8.6: INDEPENDENT AUDIT 9

SECTION 9: TERMINATION 10

SECTION 10: NON-APPROPRIATION 11

SECTION 11: CHANGES AT THE PREMISES 11

SECTION 12: ADJUSTMENTS TO ENERGY SAVINGS 11

SECTION 13: WORKING RELATIONSHIPS BETWEEN CUSTOMER AND ESCO DURING PROJECT 12

SECTION 14: WASTE MANAGEMENT 15

SECTION 14.1: CONSTRUCTION AND DEMOLITION WASTE MANAGEMENT 15

SECTION 14.2: HAZARDOUS WASTE MANAGEMENT 16

SECTION 14.3: MERCURY CONTAINING MATERIALS 17

SECTION 15: MANAGEMENT OF THE SERVICES 17

SECTION 16: MODIFICATION OF THE SERVICES 18

SECTION 17: PREVAILING WAGE RATE 18

SECTION 18: LEGAL OR EQUITABLE REMEDIES 19

SECTION 19: SUBCONTRACTORS 19

SECTION 20: MASSACHUETTS AND UNITED STATES MANUFACTURERS 19

SECTION 21: NOTICES 19

SECTION 22: ASSIGNMENT 20

SECTION 23: FORCE MAJEURE 20

SECTION 24: PARTIAL INVALIDITY 20

SECTION 25: CERTIFICATION BY ESCO 20

SECTION 26: AMENDMENTS 20

SECTION 27: REPRESENTATION AND WARRANTIES 20

SECTION 28: APPLICATION OF MASSACHUSETTS LAW 21

SECTION 29: APPLICATION AND SURVIVAL OF CERTAIN PROVISIONS 21

SECTION 30: OWNERSHIP OF DOCUMENTS 21

SECTION 31: ANTI-BOYCOTT COVENANT 21

SECTION 32: ACCESS TO ESCO’S RECORDS 21

SECTION 33: INDEMNIFICATION 21
SECTION 34: ESCO’s INSURANCE..... 22
SECTION 34.2: ESCO’s Commercial Liability..... 23
SECTION 34.3: Automobile Liability..... 24
SECTION 34.4: Pollution Liability**Error! Bookmark not defined.**
SECTION 34.5: Worker’s Compensation 24
SECTION 34.6: Builder’s Risk/Installation Floater/Stored Materials 25
SECTION 34.7: Umbrella Coverage..... 26
SECTION 34.8: Professional Liability Insurance..... 26
SECTION 34.8: Additional Types of Insurance 26
SECTION 35: THIS SECTION RESERVED FOR FUTURE USE 26
SECTION 36: BONDS 26
SECTION 37: ESCO’S ACCOUNTING METHOD REQUIREMENTS 27
SECTION 38: DISPUTE RESOLUTION 29
SECTION 39: INDEPENDENT CONTRACTOR 29
SECTION 41: ENFORCEMENT..... 29
SECTION 42: SCHEDULES 29
SECTION 43: CONTRACT SIGNATURES 30
SCHEDULE A: DESCRIPTION OF THE PREMISES 31
SCHEDULE B: DESCRIPTION OF ENERGY CONSERVATION MEASURES AND EQUIPMENT 32
SCHEDULE B-1: WARRANTY 33
SCHEDULE B-2: MAINTENANCE PROCEDURES/ROUTINES REQUIRED FOR PREMISES BY –35
SCHEDULE B-3: MAINTENANCE PROCEDURES/ROUTINES REQUIRED FOR PREMISES BY
ESCO 36
SCHEDULE C: BASELINE..... 37
PART I: BASELINE DEVELOPMENT PROCEDURE 37
PART II: ENERGY BASELINE 40
PART III: UTILITY RATE SCHEDULES 41
SCHEDULE D: MONTHLY SAVINGS 42
Part IV. Annual and Quarterly Reporting Requirements 44
Executive Summary (Annual and Quarterly)..... 44
Details for each ECM (Annual and Quarterly) 45
SCHEDULE E: DESCRIPTION OF STANDARDS OF SERVICE AND COMFORT 47
SCHEDULE F: SERVICE AGREEMENTS FOR ENERGY 48
SCHEDULE G: TERMINATION VALUE 49
SCHEDULE I: ENERGY AUDIT..... 51
SCHEDULE J: RECONCILIATION OF DOLLAR ESTIMATE OF GUARANTEED SAVINGS 52
SCHEDULE L: BONDS..... 55
EFFICIENCY GUARANTEE BOND..... 57
SCHEDULE M: USE OF PREMISES 58
SCHEDULE N: PREVAILING WAGE RATES
PREVAILING WAGE SCHEDULE
STATEMENT OF COMPLIANCE
CONTRACTOR’S WEEKLY WORKFORCE REPORT
CERTIFICATE OF COMPLIANCE WITH STATE TAX LAWSVOTE OF CORPORATION..... 63

DRAFT ESA

DEFINITION OF TERMS

| | |
|---------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|
| <u>Acceptance Certificate</u> | Certificate verifying that Customer accepts the Installation in accordance with payment schedule Outlined in Section 1 of the Agreement. |
| <u>Agreement</u> | Energy Services Agreement |
| <u>Capital Investment</u> | The total amount of the capital/equipment costs and installation/labor costs to be made by the ESCo. |
| <u>Customer</u> | City of Dover, New Hampshire |
| <u>ECMs</u> | Energy Conservation Measures |
| <u>ECM Installation Date</u> | Date on which the Customer notifies the ESCo in writing that it accepts the installation of the ECM. |
| <u>Effective Date</u> | Date by which Agreement is binding between the Parties |
| <u>Energy Cost Savings</u> | Value of Energy Cost Savings as calculated in Schedule D. |
| <u>Equipment</u> | The items to be installed to accomplish the energy and water conservation measures contained in Schedule B |
| <u>ESCo</u> | Johnson Controls Incorporated |
| <u>Final Notification Date</u> | Notice in writing from the Customer to the ESCo that the Customer accepts all the Equipment Installed and its operation as 100% complete. |
| <u>Guaranteed Savings</u> | The gross energy savings guaranteed under the Agreement by ESCo to Customer. |
| <u>Lease Purchase Agreement</u> | Master Equipment Lease/Purchase Agreement (TELP) as determined by the parties. |
| <u>Lessor</u> | Financial Institution supplying Customer with lease under the Lease Purchase Agreement. |
| <u>Measured Savings</u> | The savings achieved and calculated as set forth in Schedule D. |
| <u>Services</u> | The services to be performed by ESCo in Accordance with Schedule B-3 and its attachments. |
| <u>Term</u> | The term of this Agreement shall be as defined in Section 7: <u>Contract Term.</u> |

DRAFT ESA

Total Project Cost

The total amount the ESCo is compensated by the Lessor for the delivery and installation of the Equipment, and to provide other services as set forth herein.

Utility Rates

The minimum unit cost for each utility as established in Schedule C, Part III.

Year

Each twelve-month period covering the contract term, the first of which commences on the Effective Date.

ENERGY SERVICES AGREEMENT

This energy services agreement (“Agreement”) is made and entered into as of date of last execution (“Effective Date”) by and between Johnson Controls Incorporated, a corporation incorporated in the State of _____having its principal offices at(“ESCO”), and the City of Dover (City), a municipal corporation having its principal offices at 288 Central Avenue, Dover, New Hampshire 03820 ("Customer"), for the purpose of installing energy efficient equipment and providing other services designed to reduce energy consumption at the city buildings (hereinafter the "Premises", which are more particularly described in Schedule A attached hereto).

RECITALS

WHEREAS, the Customer owns or leases the Premises and has legal authority to procure energy and water conservations services and HVAC upgrades;

WHEREAS, the ESCo provides a service for reducing energy and water consumption and costs through the use of engineering analyses, operations procedures, and energy savings devices acquired and installed by the ESCo;

WHEREAS, the Customer desires, and is authorized under _____(Add in meeting date?), to retain the ESCo to design, acquire, install and assist in the maintenance of the equipment to be installed to accomplish the energy and water conservation measures contained on Schedule B (hereinafter collectively referred to as "the Equipment"), and to provide other services, all as more fully set forth herein, subject to all the terms and conditions of this Agreement; and

WHEREAS, the ESCo has made an assessment of the energy consumption characteristics of the Premises, and will acquire, install, and be directly responsible for undertaking certain energy efficiency improvements and assisting in the facility's operation and management of the energy and water systems as this system relates to energy savings upon some portion of the Premises;

WHEREAS, Lessor will compensate ESCo for the Equipment through a third-party Master Equipment Lease/Purchase Agreement ("Lease/Purchase Agreement").

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is mutually acknowledged, it is agreed that:

SECTION 1: EQUIPMENT INSTALLATION AND COMMENCEMENT OF SERVICES

No later than two months after the Effective Date, the ESCo will commence the implementation of such preliminary operations and procedures as the ESCo deems appropriate to begin the reduction of energy consumption of the Premises. Thereafter, within three hundred and sixty-five (365) days after the Effective Date, the ESCo shall complete design of, obtain, deliver, install, and commence to operate the Equipment, as required by this Agreement and shall complete the other services described in Schedule B.

SECTION 1.1: EQUIPMENT INSTALLATION DATE ESCo shall send a notice ("Installation Notice") to the Customer after the ECM/Equipment and/or system has operated for thirty (30)

DRAFT ESA

consecutive days in compliance with this Agreement, any applicable technical specifications, and all testing, commissioning (if required) and training has been completed. Within thirty (30) days of receipt of the Installation Notice, Customer shall either:

a) Send ESCo an “ECM/Equipment Installation Approval” form; or

b) In writing notify ESCo that it does not accept the ECM/Equipment and state the reasons for non-acceptance.

The date on which the Customer notifies the ESCo in writing that it accepts the installed ECM/Equipment and/or system shall be the ECM Installation Date. The measurement and verification services (the “M&V Services”) set forth in Schedule __ shall commence on the first day of the month following the ECM Installation Date and shall continue throughout the Term, subject to earlier termination of this Agreement, including the ESCo’s obligation to meet the Guaranteed Savings as provided herein. .

SECTION 1.2: FINAL PROJECT NOTIFICATION DATE. ESCo shall send a notice (“Final Project Notice”) to the Customer after all the Equipment and/or systems have been installed and the operations are 100% complete. Within ten (10) days of receipt of the Final Project Notice, Customer shall either :

a) Send ESCo a “Final Project Notification Approval” form; or

b) In writing notify ESCo that it does not accept the “Final Project Notice” and state the reasons for non-acceptance.

The date on which the Customer notifies the ESCo in writing that it accepts all the Equipment and/or system installed and its operation as 100% complete shall be the Final Notification Date (“Final Notification Date”).

SECTION 2: OWNERSHIP OF PROPERTY

SECTION 2.1: OWNERSHIP OF EQUIPMENT Title to and all ownership interest in the Equipment installed in the Premises pursuant to this Agreement shall pass to the Lessor upon payment in full to ESCo in accordance with Section 8.1, free and clear of any liens, encumbrances, or claims of or by ESCo, its contractors, subcontractors, and suppliers, AS IS, WHERE IS without any warranties either express or implied, except as provided in Schedule B-1, and at no additional cost or charge to Customer, upon acceptance by Customer.

ESCo shall bear all risk of loss to the Equipment which occurs in transit to the Premises and until the ECM Installation Date.

SECTION 2.2: OWNERSHIP OF CERTAIN PROPRIETARY PROPERTY RIGHTS Customer shall acquire no interest under this Agreement in any software, formulas, patterns, devices, secret inventions or processes, or copyright, patent, and other intellectual and proprietary rights or similar items of property which are or may become used in connection with the Equipment. Upon request, Customer will execute an appropriate software license agreement with the ESCo limiting the use of software provided in connection with the Equipment and this Agreement. The provisions of said software license agreement shall not modify any of the terms of this agreement.

SECTION 3: EQUIPMENT LOCATION AND ACCESS

DRAFT ESA

Customer shall provide mutually satisfactory rent free space for the installation and operation of the Equipment and shall protect such Equipment in the same careful manner that Customer protects its own property. Customer shall provide access, upon prior notice to Customer, to the Premises for the ESCo and its contractors or subcontractors during normal business hours, or such other hours as may be requested by the ESCo to install, adjust, inspect, maintain and repair the Equipment, provided that all procedures, as described in Schedule M, are followed. The ESCo's access to correct any emergency condition shall not be restricted by Customer.

SECTION 4: UPGRADING OR ALTERING THE EQUIPMENT

(a) The ESCo shall have the right to replace, delete or substantially alter any item of Equipment, add additional Equipment, or take other energy saving actions. Such actions shall be recommended to the Customer in writing and shall be subject to Customer's written prior approval, which approval shall not be unreasonably withheld. Replacements, substantial alterations, or additions of Equipment by the ESCo shall belong to and become property of the Customer and shall be a part of the Equipment for purposes of this Agreement.

(b) Any modification to, or any damage, destruction, failure or replacement of, any capital energy related equipment owned by Customer exclusive of Equipment installed under this Agreement and used at the Premises shall be the sole responsibility of Customer, except that where such damage, destruction, modification, failure or replacement is the result of an act or acts of the ESCo, its contractors, subcontractors or suppliers, the ESCo shall correct such damage, destruction, modification, failure or replacement at the ESCo's expense. The compensation payable to the ESCo pursuant to this Agreement is not intended to extend to or impose upon the ESCo any obligation to incur capital costs for equipment used or to be used at the Premises other than such items as are designated and defined as Equipment pursuant to this Agreement, except as otherwise stated in this Section 4(b) and in Schedule M.

(c) ESCo shall bear the cost of any modifications to and/or replacement of Customer's existing equipment whenever the same is reasonably necessary for installation of the new Equipment in accordance with good engineering practice; provided that the Customer shall first approve in writing such modifications to and/or replacement of its equipment.

SECTION 5: STANDARDS OF SERVICE

The ESCo will install the Equipment in such a manner that it will meet the standards of service and comfort (including lighting levels) described in Schedule E, and any amendments thereto throughout the contract term. In the event that the standards are not met, Customer shall notify the ESCo in writing, and shall withhold all payments due after the date of such notification until standards are met. ESCo shall not be liable if the existing Customer equipment, unaffected by ESCo, is insufficient or incapable of meeting standards of service.

SECTION 6: EQUIPMENT MAINTENANCE

SECTION 6.1: PREVENTIVE MAINTENANCE SCHEDULE AND TRAINING Within ninety days of each Installation Date the ESCo will provide the Customer with a preventative maintenance schedule and maintenance manuals for all new Equipment installed for this project, which Equipment is described in Schedule B. The maintenance manuals shall become the property of the City. The maintenance manuals shall detail the maintenance requirements for each system in each building, spreadsheet summary will be required. Three (3) copies and one

DRAFT ESA

electronic version of each of the manuals will be provided. The ESCo will, where reasonably practicable, coordinate its efforts in this area with the Customer's staff involved with administering the state-wide preventive maintenance program. The ESCo will train Customer personnel to operate and maintain new Equipment installed as part of this project as prescribed in Schedule B.

The ESCo shall provide for each building a list of all major equipment installed, including the manufacturer, brand name, model (if applicable), equipment components, and recommended maintenance procedures for each piece of equipment. Two digital copies shall be provided on CD in Windows compatible spreadsheet format: one copy shall be furnished to City, one to the facility. One printed copy shall be provided to City and one to the facility.

The ESCo shall provide for each building a list of all major products installed, including lights, insulation, ductwork, and other products. The list shall include the manufacturer, brand name, model (if applicable), materials contained in the product, and approximate amount of product installed. Two digital copies shall be provided on CD in Windows compatible spreadsheet format: one copy shall be furnished to City, one to the facility. One printed copy shall be provided to City and one to the facility.

Customer shall be responsible for providing the necessary maintenance, repairs, and adjustments to Customer's existing equipment and for performing maintenance, repairs and adjustments required by the ESCo's preventative maintenance schedule to the Equipment as specified in Schedule B-2. The ESCo shall be responsible for maintenance on Equipment it installs for the Term of this Agreement as detailed in Schedule B-3. Customer agrees to act reasonably to protect the Equipment from damage. Customer further agrees to maintain the Premises in good repair and to protect and preserve the building envelope and the operating condition of all mechanical systems, existing equipment (other than Equipment), and other energy-consuming systems located on the Premises as outlined in Schedules B-2 and B-3. Any existing services agreements for energy management with maintenance providers other than the ESCo are listed in Schedule F.

ESCo shall provide As Built documentation for all equipment installed under this contract.

SECTION 6.2: MAINTENANCE STAFF The ESCo will not install equipment that will require the Customer to hire additional personnel to operate, unless Customer is made aware of the need to hire additional maintenance staff and agrees, in writing, to make that commitment of staff. The ESCo will explain the operation and maintenance requirements of all proposed Equipment to facility personnel.

SECTION 6.3: EQUIPMENT ANALYSIS One hundred and fifty days (150) before the termination date of this Agreement or within thirty (30) days of receipt of an early termination notice pursuant to Section 9.1, the ESCo shall provide Customer with a report analyzing the condition, projected life, and schedule of recommended repairs or replacement to the Equipment installed by the ESCo pursuant to this Agreement.

SECTION 7: CONTRACT TERM

The Term of this Agreement shall begin on the Effective Date, and shall run continuously from such date until the tenth (10) anniversary of the Final Notification Date of this Agreement.

SECTION 8: PAYMENT PROVISIONS AND SAVINGS GUARANTEE

Provided the ESCo is not in default of its obligations hereunder, the ESCo shall be compensated a total of \$ xxxx by Lessor for all services to be provided under this contract. Payments shall be made in accordance with the sections below. Final payment shall not be made until thirty days after the Final Notification Date.

SECTION 8.1: SCHEDULE OF VALUES Prior to the first request for payment, the ESCo shall submit to Customer a schedule of values for the various portions of the work, including quantities, aggregating the Total Project Cost and divided so as to facilitate payment for work. The schedule shall be prepared in such format as the Customer may approve, and shall include data to substantiate its accuracy. When approved by the Customer, it shall constitute the Schedule of Values and shall be used only as a basis for the Contractor's requests for payments.

SECTION 8.2: REQUEST FOR PAYMENT.

(a) The ESCo shall, on a regular basis approved by the Customer, on forms provided and in the manner prescribed by the Customer, submit to the Customer a statement showing the total amount of Equipment installed to the time of such estimate and the value thereof as approved by the Commissioning Agent. Such forms will be similar to the AIA forms for payment documentation. It shall be the sole responsibility of the ESCo to deliver or cause to be delivered to the Commissioning Agent, said periodic estimate in proper form, approved as provided above and mathematically correct. All periodic estimates shall contain such certifications and other evidence supporting the ESCo's right to payment as the Customer may require. The ESCo shall include in such periodic estimate only such materials as are incorporated in the Equipment. The Customer shall retain percent as listed in Section 8.2.e of such estimated value as part security for the completing the installation of the Equipment and shall pay to the ESCo the balance not retained as aforesaid, subject to the approval of the Customer after deducting therefrom all previous payments and all sums to be kept under the provisions of this Agreement.

(b) Each periodic estimate shall constitute the ESCo's representation that (1) the payment then requested to be disbursed has been incurred by the ESCo on account of the installation of the Equipment and is justly due on account thereof, (2) the materials, supplies and equipment for which Application for Payment is being submitted have been installed or have been stored at the Site or at such off Site storage locations as the Customer shall have approved, and (3) the materials, supplies and equipment are insured in accordance with the provisions of this Agreement.

(c) The Customer may make changes in any periodic estimate submitted by the ESCo and the payment due shall be computed in accordance with the changes so made.

(d) The ESCo and all Subcontractors furnishing labor on this Agreement agree to furnish certified payroll reports if requested to do so, at no additional expense. The Customer may at all reasonable times audit such reports.

(e) Customer will pay 100% of the installation work on a progress payment basis up to 80% of the contract price. The remaining 20% will be paid at the Final Notification date. Customer will pay 25% of contract price 30

DRAFT ESA

days after effective date and remainder based on progress payments as defined above.

SECTION 8.3: GUARANTY OF SAVINGS ESCo guarantees that as a result of the installation of the Equipment, Customer will realize energy cost savings as calculated pursuant to the savings analysis set forth in the Technical Audit and measured and verified pursuant to Schedules C and D ("Baseline" and "Monthly Savings Calculations") each Year for the contract term as follows:

ENERGY COST SAVINGS
(in 2009 Dollars)

| Year | Energy Cost Avoidance | Operations & Maintenance Cost Avoidance | Future Capital Cost Avoidance | Annual Project Cost Avoidance |
|------|-----------------------|-----------------------------------------|-------------------------------|-------------------------------|
| 1 | | | | |
| 2 | | | | |
| 3 | | | | |
| 4 | | | | |
| 5 | | | | |
| 6 | | | | |
| 7 | | | | |
| 8 | | | | |
| 9 | | | | |
| 10 | | | | |

For the purpose of this guaranty, the following assumptions and provisions apply:

- (a) Calculations of energy consumption and Energy Cost Savings shall be made pursuant to the savings analysis set forth in the Technical Audit and measured and verified pursuant to Schedules C, D and J;
- (b) "Year" shall mean the twelve (12) month period following the Effective Date, and each consecutive twelve (12) month period thereafter;
- (c) Annual energy consumption shall be adjusted pursuant to Schedule J. The marginal electricity cost, as noted in the (**utility and rate schedule**) contained in Schedule C - Part 3 together with the appropriate rate adjustments as indicated in the Base Year energy and cost data, shall be considered the base amount for all calculations made pursuant to this Section.
- (d) The marginal gas cost, as noted in the (**utility and rate schedule**), dated, contained in Schedule C - Part 3, shall be considered for all calculations made pursuant to this Section.
- e) Detailed descriptions of the sources of and bases for O&M and future capital cost avoidance. Will include a description of the Customer-furnished documentation and information supporting the cost avoidance amounts (e.g., budget line items, invoices, personnel/staffing changes, etc.).]

DRAFT ESA

If the actual Energy Cost Savings for a Year calculated pursuant to Schedules C, D, and J is less than the Energy Cost Savings guaranteed for that Year as set forth above, ESCo and Customer shall agree to one of the following methodologies for repayment of the savings shortfall: (a) ESCo shall first set off the amount of such shortfall against any unpaid balance Customer then owes to ESCo, (b) pay to Customer the amount of such shortfall, or (c) subject to Customer's agreement, provide to Customer additional products or services, in the value of such shortfall, at no additional cost to Customer

Additional Improvements. Where an Annual Energy Cost Savings Shortfall has occurred, ESCo may, subject to Customer's approval (which approval shall not be unreasonably withheld, conditioned, or delayed), implement additional Improvement Measures (ECM's), at no cost to Customer, which may generate additional Energy Cost Savings in future years of the Guarantee Term.

Customer shall notify ESCo in writing within ninety (90) days of the receipt of the Annual Energy Savings Report from ESCo required by Section 8.3 if Customer determines that the actual Energy Cost Savings for that Year is less than the Energy Cost Savings guaranteed for that Year and shall state the amount due Customer from ESCo. Following a written request notice the ESCo shall pay Customer the amount so stated within thirty (30) days of receipt of such notice from Customer.

SECTION 8.4: CALCULATION OF ENERGY COST SAVINGS; REPORTING Beginning with the Effective Date, ESCo shall calculate Energy Cost Savings for each month and within 60 days of the close of each three month period following the Effective Date, submit a report to Customer summarizing these calculations including an indication of the date measured data was taken and whether it has been updated since the last report. At the end of each Year, in lieu of the fourth quarterly report, ESCo shall submit an annual report to Customer summarizing the Energy Cost Savings for each month of that Year and the total Energy Cost Savings for that Year.

SECTION 8.5: RETROACTIVE ADJUSTMENTS

If at any time within one year after the submission of the Annual Energy Savings Report required by Section 8.3, for any Year, ESCo or Customer learn of any condition existing in the Premises during said Year that would have been taken into account by ESCo in the calculations performed pursuant to Section 8.3 had ESCo learned of the condition prior to the time for any payment pursuant to Section 8.2, ESCo shall recalculate and shall submit to Customer a notice for Customer's review and approval restating the compensation due the Customer for said Year and indicating the amount of ESCo's overpayment or underpayment, as the case may be. When ESCo and Customer have agreed upon an adjustment to compensation, ESCo shall immediately pay Customer any amount due Customer from ESCo or invoice Customer for any amount due ESCo from Customer. If after thirty (30) days the parties are unable to agree upon the adjustment to compensation, the parties will follow Section 38: Dispute Resolution language.

SECTION 8.6: INDEPENDENT AUDIT

Customer shall have the right to retain, at its own cost, an independent commissioning agent to complete and submit to the parties an audit of the calculations of Energy Cost Savings made

pursuant to this Agreement. Any audit so performed must use and incorporate the same methods, procedures, and assumptions as contained in this Agreement and used by ESCo to perform the calculations undergoing an audit pursuant to this Section. Any payments between the parties necessary to resolve any irregularities identified in the audit shall be made within sixty (60) days after submission of the audit to the parties. If, after thirty (30) days the parties are unable to agree upon the adjustment, the matter shall be submitted to non-binding mediation in the State of New Hampshire. The parties shall select a mediator by mutual agreement. The parties shall share equally the cost of the mediator. In the event mediation is not successful, the parties shall be entitled to all remedies available at law or at equity.

SECTION 9: TERMINATION

SECTION 9.1: TERMINATION BY CUSTOMER Customer shall have the right to terminate this Agreement at any time upon one hundred and eighty (180) days prior written Notice thereof to the ESCo. Such termination date shall be named in the Notice. If the ESCo is in material breach of this Agreement and said breach continues for thirty (30) days after written notice by Customer to the ESCo without commencement of a cure and diligent subsequent completion thereof, then Customer shall have the right to terminate this Agreement at any time upon written notice thereof to the ESCo. The date of such termination shall be named in the Notice. Upon termination Customer shall pay to the ESCo an amount equal to the "Termination Value" calculated pursuant to Schedule G in the event of termination pursuant to this paragraph within sixty (60) days. Prior to and independent of such right to terminate, Customer shall have the right to take any emergency actions necessary to protect Customer's property or the ESCo's Equipment and/or correct deficiencies in the ESCo's Equipment, and Customer may charge the ESCo for the costs related to such actions. In the event of termination for material breach, the ESCo shall remove any Equipment not accepted by the Customer and restore that portion of the Premises to substantially the same condition as existed on the Effective Date of this Agreement.

In the event of termination, the ESCo and Customer reserve the right to exercise all remedies available at law or at equity. If the Customer terminates this Agreement, including but not limited to the M&V Services, the ESCo's obligation to meet the Guaranteed Savings shall automatically terminate.

SECTION 9.2: TERMINATION BY ESCO If, (a) Customer assigns the Agreement to any person other than a public or non-profit entity without the ESCo's consent, as described in Section 21, or (b) the Customer fails to pay any undisputed amount required to be paid hereunder within thirty (30) days of receipt of written notice from the ESCo that such amount is overdue except as provided for in Section 8.1, or (c) if the Customer fails to meet its obligations under this Agreement for thirty (30) days after written notice by the ESCo that the Customer is in material breach of its obligations under said sections without commencement of a cure and diligent subsequent completion thereof, then the ESCo shall have the right to terminate this Agreement. The ESCo shall provide Customer with written notice of termination at least ten (10) days prior to the effective date of the proposed termination. . If this Agreement is terminated the ESCo's obligations to meet the Guaranteed Savings shall automatically terminate.

In the event of termination, the ESCo and Customer reserve the right to exercise all remedies available at law or at equity.

Customer acknowledges and agrees that if, for any reason, it (i) cancels or terminates receipt of M&V Services, (ii) fails to pay for M&V Services in accordance with Schedule ____, (iii) fails to fulfill any of Customer's Responsibilities, as identified in Schedule ____, necessary to enable

ESCO to complete the work and provide the M&V Services, or (iv) otherwise cancels, terminates or materially breaches this Agreement, the Assured Performance Guarantee shall automatically terminate and ESCo shall have no liability thereunder

SECTION 9.3: SURVIVAL OF RIGHTS In the event that either party terminates this Agreement pursuant to Sections 9.1 or 9.2, any claims arising out of the performance of this Agreement, prior to the effective date of the termination, shall survive termination.

SECTION 9.4: REPAIR AND REPLACEMENTS AFTER TERMINATION For a period of one year after Termination, ESCo guarantees that it will provide Customer with materials, equipment and skilled workers, if determined necessary by Customer, to repair or replace any of the Equipment installed pursuant to this Agreement, provided that ESCo and Customer shall mutually negotiate a reasonable cost for such materials, equipment, and labor required during such one year period.

SECTION 10: NON-APPROPRIATION

(a) Customer reasonably believes the funds can be obtained sufficient to make all payments due to the ESCo under this Agreement. Customer hereby covenants that it will do all things lawfully within its power to obtain and maintain funds from which such payments may be made, including making provisions for such payments to the extent necessary in each annual or supplementary budget submitted for the purpose of obtaining funds, and using reasonable efforts to have such portion of the budget approved. Nothing herein shall obligate the Customer to institute legal action before any court, to commence proceedings before any forum, or to institute proceedings in the nature of mandamus against any public official in attempting to obtain said funds.

(b) In the event that Customer is unable to obtain an appropriation of funds sufficient to discharge Customer's obligations under this Agreement for any fiscal year during the term of this Agreement, Customer shall not be obligated to make any further payments, and this Agreement may be terminated immediately by either Customer or the ESCo, provided that Customer shall make payment to the ESCo for obligations incurred during the period for which funding was included in an annual or supplemental appropriation. If termination due to non-appropriation occurs, then the ESCo may remove any Equipment owned by the ESCo and installed in the Premises provided the ESCo restores the Premises to substantially the same condition that existed on the Effective Date.

SECTION 11: CHANGES AT THE PREMISES

Customer and the ESCo shall cooperate in the identification of significant changes at the Premises which could affect energy use at the Premises, including but not limited to changes in the hours or days during which the Premises are occupied or operated, the activity conducted, the equipment used, the size of the Premises, or malfunctions of energy-consuming equipment. Customer shall inform the ESCo in writing of any significant changes in the property that in aggregate is expected to increase or decrease energy savings by five percent (5%) or more per year.

SECTION 12: ADJUSTMENTS TO ENERGY SAVINGS

(b) (a) If there is any change at the Premises that could materially increase or decrease energy savings and/or energy costs savings the Customer agrees to notify ESCo, within sixty (60) days, of (i) any actual or intended change, whether before or during the Guarantee Term, in the use of any facility, equipment, or Improvement Measure any proposed or actual expansions or additions to the premises or any building or facility at the premises; (iii) a change to utility services to all or any portion of the premises; or (iv) any other change or condition arising before or during the Guarantee that reasonably could be expected to change the amount of Energy Savings realized under this Agreement. Such a change, expansion, addition, or condition would include, but is not limited to: (a) changes in the primary use of any facility, Improvement Measure, or portion of the premises; (b) changes to the hours of operation of any facility, Improvement Measure, or portion of the premises; (c) changes or modifications to the Improvement Measures or any related equipment; (d) changes to the M&V Services provided under this Agreement; (g) insufficient or improper maintenance or unsound usage of the Improvement Measures or any related equipment at any facility or portion of the premises (other than by ESCo); (h) changes to the Improvement Measures or any related equipment or to any facility or portion of the premises required by building codes or any governmental or quasi-governmental entity; or (i) additions or deletions of Improvement Measures or any related equipment at any facility or portion of the premises. Such a change or condition need not be identified in the Baseline in order to permit ESCo to make an adjustment to the Baseline and/or the Annual Energy Savings. If ESCo does not receive the notice within the time period specified above or travels to either Customer's location or the project site to determine the nature and scope of such changes, Customer agrees to pay ESCo, in addition to any other amounts due under this Agreement, the applicable hourly consulting rate for the time it took to determine the changes and to make any adjustments and/or corrections to the project as a result of the changes, plus all reasonable and documented out-of-pocket expenses, including travel costs. Upon receipt of such notice, or if ESCo independently learns of any such change or condition, ESCo shall calculate and send to Customer a notice of adjustment to the Baseline and/or Annual Project Benefits to reflect the impact of such change or condition, and the adjustment shall become effective as of the date the change or condition first arose. Should Customer fail to promptly provide ESCo with notice of any such change or condition, ESCo may make reasonable estimates as to the impact of such change or condition and as to the date on which such change or condition first arose in calculating the impact of such change or condition, and such estimates shall be conclusive.

The parties shall meet and undertake their best efforts to agree on the amount of increased or decreased energy savings and/or energy cost savings attributable to such change. The parties shall adjust the method of calculating energy savings, energy cost savings and/or energy savings guarantee to compensate for such change and shall review, and if necessary, revise the calculations from Schedules C and D accordingly.

SECTION 13: WORKING RELATIONSHIPS BETWEEN THE CUSTOMER AND ESCO DURING PROJECT

(a) The selection of energy conservation measures ESCo will implement at some or all of the Premises are as set forth in Schedule B. Either the Customer or ESCo may propose changes to the scope of work if such changes are agreed upon by both parties and provide energy or water savings. The ESCo may propose a list of any additional measures which it recommends

DRAFT ESA

(based on a careful engineering survey and discussions with Customer's staff) and which it is willing to construct. Customer may also recommend measures at any time.

- (i) Changes to Scope of Work: At the request of the Customer, the ESCo shall submit documentation necessary for Customer's review which will assist in approving the change in project scope. Such documentation shall include but not be limited to: a cost breakdown for the additional work, energy/water cost savings estimate, a revised cash flow, shop drawings, and a description of the proposed change in project scope.
 - (ii) When submitting a cost analysis for the additional work, ESCo shall use the same methodology as was used in preparation of its original proposal. The cost breakdown shall separate costs into Capital Investment, Supporting Investment, and Overhead and Profit as reported on Schedule B, Total Project Costs spreadsheet of the Agreement. This shall be for a not-to-exceed lump sum fee.
 - (iii) ESCo shall submit a revised cash flow which will document additional energy cost savings and additional costs to the project. At the Customer's request, ESCo shall submit detailed plans and specifications and any other supporting documentation before Customer issues a formal notice to proceed. The Notice to Proceed shall be provided in the form of a contract amendment to the Agreement signed by all parties.
- (b) The sequence and scheduling of the Equipment will be recommended by the ESCo but subject at all times to Customer approval, such approval not to be unreasonably withheld. The ESCo shall submit a Schedule for Installation no later than thirty (30) days after the Effective Date. Customer may interrupt or postpone work whenever concerns for safety or operations require it.
- (c) In the event that the ESCo retains one or more engineering firms to design projects and to support the ESCo and Customer in project management, the ESCo will provide Customer with a written description of the qualifications of each person and firm retained for Customer's approval, such approval not to be unreasonably withheld.
- (d) Prior to the installation of the Equipment, the ESCo shall provide Customer with descriptive literature, specifications and, if appropriate, sample fixtures, lamps, ballasts and other Equipment for Customer approval. Prior to installation of the Equipment, the ESCo shall measure existing conditions, including lighting levels at sample locations throughout affected areas of the facility and submit such information to Customer. Work shall not commence prior to Customer's approval. Documentation and format for Equipment approval will be determined by City and the facility and shall include ESCo submittal in hardcopy including, but not limited to: Equipment description, location key for Equipment, manufacturer cut sheets and shop drawings, if necessary.
- (e) Customer will work with the ESCo to identify areas suitable for test installation. Two weeks prior to final design approval, the ESCo shall perform test installations of mutually agreed upon equipment for selected retrofit types in selected space types. Customer shall inspect each test installation to determine the adequacy of the proposed retrofits.
- (f) Upon approval of test installations, the design will be submitted for Customer approval. The ESCo shall not proceed to install those retrofits submitted for design review until

the design has received written Customer approval. Such approval shall not be unreasonably withheld or delayed.

(g) Ballasts and other improvements, modifications, or installation of the Equipment shall not cause interference with or have deleterious effects upon the operation of any existing equipment in each building. Customer shall make the final determination governing satisfactory equipment operation. Should Equipment installed under this Agreement cause such interference, it shall be replaced to the Customer's satisfaction at no additional cost to the Customer, subject to Section 12. Customer reserves the right to make necessary alterations to ballasts in specific areas where new equipment is installed and affected by performance of said ballasts.

(h) Weekly meetings of the ESCo and Customer will be scheduled to review progress on each project, agree on any redirection, ensure that good workmanship is maintained, coordinate any outside work with schedules and restrictions, and otherwise maintain quality control. The ESCo will take minutes of each meeting in a manner acceptable to the Customer and distribute such minutes to all attendees and any other persons agreed upon by the parties prior to the next scheduled meeting.

(i) The ESCo shall ensure that a superintendent approved by Customer is on the Premises at all times during installation of the Equipment. Meetings of the ESCo, or the ESCo's agent, and Customer staff will be scheduled, as required, to fix daily work schedules and review daily progress.

(j) Customer shall retain ultimate approvals over scope of work, the qualifications of the ESCo's subcontractors, Equipment installed, and end use conditions. No work will proceed without written consent of Customer; however, such consent shall not be unreasonably withheld or delayed.

(k) The ESCo will provide Customer with duplicate copies of mylar "as-built" drawings, where such drawings are required for permit or design review/compliance purposes, of all modified conditions, excluding repair of existing systems and installation of lighting fixtures, associated with the project conforming to typical engineering standards. All drawings shall be stamped by a registered professional engineer for each corresponding trade if applicable. A detailed inventory of repairs and lighting fixtures shall be provided in lieu of drawings.

(l) Customer shall have reasonable access to inspect both the work conducted on the Premises, during construction and operations phases, and the books, records, and other compilations of data, which pertain to the performance of the provisions and requirements of this Agreement. Records shall be kept in accordance with generally accepted accounting principals, and calculations kept on file in legible form. Customer shall provide the ESCo with reasonable notice prior to exercising its rights under this subparagraph and the ESCo shall be afforded a reasonable opportunity to make books, records and data available.

(m) The ESCo shall comply with and obtain at its expense all building permits required by state and local law in connection with the installation, operation and maintenance of the energy conservation measures (ECM) detailed in this Agreement. Customer shall be responsible for obtaining all other permits, licenses, approvals, permissions and certifications, including but not limited to, all zoning and land use changes or exceptions required for the work or the ownership and use of the ECMs. ESCo shall not be obligated to provide any changes to or improvement of the facilities or any portion thereof required under any applicable building, fire, safety, sprinkler or other applicable code, standard, law, regulation, ordinance or other

requirement unless the same expressly regulates the installation of the ECM. . Customer shall make good faith, reasonable efforts to assist the ESCo in obtaining all necessary building permits and approvals for installation of the Equipment; except that neither party shall thereby be obligated to commence or participate in legal action in any court or institute or participate in any proceedings before any board, authority, or other forum to assist in obtaining such permits or approvals. The ESCo shall provide copies of all licenses and building permits requested by Customer prior to the commencement of work. All fees associated with such permits and with any inspections required in connection therewith, shall be payable by the ESCo.

(n) The ESCo will be responsible for compliance with all applicable codes, laws, and regulations in effect at the time of installation of each project, to the extent that they relate specifically to the installation of the ECM. The ESCo is not required to correct any currently existing code violations in Customer's equipment unless detailed specifically in this Agreement. Reasonable care will be used in installation, particularly in older buildings, to maintain the integrity of existing structural, mechanical and electrical systems.

(o) For purposes of this Agreement, the City Manager of City or his/her designee, in consultation with the (user agency official), or his/her designee, shall be authorized to provide approvals, consent, acceptance, or any other procedural authorization related to the installation of the Equipment required to be provided by Customer to the ESCo under this Agreement. Customer reserves the right to salvage any equipment replaced by ESCo, provided that no utility incentive program prohibits said salvage.

(q) Customer shall provide adequate space for the ESCo's office and necessary storage. The ESCo will be responsible for any hook-up of utilities including but not limited to telephone and electric. Upon completion of construction, site shall be restored by the ESCo to its original condition.

(r) Due to the operating hours of the Premises, 2nd and 3rd shift work may be required during the installation of the Equipment. Scheduling of work during peak operating hours shall be subject to Customer's reasonable approval. Security shall be provided by Customer as needed at Customer's cost if such shifts are upon the request of the Customer. Additional security costs required by the ESCo's schedule shall be borne by the ESCo.

SECTION 14: WASTE MANAGEMENT

SECTION 14.1: CONSTRUCTION AND DEMOLITION WASTE MANAGEMENT

The ESCo will be responsible for proper disposal of construction demolition debris. These wastes are all uncontaminated waste building materials and rubble resulting from the demolition of buildings, pavements, roads or other structures. Construction and demolition (C&D) wastes include, but are not limited to; concrete, bricks, lumber masonry, rebar, and plaster.

ESCo is encouraged to salvage or recycle at least 50% by weight of C&D wastes including brick, concrete, masonry, wood and scrap metal which are free from asbestos and/or hazardous materials. The ESCo shall transport salvaged items from the site as they are removed. Under no circumstances shall salvaged items be stored or sold onsite.

ESCo shall submit to the Customer a C&D Waste Management Plan within twenty-one (21) calendar days after the Effective Date. The Plan shall contain the following:

DRAFT ESA

- (a) Analysis of the proposed job site waste to be generated, including types and rough quantities.
- (b) Landfill Options: The name of the landfills where solid waste and demolition debris will be disposed.
- (c) Landfill Certification: ESCo's statement of verification that the landfills proposed for use are licensed for the types of waste to be deposited and sufficient capacity to receive waste from this project.
- (d) Alternatives to landfilling: A list of each material proposed to be salvaged or recycled during the course of the project.
- (e) Materials Handling Procedures: A description of the means by which any waste materials identified above will be protected from contamination, and a description of the means to be employed in recycling and disposing of the above materials consistent with requirements for acceptance by designated facilities.
- (f) Transportation: A description of the means of transportation of the recyclable materials (whether materials will be site-separated and self-hauled to designated centers, or whether mixed materials will be collected by a waste hauler and removed from the site) and other wastes, and destination of materials.
- (g) The ESCo shall determine the method, nature, and condition of all materials and dispose, reclaim, or recycle in accordance with all Federal, State, and local rules and regulations.

SECTION 14.2: HAZARDOUS WASTE MANAGEMENT

The Customer will be responsible for proper disposal of all ballasts containing or suspected of containing PCBs and fluorescent lamps containing mercury.

Asbestos-Containing Materials: Neither party desires to or is licensed to undertake direct obligations relating to the identification, abatement, cleanup, control, removal or disposal of asbestos-containing materials ("ACM"). Consistent with applicable laws, Customer shall supply ESCo with any information in its possession relating to the presence of ACM in areas where ESCo undertakes any work or M&V Services that may result in the disturbance of ACM. It is ESCo's policy to seek certification for facilities constructed prior to 1982 that no ACM is present, and Customer shall provide such certification for buildings it owns, or aid ESCo in obtaining such certification from facility owners in the case of buildings that Customer does not own, if ESCo will undertake work or M&V Services in the facility that could disturb ACM. If either Customer or ESCo becomes aware of or suspects the presence of ACM that may be disturbed by ESCo's work or M&V Services, it shall promptly stop the work or M&V Services in the affected area and notify the other. As between Customer and ESCo, Customer shall be responsible at its sole expense for addressing the potential for or the presence of ACM in conformance with all applicable laws and addressing the impact of its disturbance before ESCo continues with its work or M&V Services, unless ESCo knew or should have known that ACM was present and acted negligently, in which case (i) ESCo shall be responsible at its sole expense for remediating areas impacted by the disturbance of the ACM, and (ii) Customer shall resume its responsibilities for the ACM after ESCo's remediation has been completed.

Other Hazardous Materials: ESCo shall be responsible for removing or disposing of any Hazardous Materials (as defined below) that it engages in providing work or M&V Services (“ESCo Hazardous Materials”) and for the remediation of any areas impacted by the release of ESCo Hazardous Materials. For other Hazardous Materials that may be otherwise present at Customer’s facilities (“Non-ESCo Hazardous Materials”), Customer shall supply ESCo with any information in its possession relating to the presence of such materials if their presence may affect ESCo’s performance of the work or M&V Services. If either Customer or ESCo becomes aware of or suspects the presence of Non-ESCo Hazardous Materials that may interfere with ESCo’s work or M&V Services, it shall promptly stop the work or M&V Services in the affected area and notify the other. As between Customer and ESCo, Customer shall be responsible at its sole expense for removing and disposing of Non-ESCo Hazardous Materials from its facilities and the remediation of any areas impacted by the release of Non-ESCo Hazardous Materials, unless ESCo had actual knowledge that Non-ESCo Hazardous Materials were present and acted with intentional disregard of that knowledge, in which case (i) ESCo shall be responsible at its sole expense for the remediation of any areas impacted by its release of such Non-ESCo Hazardous Materials, and (ii) Customer shall remain responsible at its sole expense for the removal of Non-ESCo Hazardous Materials that have not been released and for releases not resulting from ESCo’s performance of the work or M&V Services. For purposes of this Agreement, “Hazardous Materials” means any material or substance that, whether by its nature or use, is now or hereafter defined or regulated as a hazardous waste, hazardous substance, pollutant or contaminant under applicable Law relating to or addressing public or employee health and safety and protection of the environment, or which is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, mutagenic or otherwise hazardous or which is or contains petroleum, gasoline, diesel, fuel, another petroleum hydrocarbon product, or polychlorinated biphenyls. “Hazardous Materials” specifically includes mold and lead-based paint and specifically excludes ACM. ESCo shall have no obligations relating to the identification, abatement, cleanup, control, removal, or disposal of pre-existing mold, unless ESCo causes the condition.

Environmental Indemnity: To the fullest extent permitted by law, Customer shall indemnify and hold harmless ESCo and ESCo’s subcontractors, and their respective directors, officers, employees, agents, representatives, shareholders, affiliates, and assigns and successors, from and against any and all losses, costs, damages, , causes of action or liability, directly or indirectly, relating to or arising from the Customer’s use, or the storage, release, discharge, handling or presence of ACM, mold (actual or alleged and regardless of the cause of such condition) or Non-ESCo Hazardous Materials on, under or about the facilities, or Customer’s failure to comply with this Section.

SECTION 14.3: MERCURY CONTAINING MATERIALS

The ESCo shall install only mercury-free thermostats. In addition, the ESCo shall install mechanical and electrical equipment and appliances that have switches and/or gauges that do not contain mercury. If mercury free items are not available, the ESCo must ensure that all mercury containing parts must be clearly labeled with durable labels as to the mercury content.

SECTION 15: MANAGEMENT OF THE SERVICES

DRAFT ESA

(a) The Customer shall provide access to the Premises for the ESCo its employees, agents, and subcontractors, during normal business hours, or such other hours as may be required by the ESCo, for the purpose of carrying out the ESCo's obligations under this Agreement.

(b) Customer shall monitor performance of the Equipment to the extent reasonably necessary to ensure proper performance of this Agreement.

(c) Customer shall use and operate the Equipment in accordance with operating procedures provided by the ESCo and agreed upon by the Customer.

(d) Customer shall not move, turn off, or otherwise change any Equipment without the consent of the ESCo unless such action is in accordance with the operating procedures provided by the ESCo under Paragraph (c) of this Section or is required in connection with the ordinary and reasonable operation and maintenance of the Premises; provided, however, that, upon two days notice to the ESCo, Customer may take any such action as may be necessary to ensure compliance with state and federal law and all regulations thereunder and with all professional codes and guidelines applicable to it and to otherwise preserve the health and safety of persons. In the event that Customer determines an emergency situation exists, Customer shall be authorized to take the corrective measures it deems appropriate, provided that Customer informs the ESCo at its earliest opportunity, to be no more than two days after corrective measures have been implemented.

SECTION 16: MODIFICATION OF THE SERVICES

The ESCo may, subject to the prior written approval of the Customer and Lessor, if applicable, repair, replace, modify, or otherwise change the Services or Equipment provided pursuant to this Agreement whenever the ESCo determines that such action is desirable to maintain or increase energy savings, such approval not to be unreasonably withheld.

SECTION 17: Latent Physical Conditions

If, during the progress of the work, the ESCo or the Customer discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those indicated in the contract documents or apparent upon reasonable inspection of the Premises, whether such an inspection was carried out or not, or from those ordinarily encountered and generally recognized as inherent in work of the character provided for under this Agreement, either the ESCo or the Customer may request an equitable adjustment in the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party within thirty (30) days after such conditions are discovered or reasonably should have been discovered. Upon receipt of such a claim from the ESCo, or upon its own initiative, the Customer shall make an investigation of such physical conditions, and, if they differ substantially or materially from those indicated in the contract documents or apparent upon reasonable inspection of the Premises, whether such an inspection was carried out or not, or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the Customer and ESCo shall use reasonable efforts to agree on an equitable adjustment in this Agreement and this Agreement shall be modified in writing accordingly.

SECTION 18: LEGAL OR EQUITABLE REMEDIES

No right or remedy conferred upon or reserved to the parties by this Agreement excludes any other rights or remedies provided by law or equity nor restricts the parties' rights to exercise any other such right or remedy.

SECTION 19: SUBCONTRACTORS

The ESCo may use subcontractors in meeting its obligation hereunder provided that in each case, the ESCo remains fully liable for all work under contract. Subcontractors shall be selected by the ESCo and approved by Customer prior to ESCo proceeding to implement the Work under this Agreement. Customer reserves the right to reject any subcontractors, such right not to be unreasonably exercised. The ESCo shall pay or cause payments to be made for all labor performed or furnished and for all materials used or employed in carrying out this Agreement.

SECTION 20: NEW HAMPSHIRE AND UNITED STATES MANUFACTURERS

The contractor is encouraged to give preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the State, and second, of supplies and materials manufactured and sold elsewhere within the United States in performing the work under this Agreement.

SECTION 21: NOTICES

(a) Unless a party is instructed otherwise by a notice properly given hereunder, all notices and other communications given or made under this Agreement shall be effective only when given or made by personal delivery or by certified mail, return receipt requested, directed as follows:

(i) In the case of a notice or other communication to the ESCo:

Jim Cotton
Johnson Controls
39 Salem Street
Lynnfield, MA 01940

(ii) In the case of a notice or other communication to the City:

City Manager
City of Dover
288 Central Avenue
Dover, New Hampshire 03820

Copy to : Community Services Director
City of Dover
275 Mast Road
Dover, New Hampshire 03820

DRAFT ESA

(b) This Section shall not apply to reports, bills, or payments sent by one party to the other which may be sent by ordinary mail.

SECTION 22: ASSIGNMENT

(a) Customer shall not assign, transfer, or otherwise dispose of this Agreement, or any interest therein, without the ESCo's prior written consent, which consent shall not be unreasonably withheld, provided that no such consent shall be required if such assignment is made in connection with the transfer of the Premises to another public or non-profit entity.

(b) The ESCo may not assign, pledge or encumber its rights hereunder in whole or in part without the prior written consent of the Customer except to an institutional lender, provided no such assignment shall affect Customer's rights or the ESCo's obligations hereunder.

SECTION 23: FORCE MAJEURE

Neither the ESCo nor Customer shall be responsible for any failure to fulfill, or any delay in fulfilling, its obligations hereunder if such failure or delay is due to storm, flood, or other Act of God, or to fire, war, rebellion, scarcity of water, material shortage, insurrection, riots, strikes, or is the result of some order, rule or regulation of any federal, state, municipal, or other governmental agency. The period of performance under this Agreement shall be extended by a period equal to the delay caused by such force majeure.

SECTION 24: PARTIAL INVALIDITY

In the event that any clause or provision of this Agreement or any part thereof shall be declared invalid by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Agreement.

SECTION 25: CERTIFICATION BY ESCO

If Customer so requests in writing, the ESCo shall certify to Customer, on a monthly basis, that payments owed by the ESCo to subcontractors and not under dispute have been paid in a timely fashion and that the ESCo has satisfied its current payment obligations regarding the Equipment.

SECTION 26: AMENDMENTS

No amendment hereto shall be effective unless evidenced in writing and signed by all parties.

SECTION 27: REPRESENTATION AND WARRANTIES

Each party hereto represents and warrants to the other that (i) it has adequate power and authority to conduct its business as presently conducted or contemplated hereby to be conducted by it, to enter into this Agreement and to perform its obligations hereunder and (ii) this Agreement has been duly authorized, executed and delivered by it and does not contravene any law, rule or regulation applicable to it.

SECTION 28: APPLICATION OF NEW HAMPSHIRE LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of New Hampshire. Venue of all court matters shall be Strafford County Superior Court , New Hampshire.

SECTION 29: APPLICATION AND SURVIVAL OF CERTAIN PROVISIONS

All provisions of this Agreement providing for limitation of or protection against liability and the parties' rights to payments and remedies on default shall apply to the full extent permitted by law. All of said provisions and the representation of each party shall survive termination or cancellation of this Agreement.

SECTION 30: OWNERSHIP OF DOCUMENTS

Except as provided in Section 2.2, a copy of all drawings, reports and materials prepared by the ESCo, its agents and subcontractors, specifically in performance of the Agreement, shall become the property of the Customer and shall be delivered to the Customer as needed or at the termination of this Agreement.

SECTION 31: ANTI-BOYCOTT COVENANT

The ESCo warrants, represents and agrees that during the time this Agreement is in effect, neither it nor any affiliated company, as hereafter defined, participates in or cooperates with an international boycott, as defined in Section 999 (b) (3) and (4) of the Internal Revenue Code of 1954, as amended, or engages in conduct declared to be unlawful by the State of New Hampshire General Laws. If there shall be a breach in the warranty, representation and agreement contained in this Paragraph, then without limiting such other rights as it may have, Customer shall be entitled to rescind this Agreement. As used herein, an affiliated company shall be any business entity of which at least 51% of the ownership interests are directly or indirectly owned by the ESCo or by a person or persons or business entity or entities directly or indirectly owning at least 51% of the ownership interests of the ESCo.

SECTION 32: ACCESS TO ESCO'S RECORDS

The City shall have the right at reasonable times and upon reasonable notice to examine the books, records, and other compilations of data of the ESCo which pertain to the performance and requirements of this Agreement.

SECTION 33: INDEMNIFICATION

The ESCo agrees to, indemnify, and hold harmless the Customer, its officers, agents, and employees from and against any and all claims, liabilities, actions, demands, judgments, losses, costs, expenses (including reasonable attorneys' fees), suits, actions, or damage ("Claims") arising by reason of bodily injury, death, or damage to property sustained by any person or entity to the extent caused by or sustained as a result of the negligence or willful misconduct of the ESCo, its officers, agents, subcontractors, or employees, provided also that the ESCo shall not defend, indemnify, hold harmless the Customer from and against any claim caused by or sustained as a result of the negligence or willful misconduct of the Customer. Customer shall provide timely notice to the ESCo after receipt by Customer of any claim covered by this Section.

DRAFT ESA

The Customer agrees to, indemnify, and hold harmless the ESCo, its officers, agents, and employees from and against any and all claims, liabilities, actions, demands, judgments, losses, costs, expenses, suits, actions, or damage ("Claims") arising by reason of bodily injury, death, or damage to property sustained by any person or entity to the extent caused by or sustained as a result of the negligence or willful misconduct of the Customer, its officers, agents, subcontractors, or employees, provided also that the Customer shall not defend, indemnify, hold harmless the ESCo from and against any claim caused by or sustained as a result of the negligence or willful misconduct of the ESCo. ESCo shall provide timely notice to the Customer after receipt by ESCo of any claim covered by this Section.

SECTION 33A: LIMITATION OF LIABILITY

NEITHER ESCO NOR CUSTOMER WILL BE RESPONSIBLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, REMOTE, PUNITIVE, EXEMPLARY, LOSS OF PROFITS OR REVENUE, LOSS OF USE, OR SIMILAR DAMAGES, REGARDLESS OF HOW CHARACTERIZED AND REGARDLESS OF A PARTY HAVING BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSSES OR RELIEF, ARISING IN ANY MANNER FROM THIS AGREEMENT, THE WORK, THE IMPROVEMENT MEASURES, THE PREMISES, THE M&V SERVICES, OR OTHERWISE. WITHOUT LIMITING ESCO'S EXPRESS OBLIGATIONS UNDER THE ASSURED PERFORMANCE GUARANTEE, ESCO'S LIABILITY UNDER THIS AGREEMENT, REGARDLESS OF THE FORM OF ACTION, SHALL IN NO EVENT EXCEED THE AMOUNT OF THE PAYMENTS ACTUALLY RECEIVED BY ESCO. { This is still under review } If this Agreement covers fire safety or security equipment, Customer understands that ESCo is not an insurer regarding those services, and that ESCo shall not be responsible for any damage or loss that may result from fire safety or security equipment that fails to prevent a casualty loss. The foregoing waivers and limitations are fundamental elements of the basis for this Agreement between ESCo and Customer, and each party acknowledges that ESCo would not be able to provide the work and services contemplated by this Agreement on an economic basis in the absence of such waivers and limitations, and would not have entered into this Agreement without such waivers and limitations.

SECTION 34: ESCO'S INSURANCE

SECTION 34.1: Insurance Generally.

A. The ESCo shall purchase and maintain insurance of the type and limits listed in this Section with respect to the operations as well as the completed operations of this Agreement. This insurance shall be provided at the ESCo's expense and shall be in full force and effect until the Final Notification Date or for such longer period as this Section requires.

B. All policies except for Professional Liability insurance shall be written on an occurrence basis. All policies shall be issued by companies lawfully authorized to write that type of insurance under the laws of the State with a financial strength rating of A- or better as assigned by A.M. Best Company, or an equivalent rating assigned by a similar rating agency acceptable to the Customer, or otherwise acceptable to the Customer.

C. ESCo shall submit three originals of each certificate of insurance, acceptable to the Customer, simultaneously with the execution of this Agreement. Certificates shall show each type of insurance, insurance company, policy number, amount of insurance, deductibles and/or self-insured retentions, and policy effective and expiration dates. Certificates shall show City, and anyone else the Customer requests as an additional insured as to all policies of liability insurance with respect to liability arising out of operations performed for them by or on behalf of ESCO, but only to the extent of damages directly caused by the negligence of ESCO. Certificates shall specifically note the following:

- that the automobile liability, and commercial general liability policies include the Customer as additional insureds.
- that all policies include the coverage and endorsements in accordance with the terms and conditions as required by this Agreement.
- that the Builders' Risk or Installation Floater is on an all risk basis and includes Customer as loss payee as their interest may appear and ESCo as named insured.
- that none of the coverages shall be cancelled, unless and until 30 days prior notice is given in writing to the Customer.

ESCO shall submit updated certificates prior to the expiration of any of the policies referenced in the certificates so that the Customer shall at all times possess certificates indicating current coverage.

D. The ESCo shall file one complete copy of all endorsements with the Customer within sixty days after the execution of this Agreement. If the Customer is damaged by the ESCo's failure to maintain such insurance and to comply with the terms of this Article, then the ESCo shall be responsible for all costs and damages to the Customer attributable thereto.

E. Termination, cancellation, or material modification of any insurance required by this Agreement, whether by the insurer or the insured, which adversely affects the interests of the Customer shall not be valid unless written notice thereof is given to the Customer at least thirty days prior to the effective date thereof, which shall be expressed in said notice.

F. The ESCo is responsible for the payment of any and all deductibles under all of the insurance required below. The Customer shall not in any instance be responsible for the payment of deductibles, self-insured retentions, or any portion thereof.

SECTION 34.2: ESCo's Commercial General Liability.

A. The ESCo shall purchase and maintain general liability coverage on the ISO form CG 00 01 or equivalent, including products and completed operations, on an occurrence basis. The policy shall provide the following coverage to protect the Contractor from claims with respect to the operations performed by ESCo and any employee, subcontractor, or supplier, or by anyone for whose acts they may be liable unless a higher coverage is specified in Schedule H to the Agreement, in which case the ESCo shall provide the additional coverage:

| | |
|---------------------------------|-------------------------------|
| Bodily Injury & Property Damage | \$1,000,000 each occurrence |
| Products & Completed Operations | \$2,000,000 general aggregate |
| Personal & Advertising Injury | \$1,000,000 annual aggregate |
| Medical Expenses | \$1,000,000 each occurrence |
| | \$5,000 any one person |

DRAFT ESA

B. This policy shall include coverage relating to explosion, collapse, and underground property damage.

C. This policy shall include contractual liability coverage.

D. The completed operations coverage shall be maintained for a period of three (3) years after the Final Notification Date and acceptance by the Customer. The ESCo shall provide renewal certificates of insurance to the Customer as evidence that this coverage is being maintained.

E. If the Equipment installed includes work to be performed within 50 feet of a railroad, any exclusion for liability assumed under contract for work within 50 feet of a railroad shall be deleted.

F. This policy shall include the Customer and anyone else requested by the City as additional insureds for ongoing operations and for completed operations. This policy shall be primary and non-contributory with respect to any other insurance available to additional insureds unless any loss, claim or action is caused by the negligence of an additional insured.

SECTION 34.3: Automobile Liability.

A. The ESCo shall purchase and maintain the following coverage with respect to the operations of any owned, non-owned, and hired vehicles including trailers used in the performance of the work, unless a higher coverage is specified in Schedule H to the Agreement, in which case the ESCo shall provide the additional coverage:

Bodily Injury & Property Damage \$1,000,000 combined single limit

B. The policy shall include a CA 99 48 Broadened Pollution Endorsement. If specified in Schedule H to the Agreement, the ESCo, if hauling contaminants and/or pollutants, must adhere to Sections 29 and 30 of the Motor Carrier Act of 1980, which shall include coverage Form MCS-90.

C. The policy shall name the Customer as an additional insured.

Section 34.4 Omitted

SECTION 34.5: Worker's Compensation.

A. The ESCo shall provide the following coverage unless a higher coverage is specified in Schedule H to the Agreement, in which case the ESCo shall provide the higher coverage:

| | |
|-----------------------|-------------------------------------|
| Worker's Compensation | Statutory limits |
| Employer's Liability | \$ 500,000 each accident |
| | \$ 500,000 disease per employee |
| | \$ 500,000 disease policy aggregate |

B. If specified in Schedule H to the Agreement, the policy must be endorsed to cover United States Longshoremen & Harborworkers Act (USL&HW) or Maritime Liability for \$1,000,000/\$1,000,000.

C. The policy shall contain a Waiver of Subrogation in favor of the Customer.

SECTION 34.6: Builder's Risk/ Installation Floater/Stored Materials.

A. The ESCo shall purchase and maintain coverage against loss or damage on all Work included in this Agreement in an amount equal to the Total Capital Investment. Such coverage shall be written on an all risks basis or equivalent form and shall include, without limitation, insurance against perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, windstorm, falsework temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for ESCo's services and expenses required as a result of such insured loss. This policy and/or installation floater shall include transportation and Stored Materials coverage in an amount equal to the value of the stored materials as required in **C.** below.

B. When Work will be completed on existing buildings owned by the Customer, the ESCo shall provide an installation floater, in the full amount of the Total Capital Investment. Such coverage shall be written on an all risks basis or equivalent form and shall include, without limitation, insurance against perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, windstorm, falsework, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for ESCo's services and expenses required as a result of such insured loss. This policy and/or installation floater shall include transportation and Stored Materials coverage in an amount equal to the value of the stored materials as required in **C.** below.

C. The ESCo shall maintain insurance on delivered and/or stored material designated to be incorporated in the Work against fire, theft or other hazards. Loss or damage to such material while stored at an off Site location shall be forthwith replaced by the ESCo at no expense to the Customer.

D. The policy or policies shall specifically state that they are for the benefit of and payable to the ESCo for the furnishing of labor or labor and materials for the installation of Equipment, and the Customer as its interests may appear.

E. Coverage shall include any costs for work performed by the ESCo's Designer or any consultant as the result of a loss experienced during the term of this Agreement.

F. Coverage shall include permission for temporary occupancy and a Waiver of Subrogation in favor of the Customer.

G. Coverage shall be maintained until Final Notification Date and final payment has been made.

H. A loss under the property insurance shall be adjusted by the ESCo and made payable to the ESCo.

SECTION 34.7: Umbrella Coverage.

The ESCo shall provide Umbrella Coverage in form at least as broad as primary coverages required by Sections 34.2, 34.3 and 34.5 in the following amount unless a higher amount is specified in Schedule H to the Agreement, in which case the ESCo shall provide the higher amount:

| <u>Contract Price:</u> | <u>Limit of liability:</u> |
|----------------------------|----------------------------|
| Under \$1,000,000 | \$2,000,000 per occurrence |
| \$1,000,001 -- \$5,000,000 | \$5,000,000 per occurrence |

SECTION 34.8: Professional Liability Insurance.

The ESCo's Designer shall maintain Professional Liability Insurance (PLI) covering errors or omissions in professional services in the following amount unless an alternate amount is specified in Schedule H to the Agreement:

| | |
|-----------------|--------------------------------------------|
| Liability limit | \$5,000,000 per claim and in the aggregate |
|-----------------|--------------------------------------------|

If the policy is claims-made, it shall include a retroactive date which is no later than the effective date of this contract, and an extended reporting period of at least six years which requirement can be met by providing renewal certificates of insurance to the Customer as evidence that the PLI coverage is being maintained.

If the installation of Equipment work involves the removal or remediation of Hazardous Materials and/or the ESA or the Final Audit require the ESCo's Designer to provide services in connection with Hazardous Materials conditions, the Designer's PLI policy, and the PLI policy of any Subconsultant employed on such Hazardous Material services, shall provide coverage for any and all claims and liability arising out of any negligent act, error or omission in the performance of any such Hazardous Material services

Prior to commencement of work on this contract, the policy form shall be submitted to the Customer for review. The ESCo shall file one complete copy of all endorsements with the Customer.

SECTION 34.9: Additional Types of Insurance .

The ESCo shall provide such other types of insurance as may be required in Schedule H to this contract.

SECTION 35: (THIS SECTION RESERVED FOR FUTURE USE.)

SECTION 36: BONDS

DRAFT ESA

1. ESCo shall provide Customer, , the following bonds, as attached hereto in Schedule L:

a) Installation Period Bonds. The ESCo shall provide performance and payment (labor and materials) bonds using the attached forms, executed by a surety licensed by the State of New Hampshire Division of Insurance and whose name appears on United States Treasury Department Circular 570. Each such bond shall be in the amount of the Total Capital Investment.

b) If at any time prior to final payment to the ESCo, the Surety:

-is adjudged bankrupt or has made a general assignment for the benefit of its creditors;

-has liquidated all assets and/or has made a general assignment for the benefit of its creditors;

-is placed in receivership;

-otherwise petitions a state or federal court for protection from its creditors; or

-allows its license to do business in New Hampshire to lapse or be revoked;

then the ESCo shall, within 21 days of any such action listed above, provide the Customer with new performance and payment bonds as described in Paragraph A above. Such bonds shall be provided solely at the ESCo's expense.

2. Post-Installation Bonds. ESCo shall submit to Customer prior to Final Payment under this Energy Services Agreement the following post-installation securities in a form acceptable to the General Counsel of the Division of Capital Asset Management:

a) A Letter of Credit, Bond, or equivalent security, in a sum not less than \$xxx (*the value of maintenance provided over the term of the contract*) for the full Term of this Agreement, that shall relate to the cost for providing maintenance and/or minor modifications of the Equipment referenced in (a) above. If the Customer determines that ESCo has failed to meet its obligations under this Agreement for maintenance and minor modifications, the Customer will notify the Bank issuing the Letter and the funds shall be made available to the Customer. If the Scope or work under this Agreement is extended, payment and performance bonds for the full value of such work shall be provided by the ESCo.

b) Corporate guarantee (parent or third party) Efficiency Guarantee, or other equal form of security, shall be for the full term of this Agreement in the sum of the Customer's share of the Dollar Estimate of the Guaranteed Savings pursuant to Section 8.2 of this Agreement.

SECTION 37: ESCO'S ACCOUNTING METHOD REQUIREMENTS

1. The words defined herein shall have the meaning stated below whenever they appear in this Section:

a) "Contractor" means the ESCo.

b) "Contract" means this Agreement.

c) "Records" means books or original entries, accounts, checks, bank statements and all other banking documents, correspondence, memoranda, invoices, computer printouts, tapes, discs, papers and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

DRAFT ESA

- d) "Independent Certified Public Accountant" means a person duly registered in good standing and entitled to practice as a certified public accountant under the laws of the place of his/her residence or principal office and who is in fact independent. In determining whether an accountant is independent with respect to a particular person, appropriate consideration should be given to all relationships between the accountant and that person or any affiliate thereof. Determination of an accountant's independence shall not be confined to the relationships existing in connection with the filing of reports with the awarding authority.
 - e) "Audit", when used in regard to financial statements, means an examination of records by an independent certified public accountant in accordance with generally accepted accounting principles and auditing standards for the purpose of expressing a CERTIFIED opinion thereon, or, in the alternative, a qualified opinion or a declination to express an opinion for stated reasons.
 - f) "Accountant's Report", when used in regard to financial statements, means a document in which an independent certified public accountant indicates the scope of the audit which s/he has made and sets forth his/her opinion regarding the financial statement for the most recent completed fiscal year as set forth in Paragraph (d) below.
 - g) "Management," when used herein, means the chief executive officers, partners, principals or other person or persons primarily responsible for the financial and operational policies and practices of the contractor.
 - h) Accounting terms, unless otherwise defined herein, shall have a meaning in accordance with generally accepted accounting principles and auditing standards.
2. The Contractor shall file with City, a statement of management as to whether the system of internal accounting controls of the contractor and its subsidiaries reasonably assures that:
- a) transactions are executed in accordance with management's general and specific authorization;
 - b) transactions are recorded as necessary
 - (i) to permit preparation of financial statements in conformity with generally accepted accounting principles, and
 - (ii) to maintain accountability for assets;
 - c) access to assets is permitted only in accordance with management's general or specific authorization; and
 - d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any difference.
3. The Contractor shall also file with City a statement prepared and signed by an independent certified public accountant, stating that s/he has examined the statement of management on internal accounting controls, and is expressing an opinion as to:

DRAFT ESA

- a) whether the representations of management in response to this paragraph are consistent with the result of management's evaluation of the system of internal accounting controls; and
 - b) whether such representations of management are, in addition, reasonable with respect to transactions and assets in amounts which would be material when measured in relation to the Contractor's financial statements.
4. The Contractor shall annually file with City during the term of this Agreement a financial statement prepared by an independent certified public accountant on the basis of an audit by such accountant. The final statement filed shall include the date of final payment. All statements shall be accompanied by an accountant's report.

SECTION 38: DISPUTE RESOLUTION

. All disputes shall initially be resolved by non-binding mediation in the State of New Hampshire. The mediator shall be selected by mutual agreement of the parties. The parties shall equally share the cost of the mediator. If the mediation is unsuccessful, both parties are entitled to pursue all remedies available at law and in equity. The venue of all court actions shall be the Strafford County Superior Court in New Hampshire.

SECTION 39: INDEPENDENT CONTRACTOR

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

SECTION 40: Reserved

SECTION 41: ENFORCEMENT

Failure to insist on strict performance of the terms of this Agreement does not waive either party's right to do so in the future.

SECTION 42: SCHEDULES

The attached schedules A through O are hereby incorporated into this Agreement.

SECTION 43: CONTRACT SIGNATURES

IN WITNESS WHEREOF, the parties have each caused this Agreement to be executed in quadruplicate on the dates set forth below (the last of which shall be considered the date of execution hereof) by their duly authorized representatives.

ESCO

City of Dover, NH

Name _____

Name _____

By _____

By _____

Title _____

Title _____

Date _____

Date _____

DRAFT ESA

SCHEDULE A: DESCRIPTION OF THE PREMISES

The project includes the following:

– (–) is located in Dover, New Hampshire. The buildings to be addressed under this Agreement are:

List Buildings here

SCHEDULE B: DESCRIPTION OF ENERGY CONSERVATION MEASURES AND EQUIPMENT

The ESCo shall, upon Customer's approval, implement the following energy conservation measures (Energy Conservation Measures - ECMs), as identified in the final energy audit, on the Premises and shall acquire, install, and manage the Equipment associated with each ECM. The ESCo shall provide to Customer a detailed listing of all Equipment required to be installed pursuant to each ECM upon completion of all necessary engineering and detail design requirements. The list of Equipment required for each ECM shall be attached hereto as an exhibit and made a part of this Schedule B.

Refer to the Final Technical Audit (Schedule I) for more detailed descriptions of each of the energy conservation measures.

List Energy Conservation Measures here.

The ESCo will work with the Customer to identify additional Energy Conservation Measures for inclusion under this Agreement.

SCHEDULE B-1: EQUIPMENT WARRANTY

WARRANTY

For a period of one year from the ECM Installation Date, if any part of the Equipment shall in the reasonable opinion of the Customer require replacing or repairing, or damage to the premises is caused by the negligence of ESCo during the Equipment Installation period, the Customer will notify the ESCo to make the required repairs or replacements and repair such damage. If the ESCo shall neglect to commence such repairs or replacements to the satisfaction of the Customer within ten (10) days from the date of notice, then the Customer may employ other persons to perform the Work and the ESCo shall pay to the City all amounts which the Customer expends for such repairs and/or replacements. Please note the following exceptions:

LAMPS: Replacement of failed lamps for 24 months after the Installation Date. ESCO shall provide a 2% replenishable stock of all lamp types upon the Installation Date. Provided that the Customer shall furnish to ESCo all failed lamps and a listing of their location according to a procedure established by ESCo and the Customer, ESCo shall provide the Customer with replacement lamps for all lamps that fail after the Installation Date and prior to the end of this warranty period. Installation of replaced lamps shall be provided By Customer.

BALLASTS: Replacement of failed ballasts for 60 months after the Installation Date. ESCo shall provide a 2% replenishable stock of all ballast types upon the Installation Date. The Customer shall furnish to ESCo all failed ballasts and a listing of their location according to a procedure established by ESCo and the Customer. Customer shall receive a credit of \$10, to cover installation costs, from ESCo per failed ballast replaced by the Customer during the warranty period. All failed ballasts will be returned to ESCo at which time ESCo will add one ballast to the 2% replenishable stock. Installation of replaced ballasts shall be provided by the Customer.

MAJOR EQUIPMENT: ESCO shall provide an annual contract for the maintenance and replacement of major equipment installed under this contract.

ESCO will respond to a repair or replacement of the critical service Equipment as soon as reasonable and practicable, but no later than 24 hours, and within 48 hours for non-critical Equipment. The list of critical Equipment will be defined upon completion of the installation.

If ESCo installs or furnishes goods or equipment under this Agreement, and such goods or equipment are covered by an end-user warranty from their manufacturer, ESCo will transfer the benefits of such warranty to Customer. The foregoing remedy with respect to the work, together with any remedy provided by goods or equipment manufacturers, shall be Customer's sole and exclusive remedies for warranty claims. Customer agrees that the one (1) year period following the ECM Installation Date, shall be a reasonable time for purposes of submitting valid warranty claims with respect to the work. These exclusive remedies shall not have failed of their essential purpose so long as ESCo transfers the benefits of any goods or equipment end-user warranty to Customer and remains willing to re-perform any non-conforming Work for no charge within the one (1) year period described above. **NO OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE PROVIDED BY ESCO.** This warranty does not extend to any

DRAFT ESA

work that has been abused, altered, or misused, or repaired by Customer or third parties without the supervision or prior written approval of ESCo. Except with respect to goods or equipment manufactured by ESCo and furnished to Customer hereunder, for which ESCo shall provide its express written manufacturer's warranty, ESCo shall not be considered a merchant or vendor of goods or equipment. If a merchant or vendor of goods or equipment asserts a claim or defense that the installation of the equipment did not conform to the manufacturers specifications, ESCo warrants that the installation of equipment was made according to the manufacturers specifications and requirements.

SCHEDULE B-2: MAINTENANCE PROCEDURES/ROUTINES REQUIRED FOR PREMISES BY –

Customer shall operate, maintain and repair the Equipment in accordance with the maintenance manuals provided by ESCo.

Customer's maintenance staff shall perform routine maintenance on the Equipment installed by ESCo for this project after the Schedule B-1 Warranty period.

If Customer is unable to perform routine maintenance on the Equipment due to unforeseen fiscal or staffing constraints, Customer and ESCo shall mutually agree upon an appropriate adjustment to energy savings as detailed in Schedule C: Part I and Schedule D.

ESCO shall provide all required maintenance procedures to be completed by the Customer for each ECM. Customer by completing these procedures shall be in compliance with the required maintenance as listed in section 12.

SCHEDULE B-3: MAINTENANCE PROCEDURES/ROUTINES REQUIRED FOR PREMISES BY ESCO

ESCo will be responsible for all maintenance and warranty responsibilities and costs for all newly installed Equipment as follows:

- ◆ **Fill in this section**

SCHEDULE C: BASELINE

PART I: BASELINE DEVELOPMENT PROCEDURE

Introduction Each month, the energy savings will be calculated by comparing the current month's consumption with a projection of what would have been consumed if no conservation had been undertaken. The projection will be developed by applying correction factors to the base year usage to account for changes in weather, occupancy and schedule (and other variables approved by all parties). The cost avoidance will be based on current marginal costs.

The following sections define the base year and describe the methods for obtaining consumption data, development of the temperature correlation, corrections for changes in configuration and operation.

Base Year The base year shall be based upon the Final Energy Audit (Schedule I) which determines the energy consumption and cost in the project buildings and existing equipment, as approved by Customer. These base-year data, which will become part of the contract, represent energy consumption by the facility and existing equipment as configured and operated before the beginning of this Agreement.

Sources of Data For each month of the base year and each month during the Term of this Agreement, data shall be obtained, depending on the measurement and verification plan, as follows:

1. ECM Baseline.

For energy conservation measures that the M+V plan identifies as requiring either partial measurement retrofit isolation or retrofit isolation, a baseline consumption of the existing equipment is to be established using the measurement and calculation procedure defined in the M+V plan. The calculation should identify all parameters that affect the consumption and justify which are to be stipulated by showing that the total impact of possible stipulation errors is not significant to the resulting savings.

2. Whole Facility Energy Baseline.

The following procedures for gathering whole-facility-baseline energy data are to be followed for all projects. The facility baseline shall be used for calculation of monthly energy savings if required by the M+V plan. City and the user agency reserve the right to request reconciliation of annual savings estimates with those based on the facility baseline and current utility bill data (any cost to ESCo of such reconciliation shall be agreed to at time of request and paid by City and/or user agency).

a. Oil. The method used to determine monthly oil usage will depend to a large extent on the data available for the base year. One of the following methods shall be used:

i. If oil usage is reliably metered and if meter readings are available for the base year, monthly meter readings shall be used to determine oil usage. Metered usage shall be checked for accuracy against deliveries for the base year and at least twice annually during the Term of this Agreement.

ii. If tank level readings are available for the base year, the monthly oil usage shall be determined by subtracting the end-of-month level from the beginning-of-month level and adding deliveries which occurred during the month all corrected to 60 degrees F.

iii. If neither meter data nor tank level data are available for the base year, the base year monthly usage shall be developed from deliveries by assuming a constant daily usage between deliveries and, if applicable, allowing for no usage during a summer shutdown. During the term of the contract, monthly oil usage shall be determined from tank level readings or monthly meter readings as described above.

b. Electricity. Electricity usage data shall be obtained from electricity bills. Since meters are not usually read on the same day each month, monthly usage shall be determined by apportioning billed usage assuming a constant daily usage between meter readings. Usage for most months will, therefore, be derived from two bills, one of which will usually predominate. Before the start of the contract, based on customary billing dates, the parties will agree which bill to consider predominant.

The cost used for savings calculations will be based on the rate in effect for the predominant bill, and the demand will be the billed demand from the predominant bill.

If the facility is billed on a time-of-use rate, the on-peak and off-peak usage components shall be treated as two separate energy sources.

c. Natural Gas. Natural gas usage data shall be obtained from the utility bills as for Electricity, above.

d. Water and Sewer. Water and sewer usage shall be determined by bills provided by water and sewer providers respectively.

3. Calibrated Simulation Baseline.

For components of facility that are identified in the M+V plan as requiring a calibrated simulation to establish a savings estimate, a computer simulation to be calibrated with metered energy use data from the post retrofit conditions shall be used to establish a monthly baseline energy consumption. This method should only be used when it is not possible to obtain an accurate measure of energy use in the base year.

4. Weather. Weather data shall be mean monthly temperature obtained from the National Oceanic and Atmospheric Administration (NOAA) in **Dover, NH**.

Temperature Correlation Before the Term of this Agreement begins, monthly usage data for each energy source shall be developed as described above for the base year and, if the configuration and operation of the facility have not changed significantly, for one or two previous years. Monthly weather data shall be obtained from NOAA for the same time period. Plots shall be drawn showing weather data on the horizontal axis and monthly usage on the vertical axis. Temperature correction factors (TCF) for each source for each month shall be developed by inspection of these plots by both parties.

DRAFT ESA

Correctness of Data Adjustments to the baseline for billing inconsistencies, new information, data discrepancies, and campus operation irregularities shall be agreed upon by Customer and ESCo.

Adjustment for Changes in Configuration and Operation During the term of this Agreement, parts of the facility may be closed or demolished, additions may be constructed, major pieces of equipment may be installed or removed. If such an event is likely to have a noticeable impact on energy usage, either party may propose a correction procedure. If both parties agree, the correction procedure shall become part of the contract. The correction procedure may be based on calculation or on meters installed specifically for this purpose or on some combination.

PART II: ENERGY BASELINE

The energy baseline for the facility is attached hereto.

DRAFT ESA

PART III: UTILITY RATE SCHEDULES

The effective utility rate schedules to be used for calculating energy cost savings are attached hereto.

(IF APPLICABLE, INCLUDE) FLOOR AND CEILING PRICES FOR ENERGY AND WATER

Fill this in

SCHEDULE D: MONTHLY SAVINGS CALCULATION

Part I. Introduction

The purpose of the monthly savings calculation is to determine the change in overall energy cost that has resulted from the conservation program. In general, the cost of the current month's usage, at rates and unit costs currently in effect, will be subtracted from usage in the corresponding month in the base year projected to current conditions of occupancy and configuration, taken at the rates and unit costs that would have been in effect if the conservation program had not been initiated.

Each month, the energy savings will be calculated by comparing the current month's consumption based on the procedures defined in the M+V plan, with a projection of what would have been consumed if no conservation had been undertaken. The projection will be developed by applying correction factors to the base year usage, described in Schedule C, to account for changes in weather (and other variables approved by all parties). The dollar savings will be based on current marginal costs.

Part II. Savings Measurement and Verification

The current month's energy savings is to be estimated based on the procedures defined in the M+V plan. As stated in the Form for Proposal Submission and the scope of work for the technical audit the M+V plan will have been developed following the International Performance Measurement and Verification Protocol (IPMVP). Version April 2007

Part III. Savings Calculation

1. The mean monthly temperature shall be obtained from NOAA. The current month's mean temperature shall be subtracted from the mean monthly temperature in the corresponding month in the base year to obtain the temperature difference:

$$TD = MMTb - MMTc$$

Where: TD = temperature difference

MMTb = base-year mean monthly temperature

MMTc = current month's mean temperature

2. The base-year usage shall be projected to account for temperature variation by adding an amount equal to the appropriate temperature correction factor multiplied by the temperature difference:

$$Utc = Ub + (TCF \times TD)$$

Where: Utc = temperature corrected usage

Ub = usage for the corresponding month in the base year (monthly oil usage shall be determined from tank level readings or monthly meter readings)

TCF = temperature correction factor for the month as defined at the outset of the contract

3. Corrections to account for changes in configuration and operations shall be applied if the contract has been amended to include them:

$$U_p = U_{tc} + U_{oc}$$

Where: U_p = projection of what would have been used if there had been no energy conservation contract

U_{oc} = corrections other than temperature to account for changes in configuration and operations

4. The current month's usage shall be subtracted from this projected usage to obtain the current month's energy savings:

$$U_s = U_p - U_c$$

Where: U_s = energy savings

5. The monetary savings shall be determined by multiplying the energy savings by the current unit cost:

$$S = U_s \times C$$

Where: S = monetary savings

C = unit cost as defined below

U_s = energy savings

For energy sources, the cost of which decreases with increasing usage, the cost used for savings calculations each month (C) shall be the marginal unit cost plus the demand, if applicable, from that month's predominant bill (as defined in Schedule C, Part I). For electricity, this marginal cost shall be determined for energy (amount paid for the last kilowatt-hour purchased including fuel adjustment cost) and demand (amount paid for the last kilowatt purchased including, if applicable, the effect of demand on the energy cost).

For energy sources, the cost of which does not decrease with increasing usage, the cost for savings calculations each month (C) shall be the average unit cost for all deliveries received during the month.

6. The Energy Cost Savings shall be determined by adding the monetary savings of all energy types conserved under the terms of this Agreement:

$$ECS = S1 + \dots + SX$$

Where ECS = Energy Cost Savings

$S1$ = monetary savings for energy type 1

SX = monetary savings for energy type X

In cases where the conservation program does result in a change in energy source (conversion from electric to gas heat, for example), or where the level of usage changes enough to affect the marginal cost, the calculation procedure shall be modified accordingly so that it serves the purpose stated at the beginning of this Schedule. Marginal energy costs, as noted in the Rate Schedules for the Premises, contained in Schedule C - Part 3, shall be considered the basis for all estimates, projections and payments made pursuant to this Schedule.

The floor on the price of all energy types and water shall be 100 percent (100%) of the costs per unit detailed in Schedule C - Part 3. This is the minimum value that such savings will be valued at; however, if prevailing prices are greater than the floor, the higher price will be the basis for the determination of such cost savings. The ESCo will calculate savings based on either the prevailing price of energy or the floor value, whichever is higher.

The ceiling on the price of all energy types and water shall not exceed 100 percent (100%) of the costs per unit detailed in Schedule C - Part 3 for the first year of this Agreement, and so on. This is the maximum value that such savings will be valued at; if prevailing prices are greater than the ceiling, the lower price will be the basis for the determination of such cost savings.

7. The Cumulative Energy Cost Savings shall be determined by adding each month's Energy Cost Savings from the first month's savings determined at least 30 days after the initial Installation Date and continuing until the most recent month's Energy Cost Savings:

$$CECS = ECS1 + \dots + ECSX$$

Where CECS = Cumulative Energy Cost Savings

ECS1 = the first month's Energy Cost Savings

ECSX = the most recent month's Energy Cost Savings

Part IV. Annual and Quarterly Reporting Requirements

The following report format for energy reporting is to be followed for each project. The ESCo will be required to submit quarterly reports and annual reports according to this format. Hardcopies of the following should be sent to the facility and City at a minimum on an annual basis. In order to reduce paperwork, electronic copies of quarterly reports may be substituted as determined on a project by project basis. Please note that some of the following information applies to annual report versus quarterly report information as identified.

Contract #

Performance Period Dates Covered: _____ to _____

Contract year #: _____

Executive Summary (Annual and Quarterly)

Brief Project Background and description

Summary of energy and cost savings / results from this performance period:

Project estimated and verified savings broken out by energy units and energy costs for performance period. Compare to guaranteed cost savings for total project.

Verified savings by ECM broken out by energy units, energy cost and other savings values (as applicable) for this period. (any O&M savings shall be broken out separately)

Approximate % saved by energy source type for site (optional)

DRAFT ESA

*Annual and quarterly reports should break out energy savings on a monthly basis and shall total energy unit savings and associated dollar cost savings **for all ECM's by month** on the following basis:*

- Electric (onpeak/offpeak/demand)*
- Steam (heating and cooling reductions in Mlbs)
 - Gas (in therms)*
 - Oil (in gallons)*
 - Water conservation Domestic (reductions in domestic water conservation in gallons)*
 - Water conservation Process(i.e. conversion to closed loop systems or other process reductions reported in gallons)**

Any additional reductions for other energy or addition of fuel due to conversions should be shown as negative savings and accompanied by associated negative cost savings. Also, reductions in additional fuel sources or energy types not included here can be addressed on a project by project basis.

Summary of any energy and/or cost savings adjustments required

Performance and O&M issues identified

Details for each ECM (Annual and Quarterly)

Overview description of ECM – where implemented and how cost savings are generated

Overview of M&V plan for ECM

Intent of M&V plan – what is being verified

Description of analysis and equations used for savings calculations (include appendix and electronic format as needed and/or refer to specific section of contract)

Stipulated values from contract (include details and/or refer to specific section of contract)

d. Identify any changes in scope and indicate the net change in savings.

Measurements, monitoring and inspections conducted this reporting period in accordance with M&V plan (include all that apply for each one):

Measurement equipment used

Equipment calibration documentation

Dates/times of data collection or inspections, names of personnel, and documentation of Customer witnessing

Details to confirm adherence to sampling plan (i.e. agreed to % of equipment sampled)

Include all measured values for this period. Include periods of monitoring and durations and frequency of measurements. (Use appendix and electronic format as necessary). Include description of data format (headings, units, etc.).

Describe how performance criteria have been met.

Detail any performance deficiencies that need to be addressed by ESCO or Customer

DRAFT ESA

Note impact of performance deficiencies or enhancements on generation of savings

4) *Detail commodity (e.g. energy, water, etc.) rate(s) used in calculations*

a. *Actual commodity rate(s) at site for same period (optional)*

5) *Provide summary for technical details of all calculations made (provide reference to contract docs).*

a. *Analysis Methodology – describe any data manipulation or analysis that was conducted prior to applying savings calculations*

b. *Details of any baseline or savings adjustments made*

Verified savings for this energy conservation measure (ECM)

6) *Maintenance requirements (**Annual**):*

a. *Reference section of contract (or appendix) outlining maintenance responsibilities for specific equipment*

Verification of scheduled maintenance items completed by ESCO

Summary of unscheduled maintenance activities conducted this period by ESCO

Detail any deficiencies needed to be addressed by ESCO or Customer

Note impact of maintenance deficiencies on generation of savings

Other: (i.e. O&M savings are not included in overall energy performance guarantee but may be of interest to the facility to see effect of project on operation and maintenance costs). The requirements of reporting of O&M savings will be determined on a project by project basis.

DRAFT ESA

SCHEDULE E: DESCRIPTION OF STANDARDS OF SERVICE AND COMFORT

The following average maintained standards of service and comfort shall apply:

| TYPE OF SERVICE | ENVIRONMENTAL REQUIREMENT |
|----------------------------------------------------------------------------------------|----------------------------------------------|
| I. HEATING | |
| Occupied | 70° F |
| Unoccupied | 55° F |
| Storage | 55° F |
| II. COOLING | |
| Occupied | 72-76° F |
| III. HOT WATER HEATERS | 140° F. |
| IV. VENTILATION | Must meet New Hampshire State Building Code, |
| VI. LIGHTING | |
| The following average maintained illuminating levels (at working height) shall be met: | |
| Interior Lighting | Must meet New Hampshire State Building Code |
| Exterior Lighting | Must meet New Hampshire State Building Code |

If Customer is unable to meet these Standards of Comfort for any reason, Customer and ESCo shall mutually agree upon an appropriate adjustment to energy savings as detailed in Schedule C - Part I and Schedule D.

DRAFT ESA

SCHEDULE F: SERVICE AGREEMENTS FOR ENERGY

The following list describes any contracts or agreements entered by Customer with any persons or entities other than the ESCo regarding the provisions of energy management services in or relating to the Premises.

The following list describes any contracts or agreements entered into by Customer with any persons or entities other than the ESCo regarding the servicing of any existing HVAC equipment:

SCHEDULE G: TERMINATION VALUE

The Termination Value shall be determined as follows:

If Termination occurs before the Installation Date, the Termination Value shall be equal to a percentage of \$..... based on the percent of the project completed at the time of such termination.

If Termination occurs before the end of the Contract Term, the Termination Value shall be equal to: \$

SCHEDULE H: Additional Types/Limits of Insurance

The following additional types/limits of insurance are required for this contract.

DRAFT ESA

SCHEDULE I: ENERGY AUDIT

The Final Energy Audit, prepared by the ESCo, dated will serve as the basis for the Energy Conservation Measures, defined in Schedule B, and shall be available at the City, as an exhibit to Schedule I.

SCHEDULE J: RECONCILIATION OF DOLLAR ESTIMATE OF GUARANTEED SAVINGS

Reconciliation under this Agreement is a comparison of the Actual Adjusted Energy Cost Savings to the Dollar Estimate of Guaranteed Savings as set forth in Section 8.2.

A. Calculate the annual savings for each type of energy consumed on the Premises starting with, and including, the Effective Date until the anniversary date of the Effective Date, which date is also the Reconciliation Date. Energy consumption savings is calculated pursuant to Schedule D, and consumption savings for each month is totaled. This calculation is repeated for each energy type.

$$CEs = \sum_{\text{month 1}}^{\text{month 12}} Es \quad CDs = \sum_{\text{month 1}}^{\text{month 12}} Ds$$

Where: Es = energy consumption savings for energy type
 Ds = demand consumption saving
 CEs = total annual energy consumption savings for each energy type
 CDs = total annual demand consumption savings

B. Adjusted Annual Energy Cost Savings is the Annual Energy Consumption Savings for each type of energy multiplied by the marginal energy cost per unit for that type of energy for the base year.

$$ACEs = CEs \times BEPs \quad \text{and} \quad ADEs = CDs \times BEPs$$

Where: ACEs = adjusted annual energy cost savings at base year rate shown in Schedule C

ADEs = adjusted annual demand cost savings, at base year rate shown in Schedule C

CEs = total annual energy consumption savings (from A)
 CDs = total annual demand consumption savings (from A)
 BEPs = marginal baseline energy cost per unit shown in Schedule C

C. Calculate the Energy Cost Savings Shortfall or Energy Cost Savings Excess. The Dollar Estimate of Guaranteed Savings is subtracted from the sum of the Adjusted Annual Energy Cost Savings for all types of energy and demand. If the resulting number is greater than zero the ESCo has exceeded its Guarantee obligations and an Energy Cost Savings Excess exists. If, however, the resulting number is less than zero an Energy Cost Savings Shortfall exists.

$$ECS = (ACEs + ADEs) - GS$$

Where: ECS = energy costs savings; shortfall or excess

ACEs = adjusted annual energy cost savings at base year rate for each energy type (from B)

GS = dollar estimate of guaranteed savings for year (from Section 8.3)
 ADEs = adjusted annual demand cost savings at base year rate (from B)

DRAFT ESA

D. In the event of Early Termination of this Contract, pursuant to Section 9 the Dollar Estimate of Guaranteed Savings for each month shall be one twelfth (1/12) of the annual Dollar Estimate of Guaranteed Savings as set forth in Section 8.2. The calculation of reconciliation shall be pursuant to this Schedule J, Paragraphs A, B and C above, except that only those months for which the contract was in effect shall be utilized for all calculations.

E. Adjusted Energy Cost Savings shall be determined by adding adjusted annual energy cost savings for each energy type and adjusted annual demand cost savings for each energy type:

$$AECS = ACEs + ADEs$$

Where: AECS = Adjusted Energy Cost Savings.

F. Adjusted Cumulative Energy Cost Savings for the total elapsed period of this Agreement shall be determined by adding each years Adjusted Energy Cost Savings up to the current year:

$$ACECS = AECS1 + \dots + AECSX$$

Where: ACECS = Cumulative Energy Cost Savings

AECS1 = the first year's Adjusted Energy Cost Savings

AECSX = the current year's Adjusted Energy Cost Savings

SCHEDULE K: RESERVED

SCHEDULE L: BONDS

Attached hereto are the payment, performance and efficiency guarantee bonds that the ESCo will execute with City to cover the Term and value of this Agreement.

DRAFT ESA

PERFORMANCE BOND

EFFICIENCY GUARANTEE BOND

SCHEDULE M: USE OF PREMISES

I. Safety & Health Regulations

(a) ESCo and all subcontractors shall:

(i) Perform all work in accordance with federal and State safety and health standards and guidelines and be responsible for providing healthful and safe work conditions;

(ii) Refrain from creating any recognized safety or health hazard;

(iii) Provide MATERIAL SAFETY DATA SHEETS for materials used in the course of the work when requested by City;

(iv) Notify the Customer's Director of Physical Plant or his designee at least two working days prior to use of a laser ray or beam device.

(b) Contractors performing work in buildings at the Premises that will cause smoke or dust particles to become airborne must check FIRST for the existence of smoke detector systems. If the area of work is smoke detector equipped, Contractor shall be responsible to notify appropriate facility personnel for deactivation of affected detectors BEFORE work can commence. Once work is completed, the Contractor will have the facility re-activate the affected smoke detectors and carry out any necessary testing to insure full operation.

(d) All construction will comply strictly with the New Hampshire Building Code.

(e) Encountered Asbestos: In the event that friable asbestos is encountered and must be disturbed during the course of this contract, the Customer or his designee shall be notified and work in the affected area shall cease until a remediation plan is agreed upon. An extension of the completion date will be granted equal to the time lost. Contractor shall have taken into account all available asbestos studies provided by the Customer during the audit phase of the project.

II. Permits & Fees

(a) ESCo, or its subcontractor, shall be responsible to give all notices, obtain all necessary inspections, and pay all necessary fees, as required.

(b) ESCo, or its subcontractor, shall be required to keep a copy of the State Building Code and State Electric Code (with latest amendments) at the job site at all times.

(c) The construction plans and specifications shall be reviewed by the Commissioning Agent and the City Public Safety Building Inspector.

III. Use of Premises

(a) Contract limits of construction shall be confined within actual work areas.

(b) Apparatus, storage of materials, and construction operations shall be confined to areas directed by Customer, so as not to interfere with the normal operating functions of the Premises. The Premises shall not be unreasonably encumbered with materials.

DRAFT ESA

- (c) ESCo and his employees are prohibited from entering, using or being in any building on the Premises except for authorized business. Toilet facilities will be designated by the Project Engineer.
- (d) ESCo and its subcontractors shall conduct themselves in a professional manner at all times while on the Premises.
- (e) The State of New Hampshire, the Customer, its trustees, officers, employees and agents shall neither accept nor assume responsibility for the security of ESCo's material or equipment, whether lost, stolen or vandalized. ESCo shall exercise caution in placement and storage of his equipment and material.

IV. Cleaning Up

- (a) When directed and before the final inspection, the building and the surrounding work areas shall be cleaned by ESCo or its subcontractors and all construction tools, equipment, appurtenances and waste shall be removed from the buildings.
- (b) The contractor shall clean, wash, dust, and polish all materials and equipment installed, and other materials as specified, leaving all in a finished and clean state.
- (c) At the conclusion of each day's work, all packing materials, cases, lumber, wrapping, or other rubbish, flammable or otherwise, shall be collected and removed from the buildings and the campus by ESCo or its subcontractors.

V. Protection & Repair of Existing Facilities & Utilities

- (a) ESCo shall be responsible for exercising necessary care to avoid damage to property at the Premises.
- (b) ESCo or its subcontractors shall secure the work area and equipment at the end of each work day and shall provide hardware and locks.
- (c) The repair, replacement, and/or restoration of any existing energy, steam, drain, water or sewer lines, or other utility, interfered with by ESCo or its subcontractors, shall be completed in accordance with the State Specifications for each phase of the work using experienced, competent labor, and new and unused materials meeting specifications and current codes.
- (d) ESCo shall be responsible for cleaning all existing lenses and fixtures with a damp cloth and cleaning solution during the retrofit of lighting systems.
- (e) ESCo shall remove all old fixtures either replaced or disconnected, cut any bolts to a level above the ceiling, replace ceiling tiles or patch or plate ceiling, cover junction boxes with cover plates, paint over such areas and waterproof if such areas are in danger of water damage such as on the exterior of buildings.

SCHEDULE N: ESCOs MARK UP FOR SERVICES

Attach ESCO's Proposal Sheet

SCHEDULE O: Reserved

SCHEDULE P: CONTRACTORS REQUIREMENTS FOR COMMISSIONING AGENT AND FIELD OFFICES

- A. City shall provide a suitable field office on site for the use of the ESCo. The location shall be at the discretion of City. If the office is not suitable for the ESCo, then they shall provide their own trailer which will be located on site at the discretion of City.
- B. City shall provide a suitable field office on site for the use of the Commissioning Agent.
- C. City shall pay for the installation and removal of the temporary telephones and equipment and for all calls and fixed charges in connection therewith.
- D. General Conditions for ESCo's office if in a trailer:
 - 1. The ESCo shall, on a daily basis, maintain the offices and conference space to be clean, orderly and air conditioned.
 - 2. Maintain temporary construction and support facilities until Final Acceptance, then remove.
 - 3. Comply with requirements of NFPA 241.

E SANITARY FACILITIES

- 1. If providing a trailer, the ESCo shall provide suitable toilet facilities for its staff, and additional facilities for the workmen on the job, including personnel of Sub-contractors and Filed Sub-contractors. The City may designate a specific toilet area to be used for the ESCo and Sub-contractors engaged in the Work. However, the ESCo shall take responsibility for maintenance and cleaning of such areas and shall leave them in first class condition equal to the accepted conditions of toilet facilities not used for construction personnel.
- 2. Provide chemical toilets where work is in progress and in quantity required by OSHA Code.
- 3. Chemical toilets and their maintenance shall meet requirements of state and local health regulations and ordinances and shall be subject to the approval the Customer.

DRAFT ESA

VOTE OF CORPORATION

If a corporation, complete below or attach to each signed copy of contract a notarized copy of vote of corporation authorizing the signatory to sign this contract. If attesting clerk is same as individual executing contract, have signature notarized below.

At a duly authorized meeting of the Board of Directors of the

_____ held on _____
(Name of Corporation) (Date)

At which all the Directors were present or waived notice, it was voted _____,

_____ (Name) _____ (Officer)

of this company be and hereby is authorized to execute contracts and bonds in the name and behalf of said company, and affix its Corporate Seal thereto, and such execution of any contract or obligation in this company's name on its behalf by such _____ under (Officer) seal of the company, shall be valid and binding upon this company,

A TRUE COPY,
ATTEST _____
Clerk

Place of Business: _____

DATE OF THIS AGREEMENT:

I hereby certify that I am the Clerk of the _____ and that _____ is the duly elected _____ of said company, and that the above vote has not been amended or rescinded and remains in full force and effect as of the date of this contract.

_____ (Clerk) (Corporate Seal)

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF _____, 20_____.

NOTARY PUBLIC

