

GUARANTEED ENERGY SAVINGS CONTRACT
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GUARANTEED ENERGY SAVINGS CONTRACT

This Guaranteed Energy Savings Contract (the "**Contract**") is made and entered into as of this _____ ("**Effective Date**") by and between the **PHILADELPHIA MUNICIPAL AUTHORITY**, a body politic and corporate existing under the laws of the Commonwealth of Pennsylvania ("PMA") and **NORESCO, LLC** (the "**Energy Services Company**" hereinafter referred to as "**ESCO**"), having its principal offices at One Research Drive, Suite 400C, Westborough, MA 01581.

I. BACKGROUND

A. PMA is a body corporate and politic, organized under the provisions of the Pennsylvania Municipal Authorities Act of 1945 (the Act of May 2, 1945, P.L. 382, as amended), pursuant to ordinance of the Council of The City of Philadelphia.

B. The City of Philadelphia ("City") owns and operates, or leases and operates, the four (4) properties located at: (1) Broad St & Market St, Philadelphia, Pennsylvania 19107; (2) 1301 Filbert Street, Philadelphia, Pennsylvania 19107; (3) 1401 JFK Blvd, Philadelphia, Pennsylvania 19102; and (4) 1515 Arch Street, Philadelphia, Pennsylvania 19102 (respectively: City Hall, the Criminal Justice Center, the Municipal Services Building and the One Parkway Building; collectively referred to hereinafter as the "**Quadplex**" or the "**Premises**"); and is in need of Energy Conservation Measures ("**ECMs**") that include programs, facility alterations or upgrades designed to reduce energy, water, wastewater or other measurable consumption or operating costs at said Premises.

C. The City solicited proposals from qualified firms through issuance of the Request for Proposals ("**RFP**").

D. ESCO submitted a proposal, dated April 29, 2009 and set forth in (the "**Proposal**").

E. ESCO has made an assessment of the energy and water consumption characteristics of the Premises and pre-existing equipment described in **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)**, which was delivered to the City as the Investment Grade Audit ("**IGA**") dated November 11, 2011, and approved and accepted by the City as set forth in **Exhibit II (i) (Certificate of Acceptance—Investment Grade Audit)**.

D. The City determined that the energy conservation measures proposed and recommended by ESCO and described in the IGA, including certain energy and water cost saving equipment of the type or class described in **Schedule A (Selected ECMs to be Installed by ESCO)**, attached hereto and made part hereof, present an advantageous proposal and that it would be in the City's best interest to initiate contract

negotiations for a guaranteed energy savings contract with ESCO to implement one or more of such recommended measures.

E. The City initiated contract negotiations with ESCO which have concluded with this Contract and, on _____, PMA adopted a resolution authorizing the execution and delivery of this Contract.

F. By resolution dated _____, the Board of Directors of PMA authorized its Chairman to execute this Contract.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties hereto covenant and agree as follows:

ARTICLE 1. INCORPORATION OF BACKGROUND; DEFINITIONS

1.1 **Incorporation of Background.** The Background paragraphs above are incorporated by reference into this Contract and made a part of this Contract.

1.2 **Definitions.** The terms used in this Contract shall have the following meanings:

- (a) **"Acceptance Date"** has the meaning set forth in Paragraph 4.3.
- (b) **"Amendment"** means a written modification or change to any Contract Document signed by both Parties.
- (c) **"Annual Guaranteed Savings"** means the Guaranteed Savings for each year of the Guarantee Period, as set forth in Schedule C.
- (d) **"Applicable Law"** means all applicable federal, state or local laws, ordinances, executive orders, rules, regulations and court orders, injunctions, decrees, and other official interpretation thereof by any federal, state or local court, administrative agency or government body, including the City, the Commonwealth and the United States of America in effect on the Effective Date. Applicable Law includes, without limitation, the Philadelphia Home Rule Charter, The Philadelphia Code, the Guaranteed Energy Savings Act (62 Pa. C.S. § 3751 *et seq.*); Chapter 39 of Act 57 of May 5, 1998 (62 Pa. C.S. § 3901 *et seq.*); the Prevailing Wage Act (43 P.S. § 165-1 *et seq.*); the Steel Products Procurement Act (73 P.S. § 1881 *et seq.*); the Trade Practices Act of July 23, 1968 (71 P.S. § 686 *et seq.*); the Uniform Construction Code (13 P.S. § 1101 *et seq.*); the Pennsylvania Worker's Compensation Act, 77 P.S. § 1 *et seq.*; the Pennsylvania Solid Waste Management Act (35 P.S. § 6018. 101 *et seq.*); the Pennsylvania Hazardous Sites Cleanup Act (35 P.S. § 6020.101 *et seq.*); the

Pennsylvania Clean Streams Law (35 P.S. § 691.1 *et seq.*); the Pennsylvania Storage Tank and Spill Prevention Act (35 P.S. § 6021.101, *et seq.*); the Pennsylvania Land Recycling and Environmental Remediation Standards Act (35 P.S. § 6026.101 *et seq.*); the Pennsylvania Hazardous Material Emergency Planning and Response Act, (35 P.S. § 6022. 101 *et seq.*); the Pennsylvania Air Pollution Control, 35 P.S. § 4001, *et seq.*), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*); the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 *et seq.*); the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*); the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*); the Hazardous Materials Transportation Act (49 U.S.C. § 1801 *et seq.*); the Clean Air Act (42 U.S.C. § 7401 *et seq.*); the Clean Water Act (33 U.S.C. § 1251 *et seq.*); the Oil Pollution Act of 1990 (33 U.S.C. § 2701 *et seq.*); the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 *et seq.*); and the other specific Applicable Laws set forth herein.

- (e) **"As-Built Documentation"** means a final set of Design and Engineering Documents that has been updated to accurately and clearly depict the as-built conditions of each of the Selected ECMs to be implemented under this Contract, including any supplemental details, drawings, or plans that are necessary to demonstrate the location of each Selected ECM, its relation to Premises, and any information necessary for making future alterations, connections or upgrades to the Selected ECM, such as power supplies and interconnecting wiring between units, installation of accessories, and appurtenances.
- (f) **"Business Days"** means calendar days, excluding all Saturdays and Sundays in addition to New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, or the Monday thereafter when these days occur on Saturday or Sunday.
- (g) **"Capacity Rights"** means the rights associated with the electric generation and load reduction capacity and capability of the selected ECMs, including the right to use and receive payment for electric generation capacity or load reduction capability of the selected ECMs in the PJM Reliability Price Model Base Residual Auctions and/or in other appropriate PJM capacity, emergency load reduction or demand response programs or markets.
- (h) **"Change Order"** means an instrument altering the scope of work under the Contract issued under Paragraph 7.3.3 below.
- (i) **"Contract Sum"** has the meaning set forth in Paragraph 5.1.

- (j) The **"City"** means The City of Philadelphia, a corporation and body politic existing under the laws of the Commonwealth, and includes its various executive and administrative departments, agencies, boards, commissions and offices, including the Department, and its legislature, the City Council. The City is a City of the First Class under the laws of the Commonwealth.
- (k) **"Commonwealth"** means the Commonwealth of Pennsylvania.
- (l) **"Concealed Conditions"** means subsurface or otherwise concealed physical conditions on the Premises of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in the Work anticipated by this Contract, and that the ESCO could not have anticipated based upon experience or discovered through the exercise of reasonable diligence prior to completion of the Investment Grade Audit.
- (m) **"Contract"** means this Guaranteed Energy Savings Contract between the Parties as evidenced by the Contract Documents.
- (n) **"Contract Documents"** means this Contract; any and all exhibits, Schedules, drawings, specifications, diagrams, plans, addenda or other documents incorporated by reference; the Notice(s) to Proceed with Selected ECMs; the performance and payment bonds; and any and all Amendments to any of these documents.
- (o) **"Department"** means the department, board, commission, office or agency of the City for which the ESCO carries out the Work under this Contract, as designated in writing by the City from time to time.
- (p) **"Design and Engineering Documents"** means the drawings, plans, technical specifications, or other design and engineering documents prepared for the City by or on behalf of the ESCO and set forth in the IGA.
- (q) **"ECM Implementation"** has the meaning set forth in Paragraph 7.1.
- (r) **"ECM Service Responsibilities"** has the meaning set forth in Paragraph 14.1.
- (s) **"Energy Conservation Measure" ("ECM")** has the meaning set forth in 62 Pa. C.S. § 3752 (Definition of "Energy Conservation Measure").
- (t) **"Energy Savings Guarantee"** has the meaning set forth in Paragraph 5.2, and shall consist of both the Total Guaranteed Savings and the Annual Guaranteed Savings.
- (u) **"Effective Date"** has the meaning set forth in Paragraph 4.1.

- (v) **"Environmental Incentives"** means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the development or installation of the ECMs and the reduction of energy usage at the Site. Without limiting the forgoing, "Environmental Incentives" includes utility rebates or incentive programs, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit program, grants from nongovernmental organizations, and the right to claim federal income tax credits under Section 45 and/or 48 of the Internal Revenue Code.
- (w) **"Equipment"** means the property described in the Schedules and all replacements, substitutions, repairs, restorations, modifications, attachments, accessions, additions and improvements thereof or thereto. Whenever reference is made in this Contract to Equipment listed in a Schedule, that reference shall be deemed to include all replacements, repairs, restorations, modifications, and improvements of that Equipment.
- (x) **"Excessive Savings"** has the meaning set forth in Paragraph 5.3.2.
- (y) **"Fiscal Year"** means the annual accounting year of the City, which currently begins on July 1 of each year.
- (z) **"Guaranteed Savings"** means the amount of energy, water or wastewater costs savings, operational cost savings or revenue increases resulting from the Selected ECMs. The Guaranteed Savings may be referenced in this Contract (and the Schedules and Exhibits thereto) on either an annual basis, meaning the Annual Guaranteed Savings for any single year of the Guarantee Period, or on grand total basis, meaning the Total Guaranteed Savings achieved during the fifteen-year Guarantee Period.
- (aa) **"General Contract Requirements"** means the additional contract requirements set forth in Exhibit III (General Contract Requirements – Prevailing Wage Schedule).
- (bb) **"Guarantee Period"** has the meaning set forth in Paragraph 4.4.
- (cc) **"Implementation Period"** has the meaning set forth in Paragraph 4.2.
- (dd) **"Implementation Schedule"** has the meaning set forth in Paragraph 7.3.1.
- (ee) **"Investment Grade Audit" ("IGA")** has the meaning set forth in Paragraph 2.1.

- (ff) **"Material Change"** has the meaning set forth in Paragraph 16.1.
- (gg) **"Notice of Nonappropriation"** has the meaning set forth in Paragraph 6.2.
- (hh) **"Notice to Proceed"** means a notice from the City to the ESCO authorizing the ESCO to commence work on Selected ECMs under the Contract as set forth in Paragraph 4.2. (**Dates and Contract Term**).
- (ii) **"Parties"** means PMA and the ESCO, and a **"Party"** means either PMA or the ESCO.
- (jj) **"Person"** means any individual, sole proprietorship, association, company, firm, partnership, limited partnership, joint venture, corporation, limited liability company or other form of entity or association recognized at law.
- (kk) **"PJM"** means the regional transmission organization operated by PJM Interconnection, LLC or any successor organization thereto.
- (ll) **"Premises"** means the entirety of the four City owned and operated or City leased and operated properties commonly referred to as the Quadplex, as more fully described in the Background and Schedule B.
- (mm) **"Project Site"** means all portions of the Premises for which the City has provided the ESCO rent-free access for the installation and operation of the Selected ECM as more fully described in Article 18 (Ownership and Access).
- (nn) **"Project Manager"** means the individual specifically designated in writing by the City and PMA as the Project Manager, and any other individual who may be designated in writing by the Project Manager as his or her representative.
- (oo) **"Requested Information"** has the meaning set forth in Paragraph 48.3.
- (pp) **"Schedule"** means any schedule to this Contract, substantially in the form of the schedules attached to this Contract, executed from time to time by the Parties hereto.
- (qq) **"Selected ECMs"** means the ECMs selected from the IGA by the City for design, implementation and installation at the Premises by the ESCO pursuant to this Contract.
- (rr) **"Shortfall Payment"** has the meaning set forth in Paragraph 5.3.1.
- (ss) **"Stop Work Order"** has the meaning set forth in Paragraph 7.3.4.1.

- (tt) **"Subcontract"** means a contract made between the ESCO and a Subcontractor, or between a Subcontractor and a sub-subcontractor at any tier, providing for the compensation of one or more persons of the Work which the ESCO has agreed to perform under the Contract, including agreements for the manufacture or supply of Equipment, systems or components forming part of such Work.
- (uu) **"Subcontractor"** means a Person performing at any tier under the contract with the ESCO or another Subcontractor one or more portions of the Work which the ESCO has agreed to perform under the Contract. Subcontractors shall include, without limitation, vendors, manufacturers, suppliers, or other Persons contracting with a Subcontractor or the Contractor for the manufacture or supply of Equipment, systems or components forming part of the Work under the Contract.
- (vv) **"Term"** has the meaning set forth in Paragraph 4.5.
- (ww) **"Total Guaranteed Savings"** means the total cumulative Guaranteed Savings during the fifteen-year Guarantee Period, as set forth in Schedule C.
- (xx) **"Work"** means all professional services, Equipment, software and construction services that are required for the design, implementation and installation of the Selected ECMs.

1.3 **Interpretation; number; gender** The words "herein" "hereof" and "hereunder" and other words of similar import refer to the Contract as a whole, including all Contract Documents, and not to any particular article, paragraph, subparagraph of clause contained in the Contract Documents. Whenever the context requires, words used in the singular shall be construed to include the plural and vice versa, and pronouns of any gender shall be deemed to include the masculine, feminine and neuter genders.

ARTICLE 2. SCHEDULES AND EXHIBITS

2.1 **Investment Grade Audit.** ESCO has prepared the IGA, which has been approved and accepted by City as set forth in **Exhibit II (i) (Certificate of Acceptance—Investment Grade Audit)**. The audit includes all of the Selected ECMs.

2.2 **Schedules.** ESCO has prepared, and the City has approved and accepted, the Schedules as set forth below, copies of which are attached hereto (or will be as provided for in the contract), set forth in their entirety as Attachment I and made a part of this contract by reference.

Background

Schedule A Selected ECMs to be Installed by ESCO

Schedule B Description of Premises; Pre-Existing Equipment Inventory

Savings Guarantee and Payments

Schedule C Energy Saving Guarantee

Schedule D ESCO Compensation and Payment Schedule

Schedule E Baseline Energy Consumption; Baseline Adjustments

Schedule F Measurement and Verification

Schedule G Analysis of Final Project Costs and Final Project Cash Flow

Schedule H [Intentionally Left Blank]

Schedule I [Intentionally Left Blank]

Implementation Phase

Schedule J Implementation Schedule

Schedule K Start-Up and Commissioning Plan

Schedule L Standards of Comfort

Schedule M ESCO's Training Responsibilities

Schedule N Waste and Hazardous Material Removal Responsibilities

Schedule O City Approved Subcontractor List

Schedule P [Intentionally Left Blank]

Post-Implementation Phase

Schedule Q ESCO's ECM Service Responsibilities

Schedule R City's ECM Service Responsibilities

Schedule S ECM Service Responsibilities Checklist

Schedule T Annual Reporting Requirements

2.3 **Exhibits.** The Exhibits set forth below are attached hereto in their entirety as Attachment II and are incorporated and made a part of this Contract by reference.

Exhibit I Performance Bond/Construction Bond

Exhibit II (i) Certificate of Acceptance—Investment Grade Audit

Exhibit II (ii) Certificate of Acceptance—Final Acceptance

Exhibit II (iii) Certificate of Acceptance—Hazardous Material Removal

Exhibit III General Contract Requirements – Prevailing Wage Rate Schedule

Exhibit IV Economic Opportunity Plan

Exhibit V (Intentionally Deleted)

Exhibit VI As-Built Documentation Format

ARTICLE 3. ENERGY USAGE RECORDS AND DATA

The City has furnished or PMA shall cause the City to furnish to ESCO, upon its request, all of its records and complete data concerning energy usage and energy-related maintenance for the Premises described in **Schedule B (Description of**

Premises; Pre-Existing Equipment Inventory), including the following data for the most current thirty-six (36) month period:

- (a) utility records;
- (b) occupancy information;
- (c) descriptions of any changes in the building structure or its heating, cooling, lighting or other systems or energy requirements;
- (d) descriptions of all energy consuming or saving equipment used in the Premises;
- (e) bills and records relating to maintenance of energy-related equipment, and a description of energy management procedures presently utilized.

If requested by ESCO, PMA shall cause the City to provide any prior energy audits of the Premises, and copies of the City's financial statements and records related to energy usage and operations for said thirty-six (36) month period at said Premises, and shall cause the City to make agents and employees familiar with such records available for consultations and discussions with ESCO. Any information or documentation provided by PMA or the City to the ESCO relating to the Premises is provided only for the convenience of the ESCO. Neither PMA nor the City makes any representation or warranty as to the sufficiency, completeness, or accuracy of any information submitted to the ESCO. Where the information and documentation provided is determined at a later date to be incomplete or inaccurate, the Parties shall adjust the Contract terms accordingly, which may include adjustments to the baselines, Annual Guaranteed Savings and Total Guaranteed Savings.

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II. SAVINGS GUARANTEE AND PAYMENTS

ARTICLE 4. DATES AND CONTRACT TERM

The following dates are terms in this Contract are to be defined as follows:

4.1 **Effective Date.** This Contract shall be effective and binding upon the Parties immediately upon the Effective Date.

4.2 **Implementation Period.** The period from the Effective Date until the Acceptance Date, as further defined herein, shall be known as the Implementation Period ("**Implementation Period**"). The Work performed during the Implementation Period shall commence on the date specified in a Notice to Proceed. Prior to issuing a Notice to Proceed, the PMA shall secure or shall cause the City to secure funds in an amount necessary to cover the total project cost listed in Table D-1 on **Schedule D (ESCO Compensation and Payment Schedule)**.

4.3 **Acceptance Date.** The "**Acceptance Date**" shall be defined as the first day of the month after the month in which ESCO has delivered a notice to the City that it has installed, commenced operating, and completed training for all of the Selected ECMs specified in **Schedule A (Selected ECMs to be Installed by ESCO)** and in accordance with the provisions of **Article 7 (ECM Implementation)**, **Article 9 (Training by ESCO)** and **Schedule K (Start-Up and Commissioning Plan)**; and the City has inspected and provided written notice of final acceptance of Work and all Selected ECMs, as evidenced by a signed Certificate of Final Acceptance as set forth in **Exhibit II (ii) (Certificate of Acceptance—Final Acceptance)**, such that both parties agree that the Guarantee Period, as defined in **Paragraph 4.4 (Guarantee Period)** below, has commenced and is now in effect.

4.4 **Guarantee Period.** The "Guarantee Period" is fifteen (15) years, beginning on the Acceptance Date, as defined above, unless, prior to the Acceptance Date, PMA or the City provides ESCO with written notice that it has opted to defer the beginning of the Guarantee Period to the first day of the City's Fiscal Year after the Acceptance Date, in which event the Guarantee Period will be fifteen (15) years, beginning on the first day of the Fiscal Year after the Acceptance Date. The exercise of the forgoing option to defer the beginning of the Guarantee Period shall be in PMA's sole discretion. Where the Guarantee Period is deferred to the first day of the Fiscal Year, an equitable adjustment to the Annual Guaranteed Savings and Total Guaranteed Savings shall be mutually agreed to between the Parties.

4.5 **Term.** The Term of this Contract shall commence on the Effective Date and, unless earlier terminated in accordance with this Contract, shall expire on the last day of the Guarantee Period, as defined above ("**Term**").

ARTICLE 5. PAYMENT

5.1 **Contract Sum.** PMA shall pay ESCO the Contract Sum for the Work. The Contract Sum is set forth in **Schedule D (ESCO Compensation and Payment Schedule)**. The Contract Sum represents the total amount of compensation due to ESCO during the Implementation Period under this Contract and the Professional Services Contract (dated June 18, 2010, Contract No. 10-20501, as amended by Amendment No. 1, dated March 17, 2011), subject to changes that may be made to the Contract Sum by mutual agreement of the Parties.

5.2 **Energy Savings Guarantee.** Pursuant to 62 Pa. Const. Stat. § 3754(b) of the Pennsylvania Guaranteed Energy Savings Act, ESCO guarantees that the Total Guaranteed Savings will meet or exceed the cost of the Selected ECMs. Additionally, ESCO guarantees that the Annual Guaranteed Savings set forth on annual basis in **Schedule C (Energy Savings Guarantee)** shall be achieved on annual basis. The guarantees made in this Section 5.2 constitute the "Energy Savings Guarantee."

5.2.1 **Stipulated Savings.** ESCO agrees that all Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** can be accurately defined, measured, and verified using the savings calculation formula's provided in **Schedule F (Measurement and Verification)** and that all sources of stipulated savings values, if any, have been included and documented in **Schedule F (Measurement and Verification)**.

5.2.2 **Environmental Incentives.** The Parties agree that the City shall own, and may assign in its sole discretion, all right, title, and interest associated with Environmental Incentives; and that Environmental Incentives will not be included within any calculation of Annual Guaranteed Savings or Total Guaranteed Savings, or otherwise, to reduce the ESCO's responsibility for achieving the Energy Savings Guarantee.

5.2.3 **Capacity Rights and Demand Response Programs.** The Parties agree that the City shall own, and may assign in its sole discretion, all Capacity Rights associated with the ECMs, and that all payments available to the City from its participating in the regional transmission organization's demand reduction programs will not be included within any calculation of savings, or otherwise, to reduce the ESCO's responsibility for achieving the Energy Savings Guarantee.

5.2.4 **Energy Savings Guarantee Bond.** ESCO shall furnish PMA an energy savings guaranteed bond on an annual basis. The first such bond shall be provided to PMA on or before the final acceptance of all Selected ECMs and shall be in an amount equal to 100% of the Total Guaranteed Savings as shown in Schedule C. Each subsequent bond shall be provided to PMA not later than thirty (30) days prior to the expiration of the current bond and shall be in an amount equal to the greater of: (a) 100% of the Total Guaranteed Savings as shown on Schedule C less the cumulative amount of Verified Savings achieved as of the date of renewal; or (b) the cumulative amount of the Annual Guaranteed Savings during the remaining portion of the Guarantee Period as of the date of renewal. The energy savings guarantee bonds shall

be: (a) in a form approved by the City and (b) from a surety listed on the then-current "Surety List" promulgated by the Commonwealth Insurance Department and in amount permitted by the Surety List. If the surety issuing the bond fails to meet the requirements of this Section, the ESCO shall have thirty-five (35) days from the date the inadequate bond was rejected by PMA to obtain an energy savings guarantee bond issued by a surety that meets the requirements of the Surety List. ESCO shall provide separate performance/construction bonds and payment bonds in accordance with the provisions of Paragraph 7.5 of this Contract. ESCO's failure to renew the Energy Savings Guarantee Bond annually for each of the fourteen years will subject ESCO to a breach of Contract claim by the City and PMA.

5.3 **Annual Review and Reimbursement/Reconciliation.** Cost savings shall be measured and/or calculated as specified in **Schedule F (Measurement and Verification)**. ESCO shall report cost savings to PMA and the City within ninety (90) days of the end of the year for the previous year for each year of the Guarantee Period as set forth in **Schedule T (Annual Reporting Requirements)**.

5.3.1 **Shortfall Payments.** In the event that the Verified Savings achieved during any one year of the Guarantee Period are less than the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** for that year, ESCO shall pay the City an amount equal to the deficiency ("**Shortfall Payment**"). The ESCO shall remit all Shortfall Payments to the City within thirty (30) days of written notice by the City of such monies due.

5.3.2 **Excess Savings.** ESCO agrees that any amount of Verified Savings achieved during any one year of the Guarantee Period that exceed the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** for that year shall be available for use by the City in subsequent years as "**Excess Savings,**" and that in no event shall said Excess Savings be used to reimburse the ESCO for Shortfall Payments or penalties incurred by the ESCO in any preceding or subsequent years or be attributable to the Annual Guaranteed Savings of any preceding or subsequent years.

5.4 **Progress Payments and Final Payment.** During the Implementation Period, PMA will make monthly progress payments ("Progress Payments") to ESCO for the portion of the Work complete at the end of each month in accordance with the terms of this Contract, including the terms set forth in **Schedule D (ESCO Compensation and Payment Schedule)**. The Estimated Progress Payments in **Schedule D (ESCO Compensation and Payment Schedule)** shall be reduced by the retainage required under Paragraph 5.4.1 of this Contract. PMA shall ensure that Progress Payments as reduced by the required retainage are made within thirty (30) days after receipt by PMA of a request for payment by ESCO. The last payment to be made to ESCO for Work performed during the Implementation Period ("Final Payment") shall be paid under the same terms as the Progress Payments. Amounts not paid to ESCO in accordance with the procedures set forth herein will accrue interest at the rate of the prime interest rate

plus four (4) percent for the number of days following the date on which such amounts are due until such time as same is paid in full.

5.4.1 Retainage. Act 57 of 1998, 62 Pa.C.S. § 3921 shall govern the withholding of retainage on the Contract, except that applications for payment of retained amounts shall be approved by the Project Manager. Retainage under the Contract shall be ten percent (10%) of the amount of each Progress Payment due until fifty percent (50%) of the Work under the Contract is completed (at which time one-half (½) of the amount then retained shall be returned to the ESCO) and thereafter five percent (5%) of the amount of each Progress Payment due until ESCO has completed ninety percent (90%) of the Work under the Contract in accordance with the Contract Documents and as certified by the Project Manager.

5.5 Measurement and Verification Fees. PMA shall pay or cause the City to pay measurement and verification fees ("Measurement and Verification Fees") to ESCO for certain measurement and verification services rendered by ESCO pursuant to **Schedule F (Measurement and Verification)**. The Measurement and Verification Fees shall be paid in annual installments as set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, with the first installment payment due thirty (30) days after the commencement of the Guarantee Period and each subsequent annual payment due within thirty days of the date of each anniversary of the commencement of the Guarantee Period.

5.6 Offset Provision. Except as provided otherwise herein, ESCO agrees that PMA may set off the amount of any tax liability or other obligation of ESCO or its subsidiaries to PMA or the City against any payments due ESCO under this Contract.

ARTICLE 6. NONAPPROPRIATION OF FUNDS

6.1 In the event the City fails to make appropriations in sufficient amounts as required for PMA to make all payments due to ESCO under this Contract in any Fiscal Year, then PMA will immediately notify ESCO or its assignee of such occurrence and this Contract shall terminate on the last day of Fiscal Year for which the City made such appropriations, and with the exception that PMA shall pay to ESCO the amount due for the Work already performed, such termination shall occur without penalty or expense to PMA or the City of any kind whatsoever.

6.1.1 If, in the event that ESCO has a rightful claim to title of the Selected ECMs at the time of such termination, then: (i) PMA shall cause the City to peaceably surrender possession of all the Selected ECMs in good operating condition, subject to normal wear and tear, to ESCO or its assignee on the date of such termination; (ii) ESCO or its assignee will have all legal and equitable rights and remedies to take possession of the Selected ECMs, and (iii) upon such termination, title to the Selected ECMs will revert to ESCO or its assignee.

6.2 If, on the thirtieth (30th) day after the commencement of any Fiscal Year, the City has not appropriated sufficient funds for the purpose of making all of the payments scheduled to be paid by PMA to ESCO in such Fiscal Year, PMA shall cause to be delivered written notice thereof (a "**Notice of Nonappropriation**") to ESCO within ten (10) days after such thirtieth (30th) day. Upon ESCO's receipt of a notice of nonappropriation, this Contract shall terminate, as of the end of the Fiscal Year just ended, with the exception that PMA shall make payment to ESCO within thirty days thereafter for all Work performed prior to ESCO's receipt of such Notice of Nonappropriation; provided, however, such termination shall not become effective as of the end of such Fiscal Year just ended if, within ten (10) days of the thirtieth (30th) day after the end of such Fiscal Year just completed, PMA delivers to ESCO a written statement to the effect that it reasonably expects sufficient funds for the then-current Fiscal Year to be appropriated therefore, and in such event the term shall continue into the then-current Fiscal year so long, but only so long, as an appropriation by the City becomes available from which to make the payments.

III. IMPLEMENTATION PHASE

ARTICLE 7. ECM IMPLEMENTATION

7.1 **General.** ESCO shall provide overall coordination and management and be responsible for purchasing or providing all labor, materials, Equipment, software, tools, construction equipment and machinery, transportation and other facilities and services necessary for design, installation and start-up of the Selected ECMs, and completion of the Work necessary to install and implement all of the Selected ECMs (collectively referred to as "**ECM Implementation**"). ESCO shall assure that all Selected ECMs are installed in a good and workmanlike manner during the Implementation Period.

7.2 **Status and Authority of the Project Manager.** The Parties agree that the City's Project Manager shall be responsible for the determination of final acceptance of the Work and Selected ECMs and will have the authority to issue Stop Work Orders and all other orders and directions contemplated under the Contract, determine the amount, quality, acceptability, and fitness of the several kinds of Work and materials which are to be paid for under the Contract, and reject in writing all Work and materials which in his or her opinion do not conform to the requirements of the Contract; however, any disputes in regards to acceptance and any other matters raised in this Article 7.2 shall be resolved in the manner provided for by Article 28. The provisions of this Paragraph 7.2 are not intended to supersede or limit ESCO's obligations under other provisions of this Contract or the Contract Documents.

7.2.1 **Design and Engineering Documents.** The ESCO assumes complete responsibility for the development of the Design and Engineering Documents that are necessary for the ECM Implementation. The ESCO covenants and agrees that all Design and Engineering Documents shall be accurate and free from any errors or omissions, shall be in compliance with and accurately reflect all Applicable Laws, and, where required by law, shall bear the stamp or seal of a professional architect or

engineer licensed in the Commonwealth. All Design and Engineering Documents shall conform to the provisions of the Uniform Construction Code to the extent they are applicable to the Work.

7.2.2 Design and Engineering Review. The ESCO shall prepare and submit the Design and Engineering Documents for each of the Selected ECMs to the Project Manager for review prior to commencement of the Work. By preparing and submitting the Design and Engineering Documents, the ESCO represents that it has determined and verified materials, field measurements, and field construction criteria related thereto and has checked and coordinated the information contained within the Design and Engineering Documents for consistency with one another and the requirements of the Contract Documents. PMA shall review the Design and Engineering Documents and either approve, reject or approve in part or reject in part. Upon approval by PMA of the Design and Engineering Documents, as evidenced by PMA signing **Exhibit II(i) (Certificate of Acceptance – Investment Grade Audit)**, and so long as PMA has satisfied the provisions set forth in Section 4.2, PMA shall issue the Notice to Proceed. To the extent that PMA or the City rejects the Design and Engineering Documents or any portion thereof, and such rejection causes a change to the Contract Sum, the time for completion, the Annual Guaranteed Savings, the Total Guaranteed Savings or any other component of this Contract, there shall be an equitable adjustment made. Where the Parties disagree as to the appropriate equitable adjustment, the equitable adjustment may be determined in accordance with any remedies available to the Parties under this Contract.

7.2.3 As-Built Documentation. After the completion of the Work, the ESCO shall deliver an electronic copy of all As-Built Documentation to the Project Manager prior to the Acceptance Date. As-built documentation will become the sole property of the City for its unrestricted use. The acceptance of As-Built Documentation shall not relieve the ESCO of responsibility for the proper fit of the Work, nor for its completion pursuant the Contract. The As-built Documentation shall conform to the standards specified in **Exhibit VI (As-built Documentation Format)**.

7.3 Construction and Installation. Subject to other provisions of this Contract, ESCO will act as a general contractor, responsible for performing the Work, including but not limited to: (a) selecting Subcontractors in concert with the City; (b) awarding Subcontracts in accordance with **Exhibit IV (Economic Opportunity Plan)** as approved by the City and set forth in **Schedule O (City Approved Subcontractor List)** and notifying the City in writing of any changes in subcontractors prior to their selection and subcontract awards; (c) preparing and submitting all Design and Engineering Documents for review and approval by the City's Project Manager in accordance with **Paragraph 7.2.2 (Design and Engineering Review)**; (d) obtaining all necessary permits, licenses and approvals and coordination during installation in accordance with the provisions of **Articles 10 (Coordination and Construction Requirements)** and **33 (Compliance with Applicable Laws)**; (e) purchasing of Equipment, software and materials for the Selected ECMs; (f) installation and start-up of the Equipment, software and materials for the Selected ECMs' (g) progress inspections during installation; (h) developing and presenting subcontractor punch lists after each

inspection; (i) receiving and evaluating record drawings and operation and maintenance manuals from Subcontractors; (j) training of City staff and service providers on proper operation and service of the newly installed Selected ECMs in accordance with the provisions of **Article 9 (Training by ESCO)**; and (k) requesting final inspection and recommendation for approval by the City.

7.3.1 **Implementation Schedule.** Construction and installation of all Selected ECMs shall proceed in accordance with the Implementation Schedule approved by City and attached hereto as **Schedule J (Implementation Schedule)**.

7.3.2 **Means and Methods.** The ESCO's means and methods for the performance of the Work must be those best adapted for the safe, efficient, and expeditious prosecution of the Work, with a minimum of interference to adjoining work sites, to adjoining properties, and to public traffic and convenience. The ESCO shall prosecute the Work vigorously, without delay, and with such workforces and equipment as is necessary to comply with the Implementation Schedule. The ESCO shall supervise and direct the Work, and ESCO shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for coordinating all portions of its Work under this Contract. Before commencing the Work, the ESCO shall consult and cooperate with the Project Manager to determine mutually agreeable methods of prosecution of the Work, including the maintenance of both vehicular and pedestrian traffic; underpinning, bulkheading, shoring; sinking foundations; handling spoil; lighting; fencing; street surfaces; drainage; and all other branches of its work operation. Such approval is intended to safeguard the City's interest, but such approval will not be deemed to relieve the ESCO of its obligation or responsibility for the safe and proper conduct of the Work. The ESCO shall at all times ensure that its work site, and its Subcontractor's personnel, while performing any part of the Work under this Contract, are and remain free of the influence of alcohol or illegal drugs. The ESCO shall at all times enforce good discipline and order among its employees, and shall not employ any unfit Person or anyone not skilled in the task assigned. Any contact by the ESCO or its employees with adjacent property owners, passing motorists or pedestrians, and the general public shall at all times be professional, courteous, and respectful.

7.3.3 **Change Orders.** The Project Manager may issue Change Orders if necessary to address an increase in the scope or cost of the Work arising from "**Concealed Conditions**" or other circumstances that were unforeseeable to the ESCO upon commencement of the Work. Changes to the Contract Sum and/or the Implementation Schedule will be allowed based upon a cost and schedule impact proposal submitted by the ESCO to the Project Manager and approved by both PMA and the City. The proposal shall detail the costs in substantially the same manner as is set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, as well as any proposed changes to **Schedule J (Implementation Schedule)**. If such alterations or changes reduce the cost of the Work to the ESCO, ESCO shall credit the amount of such reduction to PMA during the Implementation Period. Credit Change Orders will include the same mark-ups as chargeable Change Orders. The ESCO shall submit its

cost proposal within twenty (20) days after the Project Manager gives notification to the ESCO that the change is permissible. Thereafter, a formal Change Order will be executed and signed by PMA reflecting all changes, including any changes to the Contract Sum and the Implementation Schedule.

7.3.3.1 A Change Order negotiated, agreed to and executed by the Parties shall be deemed to cover all of the ESCO's costs associated with the change or alteration to the Work, as reflected in the Change Order, including all costs and expenses incurred by the ESCO for time, material, labor, and extended or field office or home office overhead. No loss of profit on account of any changes or alterations to the Work or on account of Work not executed or performed by the ESCO will be allowed, except that the ESCO may be entitled to an extension of time on account of changes or alterations to the Work. Mark-ups for Equipment and Subcontractors in the cost proposal for any Change Order shall not exceed the percentages set forth by the ESCO in **Schedule D (ESCO Compensation and Payment Schedule)**.

7.3.3.2 The ESCO agrees and acknowledges that after a Change Order is negotiated, agreed to and executed by Parties, and payment is made to ESCO therefore, the Change Order shall operate as a full and complete waiver and release of any and all claims of the ESCO related to or arising out of such change or alteration, whether such change or alteration is considered individually or cumulatively, including, but not limited to, any claim by the ESCO for extended home office overhead, extended field office overhead, time-impact costs, schedule delay costs, acceleration costs, compression costs, loss of productivity costs, extra work, additional work, and interference costs, or any combination of such costs.

7.3.4 **Correction of the Work.** The Parties agree that the Project Manager shall have the right and authority to reject in writing, stating the reasons therefore, Work which does not conform with the Contract Documents. The ESCO shall promptly correct any Work rejected by the City for failing to conform with the Contract Documents, whether observed before or after final acceptance by the City and whether or not the Selected ECM is fabricated, installed, or completed, and shall make such corrections in accordance with **Article 8 (Warranties)**. These provisions apply to Work done by Subcontractors as well as to Work done by direct employees of the ESCO.

7.3.4.1 **Stop Work Order.** If the ESCO fails to correct the Work, or any portion thereof, that is not in accordance with the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, and the ESCO, after receipt of written notice from the PMA or the City, either (i) has not cured such failure within ten (10) days or (ii) if the nature of the failure is such that it is not capable of cure within ten (10) days, has not reached agreement with PMA and the City for a plan to cure such failure or has not commenced and diligently and continuously pursued the cure of such failure in accordance with such plan within such ten (10) day period, then PMA or the City, by written order signed by PMA or the City or by an agent specifically so empowered by PMA or the City in writing, may order the ESCO to stop the Work ("**Stop Work Order**"), or any portion thereof, until the cause for

such order has been eliminated or the ESCO has provided PMA and the City with a plan for corrective action acceptable to the City in its reasonable judgment. The right of the City to stop the Work shall not, however, give rise to a duty on the part of PMA or the City to exercise this right for the benefit of the ESCO or any other person or entity.

7.3.4.2 Nothing contained in this **Article 7 (ECM Implementation)** shall be construed to establish a period of limitation with respect to other obligations which the ESCO might have under the Contract Documents. Establishment of such time period as described in **Paragraph 7.3.4.1 (Stop Work Order)** relates only to the specific obligation of the ESCO to correct Work that does not conform with the Contract Documents, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the ESCO's liability with respect to the ESCO's obligations other than specifically to correct the nonconforming Work.

7.4 **Start-Up and Commissioning Plan.** To the extent detailed in **Schedule K (Start-Up and Commissioning Plan)**, the ESCO shall test each Selected ECM, and all component Equipment, and all parts of each Selected ECM. All such tests must be completed prior to final acceptance of the Selected ECMs by the City. The ESCO shall provide notice to the City of the scheduled test(s) and the City and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Selected ECMs. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in the operation of the Selected ECMs that may be observed during system commissioning procedures described in **Schedule K (Start-Up and Commissioning Plan)**.

7.5 **Performance Bond/Construction Bond.** As provided by the Act of 1967, December 20, P.L. 869 (8 P.S. § 193, *et seq.*, as amended), ESCO shall at the time of execution of this Contract furnish to PMA and the City security for the faithful performance and completion of the Work and for compliance with the Contract in the form of a performance bond, with a surety company approved by PMA and the City, in a sum equal to 100% of the amount of the Contract Sum. In addition, as provided by the Act of 1967, December 20, P.L. 869 (8 P.S. § 193, as amended), the ESCO will be required at the time of execution of the Contract to give a payment bond, with a surety company approved by PMA and the City, in a sum one hundred percent (100%) of the amount of the Contract Sum, conditioned for the full payment of Subcontractors and others furnishing labor and materials in the performance of the Contract. The ESCO shall provide evidence of bonding in **Exhibit I (Performance Bond/Construction Bond)**, include evidence satisfactory to PMA and the City that the party issuing the bonds has the authority to bind the issuing surety company. If the ESCO fails to furnish and maintain such bonds, PMA or the City may purchase such bonds on behalf of the ESCO and the ESCO shall pay the cost thereof to PMA or the City upon demand. The payment and performance bonds shall expire on the Acceptance Date and shall not secure any obligations of ESCO during the Guarantee Period, including but not limited to ESCO obligation to achieve Guaranteed Savings, perform measurement and verification obligations or maintenance and service obligations. ESCO shall provide a

separate energy savings guarantee bond in accordance with the provisions of Paragraph 5.2.4 of this Contract.

ARTICLE 8. WARRANTIES

8.1 **ESCO Warranty.** ESCO warrants that all Selected ECMs installed as part of this Contract are new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the Date of Substantial Completion of each Selected ECM within each building ("Warranty Period"). For purposes of this Article 8, "Substantial Completion" shall mean the date on which the Selected ECM is operating in accordance with manufacturer's intended use. Should any Selected ECM, or any component systems, Equipment or parts of any Selected ECM, be found to be defective within one (1) year from such date, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim.

8.1.1 **Labor.** On all Selected ECMs installed pursuant to this Contract, ESCO shall provide, at no charge during the warranty period, any labor required to repair or replace any defective Selected ECM or any defective component Equipment, or parts of any Selected ECM. Such labor may include adjustment of controls, air balancing, correction of mechanical difficulties, or other reasonable adjustments if such adjustments are due to defective ECMs or improper installation.

8.1.2 **ECM Failure.** If any Selected ECM, or any Equipment or parts of any Selected ECM, fails to fulfill the guarantees made in this Article 8 during the warranty period, ESCO shall have a reasonable opportunity to make such changes as it deems necessary to fulfill such guarantees. If a demonstration is required, ESCO shall be given the opportunity to test the Selected ECM, or its component Equipment, parts, or systems under requisite conditions.

8.1.3 **Misc. Costs.** All shipping, transportation, or other miscellaneous costs involved in the repair or replacement of the defective Selected ECMs shall be paid by ESCO.

8.2. **Manufacturers' Warranties.** Prior to final acceptance of the Work and Selected ECMs by the City, the ESCO shall deliver two (2) original complete sets of all manufacturer's warranty certificates, guarantees, parts lists, and operating or maintenance literature applicable to Equipment, systems, fittings, and furnishings included in the Work for each Selected ECM to the Project Manager for inspection and approval. All manufacturers' warranties will either be issued in the first instance in the name and for the benefit of PMA and the City, or be in a freely assignable form and be assigned to PMA and the City without limitations. All warranties shall be transferable and extend to PMA and the City. The manufacturers' warranties are in addition to and

not in lieu of the ESCO's Warranty provisions under **Paragraph 8.1 (ESCO Warranty)**, and PMA and the City are entitled to look to the ESCO for remedy in all cases where the ESCO's warranty applies regardless of whether a manufacturers' warranty also applies. In the event of a malfunction or improper or defective function of a Selected ECM, or other defect in parts, workmanship and performance, the ESCO agrees to the following, so long as a claim by PMA or the City for said malfunction or defect is made to ESCO within the Warranty Period: (a) pursue rights and remedies against manufacturer of the Selected ECM under the manufacturers' warranties where necessary; and (b) where discovered, notify the City whenever defects in Selected ECM performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO.

8.3 Notwithstanding the above, nothing in this Article shall be construed to alleviate/relieve the ESCO from complying with its obligations to perform under all terms and conditions of this Contract and as set forth in all attached Schedules.

ARTICLE 9. TRAINING BY ESCO

The ESCO shall develop and conduct a training program, described in **Schedule M (ESCO's Training Responsibilities)** hereto, as necessary to provide City maintenance staff and service providers with the ability to comply with the terms of this Contract by maintaining system efficiencies during the Guarantee Period. This training program shall adequately prepare the City for the management of all ongoing services associated with the project, including: (a) managing the ongoing service of all Selected ECMs; (b) utilizing the ESCO's measurement and verification reports to maintain system efficiencies; (c) transitioning of City staff or service providers; and (d) communicating any Material Changes to ESCO.

ARTICLE 10. COORDINATION AND CONSTRUCTION REQUIREMENTS

10.1 **Coordination During Installation.** The ESCO shall have the duty to co-operate and coordinate with any other contractors on other work which is being performed concurrently on or adjacent to the Project Site, including specifically the City and its employees and agents, the Philadelphia Gas Works and the Philadelphia Water Department, or their contractors, or any other non-City utilities or authorities, and shall afford reasonable facilities and access to them. The Project Manager will decide any matters in dispute as to the performance of the Work, including access to the Project Site and priority of performance on either side of any division line between contiguous sections of the Project Site where the ESCO and another contractor each work.

10.2 **Maintenance of Traffic and Access to Buildings.** Traffic of all kinds shall be maintained continuously and access to buildings shall be provided for at all times, except where otherwise specifically permitted by this Contract, or where temporary interference is authorized by the Project Manager, in which case it shall be interrupted only for such time as is necessary to provide temporary substitutes for surfaces disturbed by the construction and to restore street and sidewalk surfaces after

the completion of the Work. Suitable bridges or other means of access shall be built and maintained to permit owners and occupants to reach their premises. Where necessary, the ESCO shall maintain proper and easy means for passengers to enter or exit public transportation. Where partial occupation of the street is allowed, materials and equipment shall be so placed as to ensure a minimum of interference with traffic; no materials shall be placed on the sidewalk within one foot of the curb line, and a clear sidewalk passage not less than four (4) feet in width shall be maintained at all times. The Work shall be so conducted that annoyance to residents and interference with the normal use of the properties will be reduced to a minimum. The flow in gutters and inlets shall be maintained. When access to any adjacent property is temporarily cut off, owing to occupancy of the street by the ESCO or its Subcontractors, the ESCO shall render every assistance to the owner or occupant in handling materials of every description that must be delivered to or removed from such property, including recyclables, rubbish, and garbage, and such materials shall be taken to or from the nearest accessible point that, in the opinion of the Project Manager, is convenient for handling. No additional compensation will be allowed for the various items of expense above noted.

10.3 **Access to Fire Hydrants and Fire Alarm Boxes.** Fire hydrants shall be left at all times clear of obstructions and readily accessible to fire apparatus. No material or other obstructions shall be placed within ten (10) feet of a fire hydrant. Fire alarm boxes shall be supported and protected and maintained so as to be readily accessible and open to view. Excavation shall be decked or bridged, where necessary, to permit the safe passage of fire apparatus and to give access to fire hydrants and to adjacent buildings for the extinguishing of fires. Where necessary, branch pipes shall be extended from the nozzles of the fire hydrants to the mains. Fire hydrants and any branch pipes shall be protected from freezing, and the fire hydrants (particularly the high pressure type) shall, where necessary, be braced or tied to the connecting pipes to prevent movement under water pressure.

10.4 **Danger Signals.** The ESCO, at ESCO's own expense, shall erect and maintain all necessary barricades, and danger signs and signals. The ESCO shall keep all necessary lights burning on the barricades, danger signals and signals from sunset until sunrise, and shall provide security personnel as necessary for the safety of the public. The ESCO shall observe such rules relative to signals and safeguards as the police regulations, harbor regulations, and other Applicable Laws require.

10.5 **Contract Identification Signs.** The ESCO shall, unless specified otherwise in writing by the Project Manager, at ESCO's own expense, erect and maintain in a prominent position upon the Project Site at a location approved by the Project Manager, a suitable sign, plainly lettered with the name and address of the ESCO, the character of the Work and the name of the Department under which the Contract is being carried out. No advertising matter other than the signs above noted shall be displayed on the Work.

10.6 **Safety and Sanitary Provisions.** The ESCO shall provide means and appliances and shall enforce suitable rules for the safe prosecution of the Work and for the safety and health of the work force employed on it. The completed portions of the Work shall be kept clean and in a sanitary condition. The ESCO shall provide and maintain properly secluded sanitary conveniences, in accordance with existing regulations of the Department of Public Health, for the use of ESCO's work force, and the ESCO shall strictly enforce the exclusive use of them by its work force.

10.7 **Storage Space.** Except as provided otherwise in Paragraph 18.4 below, buildings, yards, or sidings that may be required for the delivery or storage of materials shall be provided by and at the cost of the ESCO. The ESCO and its Subcontractors may not use streets for storing materials unless otherwise specifically authorized in writing by a permit issued by the City's Department of Streets. Upon request of the Project Manager, the ESCO shall furnish a copy of any agreement for the use of a property or building for construction purposes, except where owned by the ESCO.

10.8 **Hours.** Work shall be carried on with due regard to the comfort of, and so as to minimize any disturbance to, building occupants and nearby residents, and the methods to carry out such Work shall be subject to the approval of the Project Manager, who may, if conditions so require, order that no work be done during specific hours or in specific localities. The work force of the ESCO and its Subcontractors shall refrain from loud noises, calls, whistles, and the operation of air compressors, rock drills, riveting machinery, and blasting between the hours of 7:00 p.m. and 7:00 a.m. unless specifically permitted by the Project Manager. During occupied hours, the ESCO and its Subcontractors shall limit construction operations to methods and procedures that do not adversely and unduly effect the environment of occupied spaces within the Premises, included, but not limited to creating noise, odors, air pollution, ambient discomfort, poor lighting, or power interruptions.

10.9 **Power and Light.** In developed portions of the City, and elsewhere when ordered by the Project Manager, the ESCO and its Subcontractors shall use either electric, compressed air or internal combustion engine power. When compressed internal combustion engines are used, the exhaust shall be muffled. None but electric lights shall be used in or under buildings.

10.10 **Use of Water.** Permission for the use of City water shall be obtained directly from the Philadelphia Water Department. Water may be obtained through a hydrant attachment or as otherwise as specified by the Project Manager. In all cases, ESCO and its Subcontractors shall obtain and use such water in accordance with regulations of the Water Department. No charge will be made for the use of water actually used for the construction work.

10.11 **Prevention of Dust and Smoke.** The ESCO and its Subcontractors shall keep the surface of the sidewalks and streets affected by its work, including decking and temporary paving, in a clean, neat condition. The ESCO and its Subcontractors shall sprinkle with water or otherwise treat the surface sufficiently to

keep down any dust generated during the progress of work. Piles of dirt or other material shall not be left on the surface. The aforementioned requirements are not intended to take the place of the usual duties of the Department of Streets but to supplement them. No fires of any kind or burning of debris on the site or adjacent to it will be permitted; the debris shall be disposed of off the Project Site.

10.12 **Prevention of Air Pollution.** The ESCO and its Subcontractors shall comply strictly with the provisions of the Air Pollution Code (Title 3 of The Philadelphia Code).

10.13 **Work in Freezing Weather.** Masonry of all kinds, pointing, grouting, plastering, and other work subject to the action of frost shall not be done when exposed to freezing weather, except under conditions where the Project Manager may specifically direct or permit such work, subject to the heating of materials, the protection of finished work and such other measures as may be deemed necessary. If operations are suspended on account of freezing weather, the entire work shall be properly protected until the resumption of work is permitted. If a suspension of the work on account of freezing weather or from any other cause is necessary, the site shall be cleaned up, left in good order, and continuously maintained by the ESCO and its Subcontractors during the period of such suspension.

10.14 **Clean-up of Project Site.** ESCO and its Subcontractors shall remove all rubbish or refuse and all unused materials and tools from the Project Site daily, if required by the Project Manager, and as the Work progresses the ESCO shall carefully clean and keep the Project Site clean from any rubbish and refuse. The ESCO shall furnish to the Project Manager upon request all documentation regarding the proper disposal of all rubbish, soil, refuse and other debris. ESCO acknowledges that the City will not approve the completion of the Work under the Contract until the Project Site and any other place or places affected by the Work have been thoroughly cleared of all construction and other debris and dust, and left clean, free from debris, and in as good condition as existed before the Work was begun. The ESCO shall resod or plant anew any grass plot or plots disturbed and replace any shrubbery destroyed. Structures shall be broom clean, free from stains, spots or other blemishes, and ready for use and all glass shall be washed. The clean-up work shall be governed by the record of existing conditions made and submitted to the Project Manager prior to the commencement of Work.

10.15 **Recycling.** The ESCO shall cooperate with any recycling program established for the Premises to the extent set forth in **Exhibit III (General Contract Requirements)**. Upon request by the Project Manager, the ESCO shall furnish information and documentation regarding the recycled content of the Equipment and materials used in the Selected ECMS and the amount of construction waste or other materials recycled by the ESCO during the Implementation Period.

ARTICLE 11. UPGRADING OR ALTERING THE ECMS

11.1 **General.** ESCO shall at all times during the Implementation Period have the right, subject to the PMA's prior written approval, which approval shall not be unreasonably withheld, to change any Selected ECMs, or any component equipment, parts, software, or systems of any Selected ECMs, to revise any procedures for the operation of the Selected ECMs, or to implement any alternative ECMs on the Premises, provided that: (a) the ESCO complies with the standards of comfort and services set forth in **Article 15 (Standards of Comfort)** herein; (b) such modifications or additions to, or replacement of the Selected ECMs, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the Annual Guaranteed Savings and Total Guaranteed Savings at the Premises; and (c) any cost incurred relative to such modifications, additions or replacement of the Selected ECMs, or operational changes or new procedures shall be the responsibility of the ESCO.

11.2 All modifications, additions or replacements of the Selected ECMs or revisions to operating or other procedures made pursuant to Section 11.1 shall be described in a supplemental Schedule(s) to be provided to PMA by ESCO for approval, which shall not be unreasonably withheld, provided that any replacement of the Selected ECMs shall be new and have equal or better potential to reduce energy consumption at the Premises than the Selected ECMs being replaced. In making any such modifications, additions or replacements during the Implementation Period, the ESCO shall update at that time any and all software to be used in connection with the Selected ECMs. All replacements of and alterations or additions to the Selected ECMs shall become part of the Selected ECMs described in **Schedule A (Selected ECMs to be Installed by ESCO)** and shall be covered by the provisions and terms of **Article 7 (ECM Implementation)** so long as same are performed during the Implementation Period.

ARTICLE 12. [Intentionally Left Blank]

ARTICLE 13. [Intentionally Left Blank]

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IV. POST-IMPLEMENTATION PHASE

ARTICLE 14. ECM SERVICE RESPONSIBILITIES

14.1 **General.** The Parties acknowledge and agree that the Annual Guaranteed Savings and Total Guaranteed Savings set forth on **Schedule C (Energy Saving Guarantee)** cannot be realized and maintained unless certain ongoing procedures and methods of operation designed for energy conservation (collective known as “**ECM Service Responsibilities**”) are implemented and followed by the Parties and the City on a regular and continuous basis. The Parties further acknowledge and agree that PMA and the City are relying upon the ESCO’s skill, knowledge, professional training, and experience to develop a program for Selected ECM service that the City can utilize to realize said Annual Guaranteed Savings and Total Guaranteed Savings during the Guarantee Period.

14.2 **ESCO Responsibilities.** ESCO is responsible for all service, repairs, and adjustments to the Selected ECMs installed under terms of this Contract to the extent required in **Article 8 (Warranties)** and **Schedule Q (ESCO’s ECM Service Responsibilities)**, and for the training of all City maintenance staff and service providers pursuant to **Schedule M (ESCO’s Training Responsibilities)**.

14.3 **City Responsibilities.** The Parties agree that ESCO is not responsible for the City’s ECM Service Responsibilities as set forth in **Schedule R (City’s ECM Service Responsibilities)** of this Contract. PMA shall cause the City to be responsible for performing the items set forth in **Schedule R (City’s ECM Services Responsibilities)**. The failure of the City to meet its ECM Service Responsibilities as set forth in Schedule R of this Contract will relieve ESCO of any responsibility for any equipment breakdown, or any necessary repair or replacement of any equipment to the extent that such equipment breakdown or need for such repair or replacement is caused by the failure of the City to meet its ECM Service Responsibilities as set forth in Schedule R of this Contract. Where City fails to meet its obligations under Schedule R, an equitable adjustment shall be made to the Annual Guaranteed Savings, Total Guaranteed Savings, and any other contract provisions made necessary by such failure.

14.4. **ESCO Inspections.** Upon written request, PMA shall cause the City to make the Premises available for inspection by ESCO for the purpose of determining if City is complying or has complied with its ECM Service Responsibilities as set forth in **Schedule R (City’s ECM Service Responsibilities)**. For the purpose of determining City’s said compliance, the ESCO agrees to utilize the checklist set forth at **Schedule S (ECM Service Responsibilities Checklist)** during its inspections to measure and record the City’s said compliance. The Parties agree that PMA and the City shall have the right to witness each inspection and the recordings on the checklist. The ESCO agrees to provide PMA and the City with copies of all inspection documentation, including a copy of the completed checklist and any related reports or studies, within seven (7) days of the completion of each inspection.

ARTICLE 15. STANDARDS OF COMFORT

During the Guarantee Period, PMA shall cause the City to maintain, according to **Schedule R (City's ECM Service Responsibilities)**, and operate, the Selected ECMs in a manner that will provide the standards of comfort and levels of operation as described in **Schedule L (Standards of Comfort)**.

ARTICLE 16. MATERIAL CHANGES

16.1 **Material Change Defined:** A Material Change means any change in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected to increase or decrease energy consumption in accordance with the provisions and procedures set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)** by at least ten percent (10%) in any single quarter of the Guarantee Period from that same quarter of the preceding year of the Guarantee Period, after adjustments for climatic variations ("**Material Change**"). Actions by the City that may result in a Material Change include but are not limited to the following:

- (a) Manner of use of the Premises by the City; or
- (b) Hours of operation for the Premises or for any Selected ECM or energy using systems operating at the Premises; or
- (c) Permanent changes in the comfort and service parameters set forth in **Article 15 (Standards of Comfort)**; or
- (d) Occupancy of the Premises; or
- (e) Structure of the Premises; or
- (f) Types and quantities of ECMs used at the Premises or
- (g) Modification, renovation or construction at the Premises; or
- (h) The City's failure to perform its ECM Service Responsibilities in accordance with **Schedule R (City's ECM Service Responsibilities)**; or
- (i) Any other conditions other than climate affecting energy use at the Premises.

16.2 **Reporting of Material Changes by City; Effect of Material Changes:** This Section 16.2 shall apply only where the Material Change will affect the calculations described and set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)**.

PMA shall cause the City to use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least ten (10) days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by PMA or the City within seventy-two (72) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by PMA or the City to have occurred.

Where there is a Material Change that affects the calculations described and set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)**, an equitable adjustment shall be made to the calculations described and set forth in same, which may include an equitable adjustment to the baseline, the Annual Guaranteed Savings and the Total Guaranteed Savings.

16.3 **Analysis of Material Changes:** Where there is a Material Change that does not affect the calculations described and set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)**, upon request by PMA, the ESCO agrees to perform an analysis of the Material Change and PMA agrees to compensate ESCO for such analysis as set forth in more detail in **Schedule D (ESCO Compensation and Payment Schedule)**.

ARTICLE 17. [Intentionally Left Blank]

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V. ADMINISTRATION

ARTICLE 18. OWNERSHIP AND ACCESS

18.1 **Ownership of Certain Proprietary Property Rights.** Neither PMA nor the City shall, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Selected ECMs. The ESCO shall grant to PMA and the City a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for PMA or the City to continue to operate, maintain, and repair the Selected ECMs in a manner that will yield maximal energy consumption reductions.

18.2 **Ownership of Existing Equipment.** Ownership of the equipment and materials presently existing at the Premises at the time of execution of this Contract shall remain the property of the City even if they are replaced or their operation made unnecessary by Work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the City in writing of all equipment and materials to be replaced at the Premises and the City shall within ten (10) days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. PMA shall cause the City to be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site.

18.3 **Ownership of New ECMs.** Upon installation of the Selected ECMs by ESCO, upon final acceptance by the City as set forth in **Paragraph 4.3 (Acceptance Date)**, and upon payment to ESCO for same and release of retainage as set forth in Article 5, PMA shall own the Selected ECMs.

18.4 **Access to the Premises.** Prior to commencement of the Work, the ESCO shall provide the Project Manager with a written description of the portions of the Premises for which it seeks access from the City for the installation and operation of the Selected ECMs. The Project Manager may approve or disapprove ESCO's access request, or suggest that the ESCO modify and resubmit a revised version for approval or disapproval. Upon approval of the ESCO's access request by the Project Manager, PMA shall cause the City to provide sufficient rent-free space on the Premises for the installation and operation of the Selected ECMs and to take reasonable steps to protect such Selected ECMs from harm, theft and misuse, as specified in the logistics plan. The ESCO shall confine its operations to the portions of the Premises approved by the City, and shall not unreasonably encumber the portions of the Premises used for Work with materials, equipment, or similar items. The ESCO and all Subcontractors shall only use such entrances to the Premises as are designated by the City. PMA shall cause the City to not unreasonably restrict the ESCO's access to Premises for the purpose of performing the Work or where emergency repairs or corrections as it may determine are needed.

ARTICLE 19. INSURANCE

19.1 **Requirements.** Unless otherwise approved by the City's Risk Manager in writing, ESCO shall, at its sole cost and expense, procure and maintain, or cause to be procured and maintained, in full force and effect until the ESCO completes the Work under the Contract, the types and minimum limits of insurance specified below, covering the ESCO's performance of the Work required under the Contract. The ESCO shall procure, or cause to be procured, all insurance from reputable insurers admitted to do business on a direct basis in the Commonwealth or otherwise acceptable to the City. All insurance herein, except Professional Liability insurance, shall be written on an "occurrence" basis and not a "claims-made" basis. In no event shall the ESCO perform any work under the Contract until the ESCO has delivered or caused to be delivered to the City's Risk Management Division the required evidence of insurance coverages. If ESCO fails to obtain or maintain the required insurance, PMA shall have the right to treat such failure as a default under the Contract and to exercise all appropriate rights and remedies. ESCO shall provide written notice to PMA and the City in the event coverage is materially changed, cancelled, or non-renewed. Such written notice will be provided as soon as is practicable after receipt of notice of the change from ESCO's insurance carrier but in no event shall such notice be provided more than thirty (30) days after ESCO receives notice from its insurer. PMA, the City, and their officers, employees, and agents, shall be named as additional insureds on the General Liability Insurance policy, Automobile Liability Insurance policy, Builders Risk Insurance policy, and Umbrella Liability Insurance policy. ESCO shall also deliver or cause to be delivered to PMA and the City an endorsement stating that the coverage afforded the PMA, the City and their officers, employees and agents, as additional insureds, will be primary to any other coverage available to them. The insurance requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in the Contract by the ESCO to PMA and the City or to limit ESCO's liability under this Contract to the limits of the policies of insurance required to be maintained by the ESCO hereunder.

19.2 **Minimum Limits.** ESCO will be required to carry the following types of insurance with the minimum limits listed below:

- (a) **Workers Compensation and Employers Liability:**
 - (1) Workers Compensation: Statutory Limits.
 - (2) Employer's Liability: \$100,000 each accident—bodily injury by accident; \$100,000 each employee—bodily injury by disease; and \$500,000 policy limit—bodily injury by disease.
 - (3) Other states' coverage and Pennsylvania endorsement.

- (b) **General Liability Insurance:**
 - (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$1,000,000 advertising injury; \$2,000,000 general aggregate and \$1,000,000 aggregate for products and completed operations. The City may require higher limits of liability if, in the City's sole discretion, the potential risk so warrants.
 - (2) Coverage: Premises operations; blanket contractual liability; personal injury liability (employee exclusion deleted); products and completed operations; independent consultants, contractors, employees and volunteers as additional insureds; cross liability; and broad form property damage (including completed operations).
- (c) **Automobile Liability Insurance:**
 - (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.
 - (2) Coverage: Owned, non-owned, and hired vehicles.
- (d) **Builder's Risk Insurance/Installation Floater:** During the entire period of any construction on the Premises, ESCO shall maintain "all risk" builder's risk insurance/installation floater in an amount equal to the Contract Sum as may be adjusted in accordance with the terms of this Contract.
- (e) **Professional Liability Insurance:**
 - (1) Limit of Liability: \$1,000,000 with a deductible not to exceed \$50,000.
 - (2) Coverage: Errors and omissions including liability assumed under contract.
 - (3) Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences happening during the performance of the Services required under the Contract shall be maintained in full force and effect under the policy or "tail" coverage for a period of at least two (2) years after completion of the Services.
- (f) **Umbrella Liability Insurance:** Limits totaling \$5,000,000.00 per occurrence when combined with insurance required under (1) Employer's Liability; (2) General Liability; and (3) Automobile Liability above.

19.3. **Submission of Certificates of Insurance.** Certificates of insurance evidencing the required coverages and additional insured endorsements must specifically reference the City contract Number for which they are being submitted. At least ten (10) days before work is to commence and at least ten (10) days before each renewal date, ESCO shall submit the original certificates of insurance to the PMA and the City's Division of Risk Management and copies of the certificates of insurance to the Project

Manager. The ten (10) day requirement for advance documentation of insurance coverage may be waived in situations where such waiver will benefit the City, but under no circumstances shall ESCO actually begin work (or continue work, in the case of renewal) without providing the required certificates of insurance and required endorsements. Wherever ESCO is required by law or the rules of civil procedure to produce any of the policies referenced in this Article, ESCO shall furnish the policies of insurance required to be in place under this Contract.

ARTICLE 20. INDEMNIFICATION

20.1 ESCO shall indemnify and hold harmless PMA, the City and their officers, directors, agents, employees and representatives from and against any and all claims, suits, demands, actions, liabilities, damages, losses, and/or expenses, including, without limitation, legal fees and court costs (collectively, "Claims"), relating to any and all bodily injury (including death) and/or damage to property, contamination, and/or adverse effect on the environment or as a result of the violation of the Applicable Laws, where such Claims arise in whole or in part from any act or omission of ESCO, its agents, contractors, subcontractors, employees, or invitees, in connection with the exercise of any right or performance of any obligation of ESCO under this Contract, except to the extent that such Claims are caused by PMA's or the City's intentional conduct or negligence, or as a result of a breach by PMA of any representation or agreement made in this Contract. ESCO's obligations set forth in this Article 20 are not and shall not be limited to the provision of any insurance policy maintained on behalf of ESCO or any Applicable Law, including without limitation, the Pennsylvania Worker's Compensation Act, as amended and currently codified in 77 P.S. § 1 *et seq.*

20.1.1 If any claim is brought against the PMA, the City, or their officers, directors, agents, employees and representatives for which ESCO has indemnified the City, ESCO, shall upon written notice from PMA or the City, resist or defend such claim by use of counsel approved by PMA or the City in writing and such approval shall not be unreasonably withheld; provided that PMA's or the City's approval of counsel will not be required where the claim is resisted or defended by counsel of an insurance carrier obligated to resist or defend such claim and provided further that PMA and the City may engage their own counsel to participate in the defense of such claim and the ESCO shall reimburse the PMA's and City's costs therefore, so long as such costs are reasonable, if the City believes in its sole discretion that applicable insurance may be insufficient to satisfy the claim.

20.1.2 Without limiting the generality of **Article 19 (Insurance)** of this Contract, the provisions of this indemnification section, as they apply to occurrences or actual or contingent liabilities arising during the Contract Term, shall survive the expiration or earlier termination of this Contract.

20.2 **Patent, Copyright and Trademark Indemnity.** ESCO shall hold PMA and the City harmless from any suit or proceeding which may be brought by a third party against PMA or the City, their departments, officers or employees for the alleged

infringement of any United States or foreign patents, copyrights, or trademarks, or for a misappropriation of trade secrets arising out of performance of this Contract, including all of the Work, services, materials, reports, studies, and computer programs provided by ESCO, and in any such suit or proceeding will satisfy any final award for such infringement, including costs, except as otherwise described below. In no instance shall ESCO indemnify PMA or the City for their own negligence or intentional conduct giving rise to claims by third parties. PMA agrees to give ESCO prompt notice of any such claim of which it learns and to cause the City to give ESCO prompt notice of any such claims of which the City learns. PMA and the City may, however, in their sole discretion and under the terms they deem appropriate, delegate their rights of defense. If PMA or the City delegates the defense to the ESCO, PMA will cooperate and cause the City to cooperate with all reasonable requests of ESCO made in the defense of such suits. No settlement that prevents PMA or the City from continuing to use the items provided by ESCO shall be made without the PMA's and the City's prior written consent. In all events, PMA and the City shall have the right to participate in the defense of any such suit or proceeding through counsel of their own choosing. Where PMA or the City delegates the defense to ESCO and also chooses counsel, ESCO shall pay only those fees and costs of counsel as are reasonable. It is expressly agreed by ESCO that, in the event it requests that PMA or the City to provide support to ESCO in defending any such claim, ESCO shall reimburse PMA and the City for all expenses (including attorneys' fees, if such are made necessary by ESCO's request) incurred by PMA and the City for such support. If PMA or the City does not delegate the defense of the matter, ESCO's obligation to indemnify ceases. ESCO will, at its expense, provide whatever cooperation the City reasonably requests in the defense of the suit.

20.2.1 ESCO agrees to exercise reasonable due diligence to prevent claims of infringement on the rights of third parties. ESCO certifies that, in all respects applicable to this Contract, it has exercised and will continue to exercise due diligence to ensure that all works produced under this Contract do not infringe on the patents, copyrights, trademarks, trade secrets, or other proprietary interests of any kind which may be held by third parties. ESCO also agrees to certify that work produced for PMA and the City under this contract shall be free and clear from all claims of any nature.

20.2.2 If PMA or the City delegates defense of the suit to ESCO under 20.2, ESCO shall pay all damages and costs awarded therein against the PMA and the City. Attorney's fees and costs are addressed in 20.2. If PMA or the City at ESCO's written request furnishes information and assistance, it shall be at ESCO's expense, but the responsibility for such expense shall be only that within ESCO's written authorization.

20.2.3 If, in ESCO's opinion, the products, materials, reports, studies, or computer programs furnished hereunder are likely to or do become subject to a claim of infringement of a United States patent, copyright, or trademark, or for a misappropriation trade secret, then without diminishing ESCO's obligation to satisfy any final award, ESCO may, at its option and expense, substitute functional equivalents for the alleged infringing products, materials, reports, studies, or computer programs or, at

ESCO's option and expense, obtain the right for PMA and the City to continue the use of such products, materials, reports, studies, or computer programs.

20.2.4 If any of the products, materials, reports, studies, or computer programs provided by ESCO are in such suit or proceeding held to constitute infringement and the use or publication thereof is enjoined, ESCO shall, at its own expense and at its option, either procure the right to publish or continue use of such infringing products, materials, reports, studies, or computer programs, replace them with the non-infringing items, or modify them so that they are no longer infringing.

20.2.5 If ESCO is unable to do any of the items listed in 20.2.4, ESCO agrees to pay the PMA any amounts paid by PMA for such infringing items

20.2.6 The obligations of ESCO under this Article continue without time limit and survive the termination of this contract. In no event shall PMA's or the City's right to indemnification exist beyond the applicable statute of limitations imposed by law.

20.2.7 Notwithstanding the above, ESCO shall have no obligation for: (a) modification of any product, service, or deliverable provided by PMA or the City; (b) any material provided by PMA or the City to ESCO and incorporated into, or used to prepare, a product, service, or deliverable; (c) use of the product, service, or deliverable in other than its specified operating environment; (d) the combination, operation, or use of the product, service, or deliverable with other products, services, or deliverables not provided by ESCO as a system or the combination, operation, or use of the product, service, or deliverable, with any products, data, or apparatus that ESCO did not provide; (e) infringement of a non-ESCO product alone; (f) PMA's or the City's distribution, marketing or use beyond the scope contemplated by the Contract; and/or (g) PMA's or the City's failure to use corrections or enhancements made available to the City by ESCO at no charge.

20.2.8 The obligation to indemnify PMA and the City, under the terms of this Article, shall be ESCO's sole and exclusive obligation for the infringement or misappropriation of intellectual property.

ARTICLE 21. RISK OF LOSS

Except as provided in **Article 8 (Warranties)**, **Article 19 (insurance)**, and **Article 20 (Indemnification)**, upon the City's final acceptance of the Work and Selected ECMs as specified in **Paragraph 4.3 (Acceptance Date)**, PMA assumes all risk of loss of or damage to the Selected ECMs from any cause whatsoever and no such loss of or damage to the Selected ECMs shall relieve PMA of the obligation to make payments or to perform any other obligation under this Contract. In the event of damage to any Selected ECMs, or any Equipment, parts or systems of the Selected ECMs, PMA or the City will immediately notify ESCO or its assignee. If PMA or the City determines that the damaged Selected ECMs are repairable, and ESCO is not responsible for repair or replacement under this Contract, PMA may repair or cause the

City to repair the same. If the Parties determine that any of the Selected ECMs have been lost, stolen, destroyed, or damaged beyond repair, and ESCO is not responsible for repair or replacement under this Contract, then the Annual Guaranteed Savings, the Total Guaranteed Savings and any other calculations related to same will be adjusted by mutual agreement to account for the losses associated with the Selected ECMs.

ARTICLE 22. SUBCONTRACTS

22.1 **PMA Review and Approval of Permitted Subcontractors.** PMA shall have the right to approve all Subcontractors which the ESCO is permitted to engage under this Contract, such approval not to be unreasonably withheld, except that no approval shall be necessary for use of approved Subcontractors listed in Exhibit IV and Subcontractors hired by the ESCO for purposes of remedying an emergency situation. ESCO shall furnish PMA written notice of its intention to engage a Subcontractor not listed on Schedule O (City-Approved Subcontractor List), along with its proper entity name and address. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State, City or PMA contracting.

22.2. **Subcontract Terms and Subcontractor Actions.** The ESCO shall remain responsible for performance of the Work, regardless of any Work that may be subcontracted. No failure of any Subcontractor used by ESCO to perform the Work shall relieve the ESCO from its obligations hereunder to perform the Work, unless such failure, if experienced directly by ESCO, would be excused under the terms of this Contract, such as in the case of an Event as defined in Article 24 or PMA fault. ESCO shall be responsible for settling and resolving with all Subcontractors all claims arising out of delay, disruption, interference, hindrance, or schedule extension.

22.3 **Subcontractor Claims.** ESCO shall pay or cause to be paid to all Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have any right against PMA or the City for labor, services, materials or equipment furnished for the City.

22.4. **Assignability.** All Subcontracts entered into by the ESCO with respect to the Premises shall be assignable to PMA, solely at PMA's election and without cost or penalty, upon the expiration or termination of this Contract.

ARTICLE 23. CASUALTY OR CONDEMNATION OF PREMISES

Any construction or restoration of the Premises following or necessitated by fire, flood, or other casualty, or any condemnation affecting any portion of the Premises, shall be deemed a Material Change, and the provisions of **Article 16 (Material Changes)** shall be applicable.

ARTICLE 24. CONDITIONS BEYOND CONTROL OF THE PARTIES

If a Party ("**performing party**") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, similar events, or causes beyond that party's control (collectively, "Event" or Events"), this Contract shall at the other party's option: (a) remain in effect but said performing party's obligations shall be suspended until the said Events shall have ended; or (b) be terminated upon ten (10) days notice to the performing party, in which event neither party shall have any further liability to the other, with the exception that ESCO shall be paid for all Work performed. Where the Contract is not terminated under this Article 24, an equitable adjustment shall be made to the Contract Sum, Implementation Period and to any other contract terms necessitated by the Event.

ARTICLE 25. TERMINATION FOR CONVENIENCE

PMA may terminate this Contract, in whole or in part, during the Contract Term, for any reason, including, without limitation, the PMA's own convenience upon thirty (30) days written notice whenever PMA shall determine that such termination is in the best interest of PMA or the City. Any such termination shall be effected by delivery to ESCO of a notice of termination specifying the extent to which performance under this Contract is terminated either in whole or in part and the date on which termination becomes effective. Upon receipt of such notice of termination, ESCO shall stop all Work under the Contract. The Contract shall be equitably adjusted to compensate for such termination and the Contract modified accordingly. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of **Article 28 (Controversies and Dispute Resolution)** of this Contract. In all cases of termination under this Article 25, PMA shall compensate ESCO for all Work performed prior to receipt of the notice of termination. In no event, however, shall ESCO be paid for loss of anticipated profits on Work not yet performed.

ARTICLE 26. EVENTS OF DEFAULT

26.1 **Events of Default by PMA.** Each of the following events or conditions shall constitute an "Event of Default" by PMA:

- (a) Any failure by PMA to pay any sum due for a period of more than sixty (60) days after written notification by ESCO that PMA is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract; and/or
- (b) Any other material failure by PMA to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to PMA demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, PMA shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; and/or

- (c) Any representation or warranty furnished by PMA in this Contract that is false or misleading in any material respect when made.

26.2 **Events of Default by ESCO.** Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

- (a) Abandonment of the Work set forth in the Contract;
- (b) Failure or refusal to supply a sufficient number of properly skilled workers and necessary equipment or either of them;
- (c) The standards of comfort and service set forth in **Schedule L (Standards of Comfort)** are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Selected ECMs except that such failure, if corrected or cured within thirty (30) days after written notice by PMA or the City to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;
- (d) Any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (e) Failure to furnish and install all of the Selected ECMs and make them ready for use within the time specified by this Contract as set forth in **Schedule A (Selected ECMs to be Installed by ESCO)** and **Schedule D (ESCO Compensation and Payment Schedule)**;
- (f) Any other material failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, but, if corrected or cured within thirty (30) days after ESCO's receipt of such written notice such material failure shall be deemed cured for the purpose of this Contract.
- (g) The filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within thirty (30) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;
- (h) Failure by the ESCO to pay any amount due PMA or the City or perform any obligation under the terms of this contract or the Energy Savings Guarantee as set forth in **Schedule C (Energy Savings Guarantee)**; or
- (i) Repossession or removal of the Selected ECMs by ESCO or a third party without good cause.

ARTICLE 27. REMEDIES UPON DEFAULT

27.1 **Remedies upon Default by PMA.** If an Event of Default by PMA occurs, ESCO may, without a waiver of other remedies that exist in law or equity, elect one or both of the following remedies:

- (a) Exercise any and all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by City, and/or for damages;
- (b) Without recourse to any legal remedies, terminate this Contract by delivery of a notice declaring termination.

27.2 **Remedies Upon Default by ESCO.** In the Event of Default by ESCO, PMA shall have the choice of one or more of the following remedies without waiving any other rights or remedies in law or equity:

- (a) Exercise any and all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by ESCO, and/or for damages;
- (b) Without recourse to any legal remedies, terminate this Contract by delivery of a notice declaring termination.

ARTICLE 28. CONTROVERSIES AND DISPUTE RESOLUTION

28.1 Claims.

a. Except as otherwise provided in this Contract, the ESCO must use its best efforts to notify the Project Manager in writing of any and all claims whatsoever relating to or arising out of the Contract upon occurrence of the event giving rise to the claim or as soon as possible thereafter. The written notice of claim to the Project Manager shall provide a detailed statement of and basis for the claim, with supporting documentation attached. For purposes of this Article, a "claim" shall mean a demand or assertion seeking, as a matter of right, an adjustment or interpretation of the Contract, payment of money, extension of time or other specific relief with respect to the terms and conditions of the Contract. Within thirty (30) days after receipt of the ESCO's notice hereunder, the Project Manager will review all claims submitted by the ESCO and shall approve or reject each claim in whole or part, or shall request additional documentation in support of the claim from the ESCO and shall notify ESCO as to whether the claims are approved or rejected, in whole or in part.

b. PMA and the ESCO hereby release and waive any and all claims against each other for consequential damages arising out of or related to the Contract and the

Work performed thereunder. This mutual release and waiver includes damages incurred by the ESCO for principal home office expenses, including home office overhead and the compensation of personnel stationed there, for losses of financing, business, and reputation, and for loss of profit associated with any other work. Nothing hereunder shall preclude, however, the assessment of penalties, liquidated direct damages, or other damages as specifically provided for in this Contract.

c. Notwithstanding any other provision of this Contract, the aggregate liability in contract, tort or otherwise of ESCO, its officers, employees, agents, affiliates and subcontractors, shall in all cases be limited to the sum of the payments received by ESCO under to this Contract.

d. Relation to Judicial Legal Proceedings. Nothing in this Article shall operate to limit, interfere with or delay the right of either Party to commence judicial legal proceedings with respect to any subject matter arising out of this Contract.

ARTICLE 29. ASSIGNMENT

29.1 **General.** ESCO acknowledges that PMA is induced to enter into this Contract by, among other things, the professional qualifications of ESCO. ESCO agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of PMA, with the exception that ESCO may subcontract all or certain portions of the Work to the Subcontractors.

29.2 **Assignment by ESCO.** ESCO may, with prior written approval of PMA or the City, delegate its duties and performance under this Contract, and/or utilize Subcontractors, provided that any assignee(s), delegee(s), and/or utilization of Subcontractor(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, ESCO shall remain jointly and severally liable with its assignee(s) or transferee(s) to PMA and the City for all of its obligations under this Contract.

29.3 **Assignment by the PMA.** PMA may transfer or assign this Contract and its rights and obligations herein to a purchaser, landlord, tenant or subsequent owner of the Premises or an interest therein. PMA shall remain jointly and severally liable with its assignees or transferees to the ESCO for all of its obligations under this Contract.

ARTICLE 30. REPRESENTATIONS AND WARRANTIES

Each Party warrants and represents to the other that:

- (a) It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;

- (b) Its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
- (c) Its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any other contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or
- (d) It has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any Applicable Laws which would materially and adversely affect its ability to perform hereunder.

ARTICLE 31. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

31.1 PMA hereby warrants and represents that it has not entered into any leases or contracts with other persons or entities regarding the leasing of the Selected ECMs set forth **Schedule A (Selected ECMs to be Installed by ESCO)**, or for the provision of any energy management services in conflict with those set forth in **Schedule F (Measurement and Verification)** and **Schedule Q (ESCO's ECM Service Responsibilities)**. Upon written request, PMA shall cause the City to provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of the preexisting equipment identified **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)** which may be executed from time to time hereafter within thirty (30) days after execution of this Contract.

31.2 ESCO hereby warrants, represents and promises that:

- (a) Before commencing performance of this Contract:
 - (1) It is or shall become licensed or otherwise permitted to do business in the Commonwealth.
 - (2) It has a City of Philadelphia Business Privilege License.
 - (3) It shall confirm that it and any of its Subcontractors to be employed in connection with any services rendered under the Contract and/or the parent company (ies) and subsidiary (ies) thereof, are not currently in default of the terms of any indebtedness to the City and, to the best of its knowledge, will not at any time during the Contract Term (including any extensions or renewals thereof) be indebted to the City, for or on account of any delinquent taxes, liens,

judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. With respect to Subcontractors, ESCO will be deemed to have satisfied the requirements of this Section 31.2(3) so long as the following is included in each Subcontract:

"Subcontractor hereby certifies and represents that Subcontractor and Subcontractor's parent company(ies) and subsidiary(ies) are not currently indebted to the City and will not at any time during the term of ESCO's Agreement with PMA, including any extensions or renewals thereof, be indebted to the City, for or on account of any delinquent taxes, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. In addition to any other rights or remedies available to PMA and ESCO at law or in equity, Subcontractor acknowledges that any breach or failure to conform to this certification may, at the option and direction of PMA or ESCO, result in the withholding of payments otherwise due to Subcontractor for services rendered in connection with the Contract and, if such breach or failure is not resolved to PMA's or ESCO's satisfaction within a reasonable time frame specified by PMA or ESCO in writing, may result in the offset of any such indebtedness against said payments otherwise due to Subcontractor and/or the termination of Subcontractor for default (in which case Subcontractor will be liable for all excess costs and other damages resulting from the termination)."

To the best of ESCO's knowledge, information and belief, the representations made in any Subcontract that Subcontractor is not indebted to the City are true and correct.

- (4) It shall have provided proof and documentation of required insurance pursuant to **Article 19 (Insurance)**, and it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- (b) It shall use Subcontractors and delegees that have the necessary experience and skill for the Work, and that are licensed and bonded in this state to perform the Work so subcontracted or delegated pursuant to the terms hereof;
- (c) It is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

ARTICLE 32. WAIVER OF LIENS

ESCO will obtain and furnish to PMA and the City a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each Selected ECM and the component equipment, parts, and systems of each Selected ECM.

ARTICLE 33. COMPLIANCE WITH APPLICABLE LAWS

33.1 **Compliance With Applicable Law and Standard Practices.** ESCO and all Subcontractors, shall perform its obligations hereunder in compliance with all Applicable Laws, sound engineering and safety practices and shall give all notices required by all Applicable Laws. The Selected ECMs and shall at all times conform to all Applicable Laws. ESCO shall promptly remedy any violation of any such Applicable Laws that comes to its attention to the extent that the same results from its performance of the Work. ESCO shall promptly and as soon as is practicable give notice to the Project Manager, by telephone, with confirmation in writing, of receipt by the ESCO of any information relating to violation of Applicable Laws.

33.2 **Wastes and Hazardous Materials.** The ESCO shall be responsible for the cost of proper removal, remediation, treatment storage and disposal of all wastes and hazardous materials, if any, specified in Schedule N. PMA, the City and ESCO may negotiate the methodology for such removal, remediation, treatment, storage and disposal, but ESCO shall bear the cost and assumes full responsibility for scheduling and coordination. Each party's specific responsibilities will be set forth in **Schedule N (Waste and Hazardous Material Removal Responsibilities)** and accepted in **Exhibit II (iii) (Certificate of Acceptance—Waste and Hazardous Material Removal)**. ESCO shall treat, store and dispose of any waste and hazardous materials in accordance with all Applicable Laws.

33.3 **Permits, Licenses and Approvals.** ESCO or its Subcontractors, as may be appropriate, shall obtain all permits, licenses and approvals required pursuant to Applicable Law in connection with the performance of all or any part of the Work under the Contract throughout the Term, unless otherwise specifically directed by the Project Manager. ESCO or its Subcontractors, as appropriate, will be required to pay the current fee for such permits, license and approvals required in connection with all or any portion of the Work under the Contract, including permits and licenses required in connection with any Equipment, system or component forming part of the Work. Where requested by the City, ESCO shall furnish copies of each permit or license which is required to perform the Work to the City before the ESCO commences the portion of the Work requiring such permit or license.

33.4 **Environmental Provisions.** In the performance of this Contract, ESCO shall minimize pollution and shall strictly comply with all Applicable Laws concerning the environment. The ESCO is responsible for any violations and shall secure all required permits, licenses and approvals. Erosion control measures, if required, must be shown

on drawings and specifications prepared by the ESCO, and the ESCO shall obtain an erosion control permit, if required.

ARTICLE 34. INDEPENDENT CAPACITY OF ESCO

The Parties hereto agree that ESCO, and any agents and employees of ESCO, in the performance of this Contract, shall act in an independent capacity and not as officers, employees, or agents of PMA or the City. Neither the ESCO nor its employees or Subcontractors shall in any way represent that they are acting as employees, officials or agents of PMA or the City.

ARTICLE 35. NO WAIVER

The failure of ESCO, PMA or the City to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of any party's right to thereafter enforce the same in accordance with this Contract in the event of a continuing or subsequent default on the part of ESCO or PMA.

ARTICLE 36. NON-DISCRIMINATION; FAIR PRACTICES

36.1 The Parties acknowledge that they have entered into and perform the Contract under the terms of the Philadelphia Home Rule Charter, as it is amended from time to time, and in performing the Contract, ESCO shall not discriminate or permit discrimination against any person because of race, color, religion or national origin. In addition, the ESCO shall, in performing the Contract, comply with the provisions of the Fair Practices Ordinance of the Philadelphia Code (Chapter 9-1100) and the Mayor's Executive Order No. 04-86 (prohibiting discrimination on the basis of Human Immunodeficiency Virus infection), as each may be amended from time to time and which, as applicable, prohibit, among other things, discrimination against individuals in employment, housing and real property practices, and/or public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of actual or perceived race, ethnicity, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age, disability, marital status, source of income, familial status, genetic information, or domestic or sexual violence victim status, or other act or practice made unlawful under Chapter 9-1100 or under the nondiscrimination laws of the United States or the Commonwealth of Pennsylvania.

36.2 In accordance with Chapter 17-400 of the Philadelphia Code, as it may be amended from time to time, ESCO agrees that its payment or reimbursement of fees or other expenses in association with participation by ESCO or its employees in an exclusionary private organization, insofar as such participation confers an employment advantage or constitutes or results in discrimination with regard to hiring, tenure of employment, promotions, terms, privileges or conditions of employment on the basis of

race, color, sex, sexual orientation, religion, national origin or ancestry, constitutes without limiting the generality of other provisions of this Contract a substantial breach of this Contract entitling PMA to all rights and remedies provided in this Contract or otherwise available in law or equity. ESCO agrees to include this subparagraph, with appropriate adjustments for the identity of the parties, in all subcontracts that are entered into for work to be performed pursuant to the Contract.

36.3 ESCO further agrees to cooperate with the Commission of Human Relations for the City of Philadelphia in any manner that the said Commission deems reasonable and necessary for the Commission to carry out its responsibilities under Chapter 17-400 of the Philadelphia Code. Without limiting the generality of any other provisions of this Contract, the ESCO's failure to cooperate shall constitute a material breach of this Contract entitling PMA to all rights and remedies provided herein or otherwise available in law or equity.

36.4 In accordance with Act 57 of 1998, 62 Pa.C.S. § 3701, in the hiring of employees for the performance of work under the Contract or any Subcontract, neither the ESCO nor any of its Subcontractors, nor any person acting on their behalf shall discriminate, by reason of gender, race, creed or color, against any citizen of the Commonwealth who is qualified or available to perform the work to which the employment relates.

36.5 Neither the ESCO nor any of its Subcontractors, nor any person acting in their behalf shall in any manner discriminate against or intimidate any employee hired for the performance of work under the Contract on account of gender, race, creed or color.

36.6 In the event of any breach of this Article, PMA may, in addition to any rights and remedies available under this Contract, or at law or in equity, immediately cancel, terminate or suspend this Contract, and all payments for Work not yet performed under this Contract may be forfeited for a violation of the terms and conditions of this Article. In addition, a violation of any provisions of this Article may serve as grounds for suspension and debarment of the ESCO or its Subcontractors from contracting activities by the City.

ARTICLE 37. LABOR-MANAGEMENT RELATIONSHIPS; WAGES AND BENEFITS

37.1 **Labor-Management Relationship; Prevailing Wages.** This Contract is subject to Section 17-107 of the Philadelphia Code, "Contractors: Labor Management Relationships," and all regulations and procedures adopted thereunder.

37.1.1 As required by Section 17-107 of the Philadelphia Code, as same exists on the Effective Date of this Contract, all employees performing work under this Contract shall be paid at least the applicable prevailing wages for the respective occupational classifications designated, as set forth in the minimum wage schedule attached as part of the General Contract Requirements, and shall be given at least the

applicable presently prevailing working conditions during the entire period of work under the Contract. Such working conditions are those that are given to employees pursuant to a bona fide collective bargaining agreement for the applicable craft, trade or industry in the Philadelphia area on the date the General Bidding and Contract Requirements are issued. The occupational classifications of all employees under the Contract shall be only the specific categories of jobs within a given craft, trade or industry for which a separate hourly wage rate for the Philadelphia area is determined by the Secretary of Labor of the United States, in accordance with the Davis-Bacon Act, and which are set forth in the applicable schedule attached to the General Bidding and Contract Requirements. In the event that ESCO believes that work under the Contract should be performed by employees in occupational classifications omitted from the schedule attached to the General Contract Requirements, it shall so advise the Managing Director's Office ("**MDO**") Labor Standards Division, which, shall remedy the omission if it agrees.

37.1.2 PMA may withhold from any sums due to the ESCO under the Contract so much as may be necessary to pay the employees the difference between the wages required to be paid under Section 17-107 of the Philadelphia Code and the wages actually paid to such employees, and PMA may make or cause the City to make such payments directly to the appropriate employees.

37.1.3 ESCO shall require all Subcontractors to comply with and be bound by all of the provisions of this Article of the Contract and of Section 17-107 of the Philadelphia Code, and the ESCO shall insert the requirements of Section 17-107 of the Philadelphia Code in all subcontracts.

37.1.4 ESCO and its Subcontractor(s) shall keep an accurate record preserved on employee time sheets or time cards showing the name, address, social security number, occupational classification, wages and other benefits paid or provided and the number of hours worked for each employee assigned to "city work" (as "city work" is defined in Section 17-107(1)(b) of the Philadelphia Code), and such record shall be preserved at the current place of business of the employing ESCO or Subcontractor for two (2) years from the date of termination of this Contract. The ESCO shall maintain and make his or her accounting and employment records and records relating thereto available for inspection by authorized representatives of PMA and the City, at all reasonable hours, and shall permit such representatives to interview employees during the hours on the job, all without prior notice. Neither the ESCO nor its Subcontractor(s) shall allow any employee or other person to interfere with any such inspection or interview.

37.1.5 ESCO and its Subcontractors performing city work shall, upon request of PMA or the City, file with the MDO, Labor Standards Division a certified statement setting forth the name, address, occupational classification, wages and other benefits paid or provided and number of hours worked with respect to each employee performing city work. Such statement shall be made weekly for each proceeding weekly period. The certification shall affirm that the statement is correct and complete,

that the wages set forth therein are not less than those required by the Contract for city work and that the occupational classification set forth for each employee conforms with the work performed.

37.1.6 Nothing herein shall preclude the payment by the ESCO of wages at rates higher than those specified as the minimum in the applicable schedule attached to the General Contract Requirements. However, no increase in any contract price shall be allowed or authorized on account of the payment of wages in excess of those so specified, or on account of wage increases granted hereafter.

37.1.7 The minimum wages required hereby shall be paid unconditionally without any subsequent deduction or rebate of any kind except in accordance with Applicable Law governing payroll deductions for taxes, benefits and collective bargaining charges. Any assignment of wages by an employee for the direct or indirect benefit of the ESCO or its Subcontractor(s) shall constitute a violation of this paragraph; and any purported release of rights under Section 17-107 of the Philadelphia Code by an employee shall be void and of no effect.

37.1.8 The Parties shall refer to Section 17-107 of the Philadelphia Code, and to the regulations issued by the MDO, Labor Standards Division, as same exist on the Effective Date, for further information concerning the administration of the requirements of this paragraph. In addition, it shall be ESCO's responsibility to inform itself as to all prevailing working conditions, including without limitation, length of work day and work week, overtime compensation and holiday and vacation rights.

37.2 **Philadelphia 21st Century Minimum Wage Standard.** This Contract is subject to Chapter 17-1300 of The Philadelphia Code, "Philadelphia 21st Century Minimum Wage and Benefits Standard," and all regulations and procedures adopted thereunder and in effect on the Effective Date of this Contract. ESCO will comply with the requirements of Chapter 17-1300 of the Philadelphia Code as they exist on the date when the ESCO entered into this Contract or as they exist on the date when any amendment is executed to this Contract. The ESCO will promptly provide to PMA and the City documents and information verifying its compliance with the requirements of Chapter 17-1300. The ESCO will notify its affected employees with regard to the wages that are required to be paid pursuant to Chapter 17-1300. The Office of Labor Standards may grant a partial or total waiver of Section 17-1300 based on the specific stipulated reasons elaborated in Section 17-1304 of the Philadelphia Code.

ARTICLE 38. BUSINESS INTEREST IN NORTHERN IRELAND, SUDAN AND IRAN

38.1 In accordance with Section 17-104 of the Philadelphia Code, ESCO by execution of this Contract certifies and represents that:

- (a) ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) does not have, and will not have at any time during the Term (including any extensions thereof), any investments,

licenses, franchises, management agreements or operations in Northern Ireland, unless ESCO has implemented the fair employment principles embodied in the MacBride Principles, and no product to be provided by ESCO will originate in Northern Ireland, unless the ESCO has implemented the fair employment principles embodied in the MacBride Principles; and

- (b) ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) does not, and will not at any time during the Term (including any extension thereof), do any business in Iran or Sudan, and no product to be provided under this Contract were, are or will be manufactured by an entity doing business in Iran or Sudan, unless a federal override with respect to Iran or Sudan, as applicable, is in place or unless an exclusion from disqualification applies.

38.2 In the performance of this Contract, ESCO agrees that it will not utilize any suppliers or Subcontractors at any tier:

- (a) Who have or whose parent(s), subsidiary(ies), exclusive distributor(s) or company affiliate(s) have any investments, licenses, franchises, management agreements or operations in Northern Ireland, or who will provide products originating in Northern Ireland unless said supplier, subconsultant or Subcontractor has implemented the fair employment principles embodied in the MacBride Principles; or
- (b) Who do or whose parent(s), subsidiary(ies), exclusive distributor(s) or company affiliate(s) do business in Iran or Sudan during the Term, or who will provide products manufactured by an entity doing business in Iran or Sudan, as applicable, unless a federal override with respect to Iran or Sudan, as applicable, is in place or unless an exclusion from disqualification applies.

38.3 ESCO agrees to cooperate with the City's Director of Finance in any manner, which such Director deems reasonable and necessary to carry out the Director's responsibilities under Section 17-104 of the Philadelphia Code. ESCO expressly understands and agrees that any false certification or representation in connection with this section and/or any failure to comply with the provisions of this section shall constitute a substantial breach of this Contract entitling the PMA and the City to all rights and remedies provided in this Contract or otherwise Applicable Law (including, but not limited to, Section 17-104 of the Philadelphia Code or equity). In addition, it is understood that false certification or representation is subject to prosecution under Title 18 Pa. S. C. A. § 4904.

ARTICLE 39. BUSINESS, CORPORATE AND SLAVERY ERA INSURANCE DISCLOSURE

39.1 In accordance with Section 17-104 of the Philadelphia Code, ESCO, after

execution of the Contract agrees to complete an affidavit certifying and representing that ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) has searched any and all records of ESCO or any predecessor company regarding records of investments or profits from slavery or slaveholder insurance policies during the slavery era. The names of any slaves or slaveholders described in those records must be disclosed in the affidavit.

39.2 ESCO expressly understands and agrees that any false certification or representation in connection with this paragraph and/or any failure to comply with the provisions of this paragraph shall constitute a substantial breach of the Contract entitling PMA and the City to all rights and remedies provided in the Contract and otherwise available in law (including, but not limited to, Section 17-104 of the Philadelphia Code) or equity and the contract will be deemed voidable. In addition, it is understood that false certification or representation is subject to prosecution under Title 18 Pa.C.S.A § 4904.

ARTICLE 40. CONTRACTOR INTEGRITY PROVISIONS

40.1 For purposes of this Article (Contractor Integrity Provisions), the following definitions shall have the meanings set forth in this Paragraph 40.1.

- (a) Confidential information means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the City.
- (b) Consent means written permission signed by a duly authorized officer or employee of the City, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the City shall be deemed to have consented by virtue of execution of this Contract.
- (c) Contractor means ESCO including its directors, officers, partners, managers, key employees, owners of more than a five percent (5%) interest, parent companies, and subsidiaries.
- (d) Financial interest means:
 - (1) Ownership of more than a five percent (5%) interest in any business; or
 - (2) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- (e) Gratuity means any payment of more than nominal monetary value in the

form of case, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.

40.2 Contractor shall maintain the highest standards of integrity in the performance of this Contract and shall take no action in violation of Applicable Laws or requirements that govern contracting with the City.

40.3 Contractor shall not disclose to others any confidential information gained by virtue of this Contract.

40.4 Contractor shall not, in connection with this Contract or any other contract with the City, directly or indirectly, offer, confer, or agree to confer any pecuniary benefit on anyone as consideration for the decision, opinion, recommendation, vote, other exercise of discretion, or violation of a known legal duty by any officer or employee of City.

40.5 Contractor shall not, in connection with this Contract or any other contract with the City, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of City.

40.6 Except with the consent of City, neither the Contractor nor anyone in private with him or her shall accept or agree to accept from, or give or agree to give to, any person, any gratuity from any person in connection with the performance of work under this Contract except as provided therein.

40.7 Except with the consent of City, the Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services, labor, or material on this project.

40.8 The Contractor, upon being informed that any violation of these provisions has occurred or may occur, shall immediately notify City in writing.

40.9 The Contractor, by execution of this Contract and by the submission of any bills or invoices for payment pursuant thereto, certifies and represents that he or she has not violated any of these provisions.

40.10 The Contractor, upon the inquiry or request of the Inspector General of the City or any of that official's agents or representatives, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form necessary for a determination by the Inspector General as to the contractor's integrity or responsibility, as those terms are defined by City's statutes, regulations, or management directives. Such information may include, but shall not be limited to, the contractors business or financial records, documents or files of any type or form, which refer to or concern this Contract. Such information shall be retained by the Contractor for a period

of five (5) years beyond the termination of the Contract unless otherwise provided by law.

40.11 To preserve the integrity of City employees and maintain public confidence in the competitive bidding system, the City intends to vigorously enforce the various ethics laws as they relate to City employees in the bidding and execution of contracts to which the City is a party. Such laws are in three categories:

- (a) Executive Order No. 03-11, which prohibits City employees from soliciting or accepting anything of value from any person seeking to initiate or maintain a business relationship with the City, including, but not limited to, any of its departments, boards, commissions or agencies. All City employees presented with gifts or gratuities as indicated in Executive Order 03-11 have been instructed to report these actions to the appropriate authorities. All bidders, agents or intermediaries who are solicited for gifts or gratuities by City employees are urged to report these actions to the appropriate authorities, including but not limited to the Inspector General.
- (b) Section 10-102 of the Philadelphia Home Rule Charter, which prohibits any bid from being accepted from, or contract awarded to any city employee or official, or any firm in which City employee or official has a direct or indirect financial interest. All bidders are required to disclose any current City employees or officials of the bidder's firm, or who otherwise would have a financial interest in the contract.
- (c) The State Ethics Act and the City Ethics Code, which prohibit a public employee from using his or her public office or any confidential information gained thereby to obtain financial gain for himself or herself, a member of his or her immediate family, or a business with which he or she or any member of his or her immediate family is associated. "Use of Public office" is avoided by the employee or official publicly disclosing the conflict and disqualifying him or herself from official action in the matter, as provided in the Philadelphia Code § 20-608.

40.12 For violation of any of the above provisions, PMA may terminate this and any other Contract with the ESCO, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, and claim damages for all expenses incurred in obtaining another contractor to complete performance hereunder, and the City may debar and suspend the Contractor from doing business with the City. These rights and remedies are cumulative, and the use or nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the City may have under the law, statute, regulation, or otherwise.

ARTICLE 41. CONTRACTOR RESPONSIBILITY PROVISIONS

41.1 ESCO certifies that it is not currently under suspension or debarment by the City, the Commonwealth, any other state, or the federal government.

41.2 If ESCO enters into any Subcontracts under this Contract with Subcontractors who are currently suspended or debarred by the City, the Commonwealth, or federal government or who become suspended or debarred by the City, the Commonwealth or federal government during the Term or any extensions or renewals thereof, City shall have the right to require ESCO to terminate such Subcontracts.

41.3 ESCO agrees that it shall be responsible for reimbursing City for all necessary and reasonable costs and expenses incurred by the Office of the Inspector General relating to an investigation of ESCO's compliance with the terms of this Contract or any other contract between ESCO and City which results in the suspension or debarment of the ESCO.

ARTICLE 42. THE AMERICANS WITH DISABILITIES ACT

42.1 ESCO understands and agrees that, pursuant to federal regulations promulgated under the authority of the Americans With Disabilities Act, 28 C.F.R. § 35.101 *et seq.*, no individual with a disability shall, on the basis of the disability be excluded from participation in the Contract or from activities or services provided under the Contract. As a condition of accepting and executing the Contract, ESCO shall comply with all provisions of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101-12213, and all regulations promulgated thereunder, as the ADA and regulations may be amended from time to time, which are applicable to: (a) the ESCO; (b) the benefits, services, activities, facilities and programs provided in connection with the Contract; (c) the City or the Commonwealth; and the benefits, services, activities, facilities and programs of the City or of the Commonwealth, and, (d) if any funds for payments or otherwise under the Contract are provided by the federal government and its benefits, services, activities, facilities and programs the benefits. Without limiting the applicability of the preceding sentence, ESCO shall comply with the "General Prohibition Against Discrimination," 28 C.F.R. Part 35,130, and all other regulations promulgated under Title II of the ADA, as they may be amended from time to time, which are applicable to the benefits, services, programs and activities provided by the City through contracts with outside contractors.

42.2 ESCO shall be responsible for and agrees to indemnify and hold harmless PMA and the City from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against PMA or the City as a result of ESCO's failure to comply with the provisions of Paragraph 42.1 above.

ARTICLE 43. GENERAL PERFORMANCE REQUIREMENTS

43.1 **Standards of Performance.** ESCO shall perform all tasks/phases under this Contract, including construction and services required for ECM Implementation, in

such a manner so as to not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Schedule L (Standards of Comfort)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. PMA and the City reserve the right to review the Work performed by ESCO and to direct ESCO to take certain corrective action if, in the reasonable opinion of PMA or the City, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the Work shall be borne by ESCO.

43.2 **Professional and Technical Accuracy.** Except as otherwise stated in this Contract, ESCO shall be responsible for the professional and technical accuracy of all services performed, whether by the ESCO or its Subcontractors or others on its behalf. In no event shall any review, approval, comment, or evaluation by PMA or the City relieve the ESCO of any liability or responsibility under this Contract, it being ultimately understood that PMA and the City are relying upon the ESCO's skill, knowledge, and professional training and experience to complete the Work.

43.3 **Safety.** The ESCO shall be responsible for initiating, maintaining, and supervising reasonable safety precautions and programs in connection with the performance of this Contract. The ESCO shall take all reasonable precautions for safety of, and shall provide reasonable and appropriate protection to prevent damage, injury, or loss to (a) employees on the Work and other persons who may be affected thereby; (b) the Work and materials and Equipment to incorporated therein; and (c) other property on the Premises or adjacent thereto.

43.4 **Documentation.** Where requested by PMA or the City, the ESCO and its Subcontractors shall furnish the City with the documentation and information necessary for the City to determine the progress and execution of this Contract. The provisions of this Paragraph are not intended to supersede or limit the provisions of the Contract related to furnishing information or documents to PMA or the City.

ARTICLE 44. STEEL PRODUCTS PROCUREMENT ACT

The Steel Products Procurement Act, 73 P.S. § 1881, et seq. shall govern payments to the ESCO under the Contract. In seeking payment under the Contract, the ESCO represents, warrants and covenants that only steel products made in the United States as defined by the Steel Products Procurement Act have been used or supplied in the performance of the Contract and all Subcontracts thereunder. Where unidentified steel products are supplied or used under the Contract, PMA will not authorize, provide for, or make any payments to the ESCO for such steel products, unless and until the ESCO shall first provide to the Project Manager documentation, including, but not limited to, invoices, bills of lading, and mill certification, attesting that the steel was melted and manufactured in the United States. Where a steel product is identifiable from its face, PMA will authorize, provide for, and make payments to the ESCO for such steel products, only after the ESCO shall have submitted a certification, in a form

satisfactory to the Project Manager, that the ESCO has fully complied with the requirements of the Steel Products Procurement Act. Where the Project Manager has determined, in writing, that a particular steel product is not produced in the United States in sufficient quantities to satisfy the requirements of the Contract, then this Paragraph shall not apply to payments for that steel product. Failure of the ESCO to comply with the Steel Products Procurement Act shall constitute a violation of the Contract which shall entitle PMA and the City to exercise all rights and remedies provided to them by the Steel Products Procurement Act and under the Contract, either at law or in equity.

ARTICLE 45. SALES AND USE TAX; FEDERAL EXCISE TAX

45.1 The City is not subject to federal, state or local sales or use tax or federal excise tax. ESCO hereby assigns to the City all of its right, title and interest in any sales and use tax which may be refunded as a result of the purchase of any materials in connection with the Contract, and the ESCO, unless directed by the City, shall not file a claim for any sales or use tax refund subject to this assignment. The ESCO authorizes the City, or its agent, in its own name, or in the name of the ESCO, to file a claim for a refund of any sales or use tax subject to this assignment. To the extent it may be applicable to the work under this Contract, the ESCO covenants and agrees that it shall not bill PMA or the City for or otherwise pass-through to PMA or the City for payment any Federal Excise Tax paid in connection with the work under this Contract; in consideration of the ESCO's foregoing covenant, PMA hereby consents to any filing by the ESCO for a refund of any Federal Excise Tax paid in connection with the work under this Contract.

45.2 The ESCO agrees to include the above referenced paragraph in any Subcontracts with Subcontractors.

ARTICLE 46. AUDITS; INSPECTION RIGHTS; RECORDS

46.1 **General.** ESCO shall certify that all materials, equipment and labor charged to PMA or the City are accounted for and shall keep such full and detailed accounts as may be necessary for proper financial management under this Contract.

46.2 **Retention of Records.** The ESCO shall retain, and shall provide PMA, the City and their representatives access, to all records, books of account, correspondence, instructions, shop drawings, receipts, vouchers, memoranda, and similar data and documentation pertaining to the Contract for a period of five (5) years following final payment, or earlier termination of the Contract, or for such longer period as may be required by law; however, if any litigation, claim or audit is commenced prior to the expiration of said five(5)-year period, then records shall be retained until all litigation, claims or audit findings have been completely terminated or resolved, without right of further appeal, or if Applicable Law requires a longer period, then the record shall be retained for such longer period.

46.3 **Audits.** From time to time during the performance of the work under the Contract, and for a period of five (5) years after the completion of the work under the Contract, PMA and/or the City may audit any and all aspects of the ESCO's performance under the Contract, including but not limited to its billing and invoices. Audits may be conducted by representatives, agents or contractors of PMA or the City, including, without limitation, the City Controller. If requested by PMA or the City, the ESCO shall submit all vouchers, or invoices presented for payment pursuant to this Contract, all cancelled checks, work papers, books, records and accounts upon which the vouchers or invoices are based, and any and all documentation and justification in support of expenditures or fees incurred pursuant to this Contract. All books, invoices, vouchers, records, reports, cancelled checks and other materials related to ESCO's obligations under this Contract shall be subject to periodic review or audit by PMA or the City.

46.4 **Availability of Records.** The ESCO shall make available within the City at reasonable times during the performance of work hereunder and for period set forth above in this paragraph, all records pertaining to the Contract for the purpose of inspection, audit or reproduction by any authorized representative of the City (including any agent or contractor and the City Controller), the Commonwealth Auditor General, and any other federal or state auditors, as may be applicable, at no additional cost to PMA or the City.

46.5. **Confidential Records.** ESCO may, by a written statement signed by a representative of the ESCO, assert that a record or document provided by ESCO pursuant to this Contract contains a trade secret or confidential proprietary information. If ESCO provides such a written statement, PMA will endeavor to maintain the record as confidential to the extent permitted by Applicable Law.

ARTICLE 47. COVENANT OF QUIET ENJOYMENT

ESCO will perform its duties and obligations without disturbing the quiet use and enjoyment of the Premises during the Term except as otherwise expressly set forth herein.

ARTICLE 48. RIGHT-TO-KNOW LAW

The Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-3104, applies to this Contract.

ARTICLE 49. NOTICE

All notices from either party to the other shall be effective only if in writing and signed by the party giving notice and given by being delivered personally or sent

electronically or by registered or certified mail, return receipt requested, postage prepaid, or delivered to a nationally recognized express mail service, charges prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice.

IF TO ESCO:

Wade Carleton
NORESCO, LLC
One Research Drive, Suite 400C
Westborough, MA 01581

IF TO PMA:

The Philadelphia Municipal Authority
1515 Arch Street, 9th Floor
Philadelphia, PA 19102
Attention: Executive Director

With copies to:

Department of Public Property
790 City Hall
Philadelphia, PA 19107
Attention: Commissioner

and

City of Philadelphia Law Department
One Parkway Building
1515 Arch Street, 16th Floor
Philadelphia, PA 19102-1595
Attention: City Solicitor

ARTICLE 50. ECONOMIC OPPORTUNITY PLAN

50.1 In accordance with the Philadelphia Code Section 17-1600 et seq., as it exists on the Effective Date, the City has established a requirement for Economic Opportunity Plan(s) ("EOP") for this Contract. The EOP attached hereto as **Exhibit IV (Economic Opportunity Plan)** constitutes the entire EOP approved by the PMA and the Office of Economic Opportunity for this Contract. ESCO agrees to comply with and abide by the EOP attached to this Agreement as **Exhibit IV (Economic Opportunity Plan)**.

50.2 In accordance with Section 17-1402(f) of the Philadelphia Code, ESCO

shall during the Term of the Contract, disclose the name and title of each City officer or employee who directly or indirectly advised the ESCO, any officer, director or management employee of the ESCO, or any person representing the ESCO that a particular Person could be used by the ESCO to satisfy any goals established in the Contract for participation of minority, women, disabled or disadvantaged business enterprises. The ESCO shall also disclose the date the advice was provided, and the name of such particular Person. Such disclosure shall be made on a form provided by the City, and the form shall be signed and filed with the Department within five Business Days after the ESCO as so advised. The Department of the City receiving the disclosure form shall forward copies to the President and Chief Clerk of Council, and to the Mayor, Finance Director, Procurement Department, and the Department of Records.

ARTICLE 51

APPROVALS BY PMA AND CITY; ENFORCEMENT BY CITY

51.1 **Approvals by City.** Except where the provisions of this Contract explicitly require separate approvals by both PMA and the City, any approval granted by the City shall be deemed approval by PMA.

51.2 **Enforcement by City.** ESCO acknowledges and agrees that all of PMA's rights and remedies under this Contract may be exercised and/or enforced directly by the City. Wherever this Contract requires the approval of both PMA and the City, ESCO may submit the matter requiring such approval simultaneously to PMA and the City.

51.3 **Approval Not a Guarantee or Warranty.** PMA's or City's review, approval or acceptance under this Contract of plans and specifications and any other document, work, matter, or thing, shall not constitute a representation, warranty or guaranty by PMA or City as to the substance, accuracy, or quality of such document, matter, or thing. At all times, ESCO, its officials, officers, employees, agents, contractors and subcontractors, must each use their own independent judgment as to the substance, accuracy and quality of all such documents, work, matter, and other things.

51.4 **Approvals Under Applicable Law.** No consent, approval, or agreement of the City or PMA under this Contract shall be deemed a consent, approval or agreement of any City board, agency, department, or commission whose consent, approval, or agreement is or may be required under Applicable Law, including but not limited to the City of Philadelphia Department of Licenses and Inspections, the Fairmount Park Commission, the City of Philadelphia Historical Commission, and the City of Philadelphia Art Commission. The decisions of any City board, agency, department or commission required under Applicable Law regarding any matter arising under this Contract shall be governed solely by Applicable Law.

ARTICLE 52. MISCELLANEOUS PROVISIONS

52.1 **Entire Agreement.** This Contract, when executed, together with all other Contract Documents attached hereto or to be attached hereto, as provided for by this Contract shall contain all the agreements, conditions, understandings, undertakings, representations, covenants, promises and warranties made between the Parties hereto with respect to the subject matter hereof and supersedes all prior negotiations and proposals (either written or oral).

52.2 **Headings.** Headings and subtitles used throughout this Contract are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

52.3 **Amendments; Waiver.** This Contract may not be amended, supplemented, altered, modified or waived, in whole or in part, except by a written amendment signed by the Parties or as elsewhere provided in this Contract. Except to the extent that the Parties may have otherwise agreed in writing in an amendment, no waiver, whether express or implied, by either Party of any provision of the Contract shall be deemed: (a) to be a waiver by that Party of any provision in the Contract; or (b) to be a waiver by that Party of any breach by the other Party of its obligations under the Contract. Any forbearance by a Party in seeking a remedy for any noncompliance or breach by the other Party shall not be deemed to be a waiver of rights and remedies with respect to such noncompliance or breach.

52.4 **Further documents.** The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

52.5 **Order of Precedence.** If any conflicts or discrepancies should arise in the terms and conditions of this Contract or the interpretation thereof and the attached Schedules and Exhibits, the terms of this Contract shall control.

52.6 **Governing law and venue.** This Contract shall be deemed to have been made in Philadelphia, Pennsylvania. The Contract and all disputes arising under the Contract shall be governed, interpreted, construed and determined in accordance with the laws of the Commonwealth without regard to the choice of law doctrine theory. Any suit brought to enforce any of the rights and obligations under this Contract shall be brought in the state or federal court situated in Philadelphia, Pennsylvania.

52.7 **Severability.** In the event that any clause or provision of this Contract or any part thereof shall be declared invalid, void, or unenforceable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Contract unless the result would be manifestly inequitable or unconscionable.

52.8 **Waiver of Jury Trial.** The Parties hereby mutually waive any rights that either may have to request a jury trial in any proceeding at law or in equity in any court of competent jurisdiction.

52.9 **Third Party Beneficiaries.** The City is a third party beneficiary of this Contract. Nothing in the Contract, express or implied, is intended or shall be construed to confer upon or give to any Person, other than the City and the Parties, any rights, remedies, or other benefits, including but not limited to third-party beneficiary rights, under or by reason of the Contract. The Contract shall not provide any third party other than the City with any remedy, claim, liability, reimbursement, cause of action or other right other than any such remedy, claim, etc. existing without reference to the term of or the existence of the Contract.

52.10 **Rights of PMA or the City in its Governmental Capacity Not Limited.** Nothing in this Contract shall be interpreted as limiting the rights and obligations of PMA or the City under Applicable Law in its governmental or regulatory capacity.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this Contract by their duly authorized officers on the date first above written.

PHILADELPHIA MUNICIPAL AUTHORITY

By: _____

Name:

Title:

NORESCO, LLC

By: _____

Name

Title

Signature of Secretary, Assistant
Secretary, Treasurer or Assistant
Treasurer

Signature of President or Vice President

Title

Title

(Corporate Seal)

Fed. Identification No. _____

SCHEDULES

EXHIBITS

EXHIBIT IV

Economic Opportunity Plan**I. Introduction, Definitions and Diversity Practices**

A. This Project is subject to Chapter 17-1600 of The Philadelphia Code, which requires the development and implementation of an "Economic Opportunity Plan(s)" for certain classes of contracts and covered projects as defined in Section 17-1601. The Economic Opportunity Plan ("Plan") memorializes ESCO's best and good faith efforts to provide meaningful and representative opportunities for Minority Business Enterprises ("MBEs"), Woman Business Enterprises ("WBEs") and Disabled Business Enterprises ("DSBEs") (collectively, "M/W/DSBEs" which also includes firms designated as Disadvantaged Business Enterprises or "DBEs"¹) and an appropriately diverse workforce in connection with the Project.

This Project is subject to the Plan requirements as described in Section 17-1603 (1). Accordingly, ESCO makes a legally binding commitment to abide by the provisions of this Plan which include ESCO's commitment to exercise its best and good faith efforts throughout the Term to provide meaningful and representative contracting opportunities for M/W/DSBEs and to employ an appropriately diverse workforce which should include minority and female persons in all phases of the Project. By submission of this Plan, ESCO agrees that it shall and shall cause all its Subcontractors, professional services providers and consultants retained by ESCO (collectively, the "Participants" and each a "Participant") to use their best and good faith efforts to provide subcontracting opportunities for M/W/DSBEs in all phases of the Project. This Plan expressly applies to all subcontracts awarded by ESCO and subcontracts awarded by its Participants. The objectives set forth in this Plan shall be incorporated in all requests for proposals and solicitations and communicated to all Participant levels.

B. For the purposes of this Plan, MBE, WBE, DBE and DSBE shall refer to certified businesses so recognized by the City of Philadelphia through its Office of Economic Opportunity ("OEO"). Only the work or supply effort of firms that are certified as M/W/DSBEs by an OEO approved certifying agency² or identified in the OEO Registry will be eligible to receive credit as a Participant. In order to be counted, certified firms must successfully complete and submit to the OEO an application to be included in the OEO Registry which is a list of registered M/W/DSBEs maintained by the OEO and available online at www.phila.gov/oEO/directory. If a firm is certified by an approved certifying agency, a copy of that certification should be furnished with the proposal.

C. Neither ESCO nor any Participant shall discriminate on the basis of race, color, religion, sex, national origin, sexual orientation, gender identity, ancestry, age, or handicap in the award and performance of contracts pertaining to this Project.

¹ "DBE" or "Disadvantage Business Enterprise" means a socially and economically disadvantaged minority or woman owned business that is certified under 49 C.F.R. Part 26. If ESCO makes solicitation(s) and commitment(s) with a DBE, ESCO shall indicate which category, MBE or WBE, is submitted for counting.

² A list of "OEO approved certifying agencies" can be found at www.phila.gov/oEO.

D. For this Plan, the term “Best and Good Faith Efforts,” the sufficiency of which shall be in the sole determination of the City, means: efforts, the scope, intensity and appropriateness of which are designed and performed to foster meaningful and representative opportunities for participation by M/W/DSBEs and achieve an appropriately diverse workforce. Best and Good Faith Efforts are rebuttably presumed met, when a ESCO makes commitments within the M/W/DSBE Participation Ranges established for this Contract and commits to employ a diverse workforce.

E. ESCO and its Participant(s) hereby verify that all information submitted to the City including without limitation, the Plan and all forms and attachments thereto, are true and correct and are notified that the submission of false information is subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities. ESCO and its Participants also acknowledge that if awarded a contract/subcontract resulting from this Project, it is a felony in the third degree under 18 Pa.C.S. Section 4107.2 (a)(4) if, in the course of the contract/subcontract, ESCO and/or its Participant(s) fraudulently obtains public moneys reserved for or allocated or available to minority business enterprises or women's business enterprises.

II. Goals

M/W/DSBE Participation Ranges

As a benchmark for the ESCO’s expression of its Best and Good Faith Efforts to provide meaningful and representative opportunities for M/W/DSBEs in the contract, the following participation ranges have been developed. In order to maximize opportunities for as many businesses as possible, a firm that is certified in two or more categories (e.g. MBE and WBE and DSBE or WBE and DSBE) will only be credited toward one participation range as either an MBE or WBE or DSBE. The firm will not be credited toward more than one category. These ranges are based upon an analysis of factors such as the size and scope of the Contract and the availability of MBEs, WBEs and DSBEs to perform various elements of the Contract.

PROJECT PHASE	MBE	WBE
Implementation Period *	20% to 25%	0%
Guarantee Period	0%	0%

*This Participation ranges is based on all costs incurred during the Implementation period of the project, including work completed on the control systems. As part of the Investment Grade Audit, the ESCO performed an exhaustive search and was not able to identify any M/W/DSBE Subcontractors who were qualified to install Triduum control products (the existing system). If a non-qualified Subcontractor performed work on the Triduum controls, it would void the warranty. If the Participation ranges were based on the total costs LESS work the control system work, the ESCO would be able to achieve a MBE participation between 50-55% on the project.

Employment Goals

Noresco agrees to exhaust its Best and Good Faith Efforts to employ an appropriately diverse workforce which includes minority persons and females at all tiers of employment and management. Noresco shall also cause its Participants to employ an appropriately diverse workforce. For this Plan, an appropriately diverse workforce is one which reflects the local availability of professionals possessing the requisite education, licenses, where appropriate, and skills to work on this project.

PROJECT PHASE	MBE	WBE
Apprentices	50%	7%
Journeypersons	30% to 35%	5% to 10%

Noresco shall use its Best and Good Faith Efforts to employ an workforce that has up to 50% City Residents in all phases of the Project.

III. ESCO Responsiveness and Responsibility

A. ESCO has identified all its M/W/DSBE commitments and evidence its agreement to employ a diverse workforce on the form entitled, "M/W/DSBE Participation and Workforce Commitments." ESCO's identified commitment to use an M/W/DSBE on this form constitutes a representation by ESCO, that the M/W/DSBE is capable of completing the subcontract with its own workforce, and that Noresco or its subcontractors has made a legally binding commitment with the firm. The listing of the M/W/DSBE firm by ESCO further represents that if ESCO is awarded the contract, ESCO will subcontract with the listed firm(s) for the work or supply effort described and the dollar/percentage amount(s) set forth on the form. In calculating the percentage of M/W/DSBE participation, ESCO shall apply the standard mathematical rules in rounding off numbers. In the event of inconsistency between the dollar and percentage amounts listed on the form, the percentage will govern. ESCO is to maintain the M/W/DSBE percentage commitments throughout the Term of the Contract which shall apply to the Contract Sum and any additional increases. In the event ESCO's contract is increased by change order and/or modification, or amendment, it shall be the responsibility of ESCO to apply its Best and Good Faith Efforts to the amended amount in order to maintain any participation ranges committed to on the Contract Sum of the Contract at the time of execution.

1. Commercially Acceptable Function

Where ESCO enters into a subcontract with a M/W/DSBE, ESCO shall be considered to have made a Best and Good Faith Effort in that regard only if its M/W/DSBE subcontractor performs a commercially acceptable function ("CAF"). A M/W/DSBE is considered to perform a CAF when it engages in meaningful work or supply effort that provides for a distinct element of the subcontract (as required by the work to be performed in accordance with the Project), where the distinct element is worthy of the dollar amount of the subcontract and where the M/W/DSBE carries out its responsibilities by actually performing, managing and supervising the work involved; M/W/DSBE subcontractors must perform at least twenty percent

(20%) of the cost of the subcontract (not including the cost of materials, equipment or supplies incident to the performance of the subcontract) with their own employees.

The City may evaluate the amount of work subcontracted, industry practices and any other relevant factors in determining whether the M/W/DSBE is performing a CAF and in determining the amount of credit ESCO receives towards the participation ranges.

Upon award, letters of intent, quotations, and any other accompanying documents regarding commitments with M/W/DSBEs, including the M/W/DSBE Participation and Workforce Commitments Form, become part of the Contract. M/W/DSBE commitments are to be memorialized in a written subcontract agreement and are to be maintained throughout the Term of the Contract and shall apply to the Contract Sum (including approved change orders and amendments). Any change in commitment, including but not limited to termination of the subcontract, reduction in the scope of committed work, substitutions for the listed firms, changes or reductions in the listed dollar/percentage amounts, must be pre-approved in writing by OEO. Throughout the Term of the Contract, ESCO is required to continue its Best and Good Faith Efforts.

B. In the event ESCO does not identify on the M/W/DSBE Participation and Workforce Commitments Form that it has made M/W/DSBE commitments within the participation ranges established for this Project and/or does not agree to employ a diverse workforce as described herein, ESCO must complete and submit a Documentation of Best and Good Faith Efforts Form ("BGFE Form"), documenting its solicitations and any commitments with M/W/DSBEs, and detailing any efforts made to include M/W/DSBEs in the Contract and to employ a diverse workforce. The submission of the BGFE Form is an element of proposal responsiveness and failure to include this form may result in the rejection of the Proposal. The BGFE Form must include at a minimum, certification and documentary evidence that the following actions were taken:

1. Solicitation directed to both qualified M/W/DSBEs registered with OEO and qualified M/W/DSBEs certified by agencies approved by OEO. ESCO must provide a list of all certification directories used for soliciting participation for this Project. ESCO must determine with reasonable certainty if the M/W/DSBEs are interested by taking appropriate steps to follow up on initial solicitations; one time contact, without follow up, is not acceptable; and

2. ESCO provided interested M/W/DSBEs with adequate information about the plans, specifications, and requirements of the Contract in a timely manner to assist them in responding to a solicitation; and

3. ESCO negotiated in good faith with interested M/W/DSBEs. ESCO using good business judgment would consider a number of factors in negotiating with subcontractors, including M/W/DSBE subcontractors, and would take a firm's price and capabilities as well as the objectives of the Plan into consideration; and

4. Documentation of the following:

i. Any commitments to use M/W/DSBEs in its proposal for subcontracted services and materials supply even when ESCO would otherwise prefer to self-perform/supply these items; and

ii. Correspondence between the ESCO and any M/W/DSBE(s) related to this Proposal; and

iii. Attendance logs and/or records of any scheduled pre-proposal meeting; and

5. Certification and evidence that the following actions were taken or documentation of the following, or an explanation why these actions were not taken or why documentation does not exist:

i. Any arms-length business assistance provided to interested M/W/DSBEs; and

ii. Solicitation through job fairs, newspapers, periodicals, advertisements and other organizations or media that are owned by M/W/DSBEs and/or focus on M/W/DSBEs; and

iii. Telephone logs of communications related to this Project; and

iv. Notification of and access to proposal documents at the ESCO's office or other office locations for open and timely review; and

v. ESCO sought assistance from the Urban Affairs Coalition, Careerlink Philadelphia, Opportunity Industrial Center and the Philadelphia Workforce Development Corporation to perform employment outreach; and

vi. ESCO published its policy of nondiscrimination in the hiring, retention and promotion of employees; and

vii. Any agreement with a training program that targets the employment of minority persons, disabled persons and women.

IV. Evaluation of Responsiveness and Responsibility

A. Evaluation and Determination

1. The City, acting through its OEO, will evaluate the responsiveness of the ESCO's Plan to these requirements. OEO reserves the right to request further documentation and/or clarifying information at any time prior to the award of the Contract which may result in ESCO's amendment of its M/W/DSBE Participation and Workforce Commitments Form or BGFE Form.

B. Administrative Reconsideration

1. If the OEO determines that ESCO has not made sufficient Best and Good Faith Efforts, ESCO will be notified that its proposal is nonresponsive and may file a written appeal with OEO within forty-eight (48) hours of the date of notification. The decision of OEO may be appealed in writing within forty-eight (48) hours of the date of the OEO's decision to the Chief Operating Officer of the Commerce Department or his designee whose decision shall be final. If it is determined that ESCO did not make sufficient Best and Good Faith Efforts, its Proposal will be rejected.

2. Notwithstanding compliance with the requirements set forth herein, the City reserves the right to reject any or all proposals as deemed in the best interest of the City.

V. Compliance and Monitoring of Best and Good Faith Efforts

A. ESCO agrees to cooperate with OEO in its compliance monitoring efforts, and to submit, within the time limits prescribed by OEO, all documentation which may be requested by OEO relative to the awarded contract, including the items described below. ESCO must provide as required and maintain the following contract documentation for a period of three (3) years following acceptance of final payment under the Contract:

- Copies of signed contracts and purchase orders with M/W/DSBE subcontractors;
- Evidence of payments (cancelled checks, invoices, etc.) to subcontractors and suppliers to verify participation;
- Telephone logs and correspondence relating to M/W/DSBE commitments.

B. ESCO shall ensure that all of its on-site contractors submit to the extent required by law, certified payrolls to the City's Labor Standards Unit in the format prescribed by that agency which includes hours worked by minority and female apprentices and journeypersons.

C. Prompt Payment of M/W/DSBEs

1. ESCO shall within five (5) business days after receipt of a payment from the City for work performed under the Contract, deliver to its M/W/DSBE subcontractors their proportionate share of such payment for work performed (including the supply of materials).

2. In connection with payment of its M/W/DSBE subcontractors, Noresco agrees to fully comply with the City's payment reporting process which may include the use of electronic payment verification systems.

3. Each month of the Term and by or before the Acceptance Date, ESCO shall provide to the OEO documentation reconciling actual dollar amounts paid to M/W/DSBE subcontractors to M/W/DSBE commitments presented in the Plan.

D. Oversight Committee

1. For this project, the City, in its sole discretion, may establish a Project Oversight Committee consisting of representatives from the ESCO's company, representatives of the building trades, the construction manager and the City which may include the Project site's

District Councilperson, OEO and appropriate community organizations (“Committee”). The Committee will meet regularly to provide advice for the purpose of facilitating compliance with the Plan.

2. If a Project Oversight Committee is established, the City will convene meetings of the Committee no later than one (1) month after issuance of the Notice To Proceed.

VI. Remedies and Penalties for Non-Compliance

A. ESCO agrees that its compliance with the requirements of the Plan is material to the Contract. Any failure to comply with these requirements may constitute a substantial breach of the Contract. It is further agreed and understood that in the event the City determines that ESCO hereunder has failed to comply with these requirements, the City may, in addition to remedies reserved under Section 17-1605 of The Philadelphia Code, and any other rights and remedies the City may have under the Contract, or any bond filed in connection therewith or at law or in equity, exercise one or more of the remedies below, which shall be deemed cumulative and concurrent:

- a. Withhold payment(s) or any part thereof until corrective action is taken.
- b. Terminate the ESCO’s Contract, in whole or in part.
- c. Suspend/Debar ESCO from proposing on and/or participating in any future City contracts for a period of up to three (3) years.
- d. Recover as liquidated damages, one percent of the total dollar amount of the Contract for each one percent (or fraction thereof) of the commitment shortfall. (NOTE: The “total dollar amount of the contract” shall include approved change orders, amendments and for requirements contracts shall be based on actual quantities ordered by the City.)

The remedies enumerated above are for the sole benefit of the City and City’s failure to enforce any provision or the City’s indulgence of any non-compliance with any provision hereunder, shall not operate as a waiver of any of the City’s rights in connection with any contract resulting from this Project nor shall it give rise to actions by any third parties including identified M/W/DSBE subcontractors. No privity of contract exists between the City and the M/W/DSBE subcontractor identified in any Contract resulting from this Project. The City does not intend to give or confer upon any such M/W/DSBE subcontractor(s) any legal rights or remedies in connection with subcontracted services under any law or Executive Order or by any reason of any contract resulting from this Project except such rights or remedies that the M/W/DSBE subcontractor may seek as a private cause of action under any legally binding contract to which it may be a party.

(See Next Page for Signatures)

Philadelphia Municipal Authority

DATE: _____

By: _____

NORESCO, LLC.

DATE: _____

By: _____

Office of Economic Opportunity

DATE: _____

By: _____

Title: _____

Appendix A
OEO Certification for Subcontractors

M/W/DSBE Participation and Workforce Commitments EOPs FOR BIDS ESTIMATED AT MORE THAN \$250,000

DEPARTMENT OF COMMERCE OFFICE OF ECONOMIC OPPORTUNITY (OEO)									
Minority (MBE), Woman (WBE), Disabled (DSBE) and Disadvantaged (M-DBE and W-DBE) Business Enterprises					BID OPENING DATE - 8/20/11				
NAME OF BIDDER - NORESKO, LLC					BID OPENING DATE - 8/20/11				
List below all MBE / WBE / DSBE / DBEs that you have a commitment to use for a Commercially Acceptable Function on this Bid.					Amount Committed To				
☒ MBE	☐ WBE	☐ DSBE	☐ M-DBE	☐ W-DBE	☒ Subcontractor	☐ Supplier	Yes ³	No	
Company Name Accord Mechanical and Management Services, Inc.					Dollar Amount \$1,612,770				
Address 218 East Washington Street, Norristown, PA 19401									
Contact Person Ulrick Joseph									
Telephone Number - (610) 272-6760					Percent of Total Proposal 13.1%				
Fax # - (610) 272-6676									
E-mail Address accordmechanical@msm.com					Amount Committed To				
OEO Registry # MBE4704MOCC									
Certifying Agency N/A									
☒ MBE	☐ WBE	☐ DSBE	☐ M-DBE	☐ W-DBE	☒ Subcontractor	☐ Supplier	Yes ³	No	
Company Name The Delta Alliance, LLC					Dollar Amount \$328,630				
Address 99 Bridge Street, Suite 400, Phoenixville, PA 19460									
Contact Person Walter Logan									
Telephone Number (610) 917-8900 extension 101					Percent of Total Proposal 2.7%				
E-mail Address wlogan@deltaall.com					Amount Committed To				
OEO Registry # MBE110630-DeltaAL - DBE									
Certifying Agency N/A									
☒ MBE	☐ WBE	☐ DSBE	☐ M-DBE	☐ W-DBE	☒ Subcontractor	☐ Supplier	Yes ³	No	
Company Name Midatlantic Construction					Dollar Amount \$83,311				
Address 126 Lexington Street, Trenton, NJ 08611									
Contact Person Jon Ramirez									
Telephone Number: (609) 989-7790					Percent of Total Proposal 0.7%				
Fax # (609) 989-7796									
E-mail Address jramirez@midatlantic-ct.com					Amount Committed To				

OEO Registry # MBE - 758708 2DC		Certifying Agency N/A								
List below all MBE / WBE / DSBE / DBEs² that you have a commitment to use for a Commercially Acceptable Function on this Bid.										
☒ MBE	☐ WBE	☐ DSBE	☐ DBE	☐ MBE ²	☐ W-DBE ²	☒ Subcontractor ☐ Supplier		Amount Committed To		
Company Name PEAC Consulting, LLC Address 7320 Oakham Court, Richmond, Virginia 23231 Contact Person Barry Crommel Telephone Number: (804) 852-4996 Fax #: (804) 200-5567 E-mail Address bcrommel@peacconsulting.com							Yes ³ Add		No Add	
Work or Supply Effort to be Performed Plumbing							Dollar Amount \$798,719		Percent of Total Proposal 6.5%	
OEO Registry # 8841034CC		Certifying Agency								

¹MBE/WBE/DBEs Listed above must be certified prior to bid submission date.
²If Bidder makes commitments with DBEs, Bidder shall indicate which class type M-DBE or W-DBE is submitted for credit.
³Bidder should attach quotation with this form, but the City reserves the right to request this information which shall be submitted by Bidder within 48 hours of the City's Request.