

Project # xxxxxxxx/Project Name

Division of Capital Asset Management and Maintenance

D · C · A · M · M

**COMMONWEALTH OF MASSACHUSETTS
STANDARD ENERGY SERVICES AGREEMENT**
(for projects subject to M.G.L. c. 25A, §11C)



AWARDING AUTHORITY/CLIENT	Division of Capital Asset Management and Maintenance/
FACILITY:	
PROJECT NUMBER:	
PROJECT TITLE:	
FACILITY NAME:	
PROJECT LOCATION:	

ESCO NAME:	
ESCO ADDRESS:	
ESCO TELEPHONE:	
ESCO FACSIMILE:	
ESCO FEDERAL EMPLOYERS IDENTIFICATION NUMBER:	

Effective Date: _____ **Effective Date is defined as date of last execution.**

Term: _____ **[Fill in number of years up to 20 years]** From the Date of the Phase Final Completion Notice for Phase 1 of Installation Services.

Maximum Total Contract Value-All Phases: _____ **[Fill in RFPs Certification Limit]**

Total Contract Value Summary

Phase	Date of NTP	Installation Period Costs	Performance Term Costs	Phase Contract Value
1		\$	\$	\$
Totals		\$	\$	**\$

**** This is the Total Contract Value**

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ENERGY SERVICES AGREEMENT

This Energy Services Agreement (“ESA” or “the Contract”) is entered into as of the date of last execution (“Effective Date”) by and between:

_____, a _____ corporation licensed to conduct business in the Commonwealth of Massachusetts whose principal place of business is located at _____ (ESCO) and the Commonwealth of Massachusetts through its Division of Capital Asset Management and Maintenance (DCAMM) and its client facility _____ (FACILITY) located in _____ Massachusetts. For the purpose of this the Contract, the term “CUSTOMER” shall mean both DCAMM and FACILITY, unless otherwise indicated herein. The purpose of the Contract is to provide for the design, construction, installation, guarantee, and follow-up Measurement and Verification by ESCO of efficient equipment and the rendering of other services by ESCO designed to reduce utility consumption and cost at CUSTOMER’s FACILITY located at _____ (the “Premises”) which is more precisely described in **Schedule A (Description of Premises)**, attached hereto and incorporated herein by reference.

RECITALS

WHEREAS, CUSTOMER owns and operates the Premises and is in need of energy and water saving equipment and services designed to save energy and water and associated energy and water costs at said Premises;

WHEREAS, ESCO provides a service for reducing energy and water consumption and costs through the use of engineering analyses, operations procedures, and energy and water savings devices designed, installed and maintained by ESCO on the Premises of its CUSTOMER;

WHEREAS, in accordance with the provisions of M.G.L. c. 25A, §11C, CUSTOMER solicited proposals from qualified firms through the issuance of a request for proposals (“RFP”) dated _____;

WHEREAS, ESCO submitted a proposal dated _____ (“the Proposal”) in response to the RFP;

WHEREAS, CUSTOMER desires, and is authorized under the provisions of M.G.L. c. 25A, §11C, to retain ESCO to design, acquire, install and maintain the New Equipment/Systems to be installed as set forth in **Schedule B (Installation Services)** and to provide other services, all as more fully set forth herein, subject to all the terms and conditions of the Contract (“the Project”);

WHEREAS, ESCO has made an assessment of the energy and water consumption characteristics of the Premises, and shall acquire, install, and be directly responsible for undertaking certain energy and water efficiency improvements and assisting in the facility's operation and management of the energy and water systems as this system relates to energy and water savings on the Premises as set forth in the Final Investment Grade Audit (“FIGA”) dated _____ and attached hereto and incorporated by reference as **Appendix A**;

WHEREAS, in order to minimize costs, maximize energy and water savings, and provide for the most efficient delivery of the services required under the Contract, the parties have agreed that ESCO's required services under the Contract shall be delivered in phases, as provided for herein; and

WHEREAS, CUSTOMER shall compensate ESCO for the Installation Services and all other Services pursuant to Part 4 **Schedule M (Payment Schedule)** of the Contract.

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

PART A – GENERAL PROVISIONS

Section 1: Definition of Terms

The following words shall have the following meanings as used in the Contract:

<u>DCAMM</u>	Division of Capital Asset Management and Maintenance
<u>DESIGNER</u>	The architect(s) or professional engineers (licensed and registered in the Commonwealth of Massachusetts) employed by or retained by ESCO for the Project.
<u>ECM</u>	Energy Conservation Measure
<u>Effective Date</u>	The latest date of the original execution of the Contract by one of the parties hereto.
<u>Existing Equipment/Systems</u>	All equipment and related systems existing at the Premises which are subject to the scope of the FIGA or any PIGA included in the FIGA, existing at the time of the Effective Date, and prior to the commencement of the Installation Services set forth in Schedule B .
<u>Final ECM/Equipment Acceptance Date</u>	The date (or the effective date) of the Final ECM/Equipment Acceptance Notice issued by CUSTOMER in accordance with Section 12.2(b)
<u>Final ECM/Equipment Acceptance Notice</u>	Written notice from CUSTOMER to ESCO indicating that it accepts the installation of a particular ECM(s) as 100% complete in accordance with Section 12.2 of the Contract.
<u>Final ECM/Equipment Completion Notice</u>	Written notice from ESCO to CUSTOMER indicating that the Installation Services for a particular ECM(s) are 100% complete and requesting CUSTOMER to issue a Final ECM/Equipment Acceptance Notice.
<u>Final Investment Grade Audit (FIGA)</u>	The Final Investment Grade Audit approved and accepted by CUSTOMER in accordance with the Contract for the Installation Services to be provided by ESCO and attached

hereto as **Appendix A**. Note that if the Project is being performed in Phases, the FIGA shall consist of all approved and accepted Phased Investment Grade Audits as approved for each Phase of Installation Services.

<u>Final Project Notice</u>	Written notice from ESCO to CUSTOMER indicating that all Installation Services are 100% complete and requesting Final Project Notification Approval in accordance with Section 12.4 of the Contract.
<u>Final Project Notification Approval</u>	Written notice from the CUSTOMER to ESCO indicating that CUSTOMER accepts all of the New Equipment/Systems installed by ESCO as 100% complete and that all other requirements of the Installation Period of the Contract have been met to the satisfaction of CUSTOMER, as provided in Section 12.4(a) of the Contract.
<u>Final Project Notification Approval Date</u>	The date (or effective date) of the Final Project Notification Approval issued by CUSTOMER in accordance with Section 12.4(b) of the Contract.
<u>Guaranteed Cost Savings</u>	The gross cost savings guaranteed under the Contract by ESCO to CUSTOMER as described in Section 22.1.
<u>Guaranteed Rebate Payments</u>	Rebate payments from local utilities guaranteed by ESCO which are included in the Total Contract Value.
<u>Guaranteed Savings Bond</u>	An annual renewable bond provided by ESCO (in the form specified in Section 28 of the Contract) as security for the Guaranteed Cost Savings required during Years 1 through 5 of the Performance Term of the Contract.
<u>Installation Schedule</u>	The schedule approved by CUSTOMER for the performance of the Installation Services as set forth in Schedule C .
<u>Installation Services</u>	The design, delivery, installation, and operation of the New Equipment/Systems to be performed by ESCO, as required by the Contract and all the other services described in Schedule B .
<u>Installation Period</u>	The Installation Period shall commence on the Effective Date and extend through CUSTOMER's approval of all Installation Services and issuance of the Final Project Notification as set forth in Section 6.1 herein. The Installation Period for each Phase ends at the Phase Completion Notification Date.
<u>Installation Period Costs</u>	All costs associated with the Installation Services.
<u>Laws</u>	All applicable statutes, regulations, ordinances, codes, laws, executive orders, decrees, approvals, certificates and

	requirements of governmental and quasi-governmental authorities.
<u>Letter of Credit</u>	An instrument provided by ESCO's financial institution (in the form specified in Section 22.1 of the Contract) to secure the Guaranteed Cost Savings required during Years 1 through 5 of the Performance Term of the Contract. A Letter of Credit may be used as substitute for a Guaranteed Savings Bond upon approval of CUSTOMER.
<u>Measurement and Verification (M&V)</u>	The measurement and verification of energy and water savings and performance of the Installation Services as provided for in Schedules E and F .
<u>M/WBE</u>	Minority and Women Business Enterprises as defined by Executive Orders 524 and 526.
<u>New Equipment/Systems</u>	The equipment and related systems to be furnished and installed by ESCO as set forth in Schedule B .
<u>Notice to Proceed</u>	A written notice from the CUSTOMER to ESCO directing ESCO to commence work on a Phase of Installation Services.
<u>Performance Term Commencement Date</u>	The first day of the month following the Phase Completion Notification Date for the first Phase of the Installation Services.
<u>Performance Term</u>	Unless otherwise terminated pursuant to the terms of the Contract, the Performance Term of the Contract shall begin on the Performance Commencement Date and shall continue for _____ years. [insert number of years consistent with cover page "Term"].
<u>Performance Term Costs</u>	The cost of maintenance, measurement and verification and all other Services over the Performance Term, not discounted to present value.
<u>Phase</u>	A group of ECMs, as set forth in Schedule B , that are issued jointly under one Notice to Proceed.
<u>Phase Completion Notification Date</u>	Where the Project is performed in phases, the Phase Completion Notification Date is the date of the Phased Completion Notification from CUSTOMER to ESCO indicating that CUSTOMER accepts all the New Equipment/Systems Installed for a Phase and its operation as 100% complete.
<u>Phase Contract Value</u>	The total value of each individual Phase of the Contract for delivery and installation of all ECMs and provision of all other services as set forth in the Phased Investment Grade Audit, Schedule B , and Schedule M as of the Effective Date.

<u>Phased Investment Grade Audit</u>	To the extent that the Project is being conducted using a “phased” approach, the “Phased Investment Grade Audit” shall refer to the individual approved and accepted audit for each Phase of Installation Services for the Project and shall be included in the FIGA at Appendix A upon approval and acceptance by CUSTOMER. (For reference purposes, each Phased Investment Grade Audit shall be referred to by number. For example, “Phase 1 Investment Grade Audit”, Phase 2 Investment Grade Audit”, etc.)
<u>Project Engineer</u>	DCAMM’s representative reporting to the Project Manager.
<u>Project Manager</u>	DCAMM’s representative responsible for overseeing the planning, design and construction of this Project.
<u>Resident Engineer</u>	DCAMM’s on-site representative.
<u>Services</u>	All services to be performed by ESCO in accordance with the Contract.
<u>Shortfall</u>	The difference between the Verified Cost Savings and the Guaranteed Cost Savings, as measured by procedures established in Schedule F .
<u>Site</u>	The land and, if applicable, any buildings (or space within any such buildings) on which or in which ESCO is to perform the Services, or as more specifically provided in the description of the “Premises” set forth on page 1 of the Contract.
<u>Subcontractors</u>	Any person or entity retained by ESCO to provide any Services required by ESCO under the Contract, including but not limited to the provision of professional services (such as engineering or design services), labor and materials or labor only (whether for installation or maintenance).
<u>Substantial Completion</u>	Occurs for each ECM only upon CUSTOMER’s acceptance of ESCO’s Substantial Completion Notice confirming the successful operation of each individual ECM for thirty (30) consecutive calendar days and issuance of a Substantial Completion Approval Notice in compliance with Section 12.1 of the Contract.

<u>Substantial Completion Date</u>	The effective date upon which CUSTOMER accepts an ECM(s) as substantially complete, in accordance with Section 12.1(d) of the Contract.
<u>Substantial Completion Approval Notice</u>	CUSTOMER's written notice to ESCO that it accepts an ECM(s) as substantially complete as of the Substantial Completion Approval Date, in accordance with Section 12.1(c) of the Contract.
<u>Substantial Completion Approval Request</u>	Written notice from ESCO to CUSTOMER certifying that ESCO has completed all closeout procedures for a particular ECM(s) and requesting that CUSTOMER accept ESCO's proposed Substantial Completion Date in accordance with Section 12.1(b) of the Contract.
<u>Substantial Completion Notice</u>	Written notice from ESCO to CUSTOMER, in the form prescribed by DCAMM, informing CUSTOMER that the required Installation Services for a particular ECM(s) is complete and the date upon which ESCO intends to begin the required thirty (30) calendar days of consecutive operation, in accordance with Section 12.1(a).
<u>Termination Payment</u>	The payment to be made by CUSTOMER to ESCO in the event of a termination of the Contract pursuant to Section 30 and calculated in accordance with Schedule M .
<u>Total Contract Value</u>	The total of the Installation Period Costs and Performance Term Costs.
<u>Utility Rates</u>	The baseline unit cost for each utility as established in Schedule E, Part III .
<u>Verified Cost Savings</u>	The savings achieved and verified as calculated by the formulae set forth in Schedule F , the Measurement and Verification Plan.
<u>Year</u>	Each twelve-month period within the Performance Term of the Contract, the first of which commences on the Performance Commencement Date.

Section 2: Contract Documents

The Contract incorporates and makes part hereof certain Schedules, Exhibits and Appendices which have been approved and accepted by the parties as follows:

- 2.1 Schedules.** In addition to the FIGA (which includes the Phased Investment Grade Audits attached hereto as Appendix A), the Contract incorporates and makes part hereof certain Schedules which have been approved and accepted by the parties as part of the Contract. If, by agreement of the parties, no FIGA has been prepared and accepted, then the scope of Services are as set forth in the referenced Schedules. Each NTP issued under **Schedule B** will formally amend relevant schedules as noted

in the NTP. Copies of such agreed upon Schedules are listed below and attached hereto set forth in their entirety and made part of the Contract by reference:

Schedule A	Description of the Premises
Schedule B	Phased Installation Services
Schedule C	Construction/Installation Schedule
Schedule D	Design Services and Procedures
Schedule E	Baseline Energy Consumption and Utility Rates
Schedule F	Savings Measurement & Verification Formulae
Schedule G	Systems Start-Up and Commissioning; Operating Parameters of Installed New Equipment/Systems
Schedule H	Standards of Comfort
Schedule I	ESCO Monitoring, Maintenance and Service Work
Schedule J	CUSTOMER's Maintenance Responsibilities/Existing Contracts
Schedule K	New Equipment/Systems Warranties and ESCO's Service Requirements
Schedule L	ESCO's Training Responsibilities
Schedule M	Payment Schedule and Termination Values
Schedule N	Close-out Procedures and Forms
Schedule O	Instructions/Model Forms for Submission of Project Change Requests
Schedule P	Prevailing Wage Rates
Schedule Q	Goals for Participation by M/WBE and Equal Employment Opportunity, Anti-discrimination, and Affirmative Action Program (Executive Order No. 524 and No. 526)
Schedule R	ESCO's Requirements for Resident Engineer and Field Offices
Schedule S	Other Services Provided by ESCO
Schedule T	Sustainable Design Guidelines

2.2 Exhibits. The following additional requirements for the Contract are attached hereto as Exhibits and referenced below:

Exhibit I	Performance Bond
Exhibit II	Labor and Material Payment Bond
Exhibit IIa	Guaranteed Savings Bond/Letter Of Credit
Exhibit III	Insurance Certificates
Exhibit IV	Trench Application and Permit Documents
Exhibit V	Certificate of Compliance with State Tax Laws and With Unemployment Compensation Contribution Requirements
Exhibit VI	Vote of Corporation
Exhibit VII	Affidavit of Compliance
Exhibit VIII	Compliance and Certification Forms for Certified Payroll, MBE/WBE and Workforce Requirements
Exhibit IX	Contract Certification for Executive Order 504

2.3 Appendices. The following appendices have been approved and accepted by the parties as set forth herein:

Appendix A FIGA Acceptance and Phased Final Investment Grade Audit.

- 2.4 Entire Agreement.** The provisions of the Contract and any amendments thereto and attached Schedules, Exhibits and Appendices shall compile the entire agreement between the parties.
- 2.5 Priority.** To the extent that there is a conflict or ambiguity between the Contract and the FIGA, the provisions of the Contract shall control.
- 2.6 Days.** Unless otherwise indicated in the CONTRACT, all references to “days” shall mean calendar days.

Section 3: Total Contract Value

The agreed to Total Contract Value is for all the Services set forth in Section 5 and detailed in **Schedule B** and **Appendix A**.

The Total Contract Value is set forth in **Schedule M**.

Section 4: Payment

Prior to the issuance of the Notice to Proceed for each Phase of Installation Services, the parties agree that **Schedule M** shall be modified to include a payment schedule (subject to CUSTOMER's approval) for the Installation Period Costs and Performance Term Costs associated with such Phase of Installation Services. **Schedule M** may only be further modified by written approval of CUSTOMER.

4.1 Compensation for Installation Services.

- a. Unless otherwise agreed to in writing by the parties, DCAMM shall be responsible for the payment of all Installation Period Costs to ESCO in accordance with the provisions herein and in **Schedule M** (and as further detailed in **Table M-1A** of **Schedule M**).
- b. Provided ESCO is not in default of its obligations hereunder, upon issuance of a Phase Completion Notification Approval for each Phase of Installation Services, DCAMM shall pay ESCO the Installation Period Costs for each such Phase of Installation Services, in accordance with this Section and the payment schedule set forth in **Schedule M** (and as further detailed in **Table M-1A** of **Schedule M**).
- c. Unless otherwise specifically provided for in **Schedule M**, the parties agree that no payments are due to ESCO and ESCO shall not be entitled to any payments from DCAMM for any Installation Services until such time as the Phase Completion Notification has been issued by DCAMM for such Phase Installation Services.
- d. Upon completion of all Installation Services and issuance of the Final Project Notification, **Schedule M** shall be modified to include the payment schedule for ALL Installation Period Costs for the Project. In the instance where there is only one Phase of Installation Services, then the Phase Completion

Notification Approval for that Phase shall be considered the Final Project Notification Approval.

- e. DCAMM shall cause all undisputed payments to be made to ESCO on a timely basis in accordance with **Schedule M** and Section 4.4 herein.

4.2 Compensation for Performance Term Services. Unless otherwise agreed to in writing by the parties, DCAMM shall be responsible for the payment of all Performance Term Costs to ESCO in accordance with the provisions herein and in **Schedule M** (and as further detailed in **Table M-1B** of **Schedule M**). Provided ESCO is not in default of its obligations hereunder, DCAMM shall cause all undisputed payments for Performance Term Services to be made to ESCO in accordance with the payment schedule provided for in **Schedule M** and Section 4.4 herein. Where the Installation Services consists of multiple Phases of Installation Services resulting in multiple Phases of Performance Term Services, upon completion of each Phase of Installation Services and the issuance of Phase Completion Notification Approval for such Phase, the parties agree that **Schedule M** shall be amended to incorporate the payment schedule for each Phase of Performance Term Services.

4.3 Schedule of Values. Within thirty (30) calendar days of the Effective Date, ESCO shall submit a finalized Schedule of Values for each Phase of Installation Services by ECM, in accordance with Schedule M. The Schedule of Values for the various portions of the Services, including quantities, shall aggregate the Total Installation Period Costs and divided so as to facilitate progress of work and evaluation of project changes. The Schedule of Values shall detail the Services performed by either Minority-Owned Business Enterprises (MBE) or Women-Owned Business Enterprises (WBE), as set forth in **Schedule Q**. The schedule shall be prepared in such format as CUSTOMER may approve, and shall include data to substantiate its accuracy. When approved by CUSTOMER, it shall constitute the Schedule of Values and be incorporated in **Schedule M, Part II** to the Contract.

4.4 Request for Payment. ESCO shall submit to CUSTOMER Requests for Payment in accordance with the timetable and procedures provided for in **Schedule M**. Provided that ESCO is not in default of the Contract, CUSTOMER shall pay ESCO within forty-five (45) calendar days of receipt of ESCO's Request for Payment.

4.5 Late Payments. Payment due either party hereunder shall be due and payable within forty-five (45) calendar days of the invoice date. Interest shall accrue on any past due balance owed to either party hereunder at the rate established by the Comptroller of the Commonwealth in accordance with Massachusetts General Laws, Chapter 29, Section 29C. This remedy shall be in addition to, and not exclusive of, any other remedy available under the Contract or applicable Laws.

4.6 Accelerated Payment. DCAMM may, at its sole option, elect to accelerate payment for Installation Period Costs. In order to exercise its option to accelerate such payments, DCAMM shall notify ESCO and FACILITY in writing of its intent to make an "Accelerated Payment". Such Accelerated Payment shall release all financial obligations of DCAMM to ESCO for Installation Period Costs. All other portions of the Contract shall remain in full force and effect. Upon payment of the Accelerated Payment, ESCO shall notify CUSTOMER in writing that all of CUSTOMER's financial

obligations have been met and shall transfer title of New Equipment/Systems to CUSTOMER, pursuant to Section 17.

- 4.7 Certification by ESCO.** If CUSTOMER so requests in writing, ESCO shall certify to CUSTOMER, on a monthly basis, that payments owed by ESCO to Subcontractors and not under dispute have been paid in a timely fashion and that ESCO has satisfied its current payment obligations regarding the New Equipment/Systems.

Section 5: Scope of Services

ESCO shall supervise and direct the Services and shall be solely responsible for all design, construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Services under the Contract. ESCO shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and work necessary for the proper execution and completion of the Services.

CUSTOMER agrees to purchase and ESCO agrees to provide the New Equipment/Systems, together with design, installation, financing and maintenance necessary to complete all Installation Services identified in **Schedule B** and all other Services as provided herein, pursuant to the terms and conditions of the Contract.

The Services for the Project shall consist of the following and shall be performed in accordance with the Contract Term, unless otherwise agreed to in writing by the parties:

- 5.1 Installation Services.** ESCO and CUSTOMER agree that the Installation Services required by the Contract shall be performed in phases as set forth in **Schedule B**.

The Scope of Services for each of the Phases of Installation Services shall be set forth in **Schedule B** and shall be based on the approved Phased Investment Grade Audit, unless otherwise agreed in writing by the parties.¹

For each Phase of Installation Services, CUSTOMER shall issue a Notice to Proceed with Installation Services. In no event shall a Notice to Proceed with any Phase of Installation Services be issued prior to CUSTOMER's approval and acceptance of the Phased Investment Grade Audit for such Phase of Installation Services unless no Phased Investment Grade Audit is required in accordance with Section 2.1 of the Contract.

Upon CUSTOMER's issuance of a Notice to Proceed with Installation Services for a particular Phase of Installation Services, ESCO shall design, construct, and install the energy and water savings equipment at/for the Premises pursuant to the specifications for that Phase of Installation Services as set forth in **Schedule B** (Installation Services). The Installation Services set forth in **Schedule B** shall proceed in accordance with the Construction/Installation Schedule in **Schedule C**.

- 5.2 Maintenance, Repair and Training Services.** ESCO shall be responsible for maintaining, repairing, training and testing for certain energy and water savings

¹ For purposes of consistency and clarity, the parties shall refer to each Phase of Installation Services and the Phased Investment Grade Audit by number as defined in Schedule B, i.e., Phase 1 (or 2, 3, etc.) of Installation Services; Phase 1 (or 2, 3, etc.) of Investment Grade Audit.

equipment as set forth herein and in **Schedules I, K and L** including, but not limited to the provision of Operation and Maintenance Manuals and training of CUSTOMER's designees.

- 5.3 Measurement and Verification Services.** ESCO shall be responsible for the Measurement and Verification of the energy and water savings and performance of the Installation Services as set forth herein and in **Schedules E and F**.
- 5.4 Other Services.** ESCO shall be responsible for all other Services necessary to complete the Project, including but not limited to those detailed in **Schedule S**.

Section 6: Contract Term

The parties agree that time is of the essence for the completion of the Services required by the Contract. For purposes of the Contract, the duration of ESCO's duties shall be subdivided and referred to as follows:

- 6.1 Installation Period.** The Installation Period shall commence on the Effective Date and extend through the last day of the month of the issuance of the Final Project Notification Date as set forth in Section 12.3 of the Contract. By executing the Contract, the parties confirm and agree that the Installation Period is a reasonable period for completing the design requirements and obtaining required design approvals; obtaining all necessary governmental permits and approvals; addressing any and all preconstruction issues; and performing the Installation Services. As set forth in Section 11.4 of the Contract, if ESCO is delayed at any time in the progress of the Installation Services by an act or neglect of CUSTOMER or by labor disputes, fire or unavoidable casualties or other causes beyond the control of ESCO, then the Installation Period shall be extended by Change Order, as set forth in Section 13 herein, for such reasonable time as the parties may agree. In such event, ESCO shall not be entitled to any change to the Total Contract Value or damages for such delay and shall be allowed to an extension in time only.
- 6.2 Performance Term.** The Performance Term of the Contract shall commence on the first day of the month following the Final Project Notification Date of the Installation Services as determined in accordance with Section 12.4 of the Contract (which shall be known as the "Performance Commencement Date") and shall extend for **insert number of years up to 20** years in accordance with Section 22 of the Contract and **Schedule F** of the Contract. Except, where the Project is being performed in multiple Phases, then the Term or Performance Term of the Contract shall commence on the first day of the month following the Phase Completion Notification Date for Phase 1 of the Installation Services as determined in accordance with Section 12.3 of the Contract and shall extend for **insert number of years up to 20** years in accordance with Section 22 and **Schedule F** of the Contract.

The parties agree that where there are multiple Phases of Installation Services, the Phase Completion Notification Date for Phase 1 of the Installation Services shall be the commencement date of the Performance Term for ALL Phases of Installation Services required under the Contract.

The parties agree that all energy and water cost savings during the Installation Period through the Performance Commencement Date shall be fully credited to FACILITY

and shall NOT be considered as part of the cost savings guarantee required by ESCO set forth in Section 22 of the Contract.

PART B – INSTALLATION SERVICES

Section 7: Design Requirements and Approvals

- 7.1 Design.** Prior to the installation of the applicable ECMs, ESCO shall submit 50% and 90% and 100% designs for ECMs as outlined in **Schedule D**, unless otherwise noted in **Schedule D**.

Designs shall follow guidelines established in **Schedule D (Design Services and Procedures)**. No Installation Services shall proceed on those ECMs until the 100% design has been accepted. ESCO must have all drawings and design documents stamped by a Massachusetts registered professional engineer for each corresponding discipline, as required. ESCO shall provide three (3) CDs with electronic PDF files of the drawings and at least three (3) paper copies of the same. ESCO shall also provide three (3) CDs, with electronic PDF files containing copies of the required specifications and three (3) paper copies of the same. In addition, in lieu of drawings, ESCO shall, if approved by DCAMM in writing, provide three (3) CDs (in electronic spreadsheet format) containing a detailed inventory of repairs and lighting, steam traps, and/or water fixtures and a minimum of four (4) paper copies of the same.

- 7.2 Design Review and Acceptance.** Upon approval of test installations, as required, under Section 7.5, the design shall be submitted for DCAMM review and acceptance according to Section 7.1. ESCO shall not proceed to install those ECMs submitted for design review until the design has received written acceptance from DCAMM. Such acceptance shall not be unreasonably withheld or delayed. CUSTOMER shall have a minimum of fourteen (14) calendar days to review designs submitted in accordance with Section 7.1 and **Schedule D**. DCAMM shall notify ESCO within a maximum of thirty (30) calendar days if the design is acceptable.
- 7.3 Standards of Service.** ESCO shall perform all Services in such a manner that is in accordance with sound engineering and safety practices and in compliance with the Standards of Comfort described in Section 20 and **Schedule H**, and any amendments thereto. ESCO shall perform the Services in accordance with **Schedule T**, as applicable.
- 7.4 Notice of Deficiencies in Existing Equipment/Systems Prior to Commencement of Installation Services.** If, prior to the commencement of the Installation Services, ESCO is aware or becomes aware of any deficiencies in the Existing Equipment/Systems that were not noted in the FIGA that may: (1) prevent ESCO from completing the Installation Services set forth in **Schedule B**; (2) prevent the New Equipment/Systems from meeting the Standards of Comfort specified in Section 20 and **Schedule H** of the Contract; (3) prevent ESCO from meeting the Guaranteed Cost Savings set forth in Section 22; and/or (4) prevent ESCO from meeting any other contractual requirements under the Contract, then ESCO shall provide

immediate written notice to DCAMM of such deficiencies, which notice shall be given prior to ESCO's commencement of the Installation Services.

ESCO's notice of such deficiencies in the Existing Equipment/Systems shall include specific detail regarding the nature the deficiencies and recommendations by ESCO for the correction thereof in order to meet the contractual requirements. Upon receipt of notice of deficiencies, ESCO and DCAMM shall determine what, if any potential changes in ESCO's proposed design, New Equipment/Systems and/or Installation Services may be required to meet these contractual requirements prior to the commencement of the Installation Services. If the parties are unable to reach agreement on the changes or potential changes required and the responsibility of cost, the dispute shall be resolved in accordance with Section 31 of the Contract.

7.5 Test Installations. CUSTOMER shall work with ESCO to identify areas suitable for test installation, as required. At a minimum of two (2) weeks prior to final design acceptance in accordance with Section 7.2 above, or prior to DCAMM's acceptance of New Equipment/Systems submittals under Section 7.7, ESCO shall perform test installations of mutually agreed upon New Equipment/Systems for selected ECMs in specified locations on the Premises. CUSTOMER shall inspect each test installation to determine whether the proposed ECMs meet the needs of the CUSTOMER.

7.6 ESCO's Use of Subcontractors. ESCO may use Subcontractors in meeting its obligation hereunder provided that in each case, ESCO shall remain fully liable for all work under the Contract.

In the event that ESCO retains Subcontractors to perform any design, engineering, installation or other Services required under the Contract, ESCO shall provide CUSTOMER with a written description of the qualifications of each Subcontractor for CUSTOMER'S approval prior to proceeding with any Services under the Contract, such approval not to be unreasonably withheld. CUSTOMER reserves the right to reject any Subcontractors, such right not to be unreasonably exercised.

ESCO shall pay, or cause payments to be made, for all labor performed or furnished and for all materials used or employed in carrying out the Contract.

7.7 Submittals. Prior to the installation of the New Equipment/Systems, ESCO shall provide DCAMM with six (6) copies of descriptive literature, specifications and, if required, sample products and related warranties and New Equipment/Systems maintenance agreements for DCAMM review.

Unless otherwise provided for in the FIGA and specifically excluded from the requirements of the Contract, prior to installation of the New Equipment/Systems, ESCO shall measure existing conditions as discussed in the M&V Plan, **Schedule F**, including lighting levels and other appropriate conditions, at sample locations throughout affected areas of the FACILITY and submit such information to DCAMM. ESCO shall not commence any Services prior to DCAMM's review of required submittals.

Documentation and format for New Equipment/Systems review may be determined by DCAMM and shall include ESCO submittals in hardcopy including, but not limited

to: New Equipment/Systems description, location key for New Equipment/Systems, manufacturer cut sheets and shop drawings, if necessary.

7.8 As-Builts. ESCO shall provide CUSTOMER with duplicate paper copies of "as-built" drawings, where such drawings are required for permit or design review/compliance purposes, of all modified conditions, excluding repair of existing systems and installation of lighting and plumbing fixtures, associated with the Project conforming to typical engineering standards. All drawings shall be stamped by a Massachusetts registered professional engineer for each corresponding discipline, as applicable, and shall be on bond paper, full size (30" x 42"). Six (6) CD's with electronic copies of the as-builts shall be provided as follows: three (3) shall be in "TIFF" format of the stamped as-builts and three (3) in AutoCAD format. Three (3) CD's with electronic PDF files of specifications shall be provided. A detailed inventory of repairs and lighting, steam traps, and/or water fixtures shall be provided in lieu of drawings, three (3) in paper copy and three (3) CDs in electronic spreadsheet format.

7.9 ESCO's Duty of Proper Design and Installation. All Services called for by the Contract shall be performed by properly qualified and Massachusetts licensed professionals employed by ESCO and shall be performed in accordance with all Laws as set forth in Section 36 of the Contract. ESCO shall perform all tasks/phases under the Contract, including design and construction, and shall install the New Equipment/Systems in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth herein and in **Schedule D (Design Services and Procedures), Schedule H (Standards of Comfort) and Schedule T (Sustainable Design Guidelines).**

ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under the Contract. DCAMM reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the reasonable opinion of DCAMM, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action caused by ESCO's breach of its obligations under the Contract shall be borne by ESCO. All construction and installation by ESCO shall be in compliance with all applicable federal, state and local building, fire and other codes in existence as of the date of the Contract. ESCO shall remain responsible for the professional and technical accuracy of all Services performed, whether by ESCO, its consultants or its Subcontractors, or others on its behalf, throughout the Contract Term.

7.10 Design Warranty.

ESCO warrants that for a period of three (3) years from the Phased Completion Notification Date for each Phase of Installation Services, the design specified by ESCO shall meet the criteria set forth in the FIGA and the Standards of Comfort.

During this three-year warranty period related to design, ESCO shall make at its own cost any repairs or modifications to the Installation Services that are necessary to restore compliance with such requirements. The three-year (3) limitation of this warranty shall not be construed so as to limit, waive or modify any other obligations under the Contract.

If the parties cannot reasonably agree on the resolution of any disputes related to this Section, then such disputes shall be resolved in accordance with Section 31 of the Contract.

7.11 Performance Guarantee. ESCO guarantees to CUSTOMER the following:

- a. Products provided by ESCO meet or exceed the published catalog ratings and that these ratings were accurately used in the calculation of energy and water savings estimates.
- b. Representations made concerning energy or water consumption in its calculations in **Schedule F** are accurate.
- c. The design of each ECM enables the ECM to meet or exceed the estimated or Guaranteed Cost Savings shown in **Schedule F**.

7.12 Maintenance Staff. ESCO shall not install New Equipment/Systems that will require FACILITY to hire additional personnel to operate, unless such requirements and the costs associated with the same are detailed in the FIGA and specifically approved in writing by FACILITY. ESCO shall explain the operation and maintenance requirements of all proposed New Equipment/Systems in design submittals.

Section 8: Permits and Approvals

All required permits, approvals and licenses required by Laws for the installation, use and operation of the New Equipment/Systems, including without limitation, all federal, state and local building, plumbing and electrical permits and utility Interconnection Agreements, shall be secured and paid for by ESCO prior to commencement of the Installation Services or Final ECM/Equipment Acceptance Date, as appropriate for the respective permits, approvals and licenses. CUSTOMER shall use its reasonable efforts to assist ESCO in obtaining such necessary permits and approvals for installation of the New Equipment/Systems. In no event shall CUSTOMER, however, be responsible for payment of any permit or license fees. The New Equipment/Systems and the operation of the New Equipment/Systems by ESCO shall, upon acceptance, conform to all federal, state and local code requirements. Before commencing any Services requiring a permit or license, ESCO shall furnish copies of each such required permit or license to CUSTOMER. FACILITY shall be responsible to obtain any permits for operation of the New Equipment/Systems during the Performance Term.

Section 9: Working Relationships

9.1 CUSTOMER Authorization/Approval. DCAMM shall retain ultimate approvals over Scope of Services, the qualifications of ESCO's consultants and Subcontractors, New Equipment/Systems installed, and end use conditions. No Services shall proceed without written consent of DCAMM; however, such consent shall not be unreasonably withheld or delayed. For purposes of the Contract, the Commissioner of DCAMM or his/her designee, in consultation with the FACILITY, or his/her designee, shall be authorized to provide approvals, consent, acceptance, or any other procedural authorization related to the installation of the New Equipment/Systems required to be

provided to ESCO under the Contract. DCAMM shall have a maximum of twenty (20) calendar days to either accept or reject ESCO's submittals.

- 9.2 ESCO's Superintendent and Supervision.** ESCO shall provide, during the progress of the installation and testing, a competent and Massachusetts licensed construction superintendent in accordance with applicable law, a Project Manager with experience managing a similar construction project of size and scope and any necessary assistants. Appointment of the Superintendent shall be subject to the approval of DCAMM. The superintendent shall represent ESCO, and all directions or notices given to the superintendent shall be binding on ESCO.

The superintendent shall give efficient supervision to the work, using his or her best skill and attention. The superintendent shall see that the work is of high quality and is carried out in accordance with the Contract. The superintendent shall establish all lines, level, and marks, if any, necessary to facilitate the operations of all concerned in such installation.

ESCO shall establish an emergency telephone number by which CUSTOMER or respective agents may contact the superintendent during non-working hours. DCAMM shall have the right to halt the Installation Services without liability for any delays incurred while the required superintendent is not present on the Site, while work is being performed by ESCO or its Subcontractors.

- 9.3 ESCO Responsibility.** ESCO shall remain responsible for the professional and technical accuracy of all Services performed, whether performed by ESCO or its Subcontractors or others on its behalf, throughout the Contract Term.
- 9.4 Coordination During Installation.** ESCO shall coordinate the activities of ESCO's employees and/or Subcontractors with those of FACILITY, its employees, and agents. ESCO shall not commit or permit any act which will interfere with the performance of the normal activities conducted by FACILITY or its employees on the Premises without prior written approval of FACILITY.
- 9.5 ESCO Site Office.** FACILITY shall provide adequate space on the Site for ESCO's office trailer and lay down space and necessary storage as detailed in **Schedule R**. ESCO shall be responsible for any connections and payment of temporary utilities including, but not limited to, telephone and electric. Upon completion of construction, the Site shall be restored by ESCO to its original condition.
- 9.6 CUSTOMER Field Office.** An office shall be provided by ESCO as detailed in **Schedule R**. ESCO shall be responsible for any connections and payment of temporary utilities including, but not limited to, telephone and electric. Upon completion of construction, the Site shall be restored by ESCO to its original condition.
- 9.7 Removal of Employee or Subcontractor.** CUSTOMER has the right to request in writing that ESCO remove a staff member or a Subcontractor from the Project for reasons stated in writing.
- 9.8 Project Meetings.** ESCO shall schedule weekly meetings of ESCO and CUSTOMER to review progress on each Phase, agree on any redirection, ensure

that good workmanship is maintained, coordinate any outside work with schedules and restrictions, and otherwise maintain quality control. ESCO shall take minutes of each meeting in a manner acceptable to CUSTOMER and shall distribute such minutes to all attendees and any other persons agreed upon by the parties no later than five (5) calendar days prior to the next scheduled meeting. CUSTOMER shall have at five (5) calendar days to make corrections to minutes. Such corrections shall be deemed accepted by CONTRACTOR unless objections are provided to CUSTOMER in writing within three (3) calendar days of CUSTOMER's distribution of corrections.

9.9 Salvage Value. CUSTOMER reserves the right to salvage any Existing Equipment/Systems replaced by ESCO, provided that no utility incentive program prohibits said salvage. If CUSTOMER does not notify ESCO in writing five (5) calendar days prior to the commencement of Installation Services if its intent to salvage such Existing Equipment/Systems, then ESCO shall have the right to salvage.

9.10 Temporary Utilities. ESCO must maintain Standards of Comfort at the Premises at all times, unless otherwise approved by FACILITY. ESCO shall provide for proper notification, temporary utilities, and other measures to ensure that the Standards of Comfort outlined in **Schedule H** are maintained at the Premises.

Section 10: Location and Access

10.1 ESCO Access. ESCO acknowledges that there exists sufficient space on the Premises for the installation and operation of the New Equipment/Systems. FACILITY shall take reasonable steps to protect such New Equipment/Systems from harm, theft and misuse during the Contract Term. With reasonable notice, FACILITY shall provide access to the Premises for ESCO to perform any services related to the Contract during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to FACILITY. ESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. ESCO's access to the Premises to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by FACILITY. ESCO shall immediately notify CUSTOMER when emergency action is necessary and follow up with written notice within three (3) calendar days specifying the action taken, the reasons therefore, and the impact upon the Premises, if any.

10.2 CUSTOMER Access and Document Access

- a. CUSTOMER shall have access to inspect the work conducted on the Premises, during the Contract Term.
- b. CUSTOMER shall have reasonable access to the books, records, and other compilations of data which pertain to the performance the Services. Records shall be kept in accordance with generally accepted accounting principals, and calculations kept on file in legible form. CUSTOMER shall provide ESCO with reasonable notice prior to exercising its rights under this subparagraph and ESCO shall be afforded a reasonable opportunity to make books, records and data available. CUSTOMER shall provide access to the Premises for ESCO, its employees, agents, and Subcontractors, during normal business

hours, or such other hours as may be required by ESCO, for the purpose of carrying out ESCO's obligations under the Contract.

- c. Pursuant to Executive Order No. 195, the Governor or his designee, the Secretary of Administration and Finance, and the State Auditor or his designee shall have the right at reasonable times and upon reasonable notice to examine the books, records, and other compilations of data of ESCO which pertain to the performance and requirements of the Contract under Section 47.

10.3 Utility and Other Third Party Access. Upon request by any utility company providing service to the Site (or its agent or other third party) and with prior consent of FACILITY which consent shall not be unreasonably withheld, FACILITY shall agree to allow such utility company (or other approved agent or third parties) to interview FACILITY and to enter the Site at reasonable times throughout the life of the installed New Equipment/Systems to install metering equipment, perform energy and water audits or inspect the Premises and any New Equipment/Systems installed. FACILITY also agrees to cooperate with such utility company (or its agent or third party) upon request and with prior consent of FACILITY, in conducting such activities and/or in analyzing energy and water savings. At all times a representative of FACILITY (or its agent) shall be present during such inspections.

Section 11: Installation Commencement and Progress

11.1 Commencement of the Installation Services. ESCO shall commence the Installation Services in accordance with the Construction/Installation Schedule set forth in **Schedule C** and upon a Notice to Proceed as set forth in **Schedule B**.

11.2 Sequence and Scheduling. The sequence and scheduling of the Installation Services is subject at all times to DCAMM approval, such approval not to be unreasonably withheld. DCAMM may interrupt or postpone work whenever concerns for safety or operations require it. Otherwise, the Installation Services shall proceed in accordance with the Construction/Installation Schedule approved by DCAMM and attached hereto as **Schedule C**. Due to the operating hours of the Premises, second and third shift work may be required during the installation of the New Equipment/Systems. Scheduling of work during peak operating hours (as defined in **Schedule C**) shall be subject to CUSTOMER's reasonable approval. Security shall be provided by CUSTOMER as needed at CUSTOMER's cost if such shifts are upon the request of CUSTOMER. Additional security costs required by ESCO's schedule shall be borne by ESCO.

11.3 Progress of the Installation Services

- a. **Construction/Installation Schedule.** ESCO shall perform the Installation Services in accordance with the **Schedule C**, unless otherwise agreed to by CUSTOMER.
- b. **Periodic Estimates/Schedule Updates.**
 - i. ESCO shall, on a monthly basis, submit to DCAMM (on forms and in the manner prescribed by DCAMM) an estimate showing the total

amount of New Equipment/Systems installed to the time of such estimate and the value thereof as approved by DCAMM. It shall be the sole responsibility of ESCO to deliver or cause to be delivered to DCAMM, said periodic estimate in proper form, approved as provided above and mathematically correct. All periodic estimates shall contain such certifications and other evidence supporting ESCO's progress with the Installation Services. DCAMM's review of the periodic estimate is intended to be for verification of the status of the Installation Services and does not constitute any payment or other obligations on behalf of DCAMM, unless otherwise provided for in **Schedule M**.

- ii. ESCO must provide the periodic estimates required in this Section 11 in order to achieve Substantial Completion for each Phase of the Services.
- iii. Each periodic estimate shall constitute ESCO's representation that the materials, supplies and New Equipment/Systems have been installed and are insured in accordance with the provisions of the Contract.
- iv. DCAMM may make reasonable changes in any periodic estimate submitted by ESCO. Prior to Phase Completion Notification Approval, adjustments to the payments due to ESCO or the savings calculation, maintenance, or guarantees or other applicable Performance Term schedules shall be made in accordance with the changes so made.
- v. To the extent that progress payments to ESCO are provided for in **Schedule M**, such periodic estimates shall not serve as the basis of any such progress payments unless approved in writing by DCAMM and consistent with the payment schedule provided for in **Schedule M**.
- vi. ESCO's failure to provide the periodic estimates required in this Section 11 may constitute an event of default under the provisions of the Contract.
- vii. ESCO shall furnish weekly certified payroll reports to DCAMM at no additional expense to DCAMM. ESCO further agrees to include a provision in all of its subcontracts for the Services that requires all Subcontractors furnishing labor during the Contract Term to also provide weekly certified payroll reports at DCAMM's request at no additional expense to DCAMM. DCAMM may at all reasonable times audit such reports.

11.4 Delays in the Installation Services.

- a. Notwithstanding any provision of the Contract to the contrary, except as otherwise provided by law or as set forth herein, ESCO shall not be entitled to additional compensation under the Contract or to receive damages on account of any hindrances or delays, avoidable or unavoidable; but if any delay is excusable in the reasonable opinion of DCAMM, ESCO shall be entitled to an extension of time for the Construction/Installation Period. The

length of the extension shall be sufficient in the reasonable opinion of DCAMM for ESCO to complete the Installation Services. Although no delay shall increase the Total Contract Value, DCAMM may require that any change in the date by which ESCO must complete all or any part of the Installation Services be processed on a DCAMM standard Change Order form.

- b. If a suspension, delay, interruption or failure to act of CUSTOMER increases or decreases the guarantee of savings required in the Contract, ESCO or CUSTOMER may request an adjustment to the guarantee of savings as set forth in Section 22.1. CUSTOMER may require that any agreed upon change in the guarantee savings associated with the change in date be processed in accordance with the forms provided in **Schedule O**. If the parties cannot agree on such adjustment, then the dispute shall be resolved in accordance with Section 31.
- c. DCAMM may order ESCO in writing to suspend, delay, or interrupt all or any part of the work for such period of time as it may determine to be appropriate for the convenience of CUSTOMER, provided, however, that if there is a suspension, delay or interruption for fifteen (15) calendar days or more or due to a failure of CUSTOMER to act within the time specified in the Contract, the CUSTOMER shall make an adjustment in the Total Contract Value for any increase in the cost of performance of the Contract and for any documented "open-book" increase in the financing costs (as provided in the Total Contract Value spreadsheet in **Schedule B**) incurred by ESCO in the performance of the Contract, but said adjustment shall not include any profit to ESCO on such increase; and provided further, that DCAMM shall not make any adjustment in the Total Contract Value under this provision for any suspension, delay, interruption or failure to act to the extent that such is due to any cause for which the Contract provides for an equitable adjustment of the Total Contract Value under any other provisions of the Contract. CUSTOMER may require that any agreed upon adjustment in compensation due to ESCO under the terms of the Contract be processed in accordance with the DCAMM standard Change Order forms set forth in **Schedule O**.
- d. For any compensation sought by ESCO pursuant to this Section, ESCO shall submit the amount of a claim under Section 31, to DCAMM (if during the Installation Period) or FACILITY (if during the Performance Term), in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act and, in any event, not later than the date of ESCO's request for Phased Completion Notification Approval under the Contract. Except for costs due to a suspension order, CUSTOMER shall not approve any costs in the claim incurred more than thirty (30) calendar days before ESCO notified CUSTOMER in writing of the act or failure to act involved in the claim.

Section 12: Substantial Completion/Final Acceptance

12.1 Substantial Completion of the Installation. In accordance with the Installation Services set forth in **Schedule B**, ESCO shall substantially complete all of the Installation Services required by the Contract for all ECMs in accordance with the Construction/Installation Schedule set forth in **Schedule C**. Unless specifically

provided for in Section 4 or **Schedule M**, Substantial Completion shall not entitle ESCO to commencement of any payment obligations under the Contract.

- a. Upon completion of the required Installation Services for each individual ECM, ESCO shall send a notice ("*Substantial Completion Notice*") to DCAMM for each individual ECM informing DCAMM that the required Installation Services for such ECM are complete and the date on which ESCO intends to begin the required thirty (30) calendar days of consecutive operation for all New Equipment/Systems installed or associated with such ECM. The required *Substantial Completion Notice* shall be in the form prescribed by DCAMM, as set forth in **Schedule N**.
- b. Following the thirty (30) calendar days of consecutive operation of each ECM, ESCO shall submit to DCAMM a "*Substantial Completion Approval Request*" certifying that the ECM has operated successfully for thirty (30) consecutive calendar days and that ESCO has completed all closeout procedures specified in **Schedule N, Part I**, including any applicable technical specifications, and all testing (if required) and training has been completed. In the *Substantial Completion Approval Request* submitted by ESCO, ESCO shall indicate the Substantial Completion Date upon which it is seeking Substantial Completion to be effective. The *Substantial Completion Approval Request* shall be in the form prescribed by DCAMM, as set forth in **Schedule N**.
- c. Within fifteen (15) calendar days of receipt of the *Substantial Completion Approval Request*, DCAMM shall either:
 - i. Provide written approval of ESCO's Substantial Completion Approval Request by sending ESCO a "*Substantial Completion Approval Notice*"; or
 - ii. Notify ESCO in writing that it does not accept the *Substantial Completion Approval Request* and state the contractual reasons for non-acceptance, which shall not be unreasonably withheld.
- d. The Substantial Completion Date shall be the date requested by ESCO, in the *Substantial Completion Approval Request*, unless otherwise stated on *Substantial Completion Approval Notice* on which DCAMM notifies ESCO in writing that it accepts the installed ECM/Equipment requested. The warranty and maintenance obligations shall commence on the *Substantial Completion Date* as specified in **Schedules I, J and K**.
- e. Notwithstanding the foregoing, the parties agree that ESCO may request a partial *ECM Substantial Completion* for a particular ECM/Equipment that has been completed with respect to a particular building, provided that ESCO complies with all of the requirements for the issuance of a Substantial Completion Notice with respect to an ECM/Equipment for that building. This partial approval shall have the effect of commencing the warranty periods for the ECM/Equipment with respect to that ECM/Equipment or building in accordance with **Schedules I, J, and K**.

12.2 Final ECM/Equipment Acceptance. *Final ECM/Equipment Acceptance* shall occur for each individual ECM/Equipment when all requirements in this Section 12, **Schedule N** and any requirements noted by DCAMM in the *Substantial Completion Approval Notice* have been completed to the satisfaction of DCAMM. Upon completion of all such requirements, ESCO shall send to CUSTOMER a Final ECM/Equipment Completion Notice requesting *Final ECM/Equipment Acceptance* by CUSTOMER. The *Final ECM/Equipment Acceptance Notice* shall be in the form prescribed by DCAMM, as set forth in **Schedule N**.

- a. Within fifteen (15) calendar days of receipt of the Final ECM/Equipment Completion Notice, CUSTOMER shall:
 - i. Provide written approval of ESCO's *Final ECM/Equipment Completion Notice* by sending ESCO a "*Final ECM/Equipment Acceptance Notice*", or
 - ii. Notify ESCO in writing that it does not approve *Final ECM/Equipment Completion Notice* and state the contractual reasons for non-acceptance, which shall not be unreasonably withheld.
- b. The date on which CUSTOMER issues the *Final ECM/Equipment Acceptance Notice* shall be the *Final ECM/Equipment Acceptance Date* for each ECM and shall determine the date of the transfer of ownership pursuant to Section 17. Prior to the *Final ECM/Equipment Acceptance Date*, all savings calculations set forth in **Schedule F** shall be adjusted according to as-built conditions.

12.3 Phase Completion Notice. To effectuate the close-out of each Phase of Installation Services, ESCO shall send a notice ("*Phase Completion Notice*") to DCAMM, in the form prescribed by DCAMM and set forth in **Schedule N** after ESCO meets all of the requirements set forth Sections 12.1, 12.2 and **Schedule N** and this Section and after Final ECM/Equipment Acceptances have been issued for all ECMs in that Phase of the Installation Services and the operations of all such ECMs are 100% complete.

- a. Within thirty (30) calendar days of receipt of the *Phase Completion Notice*, CUSTOMER shall either:
 - i. Approve the *Phase Completion Notice* in writing by sending ESCO a "*Phase Completion Notification Approval*" in the form prescribed by DCAMM and set forth in **Schedule N**; or
 - ii. Notify ESCO in writing that it does not accept the "*Phase Completion Notice*" and state the contractual reasons for such non-acceptance, which shall not be unreasonably held. To the extent that there are disputed items between the parties subject to resolution under Section 31 of the Contract, CUSTOMER may agree to issue a conditional *Phase Completion Notification Approval* subject to the resolution of all outstanding items in that Phase of Installation Services.

- B. The date on which CUSTOMER notifies ESCO in writing that it accepts all the ECMs, New Equipment/Systems in a particular Phase of Installation Services and/or systems installed and its operation as 100% complete shall be the *Phased Completion Notification Date*.

12.4 Final Project Notice. ESCO shall send a notice ("*Final Project Notice*") to CUSTOMER, in the form prescribed by DCAMM as set forth in **Schedule N**, after ESCO meets all of the requirements set forth in this Section 12, **Schedule N** and this Section, and after all the New Equipment/Systems have been installed and the operations are 100% complete and a Phase Completion Notification Approval has been issued for each Phase of Installation Services.

- a. Within fifteen (15) calendar days of receipt of the *Final Project Notice*, CUSTOMER shall either:
 - i. Approve the *Final Project Notice* in writing by sending ESCO a "Final Project Notification Approval" in the form prescribed by DCAMM and set forth in **Schedule N**; or
 - ii. Notify ESCO in writing that it does not accept the "*Final Project Notice*" and state the contractual reasons for such non-acceptance, which shall not be unreasonably withheld. To the extent that there are disputed items between the parties subject to resolution under Section 31 of the Contract, DCAMM may agree to issue a conditional *Final Project Notification Approval* subject to the resolution of all such disputed items.
- b. The date on which DCAMM notifies ESCO in writing that it accepts all the Phases of Installation Services and their operation as 100% complete shall be the "*Final Project Notification Date*".
- c. DCAMM shall not be required to accept the Project as 100% complete until ESCO has complied with all of the closeout procedures in **Schedule N, Part III** for all Installation Services required under the Contract and ESCO has completed all other Installation Period obligations under the Contract.

Section 13: Changes in Scope of Services

Either CUSTOMER or ESCO may propose changes to the Scope of Services of the Contract or a particular ECM or Phase of the Installation Services provided for in the Contract if such changes are agreed upon in writing by both parties. ESCO may propose a list of any additional ECMs which it recommends (based on a careful engineering survey and information from CUSTOMER's staff), which provide energy and/or water savings. Any additional ECMs approved by the parties in writing must comply with **Schedule B** and be issued under a new Phase to the Contract. CUSTOMER may also recommend changes to the scope of the Services at any time. All requests for change orders related to the scope of an ECM must be submitted during the Installation Period and prior to the issuance of the Final ECM/Equipment Acceptance for such ECM in accordance with Section 12.2.

13.1 Change Orders Generally.

- a. As used herein the term "Change Order" shall mean a directive issued by CUSTOMER for a change in work as described in this Section 13. ESCO shall as soon as practical begin performing any Change Order work that is ordered by CUSTOMER. Whenever a Change Order is issued and said Change Order will cause a change in the Total Contract Value or the Guaranteed Cost Savings required under the Contract, ESCO or CUSTOMER may request an equitable adjustment in the Total Contract Value and/or the Guaranteed Cost Savings and **Schedule M** and/or **Schedule F** shall then be modified accordingly. A request for such an adjustment shall be in writing and shall be submitted by the party making such claim to the other party before commencement of the pertinent work or as soon thereafter as possible.
- b. No changes in the Services shall be made in absence of an approved Change Order as described herein. A request for a change in the provisions of the Contract shall be submitted in writing to CUSTOMER by ESCO or by CUSTOMER to ESCO. The request must be made in writing and in accordance with the provisions of the Contract and the instructions and forms set forth in **Schedule O** of the Contract.

13.2 Types of Change Orders. A Change Order may be issued by CUSTOMER for changes in the Installation Services and Performance Services within the scope of the Contract, including but not limited to, changes in: (1) the design; (2) the method or manner of performance of the Services; (3) CUSTOMER-furnished facilities, New Equipment/Systems, materials, services or Site; (4) the schedule for performance of the Services; (5) the Guaranteed Cost Savings required in Section 22 of the Contract; or (6) any other changes to the Contract, including the existence of latent or subsurface conditions. A Change Order cannot be used to add a new ECM or to make significant changes to an existing ECM. Such changes shall only be allowed as an amendment to **Schedule B** of the Contract providing there is written approval by the CUSTOMER and a written Notice to Proceed issued by the CUSTOMER to ESCO authorizing ESCO to proceed.

Upon receipt of such a request for Change Order due to latent or subsurface conditions from ESCO, or upon DCAMM's own initiative, DCAMM shall make an investigation of such conditions. If they differ substantially or materially from those which were documented in the FIGA (or Phased Investment Grade Audit for the applicable Phase of Installation Services) or should have been discovered during the preparation of the FIGA (or Phased Investment Grade Audit for the applicable Phase of Installation Services) and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work, which results in an increase or decrease in the cost of the work, DCAMM shall make an equitable adjustment in the Total Contract Value and the Contract shall be modified in writing accordingly.

13.3 Documentation and Submission of Change Order Requests. As indicated in Section 13.1 above, all requests for a Change Order must be made in writing and in accordance with the provisions of the Contract and the instructions and forms set forth in **Schedule O** of the Contract. In addition, at the request of CUSTOMER, ESCO shall submit any documentation necessary for CUSTOMER's review of a requested Change Order which will assist in the review and approval of the Change Order. Such documentation shall include, but not be limited to: a cost breakdown for

the work changes, energy/water cost savings estimate, a revised cash flow, shop drawings, and a description of the proposed change in scope.

- a. When submitting a cost analysis in support of a requested Change Order, ESCO shall include items requested in a standard construction change order. This includes, but is not limited to: labor (based on prevailing wage rates in **Schedule P**), equipment and materials; taxes and insurance and overhead and profit. ESCO shall use the forms required in **Schedule O** for submission of Project Change Requests.
- b. ESCO shall submit a revised cash flow which shall document changes to Total Contract Value, Project costs and Guaranteed Cost Savings (or expected cost savings). At CUSTOMER's request, ESCO shall submit detailed plans and specifications and any other supporting documentation for CUSTOMER's approval before CUSTOMER issues a formal "Notice of Intent" indicating CUSTOMER's approval and intent to proceed with the approved Change Order. Such "Notice of Intent" shall be issued in accordance forms provided in **Schedule O** and must be signed by the CUSTOMER.

13.4 Methods of Computing Equitable Adjustments.

- a. CUSTOMER and ESCO shall negotiate in good faith an agreement on an equitable adjustment in the Total Contract Value, and/or time if appropriate, before commencement of the pertinent work or as soon thereafter as is possible. In the absence of an agreement for an equitable adjustment, CUSTOMER shall unilaterally determine the costs attributable to the requested Change Order and provide ESCO with a written notice to that effect. ESCO may dispute such cost determination in accordance with Section 31 and have the right to such further appeal as is provided in M.G.L. c.30, §39Q only after exhausting the remedies provided for in Section 31 of the Contract.
- b. During the negotiation of an equitable adjustment in the Total Contract Value, ESCO shall, if requested, provide CUSTOMER with all cost and pricing data used in computing the amount of the equitable adjustment on such forms as CUSTOMER shall specify in **Schedule O**, and ESCO shall certify that the pricing data used was accurate, complete and current. If CUSTOMER subsequently determines that the data submitted by ESCO was incomplete, incorrect or not current, CUSTOMER may exclude such data from consideration under the equitable adjustment request.
- c. Equitable adjustments in the Total Contract Value shall be determined according to one of the following methods, or a combination thereof, as determined by CUSTOMER: (1) fixed price basis, provided that the fixed price shall be inclusive of items (i) through (v) below and shall be computed in accordance with those provisions; (2) estimated lump sum basis to be adjusted in accordance with the Contract or agreed upon unit prices provided that the unit prices shall be inclusive of all costs related to such equitable adjustment; (3) time and materials basis to be subsequently adjusted on the basis of actual costs (but subject to a predetermined "not to exceed limit") calculated as follows:

- i. the direct cost (or credit) for labor at the minimum wage rates established for the Contract (as set forth in **Schedule P** pursuant to M.G.L. c. 149, §§26-27H) and the direct cost for material and use of equipment;
 - ii. plus (or minus) the cost of Worker's Compensation Insurance, Liability Insurance, Federal Social Security and Massachusetts Unemployment Compensation, or as an alternative ESCO may elect to use a flat 30% of the total labor rate computed in accordance with subparagraph (i) above;
 - iii. plus an allowance equal to 20% of the amount of (i) above for overhead, superintendence and profit (said 20% allowance shall be paid to ESCO, and ESCO and its Subcontractors shall agree upon the distribution of this amount as a matter of contract between them);
 - iv. plus (or minus) the actual direct additional premium costs and expenses incurred as a result of collective bargaining agreements or other agreements between organized labor and employers, and plus (or minus) the actual direct premium cost of payment and performance bonds required of ESCO for the Contract (providing there is written documentation from bonding company);
 - v. plus, if applicable and approved by CUSTOMER, costs associated with training, engineering, maintenance, M&V, or other services, as computed per **Schedule O**.
- d. If the net change is an addition to the Total Contract Value, it shall include ESCO's overhead, superintendence and profit. On any change that involves a net credit, no allowance for overhead, superintendence and profits shall be included. For any change that does not include labor performed or materials installed in the Project, there shall be no mark-up for ESCO's overhead, superintendence, and profit, even though there may be a net increase in the Total Contract Value. Charges for small tools known as "tools of the trade" are not to be computed in the amount of any change in the Total Contract Value.
- e. If an agreed upon Change Order results in changes to any other aspect of ESCO's obligations under the Contract, including but not limited to changes to the Guaranteed Cost Savings set forth in Section 22 and ESCO's project financing, such changes shall be reflected in the Change Order forms required in **Schedule O**.
- f. ESCO and its Subcontractors are required to anticipate annual updated prevailing wage schedules in accordance with M.G.L. c. 149, §27 and shall not be entitled to claim additional compensation for base bid contract work due to updated prevailing wage schedules during the Contract Term.

13.5 Work Performed Under Protest. ESCO agrees to perform all Change Order work as directed by CUSTOMER in accordance with the terms of the Contract, and if CUSTOMER determines that certain work that ESCO believes to warrant a Change

Order under the Contract does not represent a change in the work, ESCO shall perform said work. ESCO shall be deemed to have concurred with CUSTOMER's determination as aforesaid unless ESCO shall perform work under protest in compliance with the following sub-paragraphs (a) and (b):

- a. If ESCO claims compensation for a change in the work that is not deemed by CUSTOMER to be a change or to warrant additional compensation as claimed by ESCO, ESCO shall on or before the first working day following the commencement of any such work or the sustaining of any such damage submit to the Resident Engineer and CUSTOMER a written statement of the nature of such work or claim. ESCO shall not be entitled to additional compensation for any work performed or damage sustained for which written notice is not given within the time limit specified in the preceding sentence, even though similar in character to work or damage with respect to which notice is timely given. Disputes shall be resolved pursuant Section 31 of the Contract.
- b. On or before the second business day after the commencement of such work or the sustaining of such damage, and daily thereafter, ESCO shall file to the extent possible with the Resident Engineer and CUSTOMER, itemized statements of the details and costs of such work performed or damage sustained. ESCO shall use the DCAMM Daily Time and Materials Report found in **Schedule O** to record all labor and material used and request CUSTOMER's written acknowledgement that such time and materials were expended. If ESCO shall fail to make such statements to the extent possible, then ESCO shall not be entitled to additional compensation for any such work or damages. Disputes shall be resolved pursuant Section 31 of the Contract.

13.6 Open-Book Pricing. Open-book pricing may be required, such that ESCO shall fully disclose all costs. ESCO shall maintain cost accounting records on authorized work performed documenting actual costs for labor and material, or other basis agreed to by CUSTOMER. ESCO shall afford CUSTOMER access to these records and preserve them for a period of three (3) years after the completion of the Performance Term. Costs shall be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. The pricing methodology and individual cost mark-ups shall be as provided for in **Schedule O**.

13.7 False Claims, Statutory Provisions Regarding Changes. ESCO's attention is directed to the following statutory requirements incorporated by reference into the Contract. For the purpose of the Contract, the Commissioner of DCAMM shall be considered to be the "Chief Executive Official of the State Agency"; "Contractor" shall mean "ESCO", and "Awarding Authority" shall mean "CUSTOMER as those terms are used in the statutory references below and more specifically in M.G.L. c. 30, §39Q.

- a. **Criminal Penalties.** The Contractor's attention is also directed to M.G.L. 266, §67B which provides criminal penalties for false claims by Contractor under this Contract and states, in part, as follows:

Whoever makes or presents to any employee, department, agency or public instrumentality of the commonwealth, or of any political subdivision thereof, any claim upon or against

any department, agency, or public instrumentality of the commonwealth, or any political subdivision thereof, knowing such claim to be false, fictitious, or fraudulent, shall be punished by a fine of not more than ten thousand dollars or by imprisonment in the state prison for not more than five years, or in the house of correction for not more than two and one-half years, or both."

- b. Statutory Provisions Regarding Appeal of Change Orders.** Pursuant to M.G.L. c. 30, §39Q, every contract awarded by any state agency as defined by M.G.L. c. 7, §39A (which includes "energy conservation projects" in M.G.L. c. 7, §39A(l)), requires the inclusion of the following statutory provisions from M.G.L. c. 30, §39Q(a) through (d) as follows:
- i. *Disputes regarding changes in and interpretations of the terms or scope of the contract and denials of or failures to act upon claims for payment for extra work or materials shall be resolved according to the following procedures, which shall constitute the exclusive method for resolving such disputes. Written notice of the matter in dispute shall be submitted promptly by the claimant to the chief executive official of the state agency which awarded the contract or his designee. No person or business entity having a contract with a state agency shall delay, suspend, or curtail performance under that contract as a result of any dispute subject to this section. Any disputed order, decision or action by the agency or its authorized representative shall be fully performed or complied with pending resolution of the dispute. [See M.G.L. c. 30, §39Q(a)].*
 - ii. *Within thirty days of submission of the dispute to the chief executive official of the state agency or his designee, he shall issue a written decision stating the reasons therefore, and shall notify the parties of their right of appeal under this section. If the official or his designee is unable to issue a decision within thirty days, he shall notify the parties to the dispute in writing of the reasons why a decision cannot be issued within thirty days and of the date by which the decision shall issue. Failure to issue a decision within the thirty-day period or within the additional time period specified in such written notice shall be deemed to constitute a denial of the claim and shall authorize resort to the appeal procedure described below. The decision of the chief executive official or his/her designee shall be final and conclusive unless an appeal is taken as provided below. [See M.G.L. c. 30, §39Q(b)].*
 - iii. *Within twenty-one calendar days of the receipt of a written decision or of the failure to issue a decision as stated in the preceding subparagraph, any aggrieved party may file a notice of claim for an adjudicatory hearing with the division of hearing officers or the aggrieved party may file an action directly in a court of competent jurisdiction and shall serve copies thereof upon all other parties in the form and manner prescribed by the rules governing the conduct of adjudicatory proceedings of the division of hearing officers. In the*

event an aggrieved party exercises his option to file an action directly in court as provided in the previous sentence, the twenty-one day period shall not apply to such filing and the period of filing such action shall be the same period otherwise applicable for filing a civil action in superior court. The appeal shall be referred to a hearing officer experienced in construction law and shall be prosecuted in accordance with the formal rules of procedure for the conduct of adjudicatory hearings of the division of hearing officers, except as provided below. The hearing officer shall issue a final decision as expeditiously as possible, but in no event more than one hundred and twenty calendar days after conclusion of the adjudicatory hearing, unless the decision is delayed by a request for extension of time for filing post-hearing briefs or other submissions assented to by all parties. Whenever, because an extension of time has been granted, the hearing officer is unable to issue a decision within one hundred and twenty days, s/he shall notify all parties of the reasons for the delay and the date when the decision will issue. Failure to issue a decision within the one hundred and twenty-day period or within the additional period specified in such written notice shall give the petitioner the right to pursue any legal remedies available to him without further delay. [See M.G.L. c. 30, §39Q(b)].

- iv. *When the amount in dispute is less than ten thousand dollars, a contractor who is party to the dispute may elect to submit the appeal to a hearing officer experienced in construction law for expedited hearing in accordance with the informal rules of practice and procedure of the division of hearing officers. An expedited hearing under this subparagraph shall be available at the sole option of the contractor. The hearing officer shall issue a decision no later than sixty days following the conclusion of any hearing conducted pursuant to this subparagraph. The hearing officer's decision shall be final and conclusive, and shall not be set aside except in cases of fraud. [See M.G.L. c. 30, §39Q(d)].*

13.8 Disputed Changes. Notwithstanding the appeal process for the review of CUSTOMER's decisions regarding Change Orders set forth in this Section 13.7(b) above, where the dollar amount of any such disputed Change Order is \$50,000 or more, then the parties shall engage in Mandatory Mediation as set forth in Section 31 of the Contract.

Section 14: Waste Management

14.1 Construction and Demolition Waste Management

- a. ESCO shall be responsible for proper and legal disposal of construction demolition debris in connection with the Services provided under the Contract. These wastes are all uncontaminated waste building materials and rubble resulting from the demolition of buildings, pavements, roads or other structures. Construction and demolition wastes (C&D wastes) include, but are not limited to; concrete, bricks, lumber, masonry, rebar, and plaster.

- b. ESCO is encouraged to salvage or recycle at least 50% by weight of C&D wastes including brick, concrete, masonry, wood and scrap metal which are free from asbestos and/or hazardous materials. ESCO shall transport salvaged items from the Site as they are removed. Under no circumstances shall salvaged items be stored or sold onsite.
- c. If requested by DCAMM, ESCO shall submit to CUSTOMER a C&D Waste Management Plan within twenty-one (21) calendar days of such request.

14.2 Hazardous Waste Management. ESCO shall be responsible for proper and legal disposal of all known hazardous wastes which were either documented in the RFP, FIGA, or should have been documented as part of a reasonable inspection during the FIGA. Disposal plans must be documented and appropriate transportation and disposal documents prepared before disposal commences, and actual disposal must be documented immediately after disposal.

- a. Hazardous waste can only be disposed of at a DEP/EPA licensed hazardous waste treatment, storage and disposal facility.
- b. "Special Waste", such as asbestos, shall only be disposed of at a DEP and Town Board of Health licensed landfill or DEP/EPA licensed recycling facility which is permitted to receive the particular type of special waste involved. The license should reflect the types of wastes which can be received for disposal at the landfill.
- c. ESCO represents and warrants that ESCO shall enter into an agreement with an approved PCB ballast disposal contractor who shall provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, recycling, and incineration services for PCB ballasts. All PCB containing materials removed from CUSTOMER's PCB ballasts shall be disposed of in a federally approved facility. Certificate of Destruction shall be provided to CUSTOMER. ESCO's responsibility shall be for the proper and legal management of any PCB ballasts generated as a result of the installation of the New Equipment/Systems only until they are loaded onto an approved PCB ballast disposal vehicle for transportation.
- d. ESCO warrants that ESCO shall enter into an agreement with an approved DEP lamp disposal Subcontractor who shall provide approved containers, materials required to label, transportation, recycling in accordance with EPA requirements, and a copy of the manifest.
- e. FACILITY agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Premises. ESCO shall deliver to CUSTOMER copies of all manifest, permits, and other documents pertaining to proper disposal of hazardous waste and compliance with all Laws.

14.3 Mercury Containing Materials. ESCO shall install only mercury-free thermostats. In addition, ESCO shall install mechanical and electrical New Equipment/Systems and appliances that have switches and/or gauges that do not contain mercury. If mercury free items are not available, ESCO must ensure that all mercury containing parts are clearly labeled with durable labels as to the mercury content.

Section 15: Training/Testing

- 15.1 Training.** ESCO shall conduct the training program described in **Schedule L (ESCO's Training Responsibilities)**, which shall include the appropriate training required for Substantial Completion and Final ECM/Equipment Acceptance. Throughout the Contract Term, ESCO shall provide ongoing training as provided for in Schedule L with respect to updated or altered New Equipment/Systems, including upgraded software. Such training shall be provided at no additional charge to FACILITY.
- 15.2 Modification of Schedules to Reflect "As-Built" Conditions.** ESCO shall re-validate or modify the **Schedules B, D, J, and K** to reflect "as-built" conditions for all ECMs. The provision of such "as-builts" is a condition of CUSTOMER's Phase Completion Notification Approval of each Phase of the Installation Services.
- 15.3 Systems Startup and New Equipment/Systems Commissioning.** ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed New Equipment/Systems in accordance with the procedures specified in **Schedule G** and prior to Substantial Completion of each ECM as specified herein. Testing shall be designed to determine if the New Equipment/Systems is functioning in accordance with both its published specifications and requirements of the Contract, and to determine if all associated building systems, subsystems or components are functioning properly within the new integrated environment.
- 15.4 Notice of Testing and Training.** ESCO shall provide notice to CUSTOMER of the scheduled test(s) and training(s) and CUSTOMER 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 New Equipment/Systems.
- 15.5 Correction of Deficiencies.** ESCO shall be responsible for correcting and/or adjusting all deficiencies in New Equipment/Systems that may be observed during system commissioning and testing procedures. Prior to CUSTOMER acceptance ESCO shall also provide CUSTOMER with satisfactory documentary evidence that the New Equipment/Systems installed is the New Equipment/Systems specified in **Schedule B (Installation Services)**.

Section 16: Materials and Equipment

16.1 Materials Generally

- a. Unless otherwise specifically provided in the Contract, ESCO shall provide and pay for materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary

for proper execution and completion of the Installation Services, whether temporary or permanent and whether or not incorporated or to be incorporated in the Installation Services. ESCO shall obtain prior written approval from DCAMM for permission to store materials or equipment to be incorporated in the Installation Services at off-site locations, for which progress payments will be requested (where authorized under Section 4 and **Schedule M** of the Contract).

- b. Any and all charges for storage, inspection and verification by ESCO and DCAMM, including insurance, shall be borne solely by ESCO. Before approval, DCAMM may require, without limitation (i) evidence that the off-site location is properly secure, (ii) proper proof of insurance and proof of satisfactory contractual arrangements for transportation to the site, and (iii) a certificate from ESCO stating:
- i. The name of the member of ESCO or Subcontractor that leases or owns the warehouse or other storage facility;
 - ii. The location of such storage facility, including the storage space; i.e., the entire Premises or certain areas of a warehouse giving the number of floors or portions thereof, and a certification that ESCO has visited such location, verified the storage of such material or equipment therein or thereon (including confirmation that the materials or equipment are marked and segregated as provided below), and verified payment of all current storage charges;
 - iii. The date(s) on which the material or equipment is first stored at such facility; and
 - iv. A description of the materials or equipment stored, including quantities, types, manufacturers and other identification information, such as serial numbers.

ESCO shall furnish to DCAMM, not less often than once per month, a current inventory of all materials or equipment being stored at any off-site location. ESCO shall mark each sealed carton or other item with the name of the Project and DCAMM, and all materials or equipment stored off-site shall be segregated to the extent required by DCAMM or ESCO. Payment for materials or equipment stored off-site shall be at the reasonable discretion of DCAMM, taking into account the schedule requirements of the Installation Services. Title to materials or equipment stored off-site shall be transferred at the time at which DCAMM pays for them, free of any lien or other interest of the Supplier or any other lien or encumbrance. Notwithstanding such transfer of title, ESCO shall retain sole care, custody and control of, and shall have complete responsibility for the security and protection of, all materials or equipment included in any Application for Payment which are stored at locations other than the Site, and ESCO assumes all risk of loss or damage to such materials or equipment, and ESCO shall hold harmless DCAMM from and against all liabilities arising out of or resulting from loss or damage, from any cause, to such materials or equipment for which payment is requested, including liens, security interests or other claims of any kind by Suppliers or other third parties relating to such materials or equipment.

16.2. Delivery and Storage of Materials; Inspection

- a. Materials and equipment shall be progressively delivered to the Site so that there will be neither delay in the progress of the Installation Services nor an undue accumulation of materials that are not to be used within a reasonable time and so that their security, quality, and fitness of the materials for the Installation Services is preserved.
- b. Materials stored off Site shall be insured and stored at the expense of ESCO so as to guarantee the preservation of their security, quality and fitness for the Installation Services. Without derogating from ESCO's responsibilities in the previous sentence, when necessary to avoid deterioration or damage, material (on or off Site) shall be placed on wooden platforms or other hard clean surfaces and not on the ground and shall be properly protected.
- c. Expenses for inspection of material by ESCO and/or DCAMM personnel including travel, quarters, and subsistence shall be borne by ESCO requesting the inspection of material stored outside the Commonwealth of Massachusetts as part of the Total Contract Value. The policy of DCAMM precludes the payment for material stored outside the boundaries of Massachusetts except in extremely limited circumstances with the express written consent of DCAMM. If ESCO requests an inspection of material stored outside the Commonwealth of Massachusetts, DCAMM will initially pay for all expenses of inspecting the material incurred by ESCO and/or DCAMM's personnel including travel, quarters, and subsistence. DCAMM will then invoice ESCO for such costs and ESCO shall submit a credit Change Order for the amount of those expenses in accordance with Section 13 of the Contract.
- d. Stored materials either at the Site or at some other location agreed upon in writing shall be so located as to facilitate prompt inspection and even though approved before storage, may again be inspected prior to their use in the Project.
- e. All storage sites shall be restored to their original condition by ESCO at ESCO's expense.
- f. ESCO shall take charge of and be liable for any loss of or injury to the materials for its use delivered to or in the vicinity of the place where the Installation Services are being performed, whether furnished by the CUSTOMER or otherwise; ESCO shall notify DCAMM as soon as any such materials are so delivered, allow them to be examined by DCAMM, and furnish workers to assist therewith.

16.3 Defective, Damaged, or Deteriorated Materials and Rejection Thereof

DCAMM may reject materials if DCAMM reasonably determines that such materials do not conform to the requirements of the Contract in any manner, including but not limited to materials that have become damaged or deteriorated from improper storage whether or not such materials have previously been accepted. ESCO at its own expense shall remove rejected materials from the Premises. No rejected material, the defects of which have been subsequently corrected, shall be used except with the written permission of the DCAMM. Should ESCO fail to remove rejected material within a

reasonable time, DCAMM may, in addition to any other available remedies, remove and/or replace the rejected material, and deduct the cost of such removal and/or replacement from any moneys due or to become due ESCO. No extra time shall be allowed for completion of Installation Services by reason of such rejection. The inspection of the Installation Services shall not relieve ESCO of any of its obligations herein prescribed, and any defective Installation Services shall be corrected. Installation Services not conforming to the Contract may be rejected notwithstanding that such Installation Services and materials have been previously overlooked or misjudged by DCAMM. If the Installation Services or any part thereof shall be found defective at any time before Phase Completion Notification Approval, ESCO shall forthwith make good such defect in a manner satisfactory to DCAMM. Nothing in the Contract shall be construed as vesting in ESCO any property rights in the materials used after they have been attached or affixed to the Premises or the Site; but all such materials shall upon being so attached or affixed become a property of the FACILITY.

Section 17: Ownership of Property

- 17.1 Ownership of Certain Proprietary Property Rights.** CUSTOMER shall not, by virtue of the Contract, acquire any ownership rights in any formulas, patterns, devices, secret inventions or processes, copyrights, patents or other intellectual property rights, or similar items of property which may be used in connection with the New Equipment/Systems. CUSTOMER shall, however, have a nonexclusive license to utilize all such intellectual or proprietary rights in connection with the use of the New Equipment/Systems under the Contract. ESCO hereby grants to CUSTOMER a perpetual, irrevocable, royalty-free license to any and all software or other intellectual property or proprietary rights necessary for CUSTOMER and its successors and assigns to continue to operate, maintain, and repair the New Equipment/Systems in a manner that shall yield maximal energy and water consumption reductions. This license shall continue subsequent to any termination or expiration of the Contract other than termination due to breach by CUSTOMER.
- 17.2 Ownership of Documents.** All drawings, reports and materials prepared by ESCO specifically for this Project or in performance of the Contract shall become the property of CUSTOMER.
- 17.3 Ownership of Existing Equipment/Systems.** Ownership of the Existing Equipment/Systems existing at the Premises at the time of the Effective Date shall remain the property of FACILITY.
- 17.4 ESCO's Security Interest.** During the Installation Period of the Contract, as security for its obligations to ESCO under the Contract, FACILITY may grant to ESCO a security interest in all New Equipment/Systems installed pursuant to the Contract, provided such grant is in writing and approved by FACILITY. ESCO shall have the rights of a secured party under Article 9 of the Massachusetts Uniform Commercial Code (M.G.L. c.106), as in effect, provided that if any New Equipment/Systems is/are removed by ESCO, ESCO shall restore that portion of the Premises to substantially the same condition as existed on the Effective Date of the Contract. Upon request of ESCO, FACILITY shall execute and deliver any reasonable confirmations, evidences and notices of such security interest, including without limitation appropriate Uniform Commercial Code notices. Any such security interest in the New Equipment/Systems shall be extinguished upon issuance of Final ECM/Equipment Acceptance Notice and

payment for the Installation Services associated with any ECM's for which the New Equipment/Systems are associated.

17.5 Title to Installed Equipment. Upon issuance of the Final ECM/Equipment Acceptance Notice for each ECM, title to all New Equipment/Systems installed by ESCO pursuant to the Contract shall vest in FACILITY, free and clear of any liens, encumbrances or claims except to the extent permitted by the CUSTOMER pursuant to Section 17.6. This shall not relieve ESCO from its responsibility for ECM performance and other responsibilities pursuant to the terms of the Contract. Title may, however, be vested in ESCO or a third party on such terms as the CUSTOMER may approve in writing, if CUSTOMER determines this to be in CUSTOMER'S interest. CUSTOMER will evaluate the use of financial incentives, such as renewable energy and energy efficiency tax credits and/or other incentives, when deciding whether it is in CUSTOMER'S interest to allow vesting of title in ESCO or a third party. Upon issuance of the Final Project Notification Approval, title to and ownership interest in all New Equipment/Systems installed in the Premises pursuant to the Contract shall transfer to the FACILITY upon payment in full to ESCO in accordance with Section 4 and Schedule M, free and clear of any liens, encumbrances or claims of or by ESCO, its contractors, Subcontractors, suppliers, AS IS, WHERE IS without warranties either express or implied, except as provided in **Schedule K**, and at no additional cost or charge to CUSTOMER.

17.6 Third Party Financing. CUSTOMER recognizes that financing associated with ESCO's performance of the Installation Services required under the Contract may be accomplished using third party financing, and as such, may be secured by a security interest in the Contract and the New Equipment/Systems. To protect any lien holder's interest, ESCO may be required to assign to its lenders some or all of its rights under the Contract. CUSTOMER will consider: 1) requests for assignments of monies due or to become due under the Contract provided that the assignment complies with Massachusetts Laws; 2) requests by lenders or lien holders for copies of cure or show cause notices issued to ESCO; 3) requests by lenders or lien holders for extensions of response time to cure or show cause notices, and 4) a proposed takeover of contract performance in the case ESCO defaults in performance. Requests for takeover of the Contract on substantially the same terms and conditions contained herein will be approved if the takeover party is acceptable to the CUSTOMER. ESCO's inability to obtain financing for any or all Phases of Installation Services set forth in the Contract shall not be deemed to relieve ESCO from any and all of its obligations under the Contract.

PART C – SERVICE, MAINTENANCE AND WARRANTIES

Section 18: New Equipment/Systems - Service/Maintenance

18.1 Actions by ESCO. During the Equipment Warranty Period (as defined in **Schedule K**), ESCO shall provide all service, repairs, and adjustments to the New Equipment/Systems installed under the terms of the Contract, except as set forth in **Schedule J**. FACILITY shall incur no cost for New Equipment/Systems service, repairs, and adjustments during the warranty period, except as set forth in **Schedule J**.

18.2 Malfunctions and Emergencies. FACILITY shall use reasonable efforts to notify ESCO or its designated Subcontractor within twenty-four (24) hours after FACILITY's actual knowledge and occurrence of:

- a. any malfunction in the operation of the New Equipment/Systems or any Existing Equipment/Systems that might materially impact upon the Guaranteed Cost Savings;
- b. any significant interruption or alteration to the energy supply to the Premises, or
- c. any significant alteration or modification in the New Equipment/Systems or any Existing Equipment/Systems that might materially impact upon the savings or savings guarantee.

Where FACILITY exercises reasonable diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon ESCO's meeting the Guaranteed Cost Savings required under the Contract. FACILITY shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the New Equipment/Systems. For purposes of the Contract, emergency shall mean a condition which creates an immediate threat to the health or safety of people or property. If such malfunction, interruption, or alteration occurs during the Warranty Period, ESCO shall respond to any such notice within twenty-four (24) hours for emergency conditions, and forty-eight (48) hours for non-emergency conditions and shall promptly thereafter proceed with corrective measures.

In the case of an emergency condition, if ESCO neglects to commence such repairs or replacements to the reasonable satisfaction of FACILITY, then FACILITY may perform the necessary correction work forty eight (48) hours from the date of notice. In the case of a non-emergency condition, if ESCO neglects to commence such repairs or replacement to the reasonable satisfaction of FACILITY, then FACILITY may perform the necessary correction work within five (5) calendar days from the date of notice. In either case, FACILITY may employ other persons to perform the necessary corrective work and FACILITY may deduct the cost of such work from future payments due to ESCO pursuant to **Schedule M**.

ESCO shall provide a written record of all service work performed. This record shall indicate the reason for the service, description of the problem and the corrective action performed.

18.3 Actions by CUSTOMER. During the Performance Term of the Contract, FACILITY shall not significantly move, remove, modify, alter, or change in any way the New Equipment/Systems or any part thereof so as to materially affect the savings or life expectancy of the New Equipment/Systems without the prior written approval of ESCO except as set forth in **Schedule J**. Notwithstanding the foregoing, FACILITY may take reasonable steps to protect the New Equipment/Systems if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such

actions. In the event of such an emergency, FACILITY shall take reasonable steps to protect the New Equipment/Systems from damage or injury.

18.4 Preventative Maintenance Schedule and Training.

- a. Unless an earlier date is required by **Schedules G or I**, prior to the Substantial Completion date for each Phase of Installation Services, ESCO shall provide CUSTOMER with the Operation and Maintenance (O&M) manuals, including but not limited to preventative maintenance schedules for all New Equipment/Systems, described in **Schedule B**. The maintenance manuals shall become the property of the FACILITY. The maintenance manuals shall detail the maintenance requirements for the New Equipment/Systems installed for each ECM. Four (4) copies each of the manuals shall be provided, two (2) paper and two (2) electronic on a CD. ESCO shall, where reasonably practicable, coordinate its efforts in this area with CUSTOMER's staff involved with administering the state-wide preventive maintenance program.
- b. ESCO shall provide for each building a list of all major New Equipment/Systems installed, including the manufacturer, brand name, model (if applicable), equipment components, and recommended maintenance procedures. Two digital copies shall be provided on CD in "Microsoft Windows" compatible spreadsheet format: one copy shall be furnished to the FACILITY. Two (2) printed copies shall be provided to CUSTOMER.
- c. ESCO shall provide for each building a list of all major products installed, including lights, insulation, ductwork, and other products. The list shall include the manufacturer, brand name, model (if applicable), materials contained in the product, and approximate amount of product installed. Two printed and digital copies shall be provided on CD in "Microsoft Windows" compatible spreadsheet format.
- d. After the Substantial Completion date for each Phase, FACILITY shall be responsible for providing the necessary maintenance, repairs, and adjustments to FACILITY's Existing Equipment/Systems and for performing maintenance, repairs and adjustments required by ESCO's preventative maintenance schedule to the New Equipment/Systems as specified in **Schedule J**.
- e. ESCO shall be responsible for maintenance on New Equipment/Systems it installs as detailed in **Schedule I**.
- f. FACILITY agrees to act reasonably to protect the New Equipment/Systems from damage. FACILITY further agrees to maintain the Premises in good repair and to protect and preserve the building envelope and the operating condition of all mechanical systems, Existing Equipment/Systems, and other energy and water consuming systems located on the Premises as outlined in **Schedule A**. Any existing services agreements for energy and water management with maintenance providers other than ESCO are listed in **Schedule J**.

- g. If at any time it is determined that maintenance has not been performed by ESCO in accordance with **Schedule I**, then FACILITY shall adjust future payments to ESCO accordingly by the value of the maintenance work not performed and may be entitled to further adjustments in accordance with Section 22.7. All payments for Maintenance and Verification Services shall be made to ESCO in accordance with Section 4 and Schedule M of the Contract, only after ESCO has completed all such Services as required in Section 5.3 and specified in **Schedules E, F and I**.

18.5 CUSTOMER's Maintenance Obligations

- a. The parties acknowledge and agree that the Guaranteed Cost Savings are not likely to be obtained unless certain procedures and methods of operation designed for energy and water conservation are implemented and followed by FACILITY on a regular and continuous basis.
- b. FACILITY agrees that it shall adhere to, follow and implement the energy and water conservation procedures and methods of operation to be set forth in **Schedule J**, after the Substantial Completion Date.
- c. FACILITY agrees that ESCO shall have the right once a month, with prior notice, to inspect the Premises to determine if FACILITY is complying with its obligations as set forth above in Section 18.4(d). FACILITY shall make the Premises available to ESCO for each monthly inspection, and shall have the right to witness each inspection and ESCO's recording of such inspection.

18.6 New Equipment/Systems Analysis. One hundred and fifty (150) calendar days before the termination date of the Contract or within thirty (30) calendar days of receipt of an early termination notice pursuant to Section 30, ESCO shall provide FACILITY with a report analyzing the condition, projected life, and schedule of recommended repairs or replacement of the New Equipment/Systems installed by ESCO (or Existing Equipment/Systems) that may materially impact the installed New Equipment/Systems pursuant to the Contract.

Section 19 Modification/Alteration/Interference with Existing Equipment/Systems

- 19.1 Accessory Equipment.** During the Term of the Contract, FACILITY shall not, without the prior written consent of ESCO, affix or install any accessory equipment or device on any of the New Equipment/Systems installed by ESCO if such addition will change or impair the originally intended functions, value or use of the New Equipment/Systems without ESCO's prior written approval, which shall not be unreasonably withheld.
- 19.2 New Equipment/Systems Installed By ESCO.** ESCO shall at all times during the Performance Term have the right, subject to FACILITY's prior written approval, which approval shall not be unreasonably withheld, to change the New Equipment/Systems, revise any procedures for the operation of the New Equipment/Systems or implement other energy or water saving actions in the Premises, provided that:
- a. ESCO complies with the standards of comfort and services set forth in Section 20 of the Contract and **Schedule H**;

- b. such modifications or additions to, or replacement of the New Equipment/Systems, and any operational changes, or new procedures are necessary to enable ESCO to achieve the Guaranteed Cost Savings at the Premises;
- c. such modifications or additions to, or replacement of the New Equipment/Systems, and any operational changes, or new procedures shall not reduce the Guaranteed Cost Savings, increase the cost of operations or be considered of lesser quality or compromise any ECM or Existing Equipment/Systems associated with this Project or the Premises;
- d. such modifications or additions to, or replacement of the New Equipment/Systems and operation changes or new procedures do not adversely affect their warranties;
- e. any cost incurred relative to such modifications, additions or replacement of the New Equipment/Systems, or operational changes or new procedures shall be the responsibility of ESCO.

All modifications, additions or replacements of the New Equipment/Systems or revisions to operating or other procedures shall be described in supplemental Schedule(s) to be provided to FACILITY for approval, which shall not be unreasonably withheld, provided that any replacement of the New Equipment/Systems shall be new and have equal or better potential to reduce energy or water consumption at the Premises than the New Equipment/Systems being replaced. ESCO shall update any and all software to be used in connection with the New Equipment/Systems in accordance with the provisions of Section 18 of the Contract and **Schedule I**. All replacements of and alterations or additions to the New Equipment/Systems shall become part the New Equipment/Systems described in **Schedule B** and shall be covered by the provisions and terms of the Contract.

19.3 Existing Equipment/Systems Not Installed By ESCO. Except as provided in Section 19.4, any modification to, or any damage, destruction, failure or replacement of, any energy or water related Existing Equipment/Systems owned by FACILITY, exclusive of New Equipment/Systems installed under the Contract and used at the Premises, shall be the sole responsibility of FACILITY, except that where such damage, destruction, modification, failure or replacement is the result of an act or acts of ESCO, its contractors, Subcontractors or suppliers. ESCO shall correct such damage, destruction, modification, failure or replacement at ESCO's expense.

19.4 Notice of Deficiencies in Existing Equipment/Systems Subsequent to Commencement of Installation Services. If during the Installation Period or Performance Term, subsequent to the commencement of the Installation Services, either party is aware or becomes aware of any deficiencies in the Existing Equipment/Systems [that were not previously noted in the FIGA and not identified pursuant to Section 7.4 herein], that may: (1) prevent ESCO from completing the Installation Services as set forth in **Schedule B**; (2) prevent the New Equipment/Systems from meeting the Standards of Comfort specified in Section 20 and **Schedule H** of the Contract; (3) prevent ESCO from meeting the Guaranteed Cost Savings set forth in Section 22; and/or (4) may prevent ESCO from meeting any

other contractual requirements under the Contract, then the party that become aware of such deficiencies shall provide immediate written notice to the other of such deficiencies.

The notice of such deficiencies in the Existing Equipment/Systems shall include specific detail regarding the nature the deficiencies and recommendations for the correction thereof in order to meet the contractual requirements. Upon receipt of notice of deficiencies, ESCO and CUSTOMER shall determine what, if any, deficiencies to the Existing Equipment/Systems are caused by the New Equipment/Systems installed by ESCO. To the extent that it is determined and agreed by the parties that such deficiencies in the Existing Equipment/Systems are caused by New Equipment/Systems installed by ESCO under the Contract, and that the CUSTOMER was not notified of such deficiencies pursuant to Section 7.4 or in the FIGA, then ESCO shall replace, modify, alter or repair such New Equipment/Systems to CUSTOMER's satisfaction at no additional cost to CUSTOMER, subject to Section 13 of the Contract. To the extent that the parties can not reach an agreement on the impact of any such deficiencies in accordance with Section 13, then the dispute shall be resolved in accordance with Sections 13 of the Contract and Section 31 of the Contract.

Section 20: Standards of Comfort

During the Contract Term, ESCO shall design, install and maintain, to the extent included in **Schedule I**, the New Equipment/Systems in a manner that shall provide the standards of heating, cooling, hot water, lighting and other systems as described in **Schedule H**. If at any time during the Contract Term the Standards of Comfort are not being met by the New Equipment/Systems and CUSTOMER requires ESCO to correct such deficiencies, then CUSTOMER shall notify ESCO in writing. ESCO shall commence the correction of any deficiencies in the Standards of Comfort within seven (7) calendar days and complete the correction work within thirty (30) calendar days from the date of receipt of such notice, unless it is an emergency under Section 18.2 of the Contract.

Failure to make the corrections required to achieve the Standards of Comfort or give written notice to CUSTOMER regarding the cause of the in accordance with the time provided herein may constitute an event of default under the Contract. If changes in the operation of the New Equipment/Systems are warranted to achieve the required Standards of Comfort then adjustments shall be reflected in the M&V calculations set forth in **Schedule F**. The Guaranteed Cost Savings shall not be adjusted unless approved in writing by CUSTOMER.

To the extent that ESCO claims that such change in the Standards of Comfort is the result of the acts or omissions of CUSTOMER or other third party, ESCO shall give written notice to CUSTOMER within the seven (7) calendar days provided above. Disputes related to deviations from the required Standards of Comfort shall be resolved in accordance with Section 31 of the Contract.

Section 21: New Equipment/System - Warranties

ESCO warrants that all New Equipment/Systems sold and installed as part of the Contract, are new, shall be free from defects in materials or workmanship, conform to applicable Laws, shall be installed properly in a good and workmanlike manner, and shall function properly for its stated purpose for a period of one (1) year from the date of the Substantial Completion

Notification Approval for the particular ECM. After the Equipment Warranty Period as defined in Schedule K, ESCO shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the New Equipment/Systems, except as provided in **Schedule I**.

ESCO further agrees to assign to FACILITY all manufacturer's warranties relating to the New Equipment/Systems and to deliver such written warranties and which shall be attached and set forth as **Schedule K**, to pursue rights and remedies against manufacturer and ESCO of the New Equipment/Systems under the warranties in the event of New Equipment/Systems malfunction or improper or defective function, and defects in parts, workmanship and performance, and to notify FACILITY whenever defects in New Equipment/Systems parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO. The cost of any risk of damage or damage to the New Equipment/Systems and its performance, including damage to property and Existing Equipment/Systems of FACILITY or the Premises, due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

All warranties shall be transferable and extend to FACILITY. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction.

Notwithstanding the above, nothing in this Section shall be construed to relieve ESCO from its obligations contained in the Contract, including all attached Schedules.

PART D – SAVINGS/GUARANTEES

Section 22: Guarantee of Savings

22.1 Energy and Costs Savings Guarantee. Subsequent to the Performance Commencement Date and throughout the Performance Term of the Contract, ESCO hereby guarantees the level of annual energy and water cost savings set forth below and as further detailed in a Phased Investment Grade Audit or the FIGA. ESCO guarantees that as a result of the Installation Services, FACILITY shall realize annual energy and water cost savings as calculated pursuant to the savings analysis set forth in the FIGA and measured and verified pursuant to **Schedules F and G** each Year for the Performance Term commencing on the Performance Commencement Date as set forth in **Schedule F**.

As security for Guaranteed Cost Savings required by this Section, ESCO may provide CUSTOMER with a renewable Guaranteed Savings Bond for Years 1-5 of the Performance Term in accordance with Section 28.2 and Exhibit IIa of the Contract. The amount of the Guaranteed Savings Bond shall be

_____ (\$ _____) which represents _____ percent (____%) of the maximum annual Guaranteed Cost Savings for all Phases during Years 1 through 5 of the Performance Term as set forth in Schedule F, Part II, F-1. If, for any reason during the term of the Guaranteed Savings Bond, ESCO is unable to provide or otherwise maintain such Guaranteed Savings Bond, ESCO shall substitute a Letter of Credit from a financial institution with a minimum credit rating of "A minus" or "A-" or better, in the same amount as the Guaranteed Savings Bond. If

not earlier terminated as a result of the Commonwealth's earlier waiver of the requirement, the Guaranteed Savings Bond or Letter of Credit shall automatically terminate on the last day of the term of the Guaranteed Savings Bond.

The parties agree that the Guaranteed Cost Savings required by this Section shall remain in effect for the entire Performance Term of the Contract and shall not be limited by the expiration of the Guaranteed Savings Bond or Letter of Credit securing Years 1 through 5 of the Performance Term.

As alternative security to the Guaranteed Savings Bond, CUSTOMER shall be entitled to retain _____ percent (____%) of the Installation Period Costs for each ECM during Years 1-5 of the Performance Term as provided for in Section 4 and **Schedule M** of the Contract.

At the sole option of CUSTOMER, where ESCO is not in default of its obligations under the Contract, CUSTOMER may elect to accelerate payment of any remaining payments due to ESCO pursuant to Section 4.6 and **Schedule M** of the Contract, which shall not release ESCO from future guarantee obligations.

This guarantee is achieved as a result of the installation and operation of the New Equipment/Systems and provision of services provided for in the Contract as specified in **Schedule B and Schedule I** and in accordance with the M&V Plan set forth in **Schedule F**. This Guaranteed Cost Savings is subject to the satisfactory performance by CUSTOMER of all its obligations under the Contract including, without limitation, adjustments in accordance with Section 23 hereunder. In the event the Contract is terminated due to an uncured Event of Default by CUSTOMER, ESCO shall have no obligation to make shortfall payments pursuant to Section 22.6 of the Contract.

- 22.2 Savings Assumptions.** For the purpose of ESCO's savings guarantee obligations under the Contract, the parties agree that "Year" shall mean the twelve (12) month period beginning on the Performance Commencement Date and each consecutive twelve (12) month period thereafter;
- 22.3 Calculation of Verified Cost Savings.** Calculations for Verified Cost Savings shall be made pursuant to the savings analysis set forth in each Phased Investment Grade Audit and measured and verified pursuant to **Schedule F** and subject to adjustments as set forth in Section 23 of the Contract.
- 22.4 Quarterly and Annual Reporting.** Beginning with the Performance Commencement Date for each Phase of the Project, within thirty (30) calendar days of the end of each annual quarter thereafter, ESCO shall submit two electronic copies of the quarterly report (hereinafter referred to as the "Quarterly Measurement and Verification Report" or "Quarterly M&V Report") to CUSTOMER summarizing the Verified Cost Savings of any measure that has entered the Performance Term using the calculations set forth in **Schedule F**. At the end of each Year, in lieu of the fourth quarterly report, ESCO shall submit **four (4)** of the annual report to CUSTOMER (referred to hereafter as the "Annual Measurement and Verification Report" or "Annual M&V Report"), within sixty (60) calendar days of each anniversary of the Performance Commencement Date, summarizing the Verified Cost Savings for each month of that Year and the total Verified Cost Savings for that Year.

In the Annual M&V Report ESCO shall also report on any warranty, maintenance, service, and M&V activities performed during that Year pursuant to **Schedules F, I, and K**. In the Annual M&V Report, ESCO shall also provide annual actual utility use and utility savings data, which shall not be used for calculations of shortfall. CUSTOMER shall take all reasonable efforts to provide utility data for the annual report in a timely fashion, and ESCO shall be given additional time to submit the annual report if data is not received in a timely fashion.

If ESCO fails to submit any of the required Quarterly M&V Reports and Annual M&V Reports, CUSTOMER, at its sole discretion, may deem ESCO in default of the Contract and may terminate the Contract in accordance with Sections 29 and 30 of the Contract, respectively. Further, if ESCO fails to submit the required Quarterly M&V Reports or Annual M&V Report, CUSTOMER may withhold any payments due to ESCO pursuant to Section 4.

Where a shortfall is present, CUSTOMER reserves the right to request monthly M&V Reports from ESCO.

22.5 Notice of Shortfall. If the Verified Cost Savings for a quarter or year calculated pursuant to **Schedule F** is less than the Guaranteed Cost Savings for that quarter or year as set forth above in Section 22.1, and CUSTOMER determines that a Shortfall in energy and/or water savings exists, then CUSTOMER shall notify ESCO in writing within ninety (90) calendar days of the receipt of the Quarterly or Annual M&V Report that a shortfall exists. Requests for reimbursements or recoveries of shortfalls shall be based only upon annual reports.

22.6 Reimbursement/Recovery of Shortfall. For any Year where a Shortfall exists, ESCO shall pay FACILITY the Shortfall amount within thirty (30) calendar days of receipt of the Notice of Shortfall regarding the Annual M&V Report. If ESCO fails to make payment of the Shortfall amount to FACILITY within the required thirty (30) calendar days, then ESCO shall be deemed to be in default of its contractual obligations required by the Contract and CUSTOMER may terminate ESCO for cause in accordance with Section 30 of the Contract. In addition, CUSTOMER shall be entitled to enforce any and all contractual, legal and equitable remedies against ESCO, including but not limited to the following:

- a. If such Shortfall occurs during Years 1 through 5 of the Performance Term, then CUSTOMER shall be entitled to withhold the amount of such Shortfall from any and all payments that are due or become due to ESCO in accordance with Section 4 and **Schedule M** of the Contract. If the amount of the Shortfall exceeds the amount of any payments due to ESCO or no payments are due to ESCO pursuant to Section 4 and **Schedule M** of the Contract, then CUSTOMER may recover the Shortfall against the Guaranteed Savings Bond or Letter of Credit provided by ESCO as required by Sections 22.1 and 28.2 of the Contract and ESCO shall be liable for all costs, expenses and legal fees incurred as a result thereof.
- b. If such Shortfall occurs during Years 6 through 20 of the Performance Term and ESCO fails to make payment for such Shortfall within thirty (30) calendar days of receipt of the Notice of Shortfall, in addition to the rights and remedies

provided for in Section 30 of the Contract, CUSTOMER shall be entitled to withhold the amount of such Shortfall against any payments that may be due to ESCO or become due to ESCO during the Performance Term of the Contract pursuant to Section 4 and **Schedule M** of the Contract.

If during any Year the Verified or Actual Cost Savings achieved are greater than the Guaranteed Cost Savings, such excess Verified or Actual Cost Savings shall be retained by FACILITY.

- 22.7 Retroactive Adjustments.** If at any time within one (1) year after the submission of the Annual M&V Report required by Section 22.4, for any Year, ESCO or CUSTOMER learn of any condition existing in the Premises during said Year, that would have been taken into account by ESCO in the calculations performed pursuant to Section 22, ESCO shall recalculate and shall submit to CUSTOMER a notice for CUSTOMER's review and approval restating the Verified Cost Savings achieved by CUSTOMER for said Year and indicating the amount of ESCO's overpayment or underpayment, as the case may be. When ESCO and CUSTOMER have agreed upon an adjustment to compensation, ESCO shall immediately pay CUSTOMER any amount due CUSTOMER from ESCO or invoice CUSTOMER for any amount due ESCO from CUSTOMER.
- 22.8 Disputed Shortfall.** If after thirty (30) calendar days of the issuance of the Notice of Shortfall by CUSTOMER, the parties are unable to agree upon the amount of the Shortfall and/or any adjustments to compensation due to ESCO as a result thereof, the matter shall be submitted for resolution pursuant to Section 31 of the Contract.
- 22.9 Emissions Reductions Documentation and Reporting.** ESCO shall include emissions reductions quantities in each annual report and advise CUSTOMER on opportunities to achieve monetary benefit from such credits.
- 22.10 Independent Audit.** CUSTOMER shall have the right to retain, at its own cost, an independent third party to complete and submit to the parties an audit of the M&V Reports made pursuant to the Contract. Any audit so performed must use and incorporate the same methods, procedures, and assumptions as contained in the Contract and used by ESCO to perform the calculations undergoing an audit pursuant to this Section. Any payments between the parties necessary to resolve any irregularities identified in the audit shall be made within sixty (60) calendar days after submission of the audit to the parties. If, where an independent audit is enlisted by CUSTOMER, the parties are unable to agree upon the adjustment to ESCO's compensation within thirty (30) calendar days of the issuance of the independent audit, the matter shall be submitted to resolution pursuant to Section 31, and the disputed portion of an additional payment due under this Section shall not be payable until the dispute resolution procedure required in Section 31 has been completed.

Section 23: Changes at the Premises

CUSTOMER and ESCO shall cooperate in the identification of material changes at the Premises which could affect energy and/or water use at the Premises. CUSTOMER shall inform ESCO in writing of any significant changes in the property that are expected to increase or decrease energy or water savings by five percent (5%) or more per year.

23.1 Material Change Defined: A “Material Change” shall include any change in or to the Premises, whether structural, operational or otherwise in nature which could be expected, in reasonable judgment of CUSTOMER, to increase or decrease annual energy and water consumption in accordance with the provisions and procedures set forth in **Schedule E** and **Schedule F** by at least five percent (5%) after adjustments for climatic variations. Actions by CUSTOMER that may result in a Material Change include but are not limited to the following:

- a. manner of use of the Premises by CUSTOMER; or
- b. hours of operation of the Premises or of any equipment or energy-using systems operating at the Premises; or
- c. permanent changes in the comfort and service parameters set forth in **Schedule H**; or
- d. occupancy of the Premises; or
- e. modification, renovation or construction at the Premises; or
- f. casualty or condemnation of the Premises or New Equipment/Systems; or
- g. any other condition deemed by CUSTOMER or ESCO to impact energy and water consumption at the Premises.

23.2 Reported Material Changes; Notice by CUSTOMER. CUSTOMER shall use reasonable efforts to deliver to ESCO a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least 21 calendar 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 ESCO of Material Changes due to a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by CUSTOMER within twenty-four (24) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by CUSTOMER to have occurred.

23.3 Adjustments to Energy Savings. If there is any change at the Premises, as documented in the Contract, that could materially increase or decrease the Verified and/or Guaranteed Cost Savings required under the Contract, the parties shall meet and engage in reasonable good faith efforts to agree on an appropriate adjustment to the Verified and/or Guaranteed Cost Savings attributable to such change. The parties shall adjust the method of calculating Verified Cost Savings and/or Guaranteed Cost Savings to reflect for such change and shall review, and if necessary, revise the calculations from **Schedules E and F** accordingly. Such agreed upon change shall be memorialized in a Change Order in accordance with **Schedule O**. If the parties can not agree on the amount of such adjustment, then such dispute shall be resolved in accordance with Section 31.

Section 24: Energy and Water Use Records and Data

CUSTOMER has made available and shall continue to make available (or authorize its energy and water suppliers to provide) to ESCO all of its records and complete data concerning energy and water usage and related maintenance for the Premises during the Contract Term.

Section 25: Outside Agency Energy Payments.

ESCO shall explore all available outside utility rebate programs (not already included in the Total Contract Value from the FIGA), federal government programs related to tax incentives and tax credits, emissions offsets and credits, and *ISO New England Forward Capacity Market* programs (“Outside Agency Energy Payments”). ESCO shall provide CUSTOMER with a detailed list of these outside funding sources. Unless guaranteed by ESCO and/or subject to the payment terms set forth in Section 4 and **Schedule M**, all outside agency energy payments and/or renewable or other energy credits shall accrue to CUSTOMER. In the event that ESCO guarantees any of these Outside Agency Energy Payments, the Total Contract Value will be reduced by this amount and ESCO shall have the sole obligation to obtain such payments. Services related to obtaining Outside Agency Energy Payments during the Performance Term will only be paid by CUSTOMER to ESCO if provided for in **Schedule M** and after ESCO has provided the Services, as detailed in **Schedule S**.

PART E– LEGAL/SPECIAL PROVISIONS

Section 26: Indemnification

To the fullest extent permitted by law, ESCO shall indemnify, defend (with counsel subject to the supervision of the Attorney General of the Commonwealth of Massachusetts as required by M.G.L. c. 12, §3) and hold harmless CUSTOMER and all of its agents and employees from and against all claims, damages, losses and expenses, including but not limited to court costs, reasonable attorneys' fees, interest and costs to the extent caused by or resulting from the willful misconduct and/or negligent acts, errors or omissions of ESCO in performance of the services covered by the Contract, whether by ESCO or its employees, consultants or Subcontractors, provided that the CUSTOMER shall notify ESCO of such suits and claims within a reasonable time after the CUSTOMER becomes aware of them. The provisions of this Section 26 are intended to survive Final Project Notification Approval and/or any termination of this Contract.

Section 27: Insurance Requirements

Certificates substantiating that required insurance coverage is in effect shall be filed with CUSTOMER. Any cancellation of insurance whether by the insurers or by the insured shall not be valid unless written notice thereof is given by the party proposing cancellation to the other party and to CUSTOMER at least fifteen (15) calendar days prior to the intended effective date thereof, which date shall be expressed in said notice.

27.1 Insurance Generally

- a. ESCO shall purchase and maintain the insurance of the type and limits listed in this Section 27 with respect to the operations as well as the completed operations of the Contract. This insurance shall be provided at ESCO's expense and shall be in full force and effect through the Contract Term or for such longer period as this Section 27 requires. ESCO may offer insurance coverages that are structurally different than those outlined in this Section but that are acceptable to CUSTOMER in its sole discretion.
- b. All policies, except for Professional Liability insurance, shall be written on an occurrence basis. All policies shall be issued by companies lawfully authorized to write that type of insurance under the laws of the Commonwealth of Massachusetts with a financial strength rating of A- or better as assigned by A.M. Best Company, or an equivalent rating assigned by a similar rating agency acceptable to the CUSTOMER, or otherwise acceptable to the CUSTOMER.
- c. ESCO shall submit three (3) originals of each certificate of insurance, acceptable to CUSTOMER, simultaneously with the execution of the Contract. Certificates shall show each type of insurance, insurance company, policy number, amount of insurance, deductibles and /or self-insured retentions, and policy effective and expiration dates. Certificates shall show the "Commonwealth of Massachusetts" as an additional insured as to all policies of liability insurance, as indicated herein. Certificates shall specifically note the following:

- that the automobile liability, umbrella liability and pollution liability policies include the “Commonwealth of Massachusetts” as additional insureds.
- that all policies include the coverage and endorsements in accordance with the terms and conditions as required by the Contract.
- that the Builders’ Risk or Installation Floater is on an “all risk” basis including earthquake and flood, and includes the “Commonwealth of Massachusetts and ESCO as named insureds or joint loss payees as their interests may appear.
- that none of the coverages shall be cancelled, terminated, or materially modified unless and until 30 calendar days prior notice is given in writing to the CUSTOMER.

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

- d. At the time of execution of the Contract and prior to the commencement of any Services thereunder, ESCO shall file with CUSTOMER certificates of insurance and applicable endorsements evidencing the coverage required in this Section 26 of the Contract. CUSTOMER reserves the right to request certified complete copies of all policies and endorsements at any time during the Contract Term. If CUSTOMER is damaged by ESCO's failure to maintain such insurance and to comply with the terms of this Section, then ESCO shall be responsible for all costs and damages to the CUSTOMER attributable thereto.
- e. ESCO (or its insurer) shall provide written notice to CUSTOMER of any Termination, cancellation, or material modification of any insurance required by the Contract at least thirty (30) calendar days prior to the effective date thereof, which shall be expressed in said notice.
- f. ESCO is responsible for the payment of any and all deductibles under all of the insurance required below. CUSTOMER shall not in any instance be responsible for the payment of deductibles, self-insured retentions, or any portion thereof.

27.2 ESCO's Commercial General Liability

- a. ESCO shall purchase and maintain general liability coverage on the ISO form CG 00 01 or equivalent, including products and completed operations, on an occurrence basis. The form must be amended to state that the aggregate limit applies on a per location/project basis. The policy shall provide the following minimum coverage to protect ESCO from claims with respect to the operations performed by ESCO and any employee, Subcontractor, or supplier, or by anyone for whose acts they may be liable unless a higher amount is specified in writing by CUSTOMER, in which case ESCO shall provide the additional coverage:

Bodily Injury & Property Damage	\$1,000,000 each occurrence, \$2,000,000 general aggregate per project
Products & Completed Operations	\$1,000,000 annual aggregate
Personal & Advertising Injury	\$1,000,000 each occurrence

27.4 Pollution Liability.

ESCO shall purchase and maintain coverage for bodily injury and property damage resulting from liability arising out of pollution related exposures such as asbestos abatement, lead paint abatement, tank removal, removal of contaminated soil, etc. The insurance policy shall cover the liability of ESCO during the process of removal, storage, transport and disposal of hazardous waste and contaminated soil and/or asbestos abatement. The policy shall include coverage for on-Site and off-Site bodily injury and loss of, damage to, or loss of use of property, directly or indirectly arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gas, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, whether it be gradual or sudden and accidental. The policy shall also include defense and clean-up costs. The "Commonwealth of Massachusetts" shall be named as an additional insured and coverage must be on an occurrence basis. The amount of coverage shall be as follows unless a higher amount is specified in writing by CUSTOMER, in which case ESCO shall provide the additional coverage:

Limit of liability	\$1,000,000 per occurrence
	\$3,000,000 aggregate

27.5 Worker's Compensation

- a. ESCO shall provide the following coverage in accordance with M.G.L. c.149 §34A and c.152 as amended, unless a higher amount is specified in writing by CUSTOMER, in which case ESCO shall provide the higher coverage:

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

- b. If specified in the Contract, the policy must be endorsed to cover United States Longshoremen & Harborworkers Act (USL&HW) or Maritime Liability for \$1,000,000/\$1,000,000.
- c. To the extent that a loss is covered by Workers' Compensation insurance in force and recovery is made for such loss, CUSTOMER and ESCO, including their respective agents and employees, mutually waive their rights of subrogation under the Workers' Compensation insurance coverage set forth herein.

27.6 Builder's Risk/ Installation Floater/Stored Materials

- a. ESCO shall purchase and maintain coverage against loss or damage to the Project in an amount equal to the total replacement cost value of the Project. Such coverage shall be written on an all risks basis or equivalent form and shall include, without limitation, insurance against perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, terrorism ("certified" and "non-certified"), collapse, earthquake, flood (if the project is not in an "A" or a "V" flood zone), windstorm, falsework, testing and startup, temporary buildings and debris

removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for ESCO's services and expenses required as a result of such insured loss. This policy and/or installation floater shall include transportation and Stored Materials coverage in an amount equal to the value of the stored materials as required in Section 27.6(c) below.

- b. When Services required by the Contract are to be performed on existing buildings owned by CUSTOMER, ESCO shall provide an installation floater, in the full amount of the total replacement cost value of the Project. Such coverage shall be written on an all risks basis or equivalent form and shall include, without limitation, insurance against perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood (if the project is not in an "A" or a "V" flood Zone), windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for ESCO's services and expenses required as a result of such insured loss. This policy and/or installation floater shall include transportation and Stored Materials coverage in an amount equal to the value of the stored materials as required in Section 27.6(c) below.
- c. ESCO shall maintain insurance on delivered and/or stored material designated to be incorporated in the Services against fire, theft or other hazards. Any loss or damage of whatever nature to such material while stored at an off Site location shall be forthwith replaced by ESCO at no expense to the CUSTOMER.
- d. The policy or policies shall specifically state that they are for the benefit of and payable to CUSTOMER, ESCO, and all persons furnishing labor or labor and materials for the installation of New Equipment/Services, as their interests may appear. The policy or policies shall list the "Commonwealth of Massachusetts and ESCO as named insureds.
- e. Coverage shall include any costs for work performed by ESCO's Designer or any consultant as the result of a loss experienced during the Contract Term.
- f. Coverage shall include permission for temporary occupancy and a Waiver of Subrogation in favor of the CUSTOMER.
- g. Coverage shall be maintained throughout the Installation Period of the Contract for each Phase of Installation Services until such time as the Phase Completion Notification Approval Notice has been issued for each Phase of Installation Services and Final Project Notification Approval has been issued.
- h. A loss under the property insurance shall be adjusted by ESCO as fiduciary and made payable to ESCO as fiduciary for the insureds. ESCO shall pay the Subcontractors their just shares of insurance proceeds received by ESCO and shall require Subcontractors to make payments to their sub-Subcontractors in similar manner.

27.7 Umbrella Coverage

ESCO shall provide Umbrella Coverage in form at least as broad as primary coverages required by Sections 27.2, 27.3 and 27.5 in the following amount unless a higher amount is specified in the Contract, in which case ESCO shall provide the higher amount:

<u>Total Contract Value</u>	<u>Limit of liability:</u>
Under \$1,000,000	\$2,000,000 per occurrence
\$1,000,001 -- \$5,000,000	\$5,000,000 per occurrence
\$5,000,001-- \$10,000,000	\$10,000,000 per occurrence
\$10,000,001 and over	\$25,000,000 per occurrence

27.8 Professional Liability Insurance.

ESCO and its Designer shall maintain Professional Liability Insurance (PLI) covering errors or omissions in professional services of ESCO, its Designer, and of any person or entity for whose performance ESCO or its Designer is legally liable in the following amount unless an alternate amount is specified in writing by CUSTOMER:

Liability limit	\$5,000,000 per claim
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If the policy is claims-made, it shall include a retroactive date which is no later than the effective date of this contract, and be renewed or have an extended reporting period totaling at least six (6) years which requirement can be met by providing renewal certificates of insurance to CUSTOMER as evidence that the PLI coverage is being maintained.

If the installation of New Equipment/Services work involves the removal or remediation of Hazardous Materials and/or the ESA or the FIGA require ESCO to provide services in connection with Hazardous Materials conditions, the PLI policy, and the PLI policy of any subconsultants employed on such Hazardous Material services, shall provide coverage for any and all claims and liability arising out of any negligent act, error or omission in the performance of any such Hazardous Material services.

27.9 Additional Types of Insurance.

ESCO shall provide such other types of insurance as may be required in writing by CUSTOMER in the performance of Services under the Contract.

Section 28: Bonding Requirements

28.1 Performance and Payment Bonds

ESCO shall furnish both a Performance Bond and a Labor and Material Payment Bond in the full amount of the Installation Period Costs. Such bonds shall be in the form provided by the CUSTOMER and executed by a corporate surety licensed by the Commonwealth of Massachusetts Division of Insurance and whose name appears on the United States Treasury Department Circular 570. The expense of these bonds shall be borne by ESCO and the bonds shall be submitted to CUSTOMER at the time of the execution of the Contract. Such executed bonds are incorporated herein by reference as Exhibit I (Performance Bond) and Exhibit II (Labor and Material Payment Bond). If, at any time, a Surety on such a bond becomes irresponsible or loses its right to do business in the Commonwealth of Massachusetts, another Surety shall be required, and ESCO shall furnish new executed

bonds to CUSTOMER within ten (10) calendar days after receipt of Notice. These bonds are not being furnished to cover the Guaranteed Cost Savings under the Contract.

28.2 Guaranteed Savings Bond

ESCO shall provide CUSTOMER with an annually renewable energy savings guarantee bond ("Guaranteed Savings Bond") in the amount listed in Section 22.1. The Guaranteed Savings Bond shall be in the form provided by the CUSTOMER and executed by a corporate surety licensed by the Commonwealth of Massachusetts Division of Insurance and whose name appears on the United States Treasury Department Circular 570. The Guaranteed Savings Bond shall automatically renew on an annual basis and remain in place for Years 1 through 5 of the Performance Term of the Contract unless the Commonwealth, in writing, waives the Guaranteed Savings Bond requirement. ESCO shall provide the Guaranteed Savings Bond, in a form substantially similar to **Exhibit IIa**, at the time of the execution of the Contract. The expense of the Guaranteed Savings Bond shall be borne by ESCO and the bond shall be submitted to CUSTOMER at the time of execution of the Contract. As set forth in Section 22.1 of the Contract, if, for any reason during the term of the Guaranteed Savings Bond, ESCO is unable to provide or otherwise maintain such Guaranteed Savings Bond, ESCO shall substitute a Letter of Credit from a financial institution with a minimum credit rating of "A minus" or "A-" or better, in the same amount as the Guaranteed Savings Bond. If not earlier terminated as a result of the Commonwealth's earlier waiver of the requirement, the Guaranteed Savings Bond or Letter of Credit, as applicable, shall automatically terminate on the last day of the term of the Guaranteed Savings Bond.

Section 29: Default

29.1 Events of Default by CUSTOMER. Each of the following events or conditions shall constitute an "Event of Default" by CUSTOMER:

- a. CUSTOMER fails to pay any undisputed amount required to be paid during the Performance Term hereunder within ninety (90) calendar days of receipt of written notice from ESCO that such amount is delinquent, except as provided for in Section 4 of the Contract;
- b. CUSTOMER assigns the Contract to any person or entity without ESCO's consent, as described in Section 32 of the Contract;
- c. any other material failure by CUSTOMER to perform or comply with the terms and conditions of the Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) calendar days after notice to CUSTOMER demanding that such failures to perform be cured or if such cure cannot be effected in such thirty (30) calendar days, CUSTOMER shall be deemed to have cured default upon the commencement of a cure within such thirty (30) calendar days and diligent subsequent completion thereof;
- d. any representation or warranty furnished by CUSTOMER in the Contract that was false or misleading in any material respect when made.

29.2 Notices to CUSTOMER and Right To Cure. If there is an alleged Event of Default by CUSTOMER as provided in Section 29.1 of the Contract, then CUSTOMER shall have an opportunity to cure such Event of Default as provided for herein.

Within thirty (30) calendar days of the discovery of an Event of Default, ESCO shall give written "Notice to Cure Event of Default" to CUSTOMER of the alleged Event of Default. CUSTOMER shall then have thirty (30) calendar days from the receipt of the Notice to Cure Event of Default to cure or remedy the subject Event of Default, or if a remedy for the Event of Default cannot be completed in such thirty (30) calendar days, then CUSTOMER shall commence good faith efforts to cure in that period with diligent subsequent performance to cure such Event of Default.

If CUSTOMER fails to make reasonable efforts to cure the Event of Default or commence good faith efforts to cure within thirty (30) calendar days of receipt of the Notice to Cure Event of Default as provided herein, then ESCO shall issue a "Notice of Default" to the alleged defaulting party. If then, within seven (7) calendar days of receipt of such Notice of Default, CUSTOMER still fails to cure the Event of Default then CUSTOMER shall be deemed in default of the Contract and ESCO may proceed in accordance with Section 29.3 of the Contract.

29.3 Remedies Upon Default by CUSTOMER. If CUSTOMER is deemed to be in default of the Contract as provided for in Section 29.2 of the Contract, ESCO may, without a waiver of other remedies that exist in law or equity:

- a. exercise 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 CUSTOMER, and/or for damages which shall include all costs and expenses reasonably incurred, including reasonable attorney fees;
- b. terminate the Contract in accordance with Section 30 of the Contract where CUSTOMER fails to meet its obligations under the Contract for thirty (30) calendar days after receipt of Notice of Default as provided for in Section 29.2 of the Contract and there has been no commencement of a cure and diligent subsequent completion thereof.

29.4 Events of Default by ESCO.

- a. "Material Events of Default". Each of the following events or conditions shall constitute an "Material Event of Default" by ESCO:
 - i. ESCO has filed a petition, or a petition has been filed against ESCO with its consent, under any federal or state law concerning bankruptcy, reorganization, insolvency or relief from creditors, or if such a petition is filed against ESCO without its consent and is not dismissed within sixty (60) calendar days; or if ESCO is generally not paying its debts as they become due; or if ESCO becomes insolvent; or if ESCO consents to the appointment of a receiver, trustee, liquidate, custodian or the like of ESCO or of all or any substantial portion of its assets and such appointment or possession is not terminated within sixty (60) calendar days; or if ESCO makes an assignment for the benefit of creditors;

- ii. ESCO has failed to comply with Laws;
 - iii. ESCO fails to maintain, or provide to CUSTOMER evidence of the insurance or bonds required by the Contract; or
- b. Other “Events of Default”. Any failure by ESCO to comply with the terms and conditions of the Contract, including breach of any covenant contained herein.

29.5 Notice to ESCO and Right to Cure. If there is a “Material Event of Default” by ESCO as provided in Section 29.4(a), CUSTOMER shall issue a “Notice of Material Event of Default” to ESCO. If ESCO does not cure such Material Event of Default within five (5) calendar days of such “Notice of Material Event of Default” then CUSTOMER shall issue ESCO a written Notice of Default and may immediately proceed with termination of the Contract in accordance with Section 30 of the Contract.

If the Event of Default is an Event of Default as provided for in Section 29.4(b) of the Contract, then within thirty (30) calendar days of discovery of an Event of Default, CUSTOMER shall give written “Notice to Cure Event of Default” to ESCO of the alleged Event of Default. ESCO shall then have thirty (30) calendar days from the receipt of the Notice to Cure Event of Default to cure or remedy the subject Event of Default, or if a remedy for the Event of Default cannot be completed in such thirty (30) calendar days, then ESCO shall commence good faith efforts to cure in that period with diligent subsequent performance to cure such Event of Default.

If ESCO fails to make reasonable efforts to cure the Event of Default or commence good faith efforts to cure within thirty (30) calendar days of receipt of the Notice to Cure Event of Default as provided herein, then CUSTOMER shall issue a “Notice of Default” to ESCO. If then, within seven (7) calendar days of receipt of such Notice of Default, ESCO still fails to cure the Event of Default then ESCO shall be deemed in default of the Contract and CUSTOMER may proceed in accordance with Section 29.6 of the Contract.

In accordance with Section 17.6 of the Contract, CUSTOMER recognizes that it may have additional notice and cure requirements with respect to third parties.

29.6 Remedies Upon Default by ESCO. Where an “Event of Default” occurs in accordance with Section 29.4(b) of the Contract and ESCO has failed to cure such Event of Default as provided in Section 29.5 of the Contract, CUSTOMER may, without waiver of other remedies which exist in law or equity:

- a. exercise any and all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of damages, which shall include all costs and expenses reasonably incurred, including reasonable attorneys’ fees incurred by CUSTOMER as a result of ESCO’s default;
- b. withhold a portion of any payments that may be due to ESCO under the terms of the Contract until such time as the default is cured;
- c. terminate the Contract in accordance with Section 30 of the Contract.

Section 30: Termination

30.1 Termination for Cause by CUSTOMER

- a. CUSTOMER may, without prejudice to any other right or remedy, deem the Contract "terminated for cause" if any Event of Default is not cured by ESCO in accordance with Section 29.5 of the Contract. Such termination for cause shall be deemed effective when written notice is given by CUSTOMER to ESCO (and any Surety that has given bonds in connection with the Contract) and ESCO has failed to cure within five (5) calendar days of such notice of termination for cause.
- b. CUSTOMER shall give ESCO (and any Surety) notice of such termination for cause, but any technical defect in the content or delivery of such notice of termination from the CUSTOMER to ESCO, or its Surety, shall not render such the render the termination ineffective or relieve ESCO of its duties, obligations and/or liabilities under the Contract. In the event of such termination, and without limiting any other available remedies, CUSTOMER may, at its option:
 - i. hold ESCO and its sureties liable in damages for breach of the Contract;
 - ii. notify ESCO to discontinue all Services, or any part thereof, and ESCO shall discontinue all Services, or any part thereof, as CUSTOMER may designate;
 - iii. complete the Services, or any part thereof, and charge the expense of completing the Services or part thereof, to ESCO; (or)
 - iv. require the Surety (or Sureties) to complete the Services and perform all of ESCO's obligations under the Contract.
- c. If CUSTOMER elects to complete all or any portion of the Services as specified in subparagraph (b) (iii) above, it may take possession of all materials, equipment, tools, machinery, implements at or near the Site owned by ESCO and finish the Services at ESCO's expense by whatever means the CUSTOMER may deem expedient; and ESCO shall cooperate at its expense in the orderly transfer of the same to a new contractor or to CUSTOMER as directed by CUSTOMER. In such case CUSTOMER shall not be obligated to make any further payments to ESCO until the Services are completely finished. CUSTOMER shall not be liable for any depreciation, loss or damage to said materials, machinery, implements or tools during said use and ESCO shall be solely responsible for their removal from the Site after CUSTOMER has no further use for them. Unless so removed within fifteen (15) calendar days after notice to ESCO to do so, they may be sold at public auction, after publication of notice thereof at least twice in any newspaper published in the county where the Services are being performed, and the proceeds credited to ESCO's account; or they may, at the option of CUSTOMER, be stored at ESCO's expense subject to a lien for the storage charges.
- d. Damages and expenses incurred under subparagraph b above shall include, but not be limited to, costs for any extra services required by the CUSTOMER or its consultants, in the opinion of the CUSTOMER, to successfully inspect and administer the construction contract through final completion of the Services.

- e. Expenses charged under subparagraph b above may be deducted and paid by CUSTOMER out of any monies then due or to become due ESCO under the Contract.
- f. All sums damages, and expenses incurred by CUSTOMER to complete the Services shall be charged to ESCO. In case the damages and expenses charged are less than the sum that would have been payable under the Contract if the same had been completed by ESCO, ESCO shall be entitled to receive the difference. In case such expenses shall exceed the said sum, ESCO shall pay the amount of the excess to CUSTOMER.
- g. In the event of a Termination for Cause by CUSTOMER, ESCO shall only be entitled to payment for Services performed prior to the effective date of the termination. The amount of such Termination Payment shall be calculated in accordance **Part IV of Schedule M**, less any damages and costs incurred by CUSTOMER as set forth in subparagraphs b through f above.
- h. Any payment to ESCO provided for herein shall be considered to fully compensate ESCO for all claims and expenses and those of any consultants, Subcontractors, and suppliers, directly or indirectly attributable to the termination, including any claims for lost profits.

30.2 Termination for Convenience by CUSTOMER

- a. CUSTOMER may terminate the Contract for convenience even where there has been no Event of Default and ESCO is not in default of the Contract by giving written notice to ESCO specifying in said notice the effective date of termination.
- b. In the event of a Termination for Convenience, ESCO shall only be entitled to payment for Services performed prior to the effective date of the termination. The amount of such Termination Payment shall be calculated in accordance with **Part IV of Schedule M**, plus a reasonable sum to cover the expenses which ESCO would not have incurred "but for" the early termination of the Contract (such as demobilization of the work force, restocking charges, termination fees payable to Subcontractors) less any amount which the CUSTOMER determines is necessary to correct or complete Services performed prior to the effective date of termination.
- c. Any payment to ESCO provided for herein shall be considered to fully compensate ESCO for all claims and expenses and those of any consultants, Subcontractors, and suppliers, directly or indirectly attributable to the termination, including any claims for lost profits.
- d. Upon CUSTOMER's termination of the Contract for convenience as provided, ESCO shall:
 - i. stop the Services; stop placing orders and Subcontracts in connection with the Contract;
 - ii. cancel all existing orders and subcontracts;
 - iii. surrender the Site to CUSTOMER in a safe condition; (or)

- iv. transfer to CUSTOMER all materials, supplies, work in progress, appliances, facilities, equipment and machinery of the Contract, and all plans, drawings, specifications and other information and documents used in connection with the Contract.

30.3 Termination for Cause by ESCO. ESCO may, without prejudice to any other right or remedy, deem the Contract “terminated for cause” if any Event of Default is not cured by CUSTOMER in accordance with Section 29.2, provided that ESCO shall provide CUSTOMER with written notice of termination at least ninety (90) calendar days prior to the effective date of the proposed termination.

Upon termination, pursuant to this Section, ESCO shall only be entitled to payment for Services performed prior to the effective date of the termination. The amount of such Termination Payment shall be calculated in accordance **Part III of Schedule M**, less any damages and costs incurred by CUSTOMER as set forth in Section 30.1 of the Contract.

30.4 Survival of Rights. In the event that either party terminates the Contract pursuant to this Section 30, any claims arising out of the performance of the Contract, prior to the effective date of the termination, shall survive termination.

Within sixty (60) calendar days of an early termination of the Contract pursuant to this Section, ESCO shall prepare and submit to CUSTOMER a reconciliation of Verified Cost Savings for the period preceding the effective date of the termination in accordance with the provisions of Section 22 of the Contract. If, after thirty (30) calendar days the parties are unable to agree upon the adjustments to compensation the matter shall be submitted for resolution pursuant to Section 31 of the Contract.

30.5 Repair and Replacements after Termination. In the event of Termination under this Section, ESCO shall assign to FACILITY any and all warranties provided for in the Contract and **Schedule K**. If such Termination occurs prior to the issuance of a Final ECM/Equipment Acceptance Notice (or Phased Project Notification Approval for a particular Phase of Installation Services) then, if requested by CUSTOMER, for a period of one year after Termination, ESCO guarantees that it shall provide CUSTOMER with materials, equipment and skilled workers to repair or replace any of the New Equipment/Systems installed pursuant to the Contract, provided that ESCO and CUSTOMER shall mutually negotiate a reasonable cost for such materials, equipment, and labor required during such one year period. If such Termination occurs after the issuance of a Final ECM/Equipment Acceptance Notice (or Phase Project Notification Approval for a particular Phase of Installation Services) then, ESCO shall still be required to honor all warranty obligations provided for in Section 21 and **Schedule K** of the Contract.

30.6 Reservation of Rights Upon Termination. In the event of termination, ESCO and CUSTOMER reserve the right to exercise all remedies available at law or at equity or other appropriate proceedings within the requirements of Section 31 of the Contract.

Section 31: Dispute Resolution

31.1: Notice of Claim. ESCO shall provide written notice of any claims against CUSTOMER, including an appeal of the denial of any Change Order request or

retroactive adjustment to Guaranteed Cost Savings within thirty (30) calendar days of notice of such claim or shall be deemed to have waived such claims.

31.2: Mandatory Mediation. Any and all disputes arising under the Contract, including but not limited to disputes arising under Section 13, Section 22, Section 29 and Section 30, shall be subject to resolution pursuant to M.G.L. c. 30, §39Q. For the purpose of the Contract, the Commissioner of DCAMM shall be considered to be the "Chief Executive Official of the State Agency"; CUSTOMER shall be considered to be the "Awarding Authority"; and ESCO shall be considered to be the "Contractor" as those terms are used in said §39Q. In the case of every dispute where the dollar amount in dispute (or the estimated dollar value of the extension of time in dispute) is \$50,000 or more and ESCO appeals the decision of the Commissioner of DCAMM (or his or her designee) as provided for in M.G.L. c.30, §39Q, CUSTOMER and ESCO shall engage in good faith in a non-binding mandatory mediation process, which process shall be concluded within sixty (60) calendar days from the date that ESCO files an appeal from said decision. In the case of such disputes where the dollar amount in dispute (or the estimated dollar value of the extension of time in dispute) is \$500,000 or more, the parties shall, if the mediation process fails, submit the dispute to a third-party Neutral or Dispute Review Board which shall within sixty (60) calendar days render a non-binding advisory opinion. Unless the parties have previously agreed in writing to a process for submitting disputes to mediation or a Dispute Review Board, CUSTOMER shall determine in its reasonable discretion the procedures to be followed and shall give ESCO notice of the same in writing within thirty (30) calendar days of the date that CUSTOMER receives notice of ESCO's appeal from the decision of the Commissioner of DCAMM (or his or her designee). The cost of the services of any mediator selected by one party to the Contract shall be borne by the party making the selection. The cost of the services of any mediator selected jointly by the parties to the Contract or jointly by mediators selected by the parties to the Contract shall be borne equally by ESCO and CUSTOMER.

Section 32: Assignment

- 32.1:** CUSTOMER shall not assign, transfer, or otherwise dispose of the Contract, or any interest therein, without ESCO's prior written consent, which consent shall not be unreasonably withheld.
- 32.2:** ESCO may not assign, pledge or encumber its rights hereunder in whole or in part without the prior written consent of CUSTOMER except to an institutional lender, provided no such assignment shall affect CUSTOMER's rights or ESCO's obligations hereunder.
- 32.3** Assignment of CUSTOMER payments due herein to ESCO or to a third party is acceptable, but such assignment shall not impact CUSTOMER's right to withhold payments pursuant to Section 29.6 of the Contract.

Section 33: Representations and Warranties

- 33.1 Mutual Representations and Warranties.** Each party warrants and represents to the other that as of the Effective Date and for the Contract Term:

- a. it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver the Contract and perform its obligations hereunder;
- b. its execution, delivery, and performance of the Contract have been duly authorized by, or are in accordance with, its organizational instruments, and the 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 the Contract shall not result in a breach or violation of, or constitute a default under any agreement, 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.

33.2 Additional Representations and Warranties by CUSTOMER. CUSTOMER hereby warrants, represents and promises that as of the Effective Date and for the Contract Term:

- a. CUSTOMER is authorized under the Constitution and Laws of the Commonwealth of Massachusetts to enter into the Contract, each transaction contemplated hereby, and to perform all of its obligations under the Contract;
- b. CUSTOMER has not entered into any prior leases, contracts or agreements with other persons or entities regarding the leasing or acquisition of water or energy efficiency equipment or the provision of energy management services for the Premises or with regard to servicing any of the Existing Equipment/Systems located in the Premises that would encroach upon the scope of the Contract, unless specified in **Schedule J**. CUSTOMER shall provide ESCO with copies of any successor or additional leases of energy or water efficiency equipment and contracts for management or servicing of Existing Equipment/Systems at Premises that may be executed from time to time hereafter if requested by ESCO; (or)
- c. The authorization, approval and execution of the Contract and all other proceedings of CUSTOMER relating to the transactions contemplated thereby have been performed in accordance with all applicable Laws.

33.3 Additional Representations and Warranties by ESCO. ESCO hereby warrants, represents and promises that as of the Effective Date and for the Contract Term:

- a. before commencing performance of the Contract:
 - i. ESCO shall have become licensed or otherwise permitted to do business in the Commonwealth of Massachusetts;
 - ii. ESCO shall have provided proof and documentation of all required insurance and bonds pursuant to the Contract.

- iii. ESCO shall warrant the accuracy of the FIGA except the agreed upon stipulated variables.
- b. ESCO shall make available, upon reasonable request, documents relating to its performance under the Contract, including contracts and subcontracts it shall enter into;
- c. ESCO shall use Subcontractors who are qualified, licensed and bonded in the Commonwealth of Massachusetts to perform the work so subcontracted pursuant to the terms hereof;
- d. ESCO has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by the Contract;
- e. The New Equipment/Systems shall meet or exceed the systems start-up and commissioning requirements in Section 15.3 and **Schedule G** of the Contract. .
- f. The New Equipment/Systems is or shall be compatible with all other Premises mechanical and electrical systems, subsystems, or components with which the New Equipment/Systems interacts, and that, as installed, neither the New Equipment/Systems nor such other systems, subsystems, or components shall materially adversely affect each other as a direct or indirect result of New Equipment/Systems installation or operation;
- g. That ESCO is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Installation Services and perform its obligations under the Contract.

Section 34: Headings

Headings and subtitles used throughout the 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.

Section 35: No Waiver

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

Section 36: Compliance with Applicable Laws

All New Equipment/Systems and Services provided under the Contract shall comply with all Laws.

Section 37: Complete Agreement/Severability

This Contract, when executed, together with all Schedules attached hereto or to be attached hereto, as provided for by the Contract shall constitute the entire Contract between all parties and the Contract may not be amended, modified, or terminated except by a written Agreement signed by the parties.

In the event that any clause or provision of the 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 the Contract unless the result would be manifestly inequitable or unconscionable or unlawful.

Section 38: Amendments

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

Section 39: Further Acts/Documents

The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of the Contract.

Section 40: Notice and Consent

Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail, return receipt requested, postage prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice. Any consent required hereunder shall not be unreasonably withheld.

- a. In the case of a notice or other communication to ESCO:

ESCO
Address

- b. In the case of a notice or other communication to CUSTOMER:

Division of Capital Asset Management and Maintenance
One Ashburton Place
Boston, MA 02108
Attention: Elizabeth Minnis, Deputy Commissioner, OPDC

and, with a copy to:

FACILITY

Agency CUSTOMER
Address

This Section 40 shall not apply to reports, bills, or payments sent by one party to the other which may be sent by ordinary mail.

Section 41: Non-Appropriation

CUSTOMER certifies that at the time of the execution of this Contract, sufficient appropriations exist and shall be encumbered to fund the Total Contract Value. Payments are subject to appropriation and shall be made only for work performed in accordance with the terms of this Contract, provided that CUSTOMER shall make payment to ESCO for obligations incurred during the period for which funding was included in an annual or supplemental appropriation. ESCO shall not be obligated to perform, and shall not perform, work outside the scope of this Contract without an appropriate amendment to this Contract, and a sufficient appropriation(s) to support such additional work. CUSTOMER may immediately terminate or suspend this Contract in the event that the appropriation(s) funding this Contract is eliminated or reduced to an amount which will be insufficient to support anticipated future obligations under this Contract. Such termination shall be deemed a termination for convenience subject to the provisions of Section 30 of this Contract. Delay by the General Court in enacting an annual or supplemental appropriation bill shall not be grounds for termination of the Contract pursuant to this Section, unless such annual or supplemental appropriation bill as enacted and signed by the Governor contains insufficient funding for obligations pursuant to this Contract.

Section 42: Legal or Equitable Remedies

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

Section 43: Application of Massachusetts Law

This Contract shall be governed by and construed in accordance with the laws of the Commonwealth of Massachusetts.

Section 44: Force Majeure

If a party ("performing party") shall be unable to reasonably perform any of its obligations under the Contract due to acts of God, insurrections or riots, materials or labor shortages, or similar events, the Contract shall, at the other party's option, remain in effect but the obligations of both parties shall be suspended until the said events shall have ended.

Section 45: Independent Contractors

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

Section 46: Health, Safety and Accident Prevention

46.1 Performance of Services. In the performance of the Installation Services, ESCO shall:

- a. Ensure that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his/her health and/or safety as determined under construction safety and health standards promulgated by the U.S. Secretary of Labor by regulation;
- b. Protect the lives, health, and safety of other persons; and
- c. Prevent damage to property, materials, supplies, and equipment.

46.2 Compliance. For the purposes of the Contract, ESCO shall:

- a. Comply with 84 Stat. 1590, the "Occupational Safety and Health Act of 1970" (OSHA) and with regulations and standards issued by the U.S. Secretary of Labor at 29 CFR Part 1926; and
- b. Include the terms of this Section in every subcontract so that such terms shall be binding on each Subcontractor;
- c. Designate by notice to CUSTOMER a responsible member of its organization at the Site whose duties shall include ensuring safety, implementation of ESCO's Safety Plan referenced below and preventing accidents.

46.3 OSHA 10 Hour Training Requirement. Pursuant to M.G.L. c. 30 §39S, ESCO shall certify and ensure that all employees of ESCO to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health administration that is at least 10 hours in duration at the time the employee begins work and all Subcontractors and others working at the site on behalf of ESCO shall furnish documentation of successful completion of said course with the first certified payroll report for each employee.

46.4 Records. ESCO shall maintain an accurate record of exposure data on all accidents incident to the Services resulting in death, traumatic injury, occupational disease, or damage to property, materials, supplies, or equipment, and shall report this data in the manner prescribed by 29 CFR Part 1904. Without limiting the foregoing, ESCO

shall submit to CUSTOMER without delay verbal and written reports of all accidents involving bodily injury or property damage arising in connection with the Services.

- 46.5 Emergency.** In any emergency affecting the safety of persons or property ESCO shall immediately act in the exercise of reasonable judgment to prevent threatened damage, injury, or loss. ESCO shall immediately notify CUSTOMER of such emergency.
- 46.6 Subcontractor Compliance.** ESCO shall be responsible for its Subcontractors' compliance with the provisions of this Section of the Contract.
- 46.7 Safety Plan.** Before commencing any portion of the Services ESCO shall submit a written Project-specific plan for implementing this Section of the Contract. The plan shall include an analysis of the significant hazards to life, limb and property inherent in the performance of the Services and a plan for controlling these hazards.
- 46.8 Health and Safety Laws.** Without limiting the foregoing provisions of this Section of the Contract, ESCO shall comply with all health and safety Laws applicable to the Services. Without limitation,
- a. If ESCO uses, stores or encounters toxic or hazardous substances it shall comply with M.G.L. c. 111F, §2, the "Right to Know" law and regulations promulgated by the Department of Public Health, 105 CMR 670, the Department of Environmental Protection, 310 CMR 33, and the Department of Labor and Workforce Development, 441 CMR 21; and shall post a Workplace Notice obtainable from the Department of Labor and Workforce Development.
 - b. ESCO shall comply with the Federal Resource Conservation and Recovery Act, the Federal Comprehensive Environmental Response, Compensation and Liability Act, M.G.L. c. 21C; M.G.L. c. 21E, and any other Laws affecting toxic or hazardous materials, solid, special or hazardous waste (collectively "Hazardous Materials Laws). Should ESCO discover unforeseen materials subject to Hazardous Materials Laws at the Site, ESCO shall immediately comply with any and all requirements for dealing with such materials and notify all required governmental authorities and CUSTOMER of such discovery.
 - c. ESCO shall be responsible for the location of all utilities in connection with the Services. Without limiting the foregoing, ESCO shall comply with all "Dig-Safe Laws". Dig-Safe System, Inc. may be contacted at 331 Montvale Road, Woburn, MA, 01801, 1-888-344-7233. ESCO shall notify Dig-Safe of contemplated excavation, demolition, or explosive work in public or private ways, and in any utility company right of way or easement, by certified mail, with a copy to DCAMM and the Department of Environmental Protection (DEP). This notice shall be given at least 72 hours prior to the work, but not more than sixty (60) calendar days before the work is to be done. Such notice shall state the name of the street or the route number of the way and shall include an accurate description of the location and nature of the proposed work. Dig-Safe is required to respond to the notice within 72 hours of receipt by designating the location of pipes, mains, wires or conduits at the Site. ESCO shall not commence work until Dig-Safe has responded.

The work shall be performed in such manner and with reasonable precautions taken to avoid damage to utilities under the surface at the work location. ESCO shall provide the Superintendent with current Dig-Safe regulations, and a copy of M.G.L. c. 82, §40. Any costs related to the services performed by Dig-Safe shall be borne by ESCO.

- d. ESCO shall comply with M.G.L. c. 149, §129A, relative to shoring and bracing of trenches.

46.9 Prevention. Without limiting ESCO's responsibilities described above, ESCO shall take all reasonable precautions for the safety of, and the prevention of injury or damage to: (1) all agents and employees of ESCO performing work on the Site or related to the Services and all other persons who may be affected thereby, including the general public, (2) all the Services and all materials and New Equipment/Systems to be incorporated therein, whether in storage on or off the Site, under the care custody or control of ESCO or any of its Subcontractor or any contractors directly or indirectly contracting through any of them, and (3) other property at the Site or adjacent thereto, including but not limited to trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of the Services. ESCO shall promptly remedy all damage or loss to any such property caused in whole or in part by ESCO, any Subcontractors, or anyone directly or indirectly contracted or employed by any of them or by anyone for whose acts any of them may be liable. Without limiting the foregoing, ESCO shall:

- a. post and maintain adequate danger signs and other warnings against hazards;
- b. promulgate safety regulations and give appropriate notices to CUSTOMER and users of adjacent utilities and property;
- c. insure the adequate strength and safety of all scaffolding, staging and hoisting equipment, temporary shoring, bracing and tying;
- d. protect adjoining private or public property;
- e. provide barricades, temporary fences, and covered walkways required by prudent construction practices, Laws and/or the Contract;
- f. furnish approved hard hats and other personal protective equipment, furnish approved first aid supplies, furnish the name of the first aid attendant, and maintain a posted list of emergency facilities;
- g. provide proper means of access to property where the existing access is cut off by ESCO;
- h. maintain from the beginning of any darkness or twilight, through the whole of every night, sufficient lights on or near any obstruction so as to guard and protect travelers from injury from such obstruction;

- i. maintain adequate security at the Site so as not to expose the Services and surrounding property to vandalism or malicious mischief;
- i. provide adequate fire protection procedures during the use of cutting torches, welding equipment, plumbers' torches and other flame and spark producing apparatus; and
- k. take prompt action to correct any dangerous or hazardous conditions.

46.10 Explosives. ESCO shall not use or store explosives in the performance of the Services unless ESCO first obtains CUSTOMER's prior written specific approval. If CUSTOMER approves the use or storage of explosives during the performance of the Services, ESCO shall first comply with all Laws and obtain all permits, approvals, and certificates required in connection with the same and shall exercise best efforts, including but not limited to the employment and supervision of properly qualified personnel, to prevent damage, injuries, and accidents involving said explosives.

46.11 Cutting and Welding. ESCO shall not permit cutting or welding in or immediately adjacent to existing property of CUSTOMER or property owned by anyone else without CUSTOMER's prior approval in each instance.

Section 47: ESCO's Accounting Method Requirements (M.G.L. c. 30, §39R)

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

- a. "Records" means books or original entries, accounts, checks, bank statements and all other banking documents, correspondence, memoranda, invoices, computer printouts, tapes, discs, papers and other documents or transcribed information of any type, whether expressed in ordinary or machine language.
- b. "Independent Certified Public Accountant" means a person duly registered in good standing and entitled to practice as a certified public accountant under the laws of the place of his/her residence or principal office and who is in fact independent. In determining whether an accountant is independent with respect to a particular person, appropriate consideration should be given to all relationships between the accountant and that person or any affiliate thereof. Determination of an accountant's independence shall not be confined to the relationships existing in connection with the filing of reports with CUSTOMER.
- c. "Audit", when used in regard to financial statements, means an examination of records by an independent certified public accountant in accordance with generally accepted accounting principles and auditing standards for the purpose of expressing a CERTIFIED opinion thereon, or, in the alternative, a qualified opinion or a declination to express an opinion for stated reasons.
- d. "Accountant's Report", when used in regard to financial statements, means a document in which an independent certified public accountant indicates the scope of the audit which s/he has made and sets forth his/her opinion

regarding the financial statement for the most recent completed fiscal year as set forth in Paragraph (d) of M.G.L. c. 30, §39R.

- e. "Management," when used herein, means the chief executive officers, partners, principals or other person or persons primarily responsible for the financial and operational policies and practices of ESCO.
- f. Accounting terms, unless otherwise defined herein, shall have a meaning in accordance with generally accepted accounting principles and auditing standards.

47.2 ESCO shall file with CUSTOMER, a statement of management as to whether the system of internal accounting controls of the ESCO and its subsidiaries reasonably assures that:

- a. transactions are executed in accordance with management's general and specific authorization;
- b. transactions are recorded as necessary:
 - (i) to permit preparation of financial statements in conformity with generally accepted accounting principles, and
 - (ii) to maintain accountability for assets;
- c. access to assets is permitted only in accordance with management's general or specific authorization; and
- d. the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action was taken with respect to any difference.

47.3 ESCO shall also file with CUSTOMER a statement prepared and signed by an independent certified public accountant, stating that s/he has examined the statement of management on internal accounting controls, and is expressing an opinion as to:

- a. whether the representations of management in response to this paragraph are consistent with the result of management's evaluation of the system of internal accounting controls; and
- b. whether such representations of management are, in addition, reasonable with respect to transactions and assets in amounts which would be material when measured in relation to the ESCO's financial statements.

47.4 ESCO shall annually file with CUSTOMER during the Contract Term a financial statement prepared by an independent certified public accountant on the basis of an audit by such accountant. The final statement filed shall include the date of final payment. All statements shall be accompanied by an accountant's report.

Section 48: Massachusetts and United States Manufacturers

Pursuant to General Laws, Chapter 7, Section 22, paragraph 17, ESCO is encouraged to give preference in the purchase of supplies and materials, other considerations being equal, in favor, first, of supplies and materials manufactured and sold within the Commonwealth, and second, of supplies and materials manufactured and sold elsewhere within the United States in performing the work under the Contract.

Section 49: Anti-Boycott Covenant (Executive Order No. 130)

ESCO warrants, represents and agrees that during the time the Contract is in effect, neither it nor any affiliated company, as hereafter defined, participates in or cooperates with an international boycott, as defined in Section 999 (b) (3) and (4) of the Internal Revenue Code of 1954, as amended, or engages in conduct declared to be unlawful by Section 2 of Chapter 151E, Massachusetts General Laws. If there shall be a breach in the warranty, representation and agreement contained in this Section, then without limiting such other rights as it may have, CUSTOMER shall be entitled to rescind the Contract. As used herein, an affiliated company shall be any business entity of which at least 51% of the ownership interests are directly or indirectly owned by ESCO or by a person or persons or business entity or entities directly or indirectly owning at least 51% of the ownership interests of ESCO.

ESCO shall not purchase or rent any materials, equipment, machinery, vehicles, or supplies for or in connection with the Services from any person or entity who does not sign, under pains and penalties of perjury, a certificate that recites: "The undersigned warrants, represents and agrees that during the time its agreement with ESCO is in effect for materials, supplies or equipment to be used in connection with the Services, neither the undersigned or any affiliated company, as hereafter defined, participates in or cooperates with an international boycott, as defined in Section 999(b)(3) and (4) of the Internal Revenue Code of 1954, as amended, or engages in conduct declared to be unlawful by Section 2 of Chapter 151E of the Massachusetts General Laws. As used herein, an affiliated company shall be any business entity of which at least 51% of the ownership interests are directly or indirectly owned by the undersigned or by a person or persons or business entity or entities directly or indirectly owning at least 51% of the ownership interests of the undersigned; or which directly or indirectly owns at least 51% of the ownership interests of the undersigned."

CUSTOMER shall not be obligated to pay ESCO for the cost of any materials, supplies, or equipment purchased or rented from any individual or entity from whom ESCO has not previously obtained and delivered to the CUSTOMER the certificate that the previous paragraph requires. ESCO will immediately terminate its contract with any supplier who breaches the warranty, representation and agreement contained in the previous paragraph.

ESCO shall include in ESCO's subcontracts or agreement with any person or entity from whom ESCO intends to purchase or rent any materials, equipment, machinery, vehicles or supplies for or in connection with the Services, (a) a notice that this Contract obligates ESCO to terminate the supply contract upon discovery of such breach of the sworn certificate delivered under subparagraph (1) and such termination shall be without liability to ESCO or CUSTOMER and (b) a provision which states: "The Governor or his designee, the secretary of administration and finance, and the state auditor or his designee shall have the right at reasonable times and upon reasonable notice to examine the books, records and other compilations of the undersigned vendor which pertain to the performance and requirements of this Contract to provide materials of any nature to ESCO in connection with the Services."

Section 50: Workforce Certification: Certification of Compliance with Workforce Related Legal Requirements [Executive Order 481]

50.1 Workforce Certification. ESCO shall comply with the following legal requirements for any and all employees to be employed in the Project who are required to be listed in the certified payroll reports for the Project: 1) Federal Department of Homeland Security Requirements in hiring such employees including, but not limited, to the faithful completion of the Federal Department of Homeland Security Form I-9 process by ESCO; 2) proper classification of individuals employed on the Project; 3) all Laws concerning Workers' Compensation insurance coverage, Unemployment Insurance, Social Security taxes, and Income Taxes; and 4) all Laws concerning hospitalization and medical benefits that meet the minimum requirements of the connector board established in chapter 176Q of the General Laws. ESCO shall execute a Workforce Certification form with the execution of its contract. ESCO shall require each of its Subcontractors and sub-subcontractors to execute and provide to ESCO such Workforce Certification form with the execution of each subcontract, and ESCO shall immediately provide a copy to CUSTOMER. ESCO acknowledges that with the weekly workforce reports that must be submitted on a weekly basis, ESCO and all of its Subcontractors are required to certify that the Form I-9 process was faithfully completed and that all other legal requirements related to its workforce referenced above were followed for all employees listed on each certified payroll report when submitted. ESCO and all of its Subcontractors must: comply with the legal requirements of this Section; must not knowingly use undocumented workers in connection with the performance of this Contract; pursuant to federal requirements must verify the immigration status of all workers assigned to the Contract without engaging in unlawful discrimination; and must not knowingly or recklessly alter, falsify, or accept altered or falsified documents from any such worker. Breach of any of the terms of the Workforce Certification legal requirements during the Contract Term may be regarded as a material breach, subjecting ESCO and its Subcontractors to sanctions, including but not limited to monetary penalties, withholding of payments, suspension, default or termination. ESCO must require each of its Subcontractors to execute and provide to ESCO a Workforce Certification form with the execution of each subcontract, and ESCO must require each Subcontractor to forward a copy of each such Workforce Certification to the ESCO for filing with CUSTOMER.

50.2 Veterans Preference. In the employment of mechanics and apprentices, teamsters, chauffeurs, and laborers in the performance of Services in the Commonwealth of Massachusetts, preference shall first be given to citizens of the Commonwealth of Massachusetts who have been residents of the Commonwealth of Massachusetts for at least six (6) months at the commencement of their employment and who are veterans as defined M.G.L. c.4, §7(34), and who are qualified to perform the work to which the employment relates and, within such preference, preference shall be given to service-disabled veterans; and secondly, to citizens of the Commonwealth of Massachusetts generally who have been residents of the Commonwealth of Massachusetts for at least six (6) months at the commencement of their employment, and if they cannot be obtained in sufficient numbers, then to citizens of the United States.

50.3 Prevailing Wages. All workers employed under the Contract shall not be paid less than the minimum wage rate for the area as attached in **Schedule P**. Each ESCO must issue a statement of compliance to be incorporated into the Contract. This statement, as attached in **Schedule P**, must be submitted within fifteen (15) calendar

days after completion of the Installation Services, and shall be executed by ESCO, Subcontractor, or public body or by any authorized officer or employee of ESCO, Subcontractor or public body who supervises the payment of wages. CUSTOMER is not responsible for any errors, omissions, or misprints in the said **Schedule P**.

Schedule P shall continue to be the minimum rate wages payable to workers employed in the Services throughout the Contract Term, subject to the exceptions provided in M.G.L. c.149, §§26-27H. ESCO shall not have any claim for extra compensation from CUSTOMER if the actual wages paid to workers employed in the Installation Services exceeds the rates listed on **Schedule P** or as otherwise provided by Laws. ESCO shall cause a copy of said **Schedule P** to be kept in a conspicuous place at the Site during the Contract Term. If reserve police officers are employed by ESCO, they shall be paid the prevailing wage of regular police officers. (See M.G.L. c.149, §34B). Mass General Laws c. 149, §27 as amended on August 8, 2008 requires annual updates to prevailing wage schedules for all public construction projects lasting longer than one year. ESCO is required to obtain the wage schedules from awarding authorities, and to pay no less than these rates to covered workers. ESCO and all Subcontractors are required to anticipate such annual updated prevailing wage schedules and neither ESCO nor any Subcontractors shall be entitled to claim additional compensation for Installation Services due to any increased rates shown on updated prevailing wage schedules.

- 50.4 Payroll Records and Statement of Compliance.** ESCO shall comply and shall cause its Subcontractors to comply with Massachusetts General Law c. 149, §27B, which requires that a true and accurate record be kept of all persons employed on the Project for which the prevailing wage rates have been provided. ESCO and all Subcontractors shall keep these records and preserve them for a period of three years from the date of completion of the Contract. Such records shall be open to inspection by any authorized representative of CUSTOMER at any reasonable time, and as often as may be necessary. ESCO shall, and shall cause its Subcontractors to, submit weekly copies of their weekly payroll records to DCAMM. In addition, ESCO and each Subcontractor shall furnish to the Executive Department of Labor within fifteen (15) calendar days after completion of its portion of the Services a signed statement in the form required by DCAMM.
- 50.5 Vehicle operators.** If the Director of the Department of Labor and Workforce Development has established a schedule of wage rates to be paid to the operators of trucks, vehicles or equipment for the Services, ESCO shall be obligated to pay such operators at least the minimum wage rate contained on such schedule. (See M.G.L. c.149, §§26-27H).
- 50.6 Eight Hour Day.** ESCO shall comply with M.G.L. c. 149, §§30, 34 and 34A which provide that no laborer, worker, mechanic, foreman or inspector working within the Commonwealth in the employ of ESCO, Subcontractor or other person doing or contracting to do the whole or part of the Services shall be required or permitted to work more than eight (8) hours in any one day or more than forty-eight (48) hours in any one week, or more than six (6) calendar days in any one week, except in cases of extraordinary emergency.
- 50.7 Timely Payment of Wages.** ESCO shall comply with, and shall cause its Subcontractors to comply with M.G.L. c. 149, §148 which requires the weekly or biweekly payment of employees within six (6) calendar days of the end of the pay period during which wages were earned if employed for five (5) or six (6) calendar

days of a week, and within other periods of time under certain circumstances as set forth therein.

50.8 Lodging, etc. ESCO shall comply with, and shall cause its Subcontractors to comply with, M.G.L. c. 149, §25 which provides that every employee under the Contract shall lodge, board and trade where and with whom s/he elects, and neither ESCO nor its agents or employees shall, either directly or indirectly, require as a condition of the employment of any person that the employee shall lodge, board or trade at a particular place or with a particular person.

50.9 Truck Rates. The use by ESCO of trucks or other motor vehicles hired from either common or contract motor carriers in the course of performance of the Contract is subject to such minimum rates and charges, and rules and regulations as may from time to time be promulgated by the Department of Public Utilities of the Commonwealth of Massachusetts or other agency of the state or federal government which may be authorized by law to set rates or otherwise regulate the use of such vehicles. ESCO expressly assumes the risk of any additional expense that may arise by reason of any change in such minimum rates and charges, and rules and regulations, and shall be entitled to no additional compensation or reimbursement by reason thereof.

Section 51: Equal Employment Opportunity, Non-Discrimination in Hiring and Employment and Affirmative Action Program [Executive Order Nos. 524 and 526]

ESCO (and any Subcontractors) may not engage in discriminatory employment practices; and ESCO certifies that it is in compliance with all applicable federal and state Laws, rules, and regulations governing fair labor and employment practices. These provisions shall be enforced by CUSTOMER and/or the Massachusetts Commission Against Discrimination. Any breach shall be regarded as a material breach of the Contract and may subject ESCO to appropriate sanctions.

During the performance of the Contract, ESCO and all of its Subcontractors shall comply with all applicable equal employment opportunity, non-discrimination and affirmative action requirements, including but not limited to the requirements set forth in **Schedule Q**. In addition, ESCO shall commit to purchasing supplies and services from certified minority or women-owned businesses, small businesses or businesses owned by socially or economically disadvantaged persons or persons with disabilities, including but not limited to the requirements set forth in **Schedule Q**.

For purpose of the Contract, "minority" refers to Asians, Blacks, Western Hemisphere Hispanics, Native Americans, and Cape Verdeans; "Commission" refers to the Massachusetts Commission Against Discrimination.

Section 52: Minority/Women Participation Goals and Anti-Discrimination Programs

ESCO shall comply with the goals as set forth in **Schedule Q** (Minority/Women Participation Goals and Anti-Discrimination Goals). The MBE/WBE participation goals shall be applied to the Installation Period Costs, less any Installation Period financing costs incurred by ESCO.

Section 53: Hiring of State Employees By State Contractors [Executive Order No. 346]

ESCO certifies compliance with both the conflict of interest law set forth in chapter 268A of the General Laws specifically M.G.L. c. 268A, §5(f), and Executive Order 346; and includes limitations regarding the hiring of state employees by private companies contracting with the Commonwealth of Massachusetts. A privatization contract shall be deemed to include a specific prohibition against the hiring at any time during the Contract Term, and for any position in ESCO's company, any state management employee who is, was, or will be involved in the preparation of the RFP, the negotiations leading to the awarding of the Contract, the decision to award the Contract, and/or the supervision or oversight of performance under the Contract.

Section 54: Certification Regarding Northern Ireland [M.G.L. c. 7, §22C]

ESCO certifies that it does not employ ten or more employees in an office or other facility in Northern Ireland and if ESCO employs ten or more employees in an office or other facility located in Northern Ireland, ESCO certifies that it does not discriminate in employment, compensation, or the terms, conditions and privileges of employment on account of religious or political belief; and it promotes religious tolerance within the work place, and the eradication of any manifestations of religious and other illegal discrimination; and ESCO is not engaged in the manufacture, distribution or sale of firearms, munitions, including rubber or plastic bullets, tear gas, armored vehicles or military aircraft for use or deployment in any activity in Northern Ireland.

Section 55: Enforcement

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

Section 56: Sales Tax Exemption

CUSTOMER is exempt from the assessment of Massachusetts sales and use taxes. CUSTOMER shall issue ESCO a tax exemption certificate to use for the purchases of New Equipment/Systems for CUSTOMER's benefit to complete the Services under the Contract. ESCO shall not pay any sales or use taxes on any item exempt from Massachusetts sales and use taxes unless authorized by CUSTOMER, required by the Rules published by the Commissioner of Revenue or is ordered by an appropriate taxing authority to remit sales and use taxes. To the extent ESCO pays sales or use tax consistent with the requirement of this paragraph, ESCO shall be entitled to an equitable adjustment to the total compensation payable to ESCO under Sections 4 and 22 of the Contract equal to the amount of such tax paid.

Section 57: Leading By Example – Clean Energy and Efficient Buildings [Executive Order 484]

ESCO understands that, pursuant to Executive Order No. 484, all new construction and major renovation building projects over 20,000 square feet must meet a Massachusetts LEED Plus building standard (as defined by CUSTOMER), and that smaller projects must meet the minimum energy performance standards established by the Commonwealth of Massachusetts Sustainable Design Roundtable. Furthermore, ESCO understands that the

Massachusetts LEED Plus standard applies to all projects overseen by the (Massachusetts Division of Capital Asset Management and Maintenance), as well as all projects built on any land owned by the Commonwealth of Massachusetts for use by state agencies.

Section 58: Confidentiality; Personal Data [M.G.L. c. 66A, Executive Order 504]

ESCO shall comply with M.G.L. c. 66A if ESCO becomes a "holder" of "personal data" as defined therein. ESCO shall comply with the provisions of Executive Order 504 and shall execute the Executive Order 504 Contractor Certification Form attached hereto as Exhibit IX.

[THIS SECTION INTENTIONALLY BLANK. SIGNATURES ON NEXT PAGE]

Section 59: Signatures

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

ESCO

COMMONWEALTH OF MASSACHUSETTS
(FACILITY)

Signature _____

Signature _____

Printed Name _____

Printed Name _____

Title _____

Title _____

Date _____

Date _____

DIVISION OF CAPITAL ASSET MANAGEMENT
AND MAINTENANCE (DCAMM)

Signature _____

Printed Name Elizabeth Minnis

Title Deputy Commissioner, OPDC

Date _____

Approved as to Form:

Office of General Counsel

SCHEDULE B: PHASED INSTALLATION SERVICES

1. ESCO shall, upon CUSTOMER's approval of the Phased Investment Grade Audit for each Phase of Installation Services and CUSTOMER's issuance of the required Notice to Proceed, implement the Energy Conservation Measures (ECMs), as identified in each Phased Investment Grade Audit, on the Premises and shall acquire, install, and commission the New Equipment/Systems associated with each ECM required for each Phase of Installation Services.

ESCO may work with CUSTOMER to identify additional Energy Conservation Measures for inclusion under the Contract. Additional ECMs must be approved per a Notice to Proceed, and may not result in a company multiplier of more than xxxxx [average company multiplier from Proposal].

For each additional Phase of Installation Services, ESCO shall provide to CUSTOMER in the FIGA a detailed listing of all New Equipment/Systems required to be installed pursuant to each ECM upon completion of all necessary engineering and detail design requirements as part of As-Built requirements.

Prior to the issuance of a Notice to Proceed for each additional Phase of Installation Services, ESCO must provide all cost data and mark-ups as shown on Form C of the RFP, as attached hereto.

[insert phase and list of ECMs]

Table B-1 - SCOPE of SERVICES – PHASE

ECM#	Name	Applicable Buildings	Brief Description (# of Pieces of Equipment, Size and Model for large equipment, if applicable) List manufacturer if necessary for specific New Equipment/Systems	Section Number Reference in FIGA

Refer to the Phased Investment Grade Audit (Appendix A) for more detailed descriptions of each of the energy conservation measures.

CUSTOMER will issue a Notice to Proceed for ECMs based upon the Form attached hereto.

Project # xxxxxxxx/Project Name

Attach NTP Form Here

SCHEDULE C: CONSTRUCTION/INSTALLATION SCHEDULE

The parties agree that the Installation Services set forth in **Schedule B** shall be installed in accordance with the following approved schedule which can ONLY be modified in accordance with Section 11 and Section 13 of the Contract.

To the extent that this Project is using a phased approach, the parties shall agree and CUSTOMER shall approve a schedule for each Phase of Installation Services and each such schedule shall be attached hereto.

[Attach Installation Schedule as approved by CUSTOMER in each Phased Investment Grade Audit or the FIGA hereto.]

Insert **Table C-1: Installation Schedule Phase 1**
Insert **Table C-2: Installation Schedule Phase 2**
(and continue to insert the same for each Phase)

SCHEDULE D: DESIGN SERVICES AND PROCEDURES

The design level requirements for each individual ECM are set forth in **Table D-1** as 50%, 90% or 100%. The specific requirements and procedures for each of the specified Design Document phases (50%, 90%, 100%) delineated in **Table D-1** are set forth below.

[Insert final version of “Design Table” from Proposal as Table D-1]

Table D-1: Level of Design Services

ECM # and Name	50% Design Provided in FIGA	90% Design Provided in FIGA	Complete List of replacements (schedule) in FIGA*	90% Design Required Prior to Install	100% Design or Schedule of Replacements Required Prior to Install
	(Yes or No)				(Yes or No)

[Note to E-Team/OPDC – Be sure to identify any design assumptions or variations from Schematic Design detail provided in the RFP which ESCO must incorporate into its final design.]

I. 50% Design Documents

Unless otherwise directed or approved in writing by DCAMM, for 50% Design Documents required herein, ESCO should provide XXX [min. of 3] paper copies and XXX [min of 2] electronic copies of documents listed below.

A. General Drawing Requirements:

- 1) All drawings shall be ¼” scale unless approved by the CUSTOMER

- 2) Provide a graphic scale and north arrow.
- 3) Submit all drawings on a standard DCAMM 30" x 42" sheet with a standard DCAMM title block and provide a standard Title Sheet. (Per direction of DCAMM). All draft drawings should be also submitted in electronic copy, per Section 7.1 of this Contract.
- 4) A small-scale, legible key plan adjacent to the title box on all drawings showing section, detail or partial plan locations, when the floor plan to which the sections, detail or partial plans apply are on another sheet. The key plan shall indicate the drawing number of the sheet where the section was taken.
- 5) Show legends of materials, symbols, and abbreviations for each classification of drawings.
- 6) Insert, in the title box of all 50% Design Document drawings, the date on which the drawings were submitted to the CUSTOMER.
- 7) Indicate general dimensions and notes.
- 8) A "Title" Sheet, with the list of drawings and consultant names.
- 9) All legends, symbols, abbreviations, and general notes.

B Site Plans:

- 1) All legends, symbols, and general notes.
- 2) Existing conditions site plan
- 3) Demolition plan.
- 4) Reflective ceiling plans of all floors. (*unlikely necessary, unless already provided by CUSTOMER*)

C HVAC:

- 1) HVAC legends, symbols and general notes.
- 2) Demolition plan/existing conditions.
- 3) HVAC floor plans.
- 4) HVAC roof plan.
- 5) HVAC piping plans.
- 6) HVAC sections.
- 7) HVAC controls.
- 8) HVAC schedules.

D. Electrical:

- 1) Electrical legends, symbols, and general notes.
- 2) Demolition plan/existing conditions.
- 3) Electrical site plan.
- 4) Electrical lighting floor plans (*unlikely necessary, consider removing*).

E. Plumbing:

- 1) Plumbing legends, symbols, and general notes.
- 2) Demolition plan/existing conditions.
- 3) Plumbing floor plans.
- 4) Plumbing roof plan.
- 5) Plumbing schedules.

- 6) Plumbing risers.

F. Specifications:

Provide a draft specification of all the sections required. The specifications should include:

- 1) **Basis of Design:** Specifications shall consist of a general description of the Project and shall include a Basis of Design to satisfy the needs of the program. This shall include all the design parameters that affect the design of the building systems. For example: the hours of occupancy; the design and temperature for heating and cooling; the floor loading; the number of occupants; and the foot-candle design in various spaces.
- 2) **Detailed Specifications:** The Specifications shall be as comprehensive and complete as the 50% Design Documents permit. They shall address all relevant components/sections of the work and, where required by the scope of the Project, include equipment, capacities, and descriptions of structural, mechanical, and electrical and other special systems that impact the Project.
- 3) **Section Numbers and Titles:** The Section numbers and titles established at the 50% Document Phase shall be the same as the Section numbers and titles for the 90% and 100% Design Documents.
- 4) **Specification Index:** Provide an edited index of the standard specification.
- 5) **For HVAC:** Provide Process flow Diagram.

G. Product Requirements:

- 1) Provide **xxx [min of 3]** copies of catalogs sheets, brochures, diagrams, schedules, performance charts, illustrations of materials, assemblies, systems specified, MSDS sheets (where applicable), and other standard descriptive data. Assemble in a loose-leaf binder with tabs for each specification section, and update when a change occurs. Physical material samples of specified materials shall be furnished to the CUSTOMER upon request.

H. 50% Design Quality Control Review

- 1) The following areas of coordination shall be demonstrated:
 - a) Ceiling plenum clearances
 - b) Specification/drawing coordination
 - c) Schedule coordination
 - d) Equipment and power coordination
 - e) Existing vs. new construction
 - f) Phasing

2). CUSTOMER Comments

ESCO shall review the comments prepared by CUSTOMER and incorporate them into this 50% Design Document phase. If ESCO takes exception to any comment install provide a response to CUSTOMER. ESCO shall also provide CUSTOMER with a report indicating the action taken on all comments and indicate where they were incorporated into this phase.

II. 90 % and 100% Design Documents

Unless otherwise directed or approved in writing by DCAMM, for all 90% and 100% Design Documents required herein, ESCO should provide the number and format of copies as set forth in Section 7 of the Contract.

A. Drawings

The 90% and 100% Design Document phase submission for new construction, renovation, or demolition projects shall include the following:

- 1) A "Title" sheet with all architectural and professional engineering (Registered in Massachusetts) consultant stamps (for the 100% Design Documents only)
- 2) All legends, symbols, and general notes.
- 3) Prior to submitting the 100% Design Documents (the construction documents for the Installation Services) to the CUSTOMER, the following steps shall be completed, as applicable:
 - a) Two sets of the 100% Design Documents shall be approved and signed by the state building official, the state Plumbing and Gas Inspector, the local Electrical Inspector, and the local Fire Chief in the same manner as indicated above.
 - b) All other local approvals of state or federal agencies having jurisdiction shall also be obtained.
 - c) The sets containing the original approvals shall be retained by the CUSTOMER as the official approved sets.
 - d) All documents revised after being stamped shall be replaced and the procedure shall be repeated as described above.

B. Specifications:

- 1) Indicate a complete description of the work in the "Scope of Work" section of the specification.
- 2) Indicate related work in other sections.
- 3) Indicate items supplied and installed by others.
- 4) Include test reports.
- 5) Indicate utility back charges if required.
- 6) Indicate the extent of demolition; the standard is that abatement work occurs first, then utility disconnects, and then ESCO demolition.
- 7) Indicate if either the Subcontractor or ESCO supplies the staging or lifts, and which one supplies the temporary enclosure.
- 8) Determine if the cutting and patching is Subcontractor or ESCO responsibility".
- 9) Type in the date on which the Specifications were approved by the CUSTOMER in the lower right hand corner of the title sheet.
- 10) Describe the extent of the work, the materials and workmanship, and include the work under the proper Section.
- 11) Use consistency throughout. Use the word "will" to designate what the ESCO can be expected to do and the word "shall" to designate what is mandatory for ESCO to do.
- 12) Use the same term throughout for the same subject, and the term shall be the same as that used on the drawings.

- 13) Specify that ESCO shall provide inventory information (in electronic spreadsheet format) for all major mechanical and HVAC, electrical, and special equipment, which includes the following: New Equipment/Systems type, New Equipment/Systems description, Manufacturer, Model Number, Serial Number, Building and Location of the New Equipment/Systems (per Section 7 of the Contract).
- 14) Specifications should be tailored to the specific project. Delete sections and references that do not apply.
- 15) Specifications shall be stamped by a registered Massachusetts architect or engineer.

C. Heating, Ventilating & Air Conditioning Drawings

- 1) Heating, ventilating and air conditioning drawings shall indicate the following:
- 2) Site utilities on the utility drawings.
- 3) HVAC work, other than site work, shall not be combined on the same sheets with Plumbing, Electrical or other drawings except with the prior approval of CUSTOMER.
- 4) The location and size of all piping and ductwork systems.
- 5) All systems sized at all reductions, as well as all riser diagrams of piping and duct systems.
- 6) All directions of flow, pitch on piping, and volumes for duct systems.
- 7) Sufficient servicing and/or replacement space of all large items of equipment.
- 8) All equipment, accessories, valves, and dampers with all necessary access panels identified as to type and size. Access panels, where required for access to valves and dampers, etc.
- 9) All cooling system pumps, chillers, cooling towers, air handling units, ductwork systems, dampers, fan details, temperature control system, air and hydronic balancing equipment, and schedules.
- 10) That all fire and smoke dampers, access panels, and doors are installed in accordance with the latest edition of NFPA Code 90.A.

D. Electrical Drawings Shall Include the Following:

- 1) Site utilities shall be indicated on utility drawings.
- 2) Electrical work, other than site work, shall not be combined on the same sheets with Fire Protection, Plumbing, HVAC, or other drawings except with the prior approval of the CUSTOMER.
- 3) General arrangement: Outline layout of each floor. Typical sections through the structure, floor and ceiling heights and elevations, and type of construction, including concrete pads shall be indicated.
- 4) Power system: locations, types, and method of control for all motors, heaters, appliances, controllers, starters, branch circuits, feeder conductors, and conduits. Indicate riser diagrams. Show details and indicate method of supporting electrical conduit. For larger projects, thermostats and control wiring are normally covered under the HVAC contract.
- 5) Signal systems: locations and types of all outlets and equipment, service connections, wiring diagrams, and all other essential details.
- 6) Services: location and details of all services, whether overhead or underground, feeder sizes, plans and elevations of switchgear and transformers, metering and service switchboard arrangements, wiring and ground fault diagram, and bus ducts.
- 7) Riser diagrams for all systems.

E. Plumbing Drawings Shall Indicate the Following:

- 1) All work done by ESCO shall include all water, gas, air, vacuum, and accessories. Site utilities shall be indicated on the utility drawings.
- 2) Plumbing work, other than site work, shall not be combined on the same sheets with the Fire Protection, HVAC, Electrical, or other drawings except with the prior approval of CUSTOMER.
- 3) Water and gas supply sources.
- 4) All piping shall be carefully sized, and all sizes shall be indicated on drawings and riser diagrams. Indicate all directions of flow and pitch on piping.
- 5) Plumbing legend and/or graphical symbols on the first sheet of the plumbing drawings in accordance with the National Standards Institute (ANSI).
- 6) Plumbing riser diagrams for structures two or more stories in height above ground level.
- 7) Piping material, hanger materials, and detail.
- 8) Back-flow preventers in accordance with requirements of Department of Environmental Protection (DEP).
- 9) Clean-outs in accordance with the Massachusetts State Plumbing Code.

F. CUSTOMER Comments

ESCO shall review the comments prepared by CUSTOMER and incorporate them into the 90% Design Documents. If ESCO takes exception to any comment it shall provide a response to CUSTOMER. ESCO shall also provide CUSTOMER with a report indicating the action taken on all comments and indicate where they were incorporated. All comments shall be incorporated, unless approved by CUSTOMER, into the 100% Design Documents.

SCHEDULE E: BASELINE ENERGY CONSUMPTION AND UTILITY RATES

Part I: Definitions and Adjustments

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

Base Year. The base year shall be based upon the Final Investment Grade Audit (Appendix A) which determines the energy and water consumption and cost at the Premises and Existing Equipment/Systems, as approved by CUSTOMER. These base-year data represent energy and water consumption by the Premises and Existing Equipment/Systems as configured and operated before the beginning of the Contract and how the FACILITY would use energy and water if the Installation Services provided in this Project were not implemented. This base year data is listed in **Parts II, III, and IV** of this **Schedule E**.

Base Year Adjustments. The following adjustments, pursuant to Sections 22.7 and 23.3 may be made to the baseline during the Contract Term.

Temperature Correction. The weather sensitive portion of the utility baselines may be adjusted for the current year's temperature and humidity conditions.

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

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

Load Growth. The Parties have agreed to automatically adjust the baseline **X%** each year, for the Contract Term, unless otherwise revised according to the Contract, such as material changes. (CUSTOMER must agree to this, based upon strong evidence of past load growth and future trends demonstrated in the FIGA. The percentage can be 0% if no load growth is expected in the future.)

Part II: Energy and Water Baseline

The energy and water baseline for the FACILITY is shown below, and is outlined in greater detail on page _____ of the FIGA. The energy and water baseline shall not be amended by any NTP.

Table E-1: Energy and Water Baseline

	Electric Total kWh	#2 Oil gallons	Natural Gas Therms	Sewer Cu. ft.	Water Cu.ft.	Other, etc.
Final Audit baseline (break down monthly and then total)	TBD	(or should that be #6 oil?)				
Annual Energy/or Water Usage						

Part III: Baseline Energy and Water Rates:

The effective utility rate schedules to be used for calculating values in **Schedule F** are listed below. Unless a floor or ceiling is agreed to by the parties and specified in the table, rates stated in the table shall remain in effect for the Contract Term.

Attach table detailing utility rates for all units.

Table E-2: Baseline Energy Rates

Utility Type	Units	Price / Unit	Price / MBtu	Marginal Price	Effective Date
Electricity	kWh	\$	\$	\$	201X
Natural Gas for Cogeneration	Therms	\$	\$	\$	201X

Part. IV: Baseline Cost

Using units and rates noted above, create monthly cost for each utility and total annually.

Table E-3: Monthly Cost

ESCO to provide data/paragraph explaining basis for baseline (years, etc.) and adjustments made (HDD, etc.) Please provide reference section to computation and analysis in Investment Grade Audit.

SCHEDULE F: SAVINGS MEASUREMENT AND VERIFICATION FORMULAE

This Schedule defines the terms for the verification of savings used in Part D of the Contract.

Part I: Definitions

For the purposes of Contract, the following terms are defined:

Verified Cost Savings (VCS). ESCO shall calculate the utility savings as determined by the measurement and verification plan listed in this **Schedule F, Part II** using rates as specified in **Schedule E, Part III**. The VCS shall be used strictly for determining the savings pursuant to Section 22 of the Project over the Performance Term. For each Year ESCO shall compare the VCS to Guaranteed Cost Savings listed in Section 22 of the Contract.

Actual Utility Use (AUU). The AUU is the actual utility usage (from the M&V reporting in this **Schedule F, Part III**) for the reporting year. ESCO shall compile the current utility usage for the site for each month during the Contract Term.

Actual Contract Utility Cost (ACUC). To determine the ACUC, for each utility, ESCO shall apply the applicable contract rates as defined in **Schedule E, Part III** to the current year's energy and water usage based upon actual utility data from this **Schedule F, Part III**, to determine the ACUC.

Actual Savings (AS). For each month during the Contract Term, ESCO shall calculate the AS by subtracting the AUU from the Baseline as defined in **Schedule E, Part II**. This provides the amount of savings that the FACILITY actually experienced each year in units.

Actual Utility Cost Savings (AUCS). To determine AUCS, multiply the AS by the contract rates in **Schedule E, Part III**. The AUCS can be used to assist in understanding the current value of the Project, but shall not be used to for calculations pursuant to Section 22 of the Contract.

Savings Differential (SD). The VCS shall be compared to AUCS. If there is a differential of more than ten percent (10%) between these for any utility, ESCO shall provide engineering support, to the reasonable satisfaction of CUSTOMER, to determine the cause of the differential. Such support shall be limited to 80 hours during the first four years of the Contract, and 40 hours thereafter.

Part II: M&V Guarantee and Plan

Per Section 22 of the Contract, ESCO guarantees the following savings:

Table F-1: Phase [redacted] Guarantees

Year (see definitions)	Phases	Unit Savings	Dollar Savings (see Sch. E Part III)	Cumulative Dollars
1				

Table F-1 shall be updated following the issuance of a Notice to Proceed for each new Phase of Installation Services. Unless otherwise agreed by the parties and approved writing by CUSTOMER, such updates shall only be for the inclusion of new Phases and shall not modify the terms of previous Phases or their respective Guaranteed Cost Savings.

Measurement and Verification for each utility shall be determined by the following methodology. The Verified Savings shall be calculated as noted below, and shall be used for calculations of savings and shortfall pursuant to Section 22 of the Contract.

(Attach the approved M&V Plan from IGA here, must use actual values, and not reference FIGA.)

Part III: Annual and Quarterly Reporting Requirements

The following report format for energy reporting is to be followed for each ECM for the first full quarter after the ECM phase receives a Phase Completion Notification Approval. ESCOs shall start M&V for ECMs approved under subsequent Phase Completion Notification Approvals the first full month after the Phase Completion Notification Approval, and shall add those ECMs to the Annual and Quarterly M&V reports. ESCO shall be required to submit quarterly reports and annual reports according to this format. Hardcopies of the following should be sent to CUSTOMER at a minimum on an annual basis. In order to reduce paperwork, electronic copies of quarterly reports may be substituted as determined on a project by project basis. *Please note that some of the following information applies to annual report versus quarterly report information as identified. A minimum of five (5) copies shall be submitted to CUSTOMER.*

ESCO shall submit sample M&V Report that provides the information below prior to the commencement of the Performance Term.

Every page shall include a footnote with contract #, Project name, date of report, and reporting period. Reports shall be provided in a form acceptable to CUSTOMER.

- I. Executive Summary (Annual and Quarterly)-Should be brief synopsis of each subsequent section.**
 - A. Brief Project Background and description.

B. Summary of energy and cost savings / results from this performance period. Project Guaranteed, Verified, and Actual savings broken out by energy units and energy costs for performance period. Compare to Guaranteed Cost Savings for total Project. Please provide the following table:

Units	Baseline Utility Use	Verified Savings	Surplus/ Shortfall Savings from Baseline	Contract Utility Rates	Actual Utility Savings	Actual Contract Utility Cost	Difference from Cost
Electricity kWh							
Etc.							
Total (only dollars)							

- C. Verified Savings by ECM broken out by energy or water units, energy or water cost and other savings values (as applicable) for this period. (Any O&M savings shall be broken out separately.)
- D. Summary of each Section.
- E. Annual and quarterly reports should break out energy and water savings on a monthly basis and shall total energy and water unit savings and associated dollar cost savings for all ECMs by month.
- F. Any additional reductions for other energy or addition of fuel due to conversions should be shown as negative savings and accompanied by associated negative cost savings. Also, reductions in additional fuel sources or energy types not included here can be addressed on a project by project basis.
- G. Summary of any energy or water and/or cost savings adjustments approved per Section 22.7 of the Contract.
- H. Performance and O&M issues identified.
- I. Emission Reductions (annual).

II. Details for each ECM (Annual and Quarterly)

- A. Brief overview description of ECM – where implemented and how cost savings are generated.
- B. Overview of M&V plan for ECM (provide calculations/formulae).
- C. Detail stipulated, verified, and tested variables.
- D. Identify any changes in scope and indicate the net change in savings.
- E. Measurements, monitoring and inspections conducted this reporting period in accordance with M&V plan. (annual only).
- F. Measurement equipment used & New Equipment/Systems calibration documentation (annual only).
- G. Dates/times of data collection or inspections, names of personnel, and documentation of CUSTOMER witnessing (annual only).
- H. Details to confirm adherence to sampling plan (i.e. agreed to % of equipment sampled (annual only).

- I. Include all measured values for this period. Include periods of monitoring and durations and frequency of measurements. (Use appendix and electronic format as necessary.) Include description of data format (headings, units, etc.).
 - J. Describe how performance criteria have or have not been met.
 - K. Detail any performance deficiencies that should be addressed by ESCO or CUSTOMER.
 - L. Note impact of performance deficiencies or enhancements on generation of savings.
- III. Commodity (e.g. energy, water, etc.) rate(s) used in calculations**
- A. Commodity rate(s) as specified in **Schedule E**.
 - B. Average Rates for Current Year (annual only).
- IV. Actual Utility Use (Annual)**
- A. Compile utility data for all energy/water sources for the reporting year. Present data in monthly format, divided by unit and then summarized.
 - B. Compile utility cost data, applying contract (**Schedule E**) and actual rates.
 - C. Compare data, per **Schedule F, Part I, 4**.
- V. Provide summary for technical details of all calculations made**
- A. Analysis Methodology – describe any data manipulation or analysis that was conducted prior to applying savings calculations.
 - B. Details of any baseline or savings adjustments made, per **Schedule E**.
- VI. Maintenance and monitoring requirements per Sections 18 and 21 and Schedules I and K. (Annual)**
- A. Verification of scheduled maintenance items completed by ESCO, including dates performed.
 - B. Summary of unscheduled maintenance activities conducted this period by ESCO, or service provided under Warranty, **Schedule K**.
 - C. Detail any deficiencies needed to be addressed by ESCO or CUSTOMER.
 - D. Note impact of maintenance deficiencies on generation of savings.
- VII. Other**
- (i.e. O&M savings are not included in overall energy performance guarantee but may be of interest to the CUSTOMER to see effect of Project on operation and maintenance costs.) The requirements of reporting of O&M savings shall be determined on a project by project basis. This part may be used for reporting of other consulting services, in **Schedule S**.

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**SCHEDULE G: SYSTEMS START-UP AND COMMISSIONING; OPERATING
PARAMETERS OF INSTALLED NEW EQUIPMENT/SYSTEMS**

ESCO is responsible for commissioning of all New Equipment/Systems installed pursuant to Section 15.3 of the Contract.

Please attach APPROVED Commissioning Plan for each Phase.

SCHEDULE H: STANDARDS OF COMFORT

The following average maintained standards of service and comfort shall apply to the area where people and/or equipment are located per Section 20 of the Contract.

TYPE OF SERVICE	ENVIRONMENTAL REQUIREMENT
I. HEATING	
Occupied	70° F
Unoccupied	55° F
Storage	55° F
II. COOLING	
Occupied	72-76° F
III. HOT WATER HEATERS	140° F. Must meet 248 CMR, Board of State Examiners Plumbers and Gas Fitters.
IV. HOT WATER DISTRIBUTION	110° F (maximum)
V. VENTILATION	Must meet the Massachusetts State building Code eighth Edition with Amendments, 780 CMR Chapter 13, and the International Energy conservation Code (IECC) Requirements
VI. LIGHTING	

The following average maintained illuminating levels (at working height) shall be met:

Interior Lighting	Must meet the Massachusetts State building Code eighth Edition with Amendments, 780 CMR Chapter 13, and the International Energy conservation Code (IECC) Requirements, including but not limited to Chapter 5, Section 5, Building Mechanical Systems.
Exterior Lighting:	Must meet the Massachusetts State building Code eighth Edition with Amendments, 780 CMR Chapter 13, and the International Energy conservation Code (IECC) Requirements, including but not limited to Chapter 5, Section 505, Electrical Power and Lighting Systems.

[Note to E-Team: If other standards apply to certain buildings, please list below.]

SCHEDULE I: ESCO MONITORING, MAINTENANCE AND SERVICE WORK

ESCO shall be responsible for all maintenance and warranty responsibilities, per Sections 18 and 21 of the Contract and costs for all newly installed New Equipment/Systems as follows:

Phase I requirements are noted below:

Note to E-Team/OGC

1. Fill in this section with detailed descriptions for each ECM, including a preventative maintenance schedule, if applicable, at a minimum, ESCO should conduct an annual inspection of each ECM. ESCOs should generally provide maintenance for any ECM that is not pre-existing. It is recommended that at least five (5) years of maintenance be included for EMS, and full maintenance be included for cogeneration.

2. If separate maintenance agreement with contractor, please provide reference here. This section may also reference K, if extended warranty and maintenance are combined.

Table I-1: ESCO Maintenance Requirements

ECM #	Name	Requirements	Further Referenced

Each subsequent NTP shall add requirements to applicable ECMs.

Monitoring activities not described herein are detailed in **Schedule F**. Responsibilities for warranty are detailed in **Schedule K**. CUSTOMER's responsibility for maintenance is detailed in **Schedule J**. Payments for Services under this Schedule will be made after services are completed and pursuant to **Schedule M**.

SCHEDULE J: CUSTOMER’S MAINTENANCE RESPONSIBILITIES/EXISTING CONTRACTS/AGREEMENTS

Part I: Maintenance

FACILITY shall operate, maintain and repair the New Equipment/Systems in accordance with the Operation and Maintenance (O&M) manuals provided by ESCO.

FACILITY’s maintenance staff shall perform routine maintenance on the New Equipment/Systems installed by ESCO for this Project commencing with the Substantial Completion Date.

If FACILITY is unable to perform routine maintenance on the New Equipment/Systems due to unforeseen fiscal or staffing constraints, CUSTOMER and ESCO shall mutually agree upon an appropriate adjustment to energy or water savings as detailed in **Schedule E: Part I** and **Schedule F**.

(DCAMM recommends that ESCO maintain EMS, unless staff has expertise.)

Please attach Operation and Maintenance, including preventative maintenance requirements. To the extent updates are required at Substantial Completion, they must be included by agreement of the parties and supplement this Schedule J.

See table in **Schedule H**

Table J-1: FACILITY Maintenance Requirements

Each NTP shall add requirements for applicable ECMs in that Phase.

Part II: Existing Relevant Contracts/Agreements

The following list describes any contracts or agreements entered by FACILITY with any persons or entities other than ESCO regarding the provisions of energy management services or contracts with entities other than ESCO regarding the servicing of any Existing Equipment/Systems related to energy and water:

[Note to E-Team – Insert list of all such contracts/agreements, with information indicated below.]

Contractor Name	Type of Contract	Equipment Serviced	Effective Date	Term of Contract	Expiration Date

SCHEDULE K: NEW EQUIPMENT/SYSTEMS WARRANTIES AND ESCO'S SERVICE REQUIREMENTS

ESCO shall warranty all New Equipment/Systems Installed as part of the Installation Services for one year from the Substantial Completion Date for each ECM. Warranty service by ESCO is required pursuant to Section 21 of the Contract.

If a partial Substantial Completion is issued by CUSTOMER with respect to a particular building as provided in Section 12 of the Contract, then the one-year warranty period shall commence at the time and to the extent provided in Section 12 of the Contract.

In addition ESCO shall provide:

- a. LAMPS: Replacement of failed lamps for 24 months after the Final ECM/Equipment Acceptance Date. ESCO shall provide a 2% replenishable stock of all lamp types prior to Final ECM/Equipment Acceptance. Provided that CUSTOMER shall furnish to ESCO all failed lamps and a listing of their location according to a procedure established by ESCO and CUSTOMER, ESCO shall provide CUSTOMER with replacement lamps for all lamps that fail after the Final ECM/Equipment Acceptance date and prior to the end of this warranty period. Installation of replaced lamps shall be provided By CUSTOMER.
- b. BALLASTS: Replacement of failed ballasts for 60 months after the Final ECM/Equipment Acceptance Date. ESCO shall provide a 2% replenishable stock of all ballast types prior to Final ECM/Equipment Acceptance Date. CUSTOMER shall furnish to ESCO all failed ballasts and a listing of their location according to a procedure established by ESCO and CUSTOMER. CUSTOMER shall receive a credit of the cost of prevailing wage, to cover installation costs, from ESCO per failed ballast replaced by CUSTOMER during the warranty period. All failed ballasts shall be returned to ESCO at which time ESCO shall add one ballast to the 2% replenishable stock. Installation of replaced ballasts shall be provided by CUSTOMER.
- c. OTHER REPLACEMENT PARTS: ESCO shall provide a 2% replenishable stock (minimum 2) of other items noted in the FIGA, as noted below:
(Insert a list of items requiring replacement parts, such as steam traps, water aerators, flushometers, occupancy sensors, vending machine controls, etc.)
- d. ESCO shall provide extended warranties, on the following ECMs as noted below:
(Insert a list of any ECMs for which ESCO shall provide additional warranties. Describe extent of warranty.)

ONE-YEAR WARRANTY REPAIR LIST AND INSPECTION

Approximately 30 calendar days prior to the expiration of the comprehensive one-year warranty period, ESCO shall schedule an appointment with CUSTOMER for a re-inspection

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of the work with CUSTOMER, and shall thereafter re-inspect the work at the time scheduled. Based on this inspection and on prior inspections, CUSTOMER shall issue a "Warranty Repair List" of items to be corrected by ESCO. ESCO shall make the repairs and/or replacements listed within 30 calendar days of the issuance of the Warranty Repair List unless otherwise agreed by CUSTOMER in writing.

Each subsequent NTP shall add applicable requirements to c. and d. above.

[Note to E-Team/OPDC – Unless otherwise provided, the warranty begins at the Substantial Completion Date. Be sure to calendar the warranty expiration date immediately with FACILITY and then also calendar dates 60 calendar days and 30 calendar days prior to that as reminders to schedule the warranty re-inspection required 30 calendar days prior to warranty expiration.]

SCHEDULE L: ESCO'S TRAINING RESPONSIBILITIES

ESCO shall be responsible for training the FACILITY staff on the maintenance, operation, and repair of all New Equipment/Systems installed as part of the Contract, per Section 15 of the Contract. ESCO must coordinate training with the FACILITY, and at minimum must provide the FACILITY with XXX calendar days notice in advance of such Training. ESCO is required to demonstrate that staff have attended training.

The training for each ECM in Phase I is detailed below:

ESCO to provide specific training provided for all applicable ECMs, including number of hours, type of training, and whether travel will be required by staff.

Each subsequent NTP shall add training for each Phase.

SCHEDULE M: PAYMENT SCHEDULE AND TERMINATION VALUES

Part I: Payments to ESCO

The Total Contract Value (or the Phase Contract Value) is divided into categories, as noted below:

- A. Installation Period Costs. All costs incurred during performance of Installation Services during the Installation Period (including Change Orders approved pursuant to Section 13 of the Contract).
- B. Performance Term Costs. All costs incurred during the performance of Performance Term Services, including Maintenance and M&V.

The Total Contract Value Form(s) attached show the breakdown of these costs for each Phase.

[ATTACH APPROVED Total Contract Value Sheet (formerly known as "Form B" for All ECMs in a Phase Detailing costs of each ECM)]

Providing ESCO is not in default and has not been terminated in accordance with Section 30 of the Contract, ESCO shall be compensated by CUSTOMER upon receipt of payment requests pursuant to Section 4 of the Contract. ESCO shall be paid for Installation Period Costs in accordance with the payment schedule noted in **Table M-1A** and for Performance Term Costs in accordance with the payment schedule noted in **Table M-1B**. **Table M-1A** and **Table M-1B** are incorporated herein to this as part of this **Schedule M**.

The payment schedules in **Table M-1A** shall be based upon Installation Period Costs for each Phase of the Installation Services, unless otherwise amended pursuant to Section 13 of the Contract. The payment schedule in **Table M-1B** shall be based on the Performance Term Costs for each Phase of Performance Term Services.

As set forth in Section 4.1 of the Contract, **Table M-1A** and **Table M-1B** shall be updated to incorporate the payment schedule for additional phases of Installation Services completed by ESCO only upon issuance of the Phase Completion Notification for such completed phase. Upon completion of all Phases of Installation Services and the issuance of the Final Project Notification, this Schedule M shall be amended to include the payment schedule for the Total Contract Value in accordance with Section 4.1 of the Contract. CUSTOMER shall cause payments to be made to ESCO on a timely basis pursuant to Section 4.4 of the Contract.

TABLE M-1A: SUMMARY OF FUNDING SOURCES AND PAYMENT SCHEDULE FOR INSTALLATION SERVICES (See Attached)

TABLE M-1B: SUMMARY OF PAYMENT SCHEDULE FOR PERFORMANCE TERM SERVICES (See Attached)

TABLE M-1C: SUMMARY PHASE CONTRACT VALUE/TOTAL CONTRACT VALUE – ALL PHASES

Part II: Schedule of Values

Pursuant to Section 4.3 of the Contract, once approved, the Schedule of Values, based upon the Installation Period Costs outlined in **Table M-1A**, will be attached here as **Table M-2**.

Part III: Accelerated Payment

Pursuant to Section 4.6 of the Contract (providing there has been no default or termination of the Contract in accordance with Sections 29 and 30), if DCAMM elects to accelerate its payment obligations for Installation Period Costs under the Contract, while retaining all other rights and obligations required under the Contract, this **Schedule M** shall be revised in accordance with Section 11.3 of the Contract.

Part IV: Payments In the Event of Termination

If the Contract has been terminated in accordance with Section 30 of the Contract, ESCO shall be entitled to a Termination Payment for Services performed prior to the effective date of termination, less any amounts provided for in Section 30. Such Termination Payment shall be calculated as set forth below:

If the termination is a Termination for Cause by CUSTOMER as provided in Section 30.1 of the Contract and such termination occurs during the Installation Period of the Contract, then for the purpose of calculating the value of the Termination Payment to be made to ESCO, the value of the Services performed by ESCO prior to the termination date shall be determined by review of the latest Progress Estimate required under Section 11.3 of the Contract (and any agreed upon adjustments thereto). Then, in accordance with Section 30.1, the Termination Payment shall be the value of the Services performed by ESCO prior to the termination date, less the offsets provided for in Section 30.1 of the Contract.

If the termination is a Termination for Cause by CUSTOMER as provided in Section 30.1 of the Contract and such termination occurs during the Performance Term of the Contract, then the value of the Termination Payment to be made to ESCO shall be determined by review of the Estimated Balance Due set forth in **Table M-1A** or **Table M-1B** above (and any adjustments thereto), less any Remaining M&V and less the offsets provided for in Section 30.1 of the Contract.

If the termination is a Termination for Convenience by CUSTOMER as provided in Section 30.2 of the Contract and such termination occurs during the Installation Period of the Contract, then for the purpose of calculating the value of the Termination Payment to be made to ESCO, the value of the Services performed by ESCO prior to the termination date shall be determined by review of the latest Progress Estimate required under Section 11.3 of the Contract (and any agreed upon adjustments thereto). Then, in accordance with Section 30.2 the Termination Payment shall be the value of the Services performed by ESCO prior to the termination date, less the offsets provided for in Section 30.2 of the Contract.

If the termination is a Termination for Convenience by CUSTOMER as provided in Section 30.2 and such termination occurs during the Performance Term of the Contract, then the value of the Termination Payment to be made to ESCO shall be determined by review of the Estimated Balance Due set forth in **Table M-1A** and **Table M-1B** above (and any adjustments thereto), less any remaining M&V and less the offsets provided for in Section 30.2 of the Contract. In lieu of a Termination Payment as provided for herein, CUSTOMER

may elect, at its sole discretion, to continue making payments under the payment schedule in **Table M-1A** or **Table M-1B** of this **Schedule M** (less any adjustments provided for in 30.2).

If the termination is a Termination for Cause by ESCO as provided in Section 30.3 and such termination occurs during the Installation Period of the Contract, then for the purpose of calculating the value of the Termination Payment to be made to ESCO, the value of the Services performed by ESCO prior to the termination date shall be determined by review of the latest Progress Estimate required under Section 11.3 of the Contract (and any agreed upon adjustments thereto). Then, in accordance with Section 30.3 the Termination Payment shall be the value of the Services performed by ESCO prior to the termination date, less the offsets provided for in Section 30.3 of the Contract.

If the termination is a Termination for Cause by ESCO as provided in Section 30.3 and such termination occurs during the Performance Term of the Contract, then for the purpose of calculating the value of the Termination Payment to be made to ESCO, then the value of the Termination Payment to be made to ESCO shall be determined by review of the Estimated Balance Due set forth in **Table M-1A** or **Table M-1B** above (and any adjustments thereto), less any remaining M&V and less the offsets provided for in Section 30.3. In lieu of a Termination Payment as provided for herein, CUSTOMER may elect, at its sole discretion, to continue making payments under the payment schedule in **Table M-1A** or **Table M-1B** of this **Schedule M** (less any adjustments provided for in 30.3).

SCHEDULE N: CLOSEOUT PROCEDURES AND FORMS

Part I: REQUIREMENTS PRIOR TO SUBSTANTIAL COMPLETION

A. After completing Installation Services for an ECM/Equipment and/or System, ESCO shall submit to the CUSTOMER a Substantial Completion Notice, notifying the CUSTOMER that the Installation Services for that ECM/Equipment are complete and the 30 calendar days of consecutive operation will begin.

B. When an ECM/Equipment and/or System has operated for thirty (30) consecutive calendar days in compliance with the Contract, any applicable technical specifications, and any required testing requirements, ESCO shall send a Substantial Completion Approval Request to CUSTOMER. ESCO shall develop, with the participation of CUSTOMER, a punch list identifying unfinished or unacceptable items of the work that remain to be performed or corrected under the Contract with respect to the ECM/Equipment and/or System.

C. Prior to the CUSTOMER's approval of the Substantial Completion Approval Request, ESCO shall:

- (1) Develop and have approved by CUSTOMER a punch list;
- (2) Submit signed special warranties and warranties of longer than one year as required by the Contract;
- (3) Submit signed maintenance agreements for all portions of the work specified to receive maintenance after the issuance of Substantial Completion Approval form;
- (4) Complete all items required to be completed by the Department of Public Safety and obtain a Certificate of Occupancy as required from the Department of Public Safety and similar releases which permit CUSTOMER full and unrestricted use of the ECM/Equipment and/or System;
- (5) Deliver specified maintenance stocks of materials, required spare parts, and all special tools furnished by manufacturers to persons designated by CUSTOMER and obtain written receipts for same;
- (6) Complete start-up and commissioning of New Equipment/Systems and Services and train CUSTOMER personnel on proper operation and routine maintenance of all systems and New Equipment/Systems; obtain and submit to CUSTOMER that start-up and training have been completed;
- (7) Provide Operation and Maintenance (O&M) manuals, including any preventative maintenance and warranty requirements; and
- (8) Provide copies of all required warranties, from both ESCO and manufacturers', for all New Equipment/Systems and Services.

D. After receiving the Substantial Completion Approval Request, CUSTOMER shall review the submittals and the work and shall notify ESCO in accordance with the procedures in Section 12.1 of the Contract.

Part II: REQUIREMENTS PRIOR TO FINAL ECM/EQUIPMENT INSTALLATION DATE.

A. ESCO shall have completed all items noted in Section 1 above, and must also complete the following items in order to receive Final ECM/Equipment Approval :

- (1) Complete all items on the punch list to CUSTOMER's satisfaction and submit a certified copy of the punch list stating that ESCO has completed or corrected every item listed;
- (2) Advise CUSTOMER of proposed changes in insurance in accordance with the provisions of the Contract, and provide to CUSTOMER evidence of ESCO's completed operations insurance coverage if required by the Contract;
- (3) Submit copies of 100% Design Documents in accordance with Section 7.1 and **Schedule D, Part II** of the Contract;
- (4) Remove all remaining temporary facilities that are no longer needed, surplus materials, and debris; (ESCO shall not remove construction offices and trailers without the prior Approval of CUSTOMER);
- (5) Complete final clean-up of all work, restoration of damaged finishes, and replacement of all damaged and broken glass not listed on ESCO's Punch List;
- (6) Provide all as-builts as provided in Section 7.8 of the Contract, and
- (7) Perform all Installation Period efficiency and Measurement and Verification tests and reconciliations as required by the Contract and Schedule F.

B. After completing the items specified in subsection A above, ESCO shall make a written request for CUSTOMER's inspection using a Final ECM/Equipment Completion Notice. CUSTOMER shall review the submittals and the work and shall notify ESCO in accordance with Section 12.2 of the Contract. If a partial Final ECM/Equipment Acceptance previously has been issued with respect to a particular building or buildings then the matters covered by that partial acceptance shall be deemed to have been completed for the purposes of issuance of the Final ECM Equipment Acceptance.

Part III: REQUIREMENTS PRIOR TO PHASED COMPLETION NOTIFICATION APPROVAL OR FINAL PROJECT NOTIFICATION APPROVAL.

After the issuance of ECM/Equipment Installation Acceptance for the all the New Equipment/Systems for the relevant Phase, and after ESCO has completed all of the work required by the Contract, including Change Orders and punch list Items, ESCO shall submit the following completed items to CUSTOMER together with such additional items as may be specified in the Contract:

- (1) A completed Final Periodic Estimate in accordance with Section 11.3 of the Contract, showing a final accounting of all changes in the work;
- (2) Certification and satisfactory evidence that all taxes, fees, and similar obligations have been paid;
- (3) Consent of the Surety to Final Payment executed by applicable bonding companies, if applicable;
- (4) Evidence of ESCO's continuing Completed Operations Insurance coverage to the extent required by the Contract;
- (5) All final as-built drawings and documents in the forms specified in Section 7.8 and **Schedule D** of the Contract;
- (6) A notarized certification that all purchases made under the tax exemption certificate were legitimate and entitled to exemption;
- (7) Written certifications from the Department of Public Safety to the effect that: a) the work has been inspected for compliance with the Contract and has satisfied the Department of Public Safety; b) all New Equipment/Systems included in the work have been tested in the presence of CUSTOMER and are operational and satisfactory; and c) the work is completed and ready for final inspection; and
- (8) Such other items as may be required by the Contract.

After receiving the Phased Completion Notice or Final Project Notice from ESCO, the CUSTOMER shall follow procedures outlined in 12.3 and 12.4 respectively. Final Project Notification Approval shall only be provided after ESCO has received the Phase Completion Notification Approval for all Phases issued under Section 5 and Schedule B of the Contract.

The following CLOSEOUT FORMS, comprising 7 pages, are attached and hereby incorporated into this Contract:

- **Substantial Completion and ECM/Equipment Acceptance Form** (3 pages)
- **Final Completion Approval Form** (4 pages)

SCHEDULE O: INSTRUCTIONS/MODEL FORMS FOR SUBMISSION OF PROJECT CHANGE REQUESTS

In accordance with Section 13 of the Contract, ESCO is required to adhere to the following instructions and model forms for the submission of Project Change Requests:

- Instructions Regarding Change Orders and Contract Modifications for ESA Projects – DCAMM Form 13-Energy (modified for use on M.G.L. c. 25A energy projects ONLY)
- Notice of Intent - Energy (modified for use on M.G.L. c.25A energy projects ONLY)
- Model Format for Submission of Project Change Requests (modified for use on M.G.L. c.25A energy projects ONLY)
- DCAMM Change Request Form 5-Energy (modified for use on M.G.L. c.25A energy projects ONLY)revised for use on ESA projects ONLY)
- DCAMM Daily Time and Materials Form (modified for use on M.G.L. c.25A energy projects ONLY)revised for use on ESA projects ONLY)

The following INSTRUCTIONS / MODEL FORMS FOR SUBMISSION OF PROJECT CHANGE REQUESTS, comprising 14 pages, are attached and hereby incorporated into this Contract.

SCHEDULE P: PREVAILING WAGE RATES

The minimum wage rates provided in the following pages have been provided by the Division of Occupational Safety of the Massachusetts Department of Labor and Workforce Development. The Awarding Authority is not responsible for errors or omissions in such wage rates. For the purposes of this Schedule P, the reference to “Contractor” shall mean “ESCO”.

M.G.L. c. 149, §§26 and 27 provide as follows:

“ . . . Payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers shall be included for the purpose of establishing minimum wage rates as herein provided.

. . . The aforesaid rates of wages in the schedule of wage rates shall include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans as provided in said section twenty-six, and such payments shall be considered as payments to persons under this section performing work as herein provided. Any employer engaged in the construction of such works who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in said construction ”

Mass General Laws c. 149, §27 as amended on August 8, 2008 requires annual updates to prevailing wage schedules for all public construction projects lasting longer than one year. The Contractor is required to obtain the wage schedules from awarding authorities, and to pay no less than these rates to covered workers. The Contractor and all subcontractors are required to anticipate such annual updated prevailing wage schedules and neither the Contractor nor any subcontractors shall be entitled to claim additional compensation for base contract work due to updated prevailing wage schedules.

>>Insert Prevailing Wage Rates from Division of Occupational Safety of the Massachusetts Department of Labor and Workforce Development here.

NOTE: Blank Certified Payroll Request Forms and all other forms required for the reporting of weekly payroll and workforce requirements are attached at Exhibit VIII.

SCHEDULE Q: GOALS FOR PARTICIPATION BY M/WBE ENTERPRISES AND EQUAL EMPLOYMENT OPPORTUNITY, ANTI-DISCRIMINATION, AND AFFIRMATIVE ACTION PROGRAM (EXECUTIVE ORDERS No. 524 and No. 526)

NOTE: The required forms for compliance with the requirements set forth in Section 50 of the Contract and this Schedule Q are provided in Exhibit VIII.

PART I: GOALS FOR PARTICIPATION BY MINORITY AND WOMEN BUSINESSES (EXECUTIVE ORDER 524)

1. Goals.

A. The goals for minority business enterprise and woman business enterprise participation established for this Contract are as follows:

MBE/WBE: 10.4 % combined participation of the Total Contract Value.

B. ESCO and all Subcontractors, sub-subcontractors, and materials suppliers shall comply with all of the terms and conditions of this Article, which include the provisions pertaining to M/WBE participation set forth above in order to meet the M/WBE participation goals established for this Contract.

2. M/WBE Participation Credit.

A. If ESCO is itself an MBE or WBE, M/WBE participation credit shall be given in an amount equal to the entire Contract Price. If ESCO is not an MBE or WBE, then M/WBE participation credit will be given for the value of the Work that is actually performed by each MBE or WBE subcontractor or sub-subcontractor.

B. If ESCO is a joint venture with one or more M/WBE joint venturers; M/WBE participation credit shall be given to the joint venture as follows:

(1) If the joint venture is certified by Supplier Diversity Office (“SDO”) as an MBE or WBE, M/WBE participation credit shall be given in an amount equal to the entire Contract Price.

(2) If the joint venture is not certified as an MBE or WBE by SDO, M/WBE participation credit shall be given to the joint venture for the value of the Work that is performed by the M/WBE joint venturer(s), and for the value of the Work that is actually performed by each MBE or WBE subcontractor or sub-subcontractor.

C. If an M/WBE supplies but does not install equipment or materials, M/WBE participation credit shall be given only if the M/WBE supplier is regularly engaged in sales of equipment or supplies to the construction industry from an established place of business. M/WBE participation credit shall be given the full amount of the purchase order only if the M/WBE supplier manufactures the goods or substantially alters them before resale. In all other cases, M/WBE participation credit shall be given for 10% of the purchase order.

D. MBE participation credit shall be given for the work performed by MBEs only, and WBE participation credit shall be given for the work performed by WBEs only. MBE participation may not be substituted for WBE participation, nor may WBE participation be substituted for MBE participation.

3. Establishing M/WBE Status.

A. A minority owned business shall be considered an MBE only if it has been certified as a minority business enterprise by the Supplier Diversity Office (“SDO”).

B. A woman owned business shall be considered a WBE only if it has been certified as a woman business enterprise by SDO.

C. Certification as a disadvantaged business enterprise (“DBE”), certification as an M/WBE by any agency other than SDO, or submission of an application to SDO for certification as an M/WBE shall not confer M/WBE status on a firm for the purposes of this Contract.

4. Subcontracts With M/WBEs.

Within thirty (30) days after the award of this Contract, ESCO shall (i) execute a subcontract with each M/WBE Subcontractor which has executed a Letter of Intent Approved by DCAMM, (ii) cause its Subcontractors to execute a sub-subcontract with each M/WBE sub-subcontractor, and (iii) furnish DCAMM with a signed copy of each such subcontract and sub-subcontract.

5. Performance of Contract Work by M/WBEs.

A. ESCO shall not perform with its own organization or subcontract or assign to any other firm work designated to be performed by any M/WBE in the Letters of Intent or Schedule of M/WBE Participation without the prior Approval of DCAMM, nor shall any M/WBE assign or subcontract to any other firm, or permit any other firm to perform any of its M/WBE Work without the prior Approval of DCAMM. Any such unapproved assignment, subcontracting, sub-subcontracting, or performances of M/WBE Work by others shall be a change in the M/WBE Work for the purposes of this Contract. DCAMM WILL NOT APPLY TO THE M/WBE PARTICIPATION GOAL(S) ANY SUMS ATTRIBUTABLE TO SUCH UNAPPROVED ASSIGNMENTS, SUB-CONTRACTS, SUB-SUBCONTRACTS, OR PERFORMANCE OF M/WBE WORK BY OTHERS.

B. ESCO shall be responsible for monitoring the performance of M/WBE Work to ensure that each scheduled M/WBE performs its own M/WBE Work with its own workforce.

C. ESCO and each M/WBE shall provide DCAMM with all information and documentation that DCAMM determines is necessary to ascertain whether or not an M/WBE has performed its own M/WBE Work. At the discretion of DCAMM, failure to submit such documentation to DCAMM shall establish conclusively for the purpose of giving M/WBE participation credit under this Contract that such M/WBE did not perform such work.

6. Notification of Changes in M/WBE Work.

A. If at any time during the performance of the Contract ESCO determines or has reason to believe that a scheduled M/WMBE is unable or unwilling to perform its M/WBE Work, or that there has been or will be a change in any M/WMBE Work, or that ESCO will be unable to meet the M/WBE participation goal(s) for this Contract for any reason, ESCO shall immediately notify DCAMM Contract Compliance Office in writing of such circumstances.

B. Any notice of a change in M/WBE Work pursuant to subparagraph “A” above shall include a revised Schedule of M/WBE Participation, and additional or amended Letters of Intent and subcontracts, as the case may be.

7. Actions Required If There is a Reduction in M/WBE Participation.

A. In the event there is a change or reduction in any M/WBE Work which will result in ESCO failing to meet the M/WBE participation goal(s) for this Contract, other than a reduction in M/WBE Work resulting from a Change Order initiated by DCAMM, then ESCO

shall immediately undertake a diligent, good faith effort to make up the shortfall in M/WBE participation as follows:

(1) ESCO shall identify all items of the Work remaining to be performed under the Contract that may be made available for subcontracting to M/WBEs. ESCO shall send a list of such items of work to DCAMM, together with a list of the remaining items of the Work that was not made available to M/WBEs and the reason for not making such work available for subcontracting to M/WBEs.

(2) ESCO shall send written notices soliciting proposals to perform the items of the Work that may be made available for subcontracting to M/WBEs to all M/WBEs qualified to perform such work. ESCO shall advise DCAMM of (i) each M/WBE solicited, and (ii) each M/WBE listed in the SDO directory under the applicable trade category who was not solicited and the reasons therefor. ESCO shall also advise DCAMM of the dates notices were mailed and provide a copy of the written notice(s) sent.

(3) ESCO shall make reasonable efforts to follow up the written notices sent to M/WBEs with telephone calls or personal visits in order to determine with certainty whether the M/WBEs were interested in performing the work. Phone logs or other documentation must be submitted to DCAMM evidencing this effort.

(4) ESCO shall make reasonable efforts to assist M/WBEs that need assistance in obtaining insurance, bonds, or lines of credit in order to perform work under the Contract, and shall provide DCAMM with evidence that such efforts were made.

(5) ESCO shall provide DCAMM with a statement of the response received from each M/WBE solicited, including the reason for rejecting any M/WBE who submitted a proposal.

(6) ESCO shall take any additional measures reasonably requested by DCAMM to meet the M/WBE participation goal(s) established for this Contract, including, without limitation, placing advertisements in appropriate media and trade association publications announcing ESCO's interest in obtaining proposals from M/WBEs, and/or sending written notification to M/WBE economic development assistance agencies, trade groups and other organizations notifying them of the project and of the work available to be subcontracted by ESCO to M/WBEs.

B. If ESCO is unable to meet the M/WBE participation goals for this Contract after complying fully with each of the requirements of paragraph "A" above, and ESCO is otherwise in full compliance with the terms of this Article, DCAMM may reduce the M/WBE participation goals for this Contract to the extent that such goals cannot be achieved.

8. Suspension of Payment and/or Performance for Noncompliance.

A. If at any time during the performance of this Contract, DCAMM determines or has reason to believe that (1) there has been a change or reduction in any M/WBE Work which will result in ESCO failing to meet the M/ WBE participation goal(s) for this Contract, other than a reduction in M/WBE Work resulting from a change in the Contract work ordered by DCAMM, and (2) ESCO has failed to comply fully with all of the terms and conditions of paragraphs 1 through 7 above, DCAMM may:

(1) suspend payment to ESCO of an amount equal to the value of the work which was to have been performed by an M/WBE pursuant to ESCO's Schedule of M/WBE Participation but which was not so performed, in order to ensure that sufficient Contract funds will be available if liquidated damages are assessed pursuant to paragraph 9, and/or

(2) suspend ESCO's performance of this Contract in whole or in part.

B. DCAMM shall give ESCO prompt written notice of any action taken pursuant to paragraph A above and shall give ESCO and any other interested party, including any M/WBEs, an opportunity to present evidence to DCAMM that ESCO is in compliance with the requirements of this Article, or that there is some justifiable reason for waiving the requirements of this Article in whole or in part. DCAMM may invite SDO and the

Massachusetts Commission Against Discrimination to participate in any proceedings undertaken pursuant to this paragraph.

C. Upon a showing that ESCO is in full compliance with the requirements of this Article, or that ESCO has met or will meet the M/WBE participation goals for this Contract, DCAMM shall release any funds withheld pursuant to clause A(1) above, and lift any suspension of ESCO's performance under clause A(2) above.

9. Liquidated Damages; Termination.

A. If payment by DCAMM or performance by ESCO is suspended by DCAMM as provided in paragraph 8 above, DCAMM shall have the following rights and remedies if ESCO thereafter fails to take all action necessary to bring ESCO into full compliance with the requirements of this Article, or if full compliance is no longer possible because the default of ESCO is no longer susceptible to cure, if ESCO fails to take such other action as may be required by DCAMM to meet the M/WBE participation goals set forth in this Contract:

(1) DCAMM may terminate this Contract, and/or

(2) DCAMM may retain from final payment to ESCO, as liquidated damages, an amount equal to the difference between (x) the total of the M/WBE participation goals set forth in this Contract, and (y) the amount of M/WBE participation credit earned by ESCO for M/WBE Work performed under this Contract as determined by DCAMM, the parties agreeing that the damages for failure to meet the M/WBE participation goals are difficult to determine and that the foregoing amount to be retained by DCAMM represents the parties' best estimate of such damages. Any liquidated damages will be assessed separately for MBE and WBE participation.

B. Before exercising its rights and remedies hereunder, DCAMM may, but DCAMM shall not be obligated to, give ESCO and any other interested party another opportunity to present evidence to DCAMM that ESCO is in compliance with the requirements of this Article or that there is some justifiable reason for waiving the requirements of this Article in whole or in part. DCAMM may invite SDO and the Massachusetts Commission Against Discrimination to participate in any proceedings undertaken hereunder.

10. Reporting Requirements.

ESCO shall submit to DCAMM all information or documentation that is necessary in the judgment of DCAMM to ascertain whether or not ESCO has complied with any of the provisions of this Article.

11. Awarding Authority's Right to Waive Provisions of this Article in Whole or In Part.

DCAMM reserves the right to waive any provision or requirement of this Article if DCAMM determines that such waiver is justified and in the public interest. No such waiver shall be effective unless in writing and signed by a representative of DCAMM's Compliance Office or the office of its General Counsel. No other action or inaction by DCAMM shall be construed as a waiver of any provision of this Article.

PART II: WORKFORCE EQUAL EMPLOYMENT OPPORTUNITY ANTIDISCRIMINATION AND AFFIRMATIVE ACTION PROGRAM

The applicable minority workforce utilization percentage for the Contract is %.
The women workforce utilization percentage for the Contract is %.

1. Compliance Generally

For purpose of this Article, "minority" refers to Asians, Blacks, Western Hemisphere Hispanics, Native Americans, and Cape Verdeans; "Commission" refers to the Massachusetts Commission Against Discrimination. During the performance of this Contract, CONTRACTOR and all of its Subcontractors (hereinafter collectively referred to in this **Schedule Q** as "CONTRACTOR") shall comply with all applicable equal employment opportunity, non-discrimination and affirmative action requirements, including but not limited to the following:

2. Non-Discrimination and Affirmative Action

A. CONTRACTOR shall not discriminate against any employee or applicant for employment because of race, color, religious creed, national origin, age, handicap, sexual orientation, gender identity or expression, or sex. The aforesaid provision shall include, but not be limited to, the following: employment upgrading, demotion or transfer; recruitment advertising; recruitment layoff; termination; rates of pay or other forms of compensation; conditions or privileges of employment; and selection for apprenticeship. CONTRACTOR shall comply with the provisions of M.G.L. c. 151B and all other applicable anti-discrimination and equal opportunity laws.

B. CONTRACTOR shall comply with the provisions of Executive Order 526, entitled Order Regarding Nondiscrimination, Diversity, Equal Opportunity and Affirmative Action, which prohibits unlawful discrimination based on race, color, age, gender, ethnicity, sexual orientation, gender identity or expression, religion, creed, ancestry, national origin, disability, veteran's status (including Vietnam-era veterans), or background. Executive Order 526 is herein incorporated by reference and made a part of this Contract.

Pursuant to E.O. 526 CONTRACTOR and any subcontractors may not engage in discriminatory employment practices; and CONTRACTOR certifies that they are in compliance with all applicable federal and state laws, rules, and regulations governing fair labor and employment practices; and commits to purchasing supplies and services from certified minority or women-owned businesses, small businesses, or businesses owned by socially or economically disadvantaged persons or persons with disabilities. These provisions shall be enforced through the contracting agency, the Operational Services Division, and/or the Massachusetts Commission Against Discrimination. Any breach shall be regarded as a material breach of Contract that may subject Contractor to appropriate sanctions. CONTRACTOR shall comply with the provisions of Executive Order No. 246 entitled Revoking and Superseding Executive Orders Numbers 143 and 150, with respect to affirmative action programs for handicapped individuals, which is herein incorporated by reference and made a part of this Contract.

C. In connection with the performance of the Work, CONTRACTOR shall undertake in good faith affirmative action measures designed to eliminate any discriminatory barriers in the terms and conditions of employment on the grounds of race, color, religious creed, national origin, age, sexual orientation, gender identity or expression, or sex, and to eliminate and remedy any effects of such discrimination in the past. Such affirmative action shall entail positive and aggressive measures to ensure equal opportunity in the areas of hiring, upgrading, demotion or transfer, recruitment, layoff or termination, rate of compensation, and in-service or apprenticeship training programs. This affirmative action shall include all action

required to guarantee equal employment opportunity for all persons, regardless of race, color, religious creed, national origin, age, sexual orientation, gender identity or expression, or sex. A purpose of this provision is to ensure to the fullest extent possible an adequate supply of skilled tradesmen for future public construction projects.

D. If CONTRACTOR shall use any subcontractor on any work performed under this Contract, CONTRACTOR shall take affirmative steps to negotiate with qualified minority and women subcontractors. These affirmative steps shall cover both pre-bid and post-bid periods. It shall include notification to the State Office of Minority and Women Business Assistance or its designee, while bids are in preparation, of all products, work or services for which CONTRACTOR intends to negotiate bids. In all solicitations either by competitive bidding or negotiation made by CONTRACTOR either for work to be performed under a subcontract or for the procurement of materials or equipment, each potential subcontractor or supplier shall be notified in writing by CONTRACTOR of CONTRACTOR's obligations under this Contract relative to non-discrimination and affirmative action.

E. As part of its obligation of remedial action under this Article, CONTRACTOR shall maintain on this project not less than the percent ratio set forth herein of minority and women employee worker hours to total worker hours in each job category including but not limited to bricklayers, carpenters, cement masons, electricians, ironworkers, operating engineers, and those "classes of work" enumerated in M.G.L. c. 149, s. 44F.

F. In the hiring of minority and women journeypersons, apprentices, trainees and advanced trainees, CONTRACTOR shall rely on referrals from a multi-employer affirmative action program approved by the Commission, traditional referral methods utilized by the construction industry, and referrals from agencies, not more than three in number at any one time, designated by the Liaison Committee or DCAMM.

3. Liaison Committee, Reports and Records

A. At the option of DCAMM there may be established for the term of this Contract a body to be known as the Liaison Committee. The Liaison Committee shall be composed of one representative each from the Awarding Authority, the Commission and such other representatives as may be designated by the Commission in conjunction with the Awarding Authority. CONTRACTOR (or his agent, if any, designated by him as the on-Site equal employment opportunity officer) shall recognize the Liaison Committee as an affirmative action body, and shall establish a continuing working relationship with the Liaison Committee, consulting with the Liaison Committee on all matters related to minority and women recruitment, referral, employment and training.

B. CONTRACTOR shall prepare projected staffing tables on a quarterly basis. These shall be broken down into projections, by week, of workers required in each trade. Copies shall be furnished one week in advance of the commencement of the period covered, and also when updated, to the Awarding Authority and Liaison Committee. CONTRACTOR shall prepare weekly reports in a form approved by the Awarding Authority of hours worked in each trade by each employee, identified as minority or non-minority. Copies of these shall be provided at the end of each such week to the Awarding Authority and to the Liaison Committee.

C. Records of employment referral orders, prepared by CONTRACTOR, shall be made available to the Awarding Authority and to the Liaison Committee on request.

D. A designee of the Awarding Authority and a designee of the Liaison Committee shall each have right to access to the Site.

E. CONTRACTOR shall comply with the provisions of M.G.L. c. 151B as amended, of the Massachusetts General Laws, both of which are herein incorporated by reference and made a part of this Contract.

F. CONTRACTOR shall provide all information and reports required by the Awarding Authority or the Commission on forms and in accordance with instructions issued by either of them and will permit access to its facilities and any books, records, accounts and other sources of information which may be determined by the Awarding Authority or the Commission to affect the employment of personnel. This provision shall apply only to information pertinent to the Owner's supplementary affirmative action Contract requirements. Where information required is in the exclusive possession of another who fails or refuses to furnish this information, CONTRACTOR shall so certify to the Awarding Authority or the Commission as appropriate and shall set forth what efforts he has made to obtain the information.

4. Sanctions

A. Whenever the Awarding Authority, the Commission, or the Liaison Committee believes CONTRACTOR or any Subcontractor may not be operating in compliance with the terms of this Article, the Commission shall directly, or through its designated agent, conduct an appropriate investigation, and may confer with the parties, to determine if such Contractor is operating in compliance with the terms of this Article. If the Commission or its agent finds CONTRACTOR or any Subcontractor not in compliance, it may make a preliminary report on non-compliance, and notify such Contractor in writing of such steps as will in the judgment of the Commission or its agent bring such Contractor into compliance. In the event that such Contractor fails or refuses to fully perform such steps, the Commission **may** make a final report of non-compliance, and recommend to the Awarding Authority the imposition of one or more of the sanctions listed below. If, however, the Commission believes CONTRACTOR or any Subcontractor has taken or is taking every possible measure to achieve compliance, it shall not make a final report of non-compliance. Within fourteen days of the receipt of the recommendations of the Commission, the Awarding Authority shall move to impose one or more of the following sanctions, as it may deem appropriate to attain full and effective enforcement:

- (1) The recovery by the Awarding Authority from CONTRACTOR of 1/100 of 1% of the Contract award price or \$1,000 whichever sum is greater, in the nature of liquidated damages or, if a Subcontractor is in non-compliance, the recovery by the Awarding Authority from CONTRACTOR, to be assessed by CONTRACTOR as a back charge against the subcontractor, of 1/10 of 1% of the sub-Contract Price, or \$400 whichever sum is greater, in the nature of liquidated damages, for each week that such party fails or refuses to comply;
- (2) The suspension of any payment or part thereof due under the Contract until such time as CONTRACTOR or any subcontractor is able to demonstrate his compliance with the terms of the Contract;
- (3) The termination, or cancellation, of the Contract, in whole or in part, unless CONTRACTOR or any Subcontractor is able to demonstrate within a specified time his compliance with the terms of the contract;
- (4) The denial to CONTRACTOR or any subcontractor of the right to participate in any future contracts awarded by the Awarding Authority for a period of up to three years.

B. If at any time after the imposition of one or more of the above sanctions a Contractor is able to demonstrate that it is in compliance with this Article, CONTRACTOR may request the Awarding Authority, in consultation with the Commission, to suspend the sanctions conditionally, pending a final determination by the Commission as to whether CONTRACTOR is in compliance. Upon final determination of the Commission, the Awarding Authority, based on the recommendation of the Commission, shall either lift the sanctions or reimpose them.

C. Sanctions recommended by the Commission and enumerated under Section A above shall not be imposed by the Awarding Authority except after an adjudicatory proceeding, as that term is used in M.G.L. c. 30A, has been conducted. No investigation by the Commission or its agent shall be initiated without prior notice to CONTRACTOR.

D. Notwithstanding the provisions of 4A-4C above, if the Awarding Authority determines after investigation that CONTRACTOR or any Subcontractor is not in compliance with the terms of this Article, it may suspend any payment or portion thereof due under the Contract until CONTRACTOR demonstrates to the satisfaction of the Awarding Authority compliance with the terms of this Article. This temporary suspension of payments by the Awarding Authority is separate from the sanctions set forth in Section 4A-4C of this Article above, which are determined by MCAD and recommend to the Awarding Authority. Payment may be suspended only after CONTRACTOR and any other interested party shall have been given the opportunity to present evidence in support of its position at an informal hearing held by the Awarding Authority, and the Awarding Authority has concluded upon review of all the evidence that such penalty is justified. Payment shall not be suspended if the Awarding Authority finds that CONTRACTOR made its best efforts to comply with this Article, or that some other justifiable reason exists for waiving the provisions of this Article in whole or in part.

SCHEDULE R: ESCO's REQUIREMENTS FOR RESIDENT ENGINEER AND FIELD OFFICES

[Note to E-Team/OPDC/OGC:

- Please review and modify as necessary. Some items may not be necessary for small job. Please update Schedule R periodically.
 - Default is that FACILITY shall provide space for Resident Engineer.
 - **WHEN RFP IS ISSUED** determine space availability in accordance with Sections 9.5 and 9.6 of this ESA, for ESCO/CONTRACTOR office trailer, lay down space and RE office location; **Provide plan/drawing in RFP** showing area for the aforementioned three areas of space allocation and designate location of security fence.]
- A. FACILITY shall provide a suitable location on site for the use of ESCO/CONTRACTOR's storage and/or office trailer(s). (Check with FACILITY, if not, change it in RFP. FACILITY might be able to provide office space too.)
- B. ESCO/CONTRACTOR shall provide a suitable field office trailer on site for the use of the DCAMM Resident Engineer. (Check with FACILITY to determine if FACILITY can provide space for Resident Engineer).
- C. ESCO/CONTRACTOR is responsible for equipping the DCAMM Resident Engineer's office trailer with the following:
1. One (1) lockable steel desk.
 2. One (1) swivel arm chair.
 3. One (1) electronic Fahrenheit thermometer for exterior use.
 4. One (1) lockable four-drawer metal file cabinet.
 5. One (1) battery operated electronic calculator.
 6. Two (2) highlighter color variety packs.
 7. Five (5) letter sized wide ruled writing pads.
 8. Fifty (50) letter size manila folders.
 9. Ten (10) blue pens.
 10. Ten (10) 0.9 mechanical pencils with 30 refill leads.
 11. One (1) desktop stapler with 10,000 refill staples.
 12. Sufficient quantity of electric lights and electrical outlets.
 13. Two (2) OSHA approved adjustable hard hats.
 14. Three (3) pairs of safety glasses.
 15. One (1) LED flashlight with (2) sets of replacement batteries.
- D. Computers: ESCO/CONTRACTOR shall be required to furnish (or lease) and install the following additional office equipment for the DCAMM Resident Engineer for the duration of the Project. ESCO/CONTRACTOR shall install and render fully functional all computer system equipment and software, as hereinafter defined and shall be responsible to maintain and/or replace all such items as may become lost, inoperative or damaged in the course of normal use. Provide maintenance service to provide for full restoration of usability within two (2) business days of any reported malfunction. If found to be un-repairable within two business working days, then immediately replace with new. At the completion of the Project, ESCO/CONTRACTOR retains ownership of all equipment.

1. Provide the DCAMM Resident Engineer with one (1) new Basic Laptop Computer including, at a minimum, each of the following:
 - b. Intel Core i5, 2.4 GHz or higher processor
 - c. One (1) GB System Memory (SDRAM) 8 GB DDR3 expandable to 16GB.
 - d. 750GB Hard Drive—SATA (7200 rpm).
 - e. 15.4 inch LCD screen with LED backlight (1366 x 768).
 - f. Intel Graphics Media Accelerator 4500M (minimum 2 GB video memory) or equal.
 - g. Built-in 10/100 Ethernet LAN (RJ-45 connector) compatible with operating system .
 - h. Integrated Sound Card with internal speakers.
 - i. Internal DVD ± -Read and Rewritable/CD- Read and Rewritable; 16x8x16 DVD+RW; 16x6x16 DVD-RW; 48x4x48 CD-RW.
 - j. Wireless networking B+G+N.
 - k. Bluetooth Enabled.
 - l. One (1) high-speed USB 3.0 port.
 - m. Two (2) high-speed USB 2.0 ports.
 - n. Latest Version of Windows 7 Professional.
 - o. Latest version of Microsoft Professional Office Suite.
 - p. Latest Version of Microsoft Professional Projects.
 - q. Latest version of Adobe Acrobat Professional.
 - r. Latest version of AntiVirus software (Norton AntiVirus or equal, including subscription updates for the duration of the project).
 - s. One 4G Wireless USB Card. Provide card and unlimited service for the duration of the Project.
 - t. One (1) Battery/DC powered Mobile Printer with one (1) Combination Mobile Printer & 15.4" Notebook Case and one (1) Mobile Printer 12V Auto Power Adapter. *(Please note that this item is only required for projects with multiple Facilities)*
 - u. One (1) Color Inkjet combination Copier-Scanner-Printer
 - v. Initially supply six (6) black and six (6) color ink cartridges and six (6) reams of 8 ½ x 11 copy paper. ESCO/CONTRACTOR shall provide paper, additional printer toner and ink cartridges as needed by the DCAMM Resident Engineer throughout the duration of the Project.
 - w. Two (2) USB thumb drive each with 32GB capacity.
 - x. For all of the above equipment provide a Parts, Labor, and On-site Warrantee Repair/Replacement for the duration of the Project.
- E. Documents: ESCO/CONTRACTOR shall be required to provide the DCAMM Resident Engineer with the following documents:
 1. One (1) complete set of Contract Documents including but not limited to Drawings, Specifications, Detailed Energy Audits, Submittals and Cut Sheets.
- F. Camera: ESCO/CONTRACTOR shall be required to provide the DCAMM Resident Engineer with one (1) new digital camera capable of recording images on an external memory card.
 1. Camera shall be of slim design and capable of minimum 14.0 Megapixels

- photos with a minimum 12X Optical Zoom and carrying case.
2. Camera shall also be capable of recording video with sound.
3. Provide two (2) compatible 8-Gigabyte memory cards.
4. Provide two (2) sets of rechargeable lithium ion batteries with charger.
5. Provide cables and software for direct transfer from camera to computer.

G. Phone Services:

1. Blackberry Cell Phone:

ESCO/CONTRACTOR shall provide the DCAMM Project Engineer and DCAMM Resident Engineer each with one (1) new Bluetooth enabled 4G Blackberry Cell Phone with belt clip. 4G services shall include unlimited email, data, messaging, caller ID, call waiting, 3-way conferencing, voicemail and all related services for the length of the Project. The Blackberry Cell Phone services shall also include unconditional replacement if lost, stolen or damaged. At the completion of the Project, ESCO/CONTRACTOR retains ownership of all equipment.

- a. Communications' system maintenance and replacement service to insure operation throughout the Contract Term. Minimum next day on-site service required.
- b. Blackberry Cell Phone equipment listed above shall be provided and maintained by ESCO/CONTRACTOR for the duration of the Contract. All devices and accessories shall be returned to ESCO/CONTRACTOR at the end of the Project.
- c. ESCO/CONTRACTOR shall pay for all Blackberry Cell Phone equipment listed above and all calls and fixed charges connected therewith.
- d. ESCO/CONTRACTOR shall make every effort to incorporate the Resident Engineer's current project cell phone number into the Blackberry Cell Phone service under this Contract.

H. Sanitary Facilities:

1. ESCO/CONTRACTOR shall provide suitable toilet facilities for its staff, the Resident Engineer, and additional facilities for the workers on the job, including personnel of Subcontractors. FACILITY may designate a specific toilet area to be used for ESCO/CONTRACTOR and Subcontractors engaged in the Services. However, ESCO/CONTRACTOR shall take responsibility for maintenance and cleaning of such areas and shall leave them in first class condition equal to the accepted conditions of toilet facilities not used for construction personnel.

- a. Provide chemical toilets at all work areas in a quantity as required by OSHA.
- b. Chemical toilets and their maintenance shall meet requirements of all state and local health regulations and ordinances and shall be subject to the approval of the CUSTOMER.

I. Project Signage:

1. ESCO/CONTRACTOR shall provide Project identification signage in accordance with the following STANDARD DCAMM SPECIFICATIONS:
 - a. The ESCO/CONTRACTOR shall request the AutoCAD format electronic file of the project signage sketches (AutoCAD Files) from DCAMM in sufficient time for the sign to be fabricated and erected by the ESCO/CONTRACTOR prior to the start of construction.
 - b. The ESCO/CONTRACTOR shall provide one 6 foot high by 8 foot wide project sign as shown on the AutoCAD Files conforming to all DCAMM requirements. Sign shall be fabricated from 1-inch thick MDO exterior grade plywood laminated with waterproof glue. Edges of sign shall be banded with 1 inch by 1/2 inch pressure treated pine banding. Refer to SK-1 for single-lined project title and SK-2 for double-lined project title.
 - c. Sign shall be supported by two 4 by 4 inch PT post supports set in 12 inch diameter concrete footings to a depth of four feet, such that sign bottom is raised 4 feet above grade. Nails, bolts, and connecting hardware shall be galvanized. PT post supports to be painted matte black. Provide alternative method of support as required by site conditions and approved by the CUSTOMER.
 - d. Sign shall utilize gloss vinyl lettering with size and color in accordance with the general layouts shown in the AutoCAD Files. Surfaces and edges of sign shall receive two coats of exterior primer and two coats of exterior gloss enamel.
 - e. The ESCO/CONTRACTOR shall submit a shop drawing indicating sign construction and lettering for approval by the CUSTOMER.
 - f. The ESCO/CONTRACTOR shall locate and install the sign at a location directed by the CUSTOMER. At the completion of the Project, remove the sign and supports completely and restore surface to original condition.

SCHEDULE S: OTHER SERVICES PROVIDED BY ESCO

This Schedule intentionally left blank.

[Note to E-Team - If ESCO proposes other energy/water services (non-construction related) in the RFP or Audit that is agreed to by all parties in FIGA, then that scope of work can be detailed here. Types of services may include, but are not limited to, Forward Capacity Market programs, Renewable Energy Credit payments, LEED Certification for existing buildings, retro-commissioning, energy/water analysis, etc. Payments for this scope of work shall be based upon actual revenue gained and documented as part of the services. Section 4 and/or Schedule M may need to be modified to include such payments].

SCHEDULE T: SUSTAINABLE DESIGN GUIDELINES

To the extent applicable to the Services, ESCO is required to meet the standards outlined herein.

Section 1: Product and Materials Requirements by Division

Information provided herein represents summary specification information highlighting requirements related to Sustainable Design based upon DCAMM Standard Specifications, in CSI Masterformat 2004. This is not intended to be a complete specification and does not include all CSI Masterformat sections. Likewise, some sections provided here may not be applicable to this Project. The specifications detailed below should be adopted by ESCO as standard considerations for all designs, and shall be included in the Project.

General Guidelines:

1. Where any of the below specifications applicable to the Services cannot be met, ESCO shall justify, in writing, the need for exception to such specific elements. Alternate designs shall be accepted only where justified for explicit applicability reasons, such as lack of product availability or for specific concerns unique to the Project.
2. ESCO shall specify only those products, including paints, sealants, coatings and adhesives that meet the VOC standards established in Section 3 of this **Schedule T**.
3. Where feasible and available, ESCO should include products and materials that contain high recycled content.

Division 01 - General Requirements

Environmental Protection Procedures:

- During the life of this Contract, maintain all facilities constructed for pollution, erosion, and sedimentation control as long as the operations creating the particular pollutant area being carried out.

Division 06 – Wood, Plastics and Composites

- Specify composite boards that do not contain urea-formaldehyde binding resins.

Division 07 - Thermal and Moisture Protection

- Specify insulation materials made without ozone depleting compounds, including CFCs & HCFCs.
- Specify sealants that are not formulated with aromatic solvents, halogenated solvents, fibrous talc or asbestos, formaldehyde, mercury, lead, cadmium, hexavalent chromium, or their compounds.

Division 08 - Openings (Doors & Windows: includes glass and glazing, doors, windows, storefronts, skylights)

- Specify wood doors with core materials that do not contain particleboard made with urea-formaldehyde binders.

Division 09 – Finishes

Lathing & Plastering:

- Specify plaster with no-VOC-emitting additives, such as epoxy or other resins.

Gypsum Board:

- Specify drywall with facing paper from 100% recycled content, if available, or justify the alternative.
- Specify the installation of gypsum board with screws rather than laminating with adhesives.
- Specify paper joint tape rather than fiberglass tape.
- When sound attenuation insulation is used in gypsum construction, specify that it be completely encapsulated within partitions and does not occur where particulate matter can enter return air plenums or other recirculation channels.

Acoustical Tile:

- Specify acoustic panel with a maximum recycled content or justify alternatives.
- Specify ceiling tile products that are free from formaldehyde.
- Specify ceiling tiles that do not have vinyl faces.

Carpet:

- Specify that carpeting products be approved by the Carpet and Rug Institute IAQ Testing Program and carry the approved logo.
- Avoid carpets with backing made from styrene butadiene latex, which is a primary emitter of 4-phenylcyclohexene (4-PC).
- Specify that the installation of the carpet must meet with the Carpet and Rug Institute's *Standard for Installation of Commercial Carpet CRI-104* on use of solvent adhesive removers. Liquid adhesive removers cannot be used to remove carpet replaced under this bid.

Acoustic Treatment:

- Avoid vinyl-faced acoustical wall panels.
- Specify wall panels that are manufactured without formaldehyde.
- Specify installation methods that do not use adhesives.

Painting and Coating (includes paint, stains, varnishes and similar coatings)

- Specify water-based paints. If using alkyd-base, please justify.
- For specific limitations on paints, sealants, coatings and adhesives, see Section 3 of **Schedule T**.

Division 11 – Equipment

- Specify that appliances shall not contain mercury switches, and that gas appliances with standing pilot lights shall contain an electric ignition.
- Where applicable, specify Energy Star equipment.

Division 23 – Heating, Ventilation and Air Conditioning

- Do not use any CFC-based refrigerants in new base building HVAC and Refrigeration systems. If reusing existing base building HVAC equipment, complete a comprehensive CFC phase-out conversion.

Division 26 – Electrical

- Do not exceed the Illuminating Engineering Society of North America (IESNA) footcandle level requirements as stated in the Recommended Practice Manual: Lighting for Exterior Environments.

- Design interior and exterior lighting such that zero direct-beam illumination leaves the building site (property).
- Consider impact of lighting (and other internal building loads) on HVAC system design.

Division 31 – Earthwork (includes site clearing and erosion & sedimentation controls)

- Specify careful stripping and stockpiling of topsoil for reuse in job site landscaping.
- Specify restrictions to vehicular access to the site to meet landscape and site protection goals.
- Specify the use of protective fences as well as adequate shoring and bracing of existing conditions and site amenities that are to remain intact during construction including any structures, retaining walls, and landscaping amenities.
- Provide temporary erosion and sedimentation control measures to prevent soil erosion and discharge of soil-bearing water runoff or airborne dust to adjacent properties and walkways, according to a sediment and erosion control plan specific to the site, that complies with EPA 832/R-92-005 or requirements of authorities having jurisdiction, whichever is more stringent.

Division 32: Exterior Improvements (includes planting, paving and irrigation)

- Use plants native to the site in order to reduce the need for soil amendments and excessive water.

Section 2: Indoor Environmental Quality / Indoor Air Quality (IAQ) Requirements

All designs must meet the minimum requirements of voluntary consensus standard ASHRAE 62.1-2007, Ventilation for Acceptable Indoor Air Quality and approved Addenda.²

ESCO shall take all possible steps to ensure that the building's indoor environment (including, but not limited to air quality) is safe and healthy. Mechanical designers should exercise deliberate care to ensure that thermal comfort and desired relative humidity control is achieved in a fashion that ensures adequate ventilation and distribution of air is achieved and that airborne contaminants and potential toxins are not introduced to ventilation air.

Section 3: VOCs, Additional Chemical Compound Limits, & Potential IAQ Pollutant Sources

To help avoid contamination of the indoor environment from architectural products, ESCO should specify architectural products that contain low levels of VOCs and various additional chemical compounds. VOC emissions rates and various additional chemical compound limits of designated materials should be obtained from information available from the manufacturer and from Material Safety Data Sheets (MSDS). At the discretion of DCAMM staff, ESCO may be expected to submit MSDS for those specified products for which such information exists.

² ASHRAE Standard 62.1-2007: Ventilation for Acceptable Indoor Air Quality. American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. Atlanta, GA 30329.

All products must not exceed the maximum allowable VOC limits for architectural coatings, adhesives, sealants and carpet products per the rates that have been scientifically determined and approved by the South Coast Air Quality Management District of California,³ Greenseal,⁴ and the Carpet and Rug Institute⁵ to protect human health and the environment.

Materials specified by ESCO shall not exceed these limits for any products to be utilized in DCAMM projects. VOC concentrations are also determined by US EPA Reference Test Method 24, Code of Federal Regulations, Title 40, Part 60, Appendix A.

Additional Chemical Compound Limits

In addition to the VOC limits expressed in the guidance above, DCAMM has adopted limits regarding potentially hazardous chemical components as follows (these have been adopted by Greenseal and are referenced as minimum standards by the US Green Building Council).

None of the paint and coating products listed above can contain aromatic compounds composing more than 1.0% by weight of the sum total of the product. All paint cans and products must not be fabricated with lead. None of the adhesive products listed above may be formulated with any carcinogens, reproductive toxins, persistent bioaccumulative and toxic compounds, or ozone depleting substances as specified in the Greenseal commercial adhesives product standard.⁶ Any of these substances known to be present as a contaminant shall not exceed 0.1% by weight of the adhesive product.

Chemical Component Limitations

Other Chemicals: paint and coating products specified will not contain or utilize any of the following chemical compounds in the manufacture of the product.

- Halomethanes: methylene chloride
- Chlorinated ethanes: 1,1,1-trichloroethane
- Aromatic solvents: benzene, toluene (methylbenzene), ethylbenzene
- Chlorinated ethylenes: vinyl chloride
- Polynuclear aromatics: naphthalene
- Chlorobenzenes: 1,2-dichlorobenzene
- Phthalate esters: di (2-ethylhexyl) phthalate, butyl benzyl phthalate, di-n-butyl phthalate, di-n-octyl phthalate, diethyl phthalate, dimethyl phthalate
- Miscellaneous semi-volatile organics: isophorone
- Metals and their compounds: antimony, cadmium, hexavalent chromium, lead, mercury
- Preservatives (antifouling agents): formaldehyde
- Ketones: methyl ethyl ketone, methyl isobutyl ketone
- Miscellaneous volatile organics: acrolein, acrylic

³ For more information, see South Coast Air Management District (SCAQMD) Rule 1113 at: http://www.aqmd.gov/prdas/Coatings/rule_1113.htm and SCAQMD Rule 1168: <http://www.aqmd.gov/rules/reg/reg11/r1168.pdf>

⁴ For more information, see Greenseal at: <http://www.greenseal.org/certification/environmental.cfm>

⁵ For more information, see the Carpet & Rug Institute at: <http://www.carpet-rug.org/>

⁶ For more information, see Green Seal Product Standards at <http://www.greenseal.org/certification/environmental.cfm>

EXHIBIT I: PERFORMANCE BOND

Know all men by these presents, that

as principal, and

as Surety, are held and firmly bound unto the Commonwealth of Massachusetts in the sum of

in lawful money of the United States of America, to be paid to the Commonwealth of Massachusetts, for which payments, well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the said principal has made a Contract with the Commonwealth, acting through its _____ (“Awarding Authority”), bearing date of _____, 20____, for the construction of Project No. _____ Contract No. _____ Project Name _____

Now the condition of this obligation is such that if the principal shall well and truly keep and perform all the undertakings, covenants, agreements, terms and conditions of said Contract and any extensions thereof that may be granted by the Commonwealth, with or without notice to the Surety, and during the life of any guarantee required under the Contract, and shall also well and truly keep and perform all the undertakings, covenants, agreements, terms and conditions of any and all duly authorized modifications, alterations, changes or additions to said Contract that may hereafter be made, notice to the Surety of such modifications, alterations, changes or additions being hereby waived, then this obligation shall become null and void; otherwise it shall remain in full force and virtue.

In the event that the Contract is abandoned by the Contractor, or is terminated by the Commonwealth under the provisions of said Contract, said Surety shall, if requested in writing by the Owner, take such action as is necessary to complete the Contract.

In witness whereof we hereunto set our hand and seals this _____ day of _____, 20_____.

_____ (Seal) _____ (Seal)
(Print Name of ESCO) (Print Name of Surety)

BY _____
(Signature - Title)

BY _____
(Signature - Title)

Surety Address

EXHIBIT II: LABOR AND MATERIAL PAYMENT BOND

PAYMENT BOND

Know all men by these presents, that _____ as principal, and _____ as Surety, are held and firmly bound unto the Commonwealth of Massachusetts in the sum of _____ in lawful money of the United States of America, to be paid to the Commonwealth of Massachusetts, for which payments, well and truly to be made, we bind ourselves, our respective heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Whereas, the said principal has made a Contract with the Commonwealth acting through its _____ ("Awarding Authority"), bearing date of _____, 20____, for the construction of Project No. _____ Contract No. _____ Project Name _____

Now the condition of this obligation is such that if the principal shall pay for all labor performed or furnished and for all materials used or employed in said Contract and in any and all duly authorized modifications, alterations, extensions of time, changes or additions to said Contract that may hereafter be made, notice to the Surety of such modifications, alterations, extensions of time, changes or additions being hereby waived, the foregoing to include any other purpose or items set out in, and to be subject to, provisions of Massachusetts General Laws Chapter 30, section 39A, and Chapter 149, section 29, as amended, then this obligation shall become null and void; otherwise it shall remain in full force and virtue.

In witness whereof we hereunto set our hand and seals this _____ day of _____, 20____.

_____(Seal) _____(Seal)
(Print Name of Contractor) (Print Name of Surety)

By _____
(Signature - Title) (Signature - Title)

Surety Address _____

Project # xxxxxxxx/Project Name

EXHIBIT IIa: GUARANTEED SAVINGS BOND/LETTER OF CREDIT

(See Attached)

Project # xxxxxxxx/Project Name

EXHIBIT III – INSURANCE CERTIFICATES

Attach Insurance Certificates

Project # xxxxxxxx/Project Name

EXHIBIT IV: TRENCH APPLICATION AND PERMIT DOCUMENTS

[Note to E-Team - Attach Trench Application/Permits here]

EXHIBIT V - CERTIFICATE OF COMPLIANCE WITH STATE TAX LAWS AND WITH UNEMPLOYMENT COMPENSATION CONTRIBUTION REQUIREMENTS

Pursuant to M.G.L. c. 62C, §49A and M.G.L. c. 151A, §19A, I,

_____ authorized signatory for
_____ whose
principal place of business is at _____

_____ do hereby certify under penalties of perjury that
_____ has filed all state tax
returns and paid all taxes as required by law and has complied with all state laws pertaining
to contributions to the unemployment compensation fund and to payments in lieu of
contributions.

The Business Organization Social Security Number or Federal Identification Number is
_____.

Signed under the penalties of perjury the _____ day of
_____ 20 _____.

Signature: _____
Name and Title: _____

EXHIBIT VI - VOTE OF CORPORATION

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

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

_____ held on

(Name of Corporation)

(Date)

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

_____, _____
(Name) (Officer)

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

A TRUE COPY,
ATTEST

Clerk

Place of Business: _____

DATE OF THIS AGREEMENT: _____

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

(Clerk) (Corporate Seal)

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

NOTARY PUBLIC

EXHIBIT VII - AFFIDAVIT OF COMPLIANCE

Form AF-4A 1/78

EXECUTIVE OFFICE FOR
ADMINISTRATION AND FINANCE
The Commonwealth of Massachusetts

_____ MASSACHUSETTS BUSINESS CORPORATION

_____ NON-PROFIT CORPORATION

_____ FOREIGN (Non-Massachusetts) CORPORATION

I, _____, _____ President _____ Clerk of
(Typed Name)

_____ whose principal office is located

do hereby certify that the above named Corporation has filed with the State Secretary all certificates and annual reports required by Chapter 156B, section 109 (Business Corporation), by Chapter 156D, section 7.47 (Foreign Corporation), or by Chapter 180, section 26A (Non-Profit Corporation) of the Massachusetts General Laws.

SIGNED UNDER THE PENALTIES OF PERJURY THIS ____ day of ____, 20__.

Signature of responsible Corporate Officer _____.

Please refer Corporations which refuse or fail to complete and execute Form AF-4A, and also direct any questions you may have to:

Laurie Flynn, Director
Office of the Secretary of the Commonwealth
Corporate Division
John W. McCormack Building, Room 1710
Boston, MA 02108

EXHIBIT VIII: COMPLIANCE AND CERTIFICATION FORMS FOR CERTIFIED PAYROLL, M/WBE AND WORKFORCE REQUIREMENTS

- *Schedule For Participation (for Minority and Women Business Enterprises)*
- *Letter of Intent (for Minority and Women Business Enterprises)*
- *Instructions for Completing Certificate of Payment By Contractor to Minority and Women Business Enterprises*
- *Certificate of Payment By Contractor to Minority and Women Business Enterprises*
- *Certificate of Completion By Minority and Women Business Enterprises*
- *Weekly Payroll Records Report and Statement of Compliance*
- *Weekly Payroll Report Form*
- *Quarterly Project Workforce Table*
- *Contractor's Weekly Workforce Report*
- *Minorities and Women In Contractor's Weekly Workforce Report*
- *Workforce Certification Form I-9 (certifying compliance with certain workforce related requirements)*

The following Compliance and Certification Forms, comprising 12 pages, are attached and hereby incorporated into this Contract.

[Note to E-Team/OGC - INSERT THE ABOVE REFERENCED COMPLIANCE AND CERTIFICATION FORMS HERE]

EXHIBIT IX: EXECUTIVE ORDER 504 CONTRACTOR CERTIFICATION FORM

[NOTE: For the purposes of this Exhibit IX, the reference to “Contractor” shall mean “ESCO”.

BIDDER/CONTRACTOR LEGAL NAME:

BIDDER/CONTRACTOR VENDOR/CUSTOMER CODE:

Executive Order 504: For all Contracts involving the Contractor’s access to personal information, as defined in M.G.L. c. 93H, and personal data, as defined in M.G.L. c. 66A, owned or controlled by Executive Department agencies, or access to agency systems containing such information or data (herein collectively “personal information”), Contractor certifies under the pains and penalties of perjury that the Contractor (1) has read Commonwealth of Massachusetts [Executive Order 504](#) and agrees to protect any and all personal information; and (2) has reviewed all of the Commonwealth of Massachusetts Information Technology Division’s Security Policies available at www.mass.gov/ITD under Policies and Standards.

Notwithstanding any contractual provision to the contrary, in connection with the Contractor’s performance under this Contract, for all state agencies in the Executive Department, including all executive offices, boards, commissions, agencies, departments, divisions, councils, bureaus, and offices, now existing and hereafter established, the Contractor shall:

(1) obtain a copy, review, and comply with the contracting agency’s Information Security Program (ISP) and any pertinent security guidelines, standards and policies; (2) comply with all of the Commonwealth of Massachusetts Information Technology Division’s Security Policies (“Security Policies”) available at www.mass.gov/ITD under Policies and Standards;

(2) communicate and enforce the contracting agency’s ISP and such Security Policies against all employees (whether such employees are direct or contracted) and subcontractors;

(3) implement and maintain any other reasonable appropriate security procedures and practices necessary to protect personal information to which the Contractor is given access by the contracting agency from the unauthorized access, destruction, use, modification, disclosure or loss;

(4) be responsible for the full or partial breach of any of these terms by its employees (whether such employees are direct or contracted) or subcontractors during or after the term of this Contract, and any breach of these terms may be regarded as a material breach of this Contract;

(5) in the event of any unauthorized access, destruction, use, modification, disclosure or loss of the personal information (collectively referred to as the "unauthorized use"): (a) immediately notify the contracting agency if the Contractor becomes aware of the unauthorized use; (b) provide full cooperation and access to information necessary for the contracting agency to determine the scope of the unauthorized use; and (c) provide full cooperation and access to information necessary for the contracting agency and the Contractor to fulfill any notification requirements.

Breach of these terms may be regarded as a material breach of this Contract, such that the Commonwealth may exercise any and all contractual rights and remedies, including without limitation indemnification under Section 11 of the Commonwealth's Terms and Conditions, withholding of payments, contract suspension, or termination. In addition, the Contractor may be subject to applicable statutory or regulatory penalties, including and without limitation, those imposed pursuant to M.G.L. c. 93H and under M.G.L. c. 214, §3B for violations under M.G.L. c. 66A.

Bidder/Contractor Name: _____.

Bidder/Contractor Authorized Signature: _____.

Print Name and Title of Authorized
Signatory: _____.

Date: _____.

This Certification may be signed once and photocopied to be attached to any Commonwealth Contract that does not already contain this Certification Language and shall be interpreted to be incorporated by reference into any applicable contract subject to Executive Order 504 for this Contractor.

APPENDIX A – PHASED FINAL INVESTMENT GRADE AUDIT

Attach APPROVED FIGA - Dated: _____ (attach hereto)
Approval by CUSTOMER – Dated: _____ (attach hereto)

*****NOTE TO E-TEAM/OGC – BE SURE TO LIST ANY AND ALL AMENDMENTS, CLARIFICATIONS, EXCEPTIONS, QUALIFICATIONS, ETC. TO THE FIGA AND THE DATE OF THE SAME HERE. DO NOT JUST INSERT THE QUESTIONS AND ANSWERS EXCHANGED DURING THE PROPOSAL PROCESS. IT IS CRITICAL TO DETAIL THE SPECIFIC ASPECTS OF THE FIGA THAT ARE APPROVED AND/OR REJECTED.**

List Amendments, Exceptions and Clarifications (and Date of same) here:

- 1.
 - 2.
- Etc.