

**MODEL EMS CONTRACT FOR ONSITE ENERGY GENERATION**

INSTRUCTIONS FOR USE OF

MODEL EMS CONTRACT

225 CMR 10.00 OR 225 CMR 19.00

**ACKNOWLEDGEMENTS**

This document was prepared by Eileen McHugh, Program Coordinator (DOER). DOER would like to thank the following people and organizations for their contribution to this document.; Robert Sydney, General Counsel (DOER); Rachel Evans, Deputy General Counsel (DOER); Natalie Andrews, Renewable Energy Project Coordinator (DOER); Beth Greenblatt, Managing Director, Beacon Integrated Solutions; and the Energy Services Coalition.

Disclaimer

This document is a model Energy Management Services Agreement with provisions to use in procuring Energy Management Services (EMS) for Renewable Energy Systems under 225 CMR 10.00 and 225 CMR 19.00. The information contained within is general and subject to change. The document is not intended to provide legal advice; it is intended to serve as an introduction to the elements pertaining to the development of an EMS project and should not be used as a substitute for a thorough analysis of facts and the law. When contracting for EMS, it is the sole responsibility of each governing body to consult with legal counsel in preparing any documents and to ensure compliance with all applicable federal, state, and local laws, rules, regulations, and procurement procedures.

The users of this document are strongly encouraged to search actively for the most recent updates of governmental regulations. Readers may check for recent updates to Energy Management Services at www.mass.gov/doer or by calling (617) 626.7305.

This model Energy Management Services Agreement for the installation of Onsite Energy Generating Systems (EMSA or Contract) contains provisions for the installation and construction of the system, terms for the lease of the site where the system is to be installed (ground or roof), and terms for the purchase of the energy generated onsite. Where possible, DOER has provided placeholders for attachments and exhibits.

All Contracts and Amendments to Contracts must be submitted to DOER before publication as detailed below.

1. Use this model Contract as a foundation for the EMSA. The document is intended as guidance to ensure compliance with the statute and the regulation.
2. Change the Contract to fit the specific procurement. For example, adding details applicable to the particular project, such as purpose, scope, and objectives or standard language required by the awarding authority. *Do not change required guarantee and measurement &verification terms.*

File the Contract electronically with DOER at least fifteen business days prior to execution of the contract. File a final copy of the contract with DOER along with DOER’s EMS Annual Report with projected energy and water cost savings estimates. Within 15 Business days after the contract is executed, file an electronic copy of the executed contract with the Commissioner of DOER. To file EMS documents with the DOER, email one complete electronic copy to: EMS.DOER@state.ma.us and mail one complete copy to:

Massachusetts Department of Energy Resources
Attn: NOTIFICATION OF EMS PROCUREMENT
100 Cambridge St., Suite 1020
Boston, MA 02114

1. A Local Governmental Body shall only award a contract for EMS if all the requirements of 225 CMR 10.00 or 225 CMR 19.00 have been met. The EMS contract shall conform to the terms included in the RFP, utilize the terms and conditions set forth in Guidelines established by DOER, and confirm to other terms required by law and by the Local Governmental Body.
2. A contract may be amended, if it does not exceed the scope of the RFP, and does not violate the requirements established in 225 CMR 10.00 or 225 CMR 19.00 and all other applicable laws of the Commonwealth. The LGA shall file a copy of a contract amendment with DOER on or before ten Business Days before the effective date of the applicable contract amendment.
3. For the duration of the contract term, the Local Governmental Body shall annually file with DOER an Annual Report utilizing the Guidelines established by DOER.

The EMS Contract should contain provisions for:

Onsite Energy Generation Guarantee:

* Energy generation guarantee in kWh with dollar savings
* Measurement and verification plan; methodology to adjust baseline

Payments and Schedule (depending on option selected)

* Final project cost (must confirm that Construction Bond is 100% of project cost)
* Financing agreement, if applicable
* Price for power purchase of kWh, including baseline utility cost
* Lease Terms

Design and Construction Phase

* Description of project sites
* Equipment to be installed
* Construction and installation schedule
* Systems start-up and commissioning; operating parameters of installed equipment

Post-Construction

* Contractors maintenance responsibilities
* Client’s maintenance responsibilities
* Facility maintenance checklist

Administration

* Annual reporting requirements
* Annual dispute resolution procedures

The model Contract begins on the next page.

This Energy Management Services Agreement (hereinafter “***Contract***”) is made and entered into as of ­­­­­­ (“***Effective Date***”), by and between \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,[the Local Governmental Body] a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ of the Commonwealth of Massachusetts (“***Customer[[1]](#footnote-1)***”) and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ corporation (“***Contractor***”) for the purpose of furnishing certain equipment and work specified herein (“***Work***”), and assuring the performance of said Work, designed to generate electrical power at Customer properties described in Attachment 1: Description of Premises (hereinafter “***the Premises***”). Customer and Contractor are sometimes hereinafter referred to individually as a “***Party***” and collectively as the “***Parties***.”

**Section 1: Definitions**

Key terms used within this Contract are defined as follows:

Annual System Degradation Factor. The decreased power output factor expressed in percent by which the Guaranteed Annual Electric Output of the System shall decrease from one Guaranteed Performance Year to the next Guaranteed Performance Year.

Appraised Value. The fair market value assigned to the System, and any other power sales agreements, emission trading agreements, renewable energy certificate sales agreements or revenue producing agreements to which Contractor is a party and which are assignable to Customer, as determined by the Independent Appraiser.

Commercial Operation. System is ready for regular, daily operation, has been connected to the Premises’ electrical system or interconnected to the grid, has undergone testing as provided herein, has been accepted by Customer and (to the extent required, the LDC), and is capable of producing Electricity.

Commercial Operation Date. The first day on which the System is ready for Commercial Operation, as certified in writing by Contractor to Customer in the Notice of Commercial Operation.

Construction Commencement Date. The date of commencement of actual preparation or construction activities on the Premises in connection with the installation of the System.

Delivery Point. The agreed location or locations on the Premises where Electricity is to be delivered and received under this Contract

Business Day. A business day shall mean Monday through Friday, exclusive of state and federal legal holidays.

Contractor. The vendor selected by the Local Governmental Body to perform the energy management services solicited through an RFP under 225 CMR 10.00 or an RFQ under 225 CMR 19.00 (whichever is applicable).

Electricity. The actual and verifiable amount of electricity generated by the System and delivered to Customer at the Delivery Point for use by Customer on the Premises, as metered in whole kilowatt-hours (kWh) at the Metering Device, and that conforms to the applicable LDC and/or authoritative regulatory body standards.

Electricity Price. The amount paid by Customer to Contractor for each kWh of Electricity sold by Contractor to Customer pursuant to this Contract.

EMS Annual Report. A report form required by DOER that must be completed by the Local Governmental Body summarizing the energy or water unit and dollar cost savings. The initial report providing estimated savings must be filed along with the EMS contract and thereafter within 90 days after the anniversary of the Guaranteed Energy Performance Period.

Energy Audit. A systematic inspection, verification, and determination of the energy consumption characteristics of a building or facility which:

(a) identifies the type, size and rate of energy consumption of such building or facility and the major energy using systems of such building or facility;

(b) determines appropriate energy conservation maintenance and operating procedures; and

(c) indicates the need, if any, for the acquisition and installation of Energy Conservation Measures or On-site Energy Generation.

Energy Conservation. A modification of, or change in, the operation of real or personal property in a manner likely to improve the efficiency of energy use, and shall include Energy Conservation Measures and any Energy Audits to identify and specify energy and cost savings.

Energy Conservation Measures. Measures involving modifications of maintenance and operating procedures of a building or facility and installations therein, which are designed to reduce energy consumption in such building or facility, or the installation or modification of an installation in a building or facility which is primarily intended to reduce energy consumption.

Energy Conservation Projects. Projects to promote Energy Conservation, including but not limited to energy conserving modification to windows and doors; caulking and weather stripping; insulation, automatic energy control systems; hot water systems; equipment required to operate variable steam, hydraulic and ventilating systems; plant and distribution system modifications, including replacement of burners, furnaces or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; utility plant system conversions; replacement or modification of lighting fixtures; energy recovery systems; on-site electrical generation equipment using new renewable generating sources as defined in M.G.L. c. 25A, § 11F; and cogeneration systems.

Energy Management Services (EMS). A program of services, including Energy Audits, Energy Conservation Measures, Energy Conservation Projects or a combination thereof, and building maintenance and financing services, primarily intended to reduce the cost of energy and water in operating buildings, which may be paid for, in whole or in part, by cost savings attributable to a reduction in energy and water consumption that result from such services. The EMS contract may extend for a term not to exceed 20 years. The allowable length of the contract may also reflect the useful life of the cost savings measures.

EMS Annual Report. A report form required by DOER that must be completed by the Local Governmental Body summarizing the energy or water unit and dollar cost savings. The initial report providing estimated savings must be filed along with the EMS contract and thereafter within 90 days after the anniversary of the Guaranteed Energy Performance Period.

Energy Savings. A measured reduction in fuel and its costs, energy and its costs, water and its costs, or operating or maintenance costs resulting from the implementation of Energy Conservation Measures or Projects; provided, however, that any payback analysis to evaluate the energy savings of a geothermal energy system to provide heating, cooling or water heating over its expected lifespan shall include gas and electric consumption savings, maintenance savings and shall use an average escalation rate based on the most recent information for gas and electric rates compiled by the Energy Information Administration of the United States Department of Energy.

Environmental Attributes. Any credit, benefit, reduction, offset, financial incentive, tax credit and other beneficial allowance that is in effect as of the Effective Date or may come into effect in the future, including, to the extent applicable and without limitation, (i) financial based incentives under state grant programs, (ii) greenhouse gas offsets under the Regional Greenhouse Gas Initiative, (iii) Renewable Energy Credits or any similar credits under the laws of the Commonwealth of Massachusetts or any other jurisdiction, (iv) tax credits, incentives or depreciation allowances established under any federal or State law, and (v) other allowances howsoever named or referred to, with respect to any and all fuel, emissions, air quality, or other environmental characteristics, resulting from the use of solar generation or the avoidance of the emission of any gas, chemical or other substance into the air, soil or water attributable to the sale of Electricity generated by the System during the Term and in which Contractor has good and valid title.

Established Baseline. A written description of previous fuel, energy, and water consumption data and operating and maintenance costs for the past three years, including, but not limited to, future capital replacement expenditures avoided as a result of equipment installed or services performed. The description shall be included in the Request for Proposals.

Escalation Rate. If applicable, the percentage by which the Electricity Price increases from one Guaranteed Performance Year to the next Guaranteed Performance Year based on the most recent information for gas and electric rates compiled by the Energy Information Administration (EIA) of the United States Department of Energy.

Final Completion. Final Acceptance by the owner that the Contractor has fulfilled all of its obligations under the EMSA including construction, installation, inspection, testing and commissioning, and that all punch list items are reconciled.

Guarantee of Savings. The written guarantee of a Contractor, warranting the energy savings to be derived from a particular Energy Conservation Measure, Energy Conservation Project, Energy Management Services, or Energy Savings. Such written guarantee shall include a detailed description of the cost of the energy or water conservation or usage measures, all causally connected work, and ancillary improvements provided for in the contract. The guarantee shall state the annual savings expressed in applicable energy units or (if water savings) in gallons per year and be based on dollars saved by reference to established unit rates.

Guarantee of Generation. The written guarantee of a Contractor warranting the particular electrical energy generation to be derived from the On-site Energy Generation unit. Such written guarantee shall: (1) include a detailed description of the equipment to be installed; and (2) state the annual amount of electrical energy to be generated in kilowatt hours per year.

Guaranteed Maximum Cost. The fixed maximum cost of the Energy Management Services, including: (1) the cost of each energy conservation measure, after installation, startup, and testing; and (2) the total payments made by a Local Governmental Body to a contractor, including but not limited to, the total capital investment and the contractor’s costs. Utility sponsored rebates, tax credits or other incentives, any direct governmental subsidies, interest payments, and energy and water cost savings shall not be deducted from the Guaranteed Maximum Cost.

Guaranteed Performance Year. The consecutive 12-month period commencing on the Commercial Operation Date and every year following for the term of the Contract.

Guidelines. A set of clarifications, interpretations, and procedures, including forms and model documents, developed and issued by DOER to assist it in determining compliance with 225 CMR 10.00 or 225 CMR 19.00. Each Guideline shall be effective on its date of issuance or on such date as is specified therein, except as otherwise provided in 225 CMR 10.00 or 225 CMR 19.00.

Independent Appraiser. An individual who is a member of a national accounting, engineering, or energy-consulting firm qualified by education, certification, experience and training to determine the value of solar generating facilities of the size and age and with the operational characteristics of the System. Except as may be otherwise agreed by the Parties, the Independent Appraiser shall not be (or within three years before his appointment have been) a director, officer or employee of, or directly or indirectly retained as consultant or adviser to, Contractor, any Affiliate of Contractor, or Customer.

Lease/license Area. The area on the Premises to which the Customer grants access to the Contractor for the purpose of installing and operating the System.

Local Distribution Company (LDC). The regulated electric local distribution company that provides electric distribution service to the municipality in which Customer is located.

LDC Retail Rate. The applicable all-inclusive rate (expressed on a $/kWh basis) charged by the LDC for Electricity that is delivered to the municipality, and shall include, without limitation, all electric commodity charges, transmission, distribution or other delivery charges, ancillary service charges, transition, renewable energy, efficiency, or competitive service charges, taxes, and other fees and charges in place.

LDC System. The electric distribution system operated and maintained by the LDC.

Local Governmental Body. A city, town, district, regional school district or county, or an agency or authority thereof, including a housing authority, board, commission, department or instrumentality of a city, town district, regional school district or county, and any other agency that is not a state agency or building authority; or a combination of 2 or more such cities, towns, districts, regional school districts or counties, or agencies or authorities thereof.

Maximum Electricity Price. The maximum not to exceed Electricity Price that may be charged under this Contract.

Metering Device. Any and all revenue quality meters installed by Contractor at or before the Delivery Point needed for the registration, recording, and transmission of information regarding the amount of Electricity generated by the System and delivered to the Delivery Point for use by Customer or otherwise for delivery into the LDC System.

Net Metering. Net metering will have the meaning set forth in 220 CMR 18.02.

On-site Energy Generation.The generation of renewable energy or the cogeneration of electricity and heating or cooling of a generation unit located on or adjacent to a building or structure owned by a Local Governmental Body that utilizes some or all of the energy so generated either directly or indirectly through net metering.

Premises. The area leased to install the System.

Production Shortfall. The amount, expressed in kWh, by which the actual amount of Electricity generated by the System in any Guaranteed Performance Year is less that the Guaranteed Annual Energy Output for that specific year.

Renewable Generation. The electrical energy output of an RPS Class I Renewable Generation Unit or Solar Carve-Out Renewable Generation Unit as defined under 225 CMR 14.00: *Renewable Energy Portfolio Standard – Class I*.

 Request for Proposals (RFP). A written document issued by a Local Governmental Body that invites potential Responsive Offerors to submit proposals outlining their qualifications to perform the Energy Management Services for the Local Governmental Body, a cost proposal, and other information required by 225 CMR 10.00 and the Local Governmental Body.

Request for Qualifications (RFQ). A written document issued by a Local Governmental Body that invites qualified providers to submit responses outlining their qualifications, the capacity to perform the EMS for the Local Governmental Body, and other information required by 225 CMR 19.00 and the Local Governmental Body.

Responsive Offeror. A person who has submitted a proposal, which conforms in all respects to the Requests for Proposals and who possesses the skill, ability, and integrity necessary to faithfully perform the work, based upon a determination of competent workmanship and financial soundness in accordance with M.G.L. c. 149, §44D.

System Assets. Each and all of the assets of which the System is comprised, including Contractor’s solar energy panels, mounting systems, carports, tracking devices, inverters, integrators and other related equipment and components installed on the Premises, electric lines and conduits required to connect such equipment to the Delivery Point, protective and associated equipment, improvements, Metering Devices, and other tangible and intangible assets, permits, property rights and contract rights reasonably necessary for the construction, operation, and maintenance of the System.

System Loss. The loss, theft, damage or destruction of the System or any portion thereof, or any other occurrence or event that prevents or limits the System from operating in whole or in part, resulting from or arising out of any cause (including casualty, condemnation or Force Majeure).

Substantial Completion Date. The date on which the Contractor warrants by written notice that the System is substantially complete and producing Electricity equal to or greater that the guaranteed electricity generation.

Termination Date. The earlier to occur of (i) the last day of the Term, (ii) the date of termination of this Contract as the result of an Event of Default, and (iii) the date of termination pursuant to Sections 7.1(d)(i) or 7.3 herein.

Termination Payment. The amount payable by a Party to the other Party in the event of termination of this Contract as a result of an Event of Default or as agreed to by both Parties, as set forth in Attachment E attached hereto.

Update Statement. A form developed by DCAM, as defined in 810 CMR 4.01, to be completed by a General Contractor and submitted with all proposals.

#### **Section 2: Price and Terms**

**2.1 Purchase and Sale of Electricity**

1. Commencing on the Commercial Operation Date and continuing throughout the remainder of the contract term of, Contractor shall make available to Customer, and Customer shall take delivery of all of the Electricity generated by the System.
2. Notwithstanding the provisions of (a) above, in the event that the System produces Excess Electricity, then the Parties agree that:
3. If the System and Customer are eligible for Net Metering, then (a) Customer shall purchase such excess electricity at the Electricity Price, and (b) Contractor shall transmit such excess electricity into the LDC System on behalf of and for the account of Customer; and
4. If the System and Customer are not eligible for Net Metering, then (a) Customer shall not purchase such excess electricity, and (b) Contractor may sell such excess electricity into the LDC System on behalf of and for its own account.
5. Customer shall pay Contractor for the Electricity, as metered at the Metering Device, at the applicable Electricity Price of $\_\_\_\_\_\_\_\_. The payment made by Customer to Contractor shall equal the Electricity for the relevant period multiplied by the Electricity Price for such period. The Parties agree that in no event shall the Electricity Price exceed the Maximum Electricity Price of $\_\_\_\_\_\_\_\_.
6. Contractor is responsible for local, state, and federal income taxes attributable to Contractor for income received under this Contract.
7. Contractor is responsible for all real property taxes attributable to the System.
8. Contractor is responsible for any governmental charges attributable to the sale of Electricity from Contractor to Customer or imposed specifically upon the production of renewable and/or distributed electrical energy, irrespective of whether imposed before, upon or after the delivery of Electricity to Customer at the Delivery Point or to the LDC System.
9. Both Parties will use reasonable efforts to administer this Contract and implement its provisions to minimize Governmental Charges. In the event any of the sales of Electricity hereunder are to be exempted from or not subject to one or more Governmental Charges, the applicable Party shall, promptly upon the other Party’s request therefore, provide the applicable Party with all necessary documentation to evidence such exemption or exclusion.

**2.02 Payment Terms**

1. All invoices under this Contract will be due and payable not later than thirty (30) days after receipt of the applicable invoice or on the next Business Day. Each Party will make payment by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party.
2. The Customer may in good faith dispute the correctness of any invoice (or any adjustment to any invoice) under this Contract at any time within three (3) months following the date the invoice (or invoice adjustment) was rendered. Any payments between the parties necessary to resolve any irregularities will be made within thirty days after submission. If, after thirty days, the parties are unable to agree upon the adjustment, the matter shall be submitted to resolution pursuant to Section 3.1: *Dispute Resolution*, and the disputed portion of any additional payment due under this Section shall not be payable until the dispute resolution procedure required in Section 3.1: *Dispute Resolution* has been completed.
3. Each Party will keep, for a period not less than two (7) years after the expiration or termination of any transaction, records sufficient to permit verification of the accuracy of billing statements, invoices, charges, computations and payments for such transaction. During such period each Party may, at its sole cost and expense, and upon reasonable notice to the other Party, examine the other Party’s records pertaining to transactions during such other Party’s normal business hours.

**2.3 Title to Environmental Attributes**

All Environmental Attributes relating to the System or the Electricity will be and remain property of [Contractor/Customer]. [Contractor/Customer] shall have all right, title, and interest in Environmental Attributes that relate to the Electricity during the Term. [Customer/Contractor] shall have no right, title or interest in or to any such Environmental Attributes.

1. Reporting of Ownership of Environmental Attributes.

[Contractor/Customer] shall take all actions necessary to qualify for, register and report the Environmental Attributes relating to the Electric Output.
2. Further Assurances

At [Contractor’s/Customer’s] request and expense, [Customer/Contractor] shall execute all such documents and instruments reasonably necessary or desirable to effect or evidence [Contractor’s/User’s] right, title and interest in and to the Environmental Attributes relating to the Electricity.

If the standards used to qualify the Environmental Attributes to which [Contractor/Customer] is entitled under this Contract are changed or modified, [Customer/Contractor] shall at [Contractor’s/Customer’s] request and expense use all commercially reasonable efforts to cause the Environmental Attributes to comply with new standards as changed or modified.

**2.04 System Purchase and Sale Options**

1. Purchase Option

No later than (a) 180 days prior to the end of the Contract Termination or (b) in the Event of Default, Customer shall have the right to provide a notice to Contractor requiring a determination of the Purchase Price.
2. Selection of Independent Appraiser

Within twenty (20) Business Days of Contractor’s receipt of Customer’s notice of intention to exercise Purchase Option, Contractor and User shall each propose an Independent Appraiser. If Contractor and Customer do not agree upon the appointment of an Independent Appraiser within such twenty (20) Business Day period, then at the end of such twenty (20) Business Day period, two proposed Independent Appraisers shall, within five (5) Business Days of each Party’s notice, select a third Independent Appraiser (who may be one of the Independent Appraisers originally designated by the Parties or another Independent Appraiser) to perform the valuation and provide notice thereof to Contractor and User. Such selection shall be final and binding on Contractor and User.
3. Determination of Purchase Price

The selected Independent Appraiser will provide a preliminary determination of the Purchase Price within twenty days to Contractor and Customer, together with all supporting documentation that details the calculation of the Purchase Price. The Parties shall each have the right to object to the Purchase Price within twenty Business Days of receiving such Preliminary Determination. The objecting Party will provide a written explanation documenting the reasons for its objection. Within ten days after the expiration of such twenty day period, the selected Independent Appraiser shall issue its final determination (the “Final Determination”) to Contractor and User, which shall specifically address the objections received by the Independent Appraiser and whether such objections were taken into account in making the Final Determination. Except in the case of fraud or manifest error, the Final Determination of the selected Independent Appraiser shall be final and binding on the Parties.
4. Exercise of Purchase Option

Customer will have thirty days to exercise the Purchase Option, at the Purchase Price set forth in the Final Determination. Promptly following receipt of Customer’s notice, Contractor shall make the System and the Environmental Attributes, including records relating to the operations, maintenance, and warranty repairs, available to Customer for its inspection during normal business hours.

1. Terms of System Purchase

On the Transfer Date:
2. Contractor will surrender and transfer to Customer all of Contractor’s right, title and interest in and to the System, and the Environmental Attributes, and shall retain all liabilities arising from or related to the System and the Environmental Attributes prior to the Transfer Date.
3. Customer will pay the Purchase Price, by certified check, bank draft or wire transfer and shall assume all liabilities arising from or related to the System and the Environmental Attributes from and after the Transfer Date.
4. Both Parties will execute and deliver a bill of sale and assignment of contract rights containing such representations, warranties, covenants and other terms and conditions as are usual and customary for a sale of assets similar to the System, together with such other conveyance and transaction documents as are reasonably required to fully transfer and vest title to the System, and the Environmental Attributes in Customer.
5. Contractor will deliver ancillary documents, including releases, resolutions, certificates, third person consents and approvals and such similar documents as may be reasonably necessary to complete the sale of the System and the Environmental Attributes to Customer.

**2.5 Contract Termination**

This Contract shall terminate \_\_\_\_\_\_\_\_ ( ) years after Acceptance and Final Completion unless otherwise agreed to in writing (with twenty years being the maximum allowed).

#### **Section 3: General Provisions**

**3.01 Dispute Resolution**

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:

1. All claims by either party shall be made in writing and submitted to the Customer for a written decision.
2. Contractor shall not delay, suspend, or curtail performance under the Contract because of any dispute subject to this section.
3. Within sixty days of submission of the dispute to the Customer, the Customer shall issue a written decision stating the reasons thereof, 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 sixty days, he shall notify the parties to the dispute in writing of the reasons and of the date by which the decision shall issue.
4. Failure to issue a decision within one hundred and twenty-days (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.

**3.02 Conditions beyond Control of the Parties**

Except as otherwise provided herein, if either party shall be unable to carry out any material obligation under this Contract due to events beyond its control, such as acts of God, governmental or judicial, insurrections, riots, extended labor disputes, fires, explosions or floods, this Contract shall remain in effect but the affected party's obligations shall be suspended until the uncontrollable event terminates or is resolved, unless the Contract is terminated by mutual consent, in which event,

**3.03 Labor Laws**

The Contractor will obey and abide by all laws and regulations of the Commonwealth relating to the employment of labor and public work.

Contractor shall comply with all federal and state laws, rules, and regulations promoting fair employment practices or prohibiting employment discrimination and unfair labor practices. Contractor shall not discriminate in the delivery of services against any person who otherwise meets the eligibility criteria for services, or in the hiring of any applicant for employment nor shall any qualified employee be demoted, discharged or otherwise subject to discrimination in the tenure, position, promotional opportunities, wages, benefits or terms and conditions of their employment because of race, color, national origin, ancestry, age, sex, religion, disability, status as a Vietnam Era Veteran, sexual orientation or for exercising any rights or benefits afforded by law.

**3.04 Prevailing Wage Rate**

The [Division of Occupational Safety](http://www.mass.gov/dos/pw/index.htm) has established a Schedule listing the prevailing minimum wage rates that must be paid to all workers employed on the Contract by either the Contractor or its subcontractors. Such Schedule shall continue to be the minimum rate of wages payable to workers on this Contract throughout the term of this Contract. The Contractor shall not have any claim for extra compensation from the Customer if the actual wages paid to employees on the Contract exceeds the rates listed on the Schedule. The Contractor shall cause a copy of the Schedule to be kept in a conspicuous place at the project site during the term of this Contract (see M.G.L. c.149 27). If reserve police officers are employed by the Contractor they shall be paid the prevailing wage rate of regular police officers (see M.G.L. c.149 §34B).

 **3.05 Appropriations**

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

In the event that the Customer is unable to obtain an appropriation of funds sufficient to discharge the Customer’s obligations under this Contract [**insert language citing municipal contracting/appropriation authority].**

**3.06 Laws, Regulations, Ordinances, and Standard Practices**

Contractor shall perform its obligations hereunder in compliance with all applicable federal, state, and local laws, regulations, ordinances and by-laws, including applicable licensing and permitting requirements, in accordance with sound engineering and safety practices, and in compliance with all reasonable rules or policies of the Customer relative to the properties. Contractor shall be responsible for obtaining all governmental permits, licenses, consents, and authorizations as may be required to perform its obligations hereunder (see Section 4.9: *Permits and Fees* regarding permits and fees pertaining to the Work).

This Contract is made and shall be interpreted and enforced in accordance with the laws of the Commonwealth of Massachusetts. If any provision of this Contract shall be determined to be invalid or unenforceable under applicable law, such provision shall, insofar as possible, be construed or applied in such manner as will permit enforcement; otherwise this Contract shall be construed as if such provision had never been made part thereof.

The Parties agree to notify each other within 24 hours upon becoming aware of an inspection under, or any alleged violation of, the Occupational Safety and Health Act or any other provision of Federal, State or local law, relating in any way to the undertakings of either Party under this Contract.

**3.07 Patents and Patent Rights**

The Contractor shall indemnify and hold the Customer harmless from all claims and actions due to any actual or asserted infringement upon patent rights in any equipment, material, or process used by Contractor in connection with this Contract.

**3.08 Access and Inspection**

Customer shall have access to inspect the Work and the books, records, and other compilations of data that pertain to this Contract. Records shall be kept on a generally recognized accounting basis and calculations kept on file in legible form. Records shall be saved or archived for a period of three (3) years after the termination of this Contract and shall be kept or made available within Massachusetts.

Contractor shall have access (upon reasonable notice to the Customer) to inspect the property to assess the condition and operation of material and equipment installed and shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the Contract conforms to Contract requirements according to Attachment X: *Maintenance Schedule*. The Contractor shall maintain complete inspection records and make them available to the Customer.

All work is subject to inspection and testing at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the Contract. Contractor shall replace or correct work, without charge, found not to conform to the Contract. If the Contractor does not promptly replace or correct rejected work, the Customer may, by contract or otherwise, replace or correct the work and charge the cost to the Contractor or terminate for default the Contractor's right to proceed.

Notwithstanding inspection and acceptance by the Customer or any provision concerning the conclusiveness thereof, the Contract warrants that all services performed will, at the time of acceptance, be free from defects in workmanship and conform to the requirements of this Contract.

**3.09 Ownership of Documents**

All drawings, reports and other materials prepared by Contractor specifically in performance of this Contract shall become the property of the Customer.

**3.10 Sales Tax Exemption**

Customer is exempt from the assessment of Massachusetts sales and use taxes. Customer shall issue Contractor a tax exemption certificate to use for the purchases of new equipment/systems for the Customer’s benefit to complete the Work. Contractor shall not pay any sales or use taxes on any item exempt from Massachusetts sales and use taxes unless authorized by Customer or is ordered by an appropriate taxing authority to remit sales and use taxes.

**3.11 Certificates**

Contractor certifies as follows:

[INSERT AND REFERENCE FORMS FOR CERTIFICATES]

1. **Certificate of Authorization**: If Contractor is a corporation, each person executing this Contract on behalf of the Contractor hereby covenants, represents and warrants that Contractor is a duly incorporated or duly qualified (if foreign) corporation and is authorized to do business in the Commonwealth of Massachusetts (a copy of evidence thereof to be supplied to the Customer upon request); and that each person executing this Contract on behalf of the Contractor is an officer of Contractor and that he or she is duly authorized to execute, acknowledge and deliver this Contract to the Customer, a copy of a corporate resolution to this effect is attached hereto as Exhibit X: Certificate of Authorization.
2. **Tax Compliance Certification**: Pursuant to M.G.L. c.62C §49A(b), each person signing this Contract on behalf of the Contractor hereby certifies, under the penalties of perjury, that to the best of his/her knowledge and belief, the Contractor has complied with any and all applicable state tax laws attached hereto as Exhibit X: Tax Compliance Certificate.
3. **Certificate of Non-collusion**: The undersigned certifies under penalties of perjury that this Contract has been made in good faith and without collusion or fraud with any other person. As used in this certification, the word “person” shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity of group of individuals attached hereto as Exhibit X: Certificate of Non-collusion.
4. **Covenants**: Contractor covenants that: (1) it presently has no financial interest and shall not acquire any such interest direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Contract or which would violate M.G.L. c.268A, as amended from time-to-time, (2) in the performance of this Contract, no person having such an interest shall be employed by the Contractor, and, (3) no partner or employee of the Contractor is related by blood or marriage to any Commissioner or employee of the Customer.
5. **Customer Certification**: The Customer certifies that it is duly authorized to execute, acknowledge and deliver this Contract under the provisions of 225 CMR 10.00 or 225 CMR 19.00, to retain Contractor to design, acquire, install and assist in the maintenance of the installed equipment to accomplish the energy conservation measures and to provide other services, as more fully set forth herein, subject to all the terms and conditions of this Contract.

**3.12 Representations and Warranties**

Each party hereto represents and warrants to the other that (i) it has adequate power and authority to enter into this Contract and to perform its obligations hereunder and that (ii) it possesses full authority to execute and deliver this Contract and that it does not contravene any applicable law, rule or regulation.

**3.13 Assignment**

Contractor shall not assign, transfer, convey, or otherwise dispose of this Contract, or any part hereof, or his right, title or interest in the same or any part thereof, without the prior written notice to the Customer. Contractor shall not assign by power-of-attorney, or otherwise, any of the moneys due or to become due and payable under this Contract, without the prior written notice to the Customer.

**3.14 Complete Contract**

This Contract, together with any documents incorporated herein by attachment or by reference, shall constitute the entire and exclusive Contract between both parties. This Contract may not be amended or modified except in writing and executed by the Customer and the Contractor.

It is understood and agreed that the following documents, attachments, exhibits, schedules and any amendments and/or addenda, comprise the total Contract:

 Attachment X: Description of the Premises

 Attachment X: Site Lease/license

 Attachment X: Description of System

 Attachment X: Scope of Work

 Attachment X: Cost and Generation

 Attachment X: Operations and Maintenance Schedule

 Attachment X: Commissioning Plan

 Attachment X: Project Schedule

 Attachment X: Termination Payment Schedule

#### **Section 4: The Work**

**4.01 Time for Performance and Final Completion**

Contractor will commence Work within sixty days of Customer sending the Contractor a Notice to Proceed. Contractor shall substantially complete Work according to Attachment X: *Project Schedule*. Extension of dates to commence or complete Work is at the sole discretion of the Customer. Approval for an extension of dates to commence or complete Work shall not be unreasonably withheld.

If Contractor is delayed in the commencement or completion of any part of the Work due to events beyond Contractor’s control and without the fault or negligence of the Contractor, including but not limited to fire, flood, extended labor disputes, unusual delays in deliveries, unavoidable casualties, abnormal adverse weather, war, and acts of God, or due to Customer’s actions or failure to perform its obligations under this Contract or to cooperate with the Contractor in the timely completion of the Work, then Contractor will notify Customer in writing of the existence, extent of, and reasons for such delay. Contractor shall have no claim for additional compensation because of such delays but Contractor and Customer may extend the Contract time by revision for such reasonable time, as they shall agree.

**4.02 Specifications of Work**

Contractor’s obligations hereunder are specified in Attachment X: *Description of System* and related drawings and plans and any subsequent revisions thereto, as approved by the Customer. Excluded from the Work are any modifications or alterations to the properties not expressly included within the Work. The requirements of all applicable laws, regulations and codes of federal, state, and local town or city government shall be met at all times. All Work shall be performed in a professional and competent manner.

**4.03 Construction Procedures, Changes to Work and Coordination**

Contractor shall supervise and direct the Work using its best ability, skill, attention, and oversight. Contractor, in consultation with Customer, shall be responsible for the construction means, methods, techniques, sequences, and procedures. The Customer will review all proposed modifications to the building and systems and must approve of them prior to commencement of any work; such approval will not be unreasonably withheld. No change to the scope or specifications of Work shall be made without the written consent of the Customer, in the form of a revision to the *Scope of Work*. If Contractor fails to correct Work that is not in accordance with the specifications or persistently fails to meet specifications herein, Customer, by written order signed personally or by its authorized agent, may order Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

Contractor shall perform the Work in such a manner as to not harm the structural integrity or operating systems of any building or facility and shall repair and restore any damage caused by the Work at Contractor’s expense.

Contractor will not create (or allow to continue) any condition deemed to endanger health or safety as defined in Section 5.01: *Workmanship* and if such a condition exists Customer shall have the right to exercise the remedies described therein.

Contractor shall supply to the Customer the telephone number of a responsible person who may be contacted during non-work hours for emergencies arising in connection with or affecting the Work.

Contractor and its employees, subcontractors and agents shall not smoke within any building, including basements.

**4.04 Relationship with Maintenance Staff**

Contractor shall cooperate with Customer’s operating and maintenance personnel, train said personnel in operation and maintenance of any equipment installed as part of the Work, and coordinate the Work on a planned and programmed basis. Contractor shall deliver a preventive maintenance schedule and procedures for any equipment installed as part of the Work. No equipment shall be installed which will require additional personnel to be hired by the Customer for the operation or maintenance of said equipment without prior approval of the customer in the form of a revision to the Scope of Work.

**4.05 Material and Equipment Installed**

The Customer shall make the final determination whether any material or equipment installed is as specified in Contractor’s Response to the RFP/RFQ, which is incorporated in this Contract by reference and *Scope of Work*. No substitution of any material or equipment specified shall be made without the written consent of the Customer in the form of a revision to the Scope of Work, and any such substitution shall be at least equal in quality, finish, durability, serviceability and performance for the purpose intended.

Contractor shall install and, when applicable, operate and maintain, or, if specified in the Contract, train Customer personnel to operate and maintain equipment in a manner that will provide the equipment manufacturers’ literature, specifications and instructions.

Prior to the installation of the systems, the Contractor shall submit design documents. The installation of the system shall not commence until the Customer accepts the design documents in writing. **All electrical, and structural design drawings shall be stamped by a Massachusetts registered professional engineer for each corresponding trade if applicable.**

**4.06 Disposal**

Contractor will be responsible for proper disposal of all non-hazardous materials and construction demolition debris. Disposal plans must be documented and appropriate transportation and disposal documents prepared before disposal commences and actual disposal must be documented immediately after disposal.

Demolition debris can only be disposed of at a DEP and Board of Health licensed municipal sanitary landfill or DEP/EPA licensed recycling facility. The landfill or recycling facility must be permitted to receive the type of waste involved.

Hazardous waste can only be disposed of by a Person licensed for special waste disposal.

In the event that friable asbestos is encountered and must be disturbed during the course of this Contract, the Contractor will notify the Customer immediately. All work in the affected area shall cease until the Parties agree upon a remediation plan. This will not affect the savings allocation, but an extension of the completion date may be granted equal to the time lost. Contractor will take into account all available asbestos studies provided by the Customer during the audit phase of the project.

**4.07 Subcontracting**

Contractor may subcontract part of the Work to others provided any subcontractors are identified in Contractor’s Response to the RFP. Contractor may, with the written consent of the Customer in the form of a revision to the *Scope of Work*, substitute a subcontractor for one so identified or, if no subcontractor for a certain trade or task has been so identified, engage one. Contractor shall be responsible for the conduct, acts and omissions, whether intentional or unintentional, of its subcontractor, employees, agents, invitees or suppliers. Nothing in this Contract shall create any contractual relationship between any subcontractor, employee, agent, invitee or supplier and the Customer.

**4.08 Equipment Location and Access**

Premises may be occupied during construction. Contractor shall take all necessary precautions to ensure the public safety and convenience of the occupants during construction. The Contractor shall complete the Work in accordance with the schedule in Attachment X: *Project Schedule*. Contractor must use sufficient personnel and adequate equipment to complete the Work. The Work must be completed in a continuous uninterrupted operation between the hours of 8:00 AM and 4:30 PM on Monday through Friday, unless otherwise authorized in writing by the Customer. No Work is to be done on holidays, Saturdays, or Sundays other than for emergencies or unless agreed to in writing.

The Contractor is responsible for the security of partially completed work and for materials or equipment stored at Customer properties. Only materials and equipment intended and necessary for immediate use shall be brought into the buildings. Equipment and unused materials shall be removed from each building by the end of each workday. The Customer shall provide if available, without charge, a mutually satisfactory location or locations for the storage and operation of materials and equipment and the performance of the Work, including a location for staging and mobilization.

Flammables and combustibles shall be stored only in accordance with Fire Prevention Regulations (527 CMR 1.00-50.00). In the event that the Customer is unable to provide a satisfactory location then Contractor shall provide and pay for suitable storage.

**4.9 Permits and Fees**

Contractor shall secure and pay for any and all permits and governmental fees, licenses, and inspections that are required by federal, state, or town or city governments for proper performance and completion of the Work. In the event that fees for any permits are reduced or waived by request, standing or intervention of the Customer, then, at the Customer’s option, the amount of the savings of the fee shall be deducted from the line item in the Work budget and added to the contingency line item or the Contract Price reduced by that amount.

Subsequent to receipt of a Notice to Proceed, the Contractor shall provide a listing of all anticipated permits required to implement the Scope of Work described in Attachment x: *Scope of Work*.

**4.10 Utilities**

Contractor shall make all arrangements for and pay directly to the entity providing the service, before delinquent, all charges for all utilities and services furnished to or used by it, including without limitation, gas, electricity, water, steam, telephone service, trash collection and connection charges. Customer shall have no duty or liability to Contractor with respect to the maintenance, repair, upgrade, replacement or security of any utilities, including, without limitation, any electrical transmission or distribution lines, whether such lines are owned by Customer or any third party, nor shall Customer have any liability to Contractor (including, without limitation, liability for lost revenue) arising from Customer’s actions or omissions with respect to such maintenance, repair, upgrade, replacement or security.

**4.11 Concealed or Unknown Conditions**

If Contractor finds conditions during the Work that are subsurface or otherwise concealed physical conditions that differ materially from those indicated on the drawings or are unknown physical conditions of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in similar construction activities, Contractor shall notify Customer of such conditions promptly, prior to significantly disturbing the same, and in no event later than one (1) business day after first observing the conditions. Such conditions may include, but are not limited to, water damage, termite damage, or structural building defects. If such conditions differ materially and cause an increase in the Contractor’s cost of, or time required for, performance of any part of the Work, the Contractor shall submit a written estimate of the material and labor cost increase and time delay. If the Customer concurs with the need, cost estimate, and time delay, the Parties shall make an equitable adjustment to the Contract Price or Time for Performance and Final Completion, or both only upon execution of a Contract Amendment. Contractor shall not be entitled to damages for delay.

**4.12 Casualty, Condemnation, Damage**

If any fire, flood, other casualty, or condemnation renders a portion of any property described in Attachment X: *Description of the Premises* unsuitable for habitation or destroys a substantial part of the area within which the Work is to be performed or which the Work affects, the Parties may terminate or modify this Contract by mutual agreement.

**4.13 Shutdown of Services**

Contractor hereby acknowledges that continuous operation of services and access to the property or common areas is essential to the operation of the Customer’s properties. If any such service, or access to the property, or any common area is to be discontinued for any period of time in order to perform the Work, Contractor will give the Customer as much notice in writing as is practicable, but in no event less than seven (7) days in which event the Customer shall, by written response, approve unconditionally or with conditions such shutdown of services. Such conditional approval may include a requirement for the Contractor to provide and pay for temporary services, may limit the time for which services or access may be shut down, or may require other actions, accommodations or expenditures on the part of the Contractor. With respect to fire alarm or other fire protections, Contractor shall also notify the local fire department of any shutdown of service and notify the fire department when such service is restored.

The Customer acknowledges that such shutdowns may be necessary to perform the Work from time to time and will not withhold approval unreasonably. The Customer agrees to communicate with occupants on plans to shut down services or access and temporary measures, if any, which will be made.

**4.14 Interconnection with Electric Distribution Grid****.**

Contractor will obtain at its sole cost all approvals and agreements required for Contractor’s interconnection of the System to the LDC System. Contractor will promptly inform User of all significant developments relating to such interconnection matters.

**4.15 Indemnification and Limitation of Liability**

Contractor shall be responsible for the Work and take all precautions for preventing injuries to persons and property in or about the Work and shall bear the costs of all losses or damages resulting from or because of the Work. The Contractor shall pay or cause payment to be made for all labor performed or furnished and for all material used or employed in carrying out this Contract. Contractor shall assume the defense of, indemnify and hold harmless the Customer, their officers and agents from all claims relating to the following:

1. Labor performed or furnished and materials used or employed for the Work,
2. Inventions, patents and patent rights used in and in doing the Work,
3. Injuries to any person received or sustained by or from the Contractor and its employees, subcontractors and its employees, any agents, suppliers and invitees in doing the Work, or as a consequence of any improper materials, implements of labor used or employed therein, and
4. Any act, omission, or neglect of the Contractor and any employees, subcontractors and employees, agents, suppliers and invitees.

Nothing herein shall relieve or limit the Contractor of liability for losses and damages to person or property because of its operations. The Contractor shall indemnify and hold the Customer harmless from all liability, including attorneys’ fees and legal costs, associated with or resulting from the Contractor’s operations.

**4.16 Commercial Operation**

1. Substantial Completion

Upon Substantial Completion, the Contractor will provide a Delivery and Acceptance Certificate in the form of Exhibit X: *Delivery and Acceptance Certificate* for the System. Within ten business days of receipt, the customer will sign and return the Certificate indicating either acceptance or rejection of Substantial Completion.
2. Final Completion

At least thirty days in advance of the scheduled date of Final Completion, the Contractor will meet with the Customer to assess the progress and remaining work to complete the System. If the Contractor is unable to complete the System within the schedule time remaining then the Customer may request that the Contractor accelerate the Work.

**Section 5: Performance and Evaluation Subsequent to Work**

**5.01 Workmanship**

Contractor warrants that all equipment, materials and Work shall be free from defects in material, manufacture, workmanship and performance as set forth by the catalogs, bulletins and specifications included within Response to the RFP, or this agreement, whichever is appropriate.

Contractor shall correct defective equipment, materials or Work within a reasonable period of time, but no less than seventy two (72) hours, unless such defect is a condition deemed to endanger health or safety or is a fire hazard, Customer may correct any defect and Contractor shall reimburse Customer for its reasonable expenses incurred in performing such correction. Conditions which are deemed to endanger under the State Sanitary Code (105 CMR 410.000) or are fire hazards under Fire Prevention Regulations (527 CMR 1.00-50.00) shall be addressed promptly and jointly, if necessary, by Contractor, assuring that immediate precautions are taken to avoid risk to persons or property, imminent measures are taken to prevent deterioration of condition, occupants are alerted to any dangers or hazards, and steps for final correction taken within twenty four (24) hours.

**5.02 Measurement and Verification of Electricity Generated**

1. The Contractor shall provide, install, own, operate, and maintain the Metering Device. Contractor shall maintain and test the Metering Device in accordance with applicable requirements, but on no less than an annual basis.
2. Meter readings will be conclusive as to the amount of Electricity delivered to Customer; provided, that if the Metering Device is out of service, is discovered to be inaccurate pursuant to, or registers inaccurately, measurement of Electricity shall be determined in the following sequence:
3. by estimating by reference to historical data for quantities measured during periods of similar conditions when Metering Device was registering accurately; or
4. if no reliable information exists as to the period of time during which such Metering Device was registering inaccurately, it will be assumed that the period of such inaccuracy was equal to (1) if the period of inaccuracy can be determined, the actual period during which inaccurate measurements were made; or (2) if the period of inaccuracy cannot be determined, one-half of the period from the date of the last previous test of such Metering Device through the date of the adjustments, provided, however, that the period covered by the correction shall not exceed three months.

**5.03 Performance and Guarantees**

 **Contractor guarantees the following:**

1. That the System will produce \_\_\_\_\_\_\_ (the Guaranteed Annual Electric Output in each Guaranteed Performance Year, as adjusted by the Annual System Degradation Factor). On the first anniversary of the Commercial Operation Date and each anniversary of the Commercial Operation Date thereafter during the Term, the Guaranteed Annual Electric Output shall be decreased by the Annual System Degradation Factor.
2. The Contractor shall bear the cost of the annual testing of the Metering Device and the preparation of the Metering Device test reports.
3. Calculations for verified electricity generation will be made at least annually according to the most recent version of the Federal Energy Management Program (FEMP) Measurement and Verification Guidelines using Option B with continuous direct measurement of energy generated taken at the system level.
4. The value of a shortfall shall be calculated as the difference between the applicable contract price and the LDC kWh in the year that the shortfall occurs with no ceiling price.

**5.04 Performance Remedies**

1. Contractor shall be bound to both the annual and total guaranteed electricity generation. If, during the term of this Contract, the electricity generated is less than the guaranteed amount (shortfall), Contractor shall be required to pay or credit the Customer an amount equal to the difference between the kWh cost for the LDC and the price for kWh.

In the event that a Production Shortfall exists in any Guaranteed Performance Year, Contractor shall pay to User, within thirty (30) days of the end of such Guaranteed Performance Year, the LDC Retail Rate for each kWh of such Production Shortfall.
2. Contractor shall bear the risk of any System Loss, except to the extent such System Loss results from the gross negligence of Customer or its agents, representatives, vendors, visitors, employees, contractors, or invitees.
3. In the event of any System Loss that results in less than total damage, destruction or loss of the System, this Contract will remain in full force and effect and Contractor will, at Contractor’s sole cost and expense repair or replace the System as quickly as practicable.
4. In the event of any System Loss that, in the reasonable judgment of Contractor, results in total damage, destruction or loss of the System, Contractor shall, within twenty Business Days following the occurrence of such System Loss, notify User whether Contractor is willing to repair or replace the System.
5. In the event that Contractor notifies Customer that Contractor is not willing to repair or replace the System, this Contract will terminate automatically upon the effective date of such notice and Contractor shall promptly remove the System from the Premises with ten days.
6. In the event that Contractor notifies Customer that Contractor is willing to repair or replace the System, this Contract will remain in full force and effect and Contractor will repair or replace the System as quickly as practicable.

**5.06 Operation and Maintenance**

According to Attachment X: Operation and Maintenance Plan

**5.07 As-built Plans.**

Within ninety days following the issuance of the Notice of Commercial Operation, Contractor shall prepare and deliver to Customer detailed as-built plans accurately depicting the System including, without limitation, all wiring, lines, conduits, piping and other structures or equipment.

**Section 6: obligations of the parties**

**6.1 Obligations of the Contractor**

Contractor acknowledges and agrees that Contractor’s obligations hereunder are in the capacity of providing professional services for the purposes described in the Preamble to this Contract and in said capacity is expected to provide, engineering, design, monitoring, construction management including general contracting as necessary, and other related services as solicited in the RFP/RFQ and as may normally be incidental to these types of professional services. Contractor acknowledges and agrees that any other functions including but not limited to manufacturer’s representative, dealer or distributor of equipment, materials or commodity specified herein or as subcontractor, or ownership in whole or in part or financially affiliated with a contractor which performs such other function shall constitute a conflict of interest which shall constitute a material breach of this Contract unless 1) fully disclosed in the Response to the RFR, and 2) accepted by the Customer under terms which are specified in the Contract. Contractor acknowledges and agrees that this paragraph applies to all its officers and employees.

The following events or conditions shall constitute a breach by the Contractor and shall give the Customer the right, without an election of remedies, to proceed and/or terminate this Contract by delivery of written notice declaring termination, upon which event the Contractor shall be liable to the Customer for any and all damages sustained by the Customer:

1. Any attempt by the Contractor to increase the Contract price for reasons other than those related to changes in the Work
2. Any failure by the Contractor to provide quarterly monitoring reports.
3. Any failure by the Contractor to remedy a shortfall in the guaranteed generation,
4. Any representation or warranty furnished by the Contractor in Contractor’s Response to the RFR, the system engineering plans and drawings, or this Contract which is false or misleading in any material respect when made.
5. The filing of bankruptcy by the Contractor or by Contractor’s creditors, an involuntary assignment for the benefit of creditors, or the liquidation of the Contractor.
6. Any failure by the Contractor to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to Contractor demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, the Contractor fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible.
7. Contractor shall take good care of the Area and the System, conduct all required maintenance and make all repairs thereto, interior and exterior, ordinary and extraordinary, foreseen and unforeseen, and shall maintain and keep the Premises and the System in first class order, repair, and condition.

Customer shall have no duty or liability to Contractor with respect to the maintenance, repair, or security of the Premises, the System or any access areas.

Nothing in this Contract shall limit Customer’s ability to maintain the Premises in a reasonable manner consistent with Customer’s current and past practices.

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1. If Customer contemplates re-roofing, Contractor agrees that it shall bear the cost of moving the System once during the Term to allow Customer to re-roof the Building. This will include all costs related to removing the System from the roof, storing the System components, and re-installing the System as per the approved design and plans. Contractor agrees that it will defend, indemnify, and hold harmless Customer for the cost of any damages incurred because of Contractor’s removal, storage, and re-installation of the System. Contractor agrees to reinstall the System in a manner that will not jeopardize the warranty of the new roof as installed.

**6.1 Obligations of the Customer**

Customer agrees to respond to all proposed revisions and related requests on a timely basis for the expeditious design, implementation and monitoring of the System.

Each of the following events or conditions shall constitute a breach by Customer and shall give the Contractor the right, without an election of remedies to proceed pursuant to Section 3.01 and terminate this Contract by delivery of written notice declaring termination, upon which event the Customer shall be liable to the Contractor for all Work furnished to date:

1. Any failure by the Customer, without cause, to authorize payment due more than forty-five (45) days after receipt of the invoice therefore.
2. Any representation by Customer in the RFP/RFQ and this Contract is false or misleading in any material respect when made.
3. Any failure by the Customer to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to the Customer demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, the Customer fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible.
4. Regardless of whether Customer exercises its rights pursuant to Section 2.1, Customer shall have the right, but not the obligation, and to the extent permitted by Applicable Legal Requirements, to take possession of the System and to operate the System upon the occurrence of default until Contractor demonstrates to the reasonable satisfaction of Customer that the events giving rise to the default have been cured, and that Contractor has taken all reasonably necessary steps to ensure that such events shall not re-occur.
5. Customer shall not be liable to Contractor for any damages, losses or claims sustained by or made against Contractor as a result of Customer’s exercise of possession and operational control of the System except to the extent such damages, losses or claims result from the negligence or willful misconduct of User.

**Section 7: Insurance and Bond Requirements**

**7.01 Worker’s Compensation Insurance**

 Workers Compensation Coverage A Statutory Minimum

 Employer’s Liability Coverage B $500,000 each accident

 $500,000 disease per employee

 $500,000 disease policy

**7.02 Comprehensive General Liability**

Bodily Injury and Property Damage $2,000,000 each occurrence,

$4,000,000 aggregate

 Products & Completed Operations $2,000,000 aggregate

 Personal & Advertising Injury $2,000,000 each occurrence

This policy shall include coverage relating to explosion, collapse, and underground property damage and contractual liability coverage. Contractor shall provide a separate “Owners and Contractor’s Protective Liability” policy in the name of the Customer at the same limits listed above. The completed operations coverage shall be maintained for a period of two (2) years after Substantial Completion as defined in Attachment 3.

**7.03 Vehicle Liability**

Contractor shall provide the following minimum coverage with respect to the operations of the any employee, including coverage for owned, non-owned, and hired vehicles:

 Bodily Injury $2,000,000 each person

 Property Damage $2,000,000 each accident

 $4,000,000 aggregate

8.04 Property Coverage

Contractor shall provide the following coverage against loss or damage by fire and against loss or damage covered by the special perils insurance endorsement on all Work:

Special Perils 80% of Contract Price minimum

Upon completion of Work at Customer buildings, Contractor shall provide an installation floater, in the full amount of the Contract Price, for the requirements set forth above. The policy or policies shall specifically state that they are for the benefit and payable to the Customer, the Contractor, and all persons furnishing labor or labor and materials for the Work, as their interests may appear.

**7.05 Customer as Additional Insured**

The Customer shall be named as additional insured on the Contractor’s Liability Policies.

**7.06 Certificates of Insurance, Policies**

Certificates of insurance, acceptable to the Customer, shall be submitted to the Customer upon the execution of this Contract and shall be renewed upon expiration of the policies. Certificates shall indicate that the coverage required by section 7.01 through 7.05 is in effect. If the Customer is damaged by Contractor’s failure to maintain such insurance, then Contractor shall be responsible for all reasonable costs or damages attributable thereto. Certificates shall note the thirty-day cancellation notice requirement of Section 7.07. All policies shall be issued by companies authorized to write that type of insurance under the laws of the Commonwealth of Massachusetts.

**7.07 Cancellation**

Cancellation of any insurance required by this Contract, whether by the insurer or the insured, shall not be valid unless written notice thereof is given by the party proposing cancellation to the other party and the Customer at least thirty days prior to the effective date thereof.

**7.08 Bonds**

Contractor shall provide the Customer with 100 % payment and performance within 30 days of award of the contract. The contractor shall furnish a certified copy and duplicate of a performance bond, with project financier as co-beneficiary along with the customer. Performance and payment bonds shall secure 100% of the Contract Price for all ECMs cited.

The performance and payment bonds shall remain in effect during the total implementation period for all ECMs. The ECM implementation period shall include all time required for installation, testing, measuring initial performance, and agency acceptance of all installed ECMs. The performance bond shall be released upon agency acceptance of all contractor-installed ECMs. The payment bond shall be released upon receipt of satisfactory evidence that all subcontractors, laborers, etc., have been paid in full.

**Contract Signatures**

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

[Contractor] [MUNICIPALITY]

Name \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Name \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Title \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[MUNICIPAL AGENCY]

Name \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Title \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Approved as to Form: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Office of General Counsel

**ATTACHMENT 1: DESCRIPTION OF THE PREMISES**

**Address:**

**Property Description:**

**Location and Description of the License/Lease Area:**

**ATTACHMENT 2: SOLAR LEASE/License PROVISIONS**

Customer (for and in consideration of the covenants and agreements on the part of Contractor contained herein and in the Agreement) does by means of a [lease/license] unto Contractor, and Contractor does hereby take from Customer, upon and subject to the conditions hereinafter expressed, the [License/Lease Area] (“***Area***”) on the Premises for the sole and exclusive purpose of constructing, operating, maintaining, repairing and removing the System.

**SECTION 1: USE OF THE AREA**

Contractor’s use of the Area is subject to the following:

1. Present and future zoning laws, ordinances, resolutions, and regulations of the municipality in which the land lies, and all present and future ordinances, laws, regulations, and orders of all boards, bureaus, commissions, and bodies of any municipal, county, state, or federal authority, now or hereafter having jurisdiction, so long as they permit or otherwise regulate the use of the Premises; the condition and state of repair of the Premises as the same may be on the Effective Date; and full compliance by the Contractor in all respects with all Applicable Legal Requirements.
2. Contractor accepts the Area in the current condition or state without any representation or warranty, express or implied in fact or by law, by Customer and without recourse to Customer, as to the nature, condition, usability, the use or uses to which the Area or the Premises or any part thereof may be put. Customer will not be required to furnish any services or facilities or to make any repairs or alterations in or to the Area or the Premises.
3. Notwithstanding the above, the Parties agree that Contractor shall not be liable for any conditions on the Premises arising from or related to acts or omissions occurring prior to the Effective Date, except to the extent arising from or related to Contractor’s negligence or willful misconduct.
4. Contractor and Customer acknowledge and agree that Customer shall not be required to make any expenditure, incur any obligation, or incur any liability of any kind whatsoever in connection with this lease or the ownership, construction, operation, maintenance, repair, or removal of the System.
5. Except with the prior express written consent of Customer, Contractor shall not use the Premises for any use other than the installation, operation, maintenance, repair, and removal of the System.

**SECTION 2:** **CONSTRUCTION AND OPERATION OF PERMITTED USE**

1. Contractor will arrange for the construction of the System in a good, careful, proper and workmanlike manner in accordance with good engineering practices, the Request for Proposal (or Request for Qualifications) which resulted in the Agreement (the “***RFP***”), and with all Applicable Legal Requirements. The System will, when completed, comply with all Applicable Legal Requirements and the RFP.
2. Contractor and its sub-contractors, agents, consultants, and representatives shall have reasonable access at all reasonable times (including under emergency conditions) to the necessary portion of the Premises for the purpose of construction, operation, inspection, maintenance, repair and removal of the System, and to any documents, materials and records of Customer relating to the Premises that Contractor reasonably requests in conjunction with these activities. Contractor shall provide Customer reasonable notice of all activities conducted by or on behalf of Contractor on the Premises relating to the System. During any such activities, Contractor, and its sub-contractors, agents, consultants and representatives shall comply with Customer’s reasonable safety and security procedures (as may be promulgated from time to time), and Contractor and its sub-contractors, agents, consultants and representatives shall conduct such activities in such a manner and such a time and day as to cause minimum interference with Customer’s activities.

**Section 3:** **RIGHT TO INSPECT AND ENTER**

1. During the course of construction and completion of the System and any substantial alteration thereto, Contractor shall maintain all plans, shop drawings, and specifications relating to such construction which Customer, its agents or contractors may examine at reasonable times upon reasonable prior notice for the purpose of determining whether the work conforms to the agreements contained or referenced in this lease. Customer may, upon reasonable prior notice to Contractor, enter upon the Lease Area and inspect the System for the purpose of ascertaining their condition or whether Contractor is observing and performing the obligations assumed by it under this lease, all without hindrance or molestation from Contractor.
2. Customer shall, upon five (5) Business Days’ prior notice to Contractor, have the right, at Customer’s expense, to examine, during normal business hours and at Contractor’s place of business, the books of account and other records in Contractor’s possession, custody, or control pertaining to Contractor’s obligations hereunder or under the Agreement.
3. Customer shall promptly notify Contractor of any matter it is aware of pertaining to any damage to or loss of the use of the System(s) or that could reasonably be expected to affect adversely the System(s).

**SECTION 4: INDEMNIFICATION**

1. Contractor shall indemnify and save harmless Customer (including, its officers, employees, and agents) from and against all liabilities, losses, damages, penalties, costs, and expenses, including reasonable attorneys’ fees, that may be imposed upon or incurred by or asserted against Customer by reason of any of the following occurrences during the Term:
2. any breach by Contractor of its obligations, covenants, representations or warranties contained in this lease or made pursuant thereto;
3. any work or thing done in, on or about the Premises or any part thereof by Contractor, its agents, contractors, servants, employees, or invitees;
4. any negligence on the part of Contractor or any of its agents, contractors, servants, employees, subtenants, lessees or invitees in, on or about the Premises or in connection with the System;
5. any accident, injury, or damage to any person or property occurring in, on or about the Premises or any part thereof, except to the extent caused by the negligence or intentional misconduct of Customer or any of its officers, employees or agents; and
6. any failure on the part of Contractor or any of its agents, contractors, servants, employees, subtenants, lessees or invitees in, on or about the Premises to fully comply with the Applicable Legal Requirements.

In case any action or proceeding is brought against Customer because of any such claim, Customer may elect that Contractor defend such action or proceeding. Upon written notice from Customer of such election, Contractor shall defend such action or proceeding at Contractor’s expense to the reasonable satisfaction of Customer.

**Section 5: MISCELLANEOUS**

**5.01 Quiet Enjoyment**

1. Customer covenants that so long as no Event of Default has occurred and is continuing, Contractor shall quietly have and enjoy the Lease Area during the Term. Customer’s exercise of self-help pursuant to Article 2 of this lease and rights of entry and inspection pursuant to Article 6 of this lease shall not be considered a breach of the covenant of quiet enjoyment. Subject to the specific provisions of this lease permitting the same, Customer shall have the right to enter upon the Premises at reasonable times for purposes related to the System of this lease and no such entry that complies with the provisions of this lease permitting the same shall be considered a breach of the covenant of quiet enjoyment.
2. Contractor shall operate, maintain, and repair the System in a manner that will not obstruct or interfere with Customer’s use of the Premises or the rights of any other occupants of the Premises and Contractor will not injure or annoy any occupants of the Premises. In the event interference occurs, Contractor agrees to take all reasonable steps necessary to eliminate such interference promptly, but no later than thirty (30) days from notification by the Customer. Contractor will use its best efforts to maintain its System in a manner that does not interfere with the Premises or improvements to the Premises. Customer may construct, reconstruct, modify, or alter the Premises so long as such, activities do not materially interfere (including shading) with the operation of the System.

**5.02 No Limitation of Regulatory Authority**

The Parties acknowledge that nothing in this lease shall be deemed to be an agreement by Customer to issue or cause the issuance of any approval or permit, or to limit or otherwise affect the ability of the Customer or any regulatory authority of the Customer to fulfill its regulatory mandate or execute its regulatory powers consistent with Applicable Legal Requirements.

**5.03 Subordination to Existing Leases, Easements and Rights of Way**

Contractor acknowledges and understands that the Agreement, this SLAP, and all rights of Contractor are subject and subordinate to all existing leases, easements, rights of way, declarations, restrictions or other matters of record and all existing agreements of the Customer with respect to the Premises. Customer reserves the right to grant additional leases, easements, leases or rights of way, whether recorded or unrecorded, as may be necessary, which do not unreasonably interfere (including shading) with Contractor’s use of the Premises and the operation of the System.

**5.04 Hazardous Materials**

Contractor agrees to comply with all applicable laws pertaining to the use, storage, and disposal of Hazardous Materials (“Environmental Laws”) at the Premises. Contractor shall indemnify, defend and hold harmless Customer and its agents, representatives and employees from any and all liabilities and costs (including any and all sums paid for settlement of claims, litigation, expenses, attorneys’ fees, consultant and expert fees) of whatever kind or nature, known, or unknown, resulting from any violation of Environmental Laws caused by Contractor or Contractor’s representatives at the Premises. In addition, Contractor shall reimburse Customer for any and all costs related to investigation, clean up and/or fines incurred by Customer for non-compliance with Environmental Laws that are caused by Contractor or Contractor’s representatives at the Premises. Customer reserves the right to inspect the Leased Area for purposes of verifying compliance with these Hazardous Materials requirements.

**ATTACHMENT 3: DESCRIPTION OF THE SYSTEM**

|  |  |
| --- | --- |
| SOLAR ENERGY SYSTEM: | Module Manufacturer:  |
|  | Module rated output (watts):Module warranty:Nameplate Capacity of system:  |
|  | Approximate Annual Energy Production of system: |
|  |  kWhDerate factor |
|  | Location:  |
|  | Preliminary Specifications: |
|  |   |
| SOLAR ENERGY SYSTEM ASSETS: | Mounting Systems  |
|  | Tracking Devices:  |
|  | Inverters: Tilt:Azimuth:% shaded:Data monitoring system:Electrical installation company: |
|  | Integrators:  |
|  | Related Equipment:  |
|  | Electric Lines:  |
|  | Permits:  |
|  | Contracts:  |

**ATTACHMENT 4: SCOPE OF WORK**

**ATTACHMENT 5: Cost and Generation**

|  |  |
| --- | --- |
| GUARANTEED ANNUAL ELECTRIC OUTPUT |  kWh/year |
| ANNUAL SYSTEM DEGRADATION FACTOR | \_\_\_\_% per year |
| CONTRACT ELECTRICITY PRICE | $\_\_\_\_\_ per kWh during the first Contract Year of the Term |
| ELECTRIC PRICE INCREASE FACTOR (if applicable) | \_\_\_\_% per year |
| MAXIMUM ELECTRICITY PRICE | \_\_\_\_% of LDC Retail Rate |
| Local Distribution Company (LDC) | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| LDC RETAIL RATE | $\_\_\_\_\_ per kWh during the first Contract Year of the Term |
| PERFORMANCE BOND AMOUNT (100% of project cost) | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| DECOMMISSIONING ASSURANCE AMOUNT (if applicable) | $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Performance Year | Estimated Annual Output | Electricity Price Increase Factor | Cost per kWh (if applicable) | Guaranteed Electricity Generation | Total Estimated Cost, Year # ($/yr) |
| 1 |   | 0  |   | 0  | $0  |
| 2 |   | 0  |   | 0  | $0  |
| 3 |   | 0  |   | 0  | $0  |
| 4 |   | 0  |   | 0  | $0  |
| 5 |   | 0  |   | 0  | $0  |
| 6 |   | 0  |   | 0  | $0  |
| 7 |   | 0  |   | 0  | $0  |
| 8 |   | 0  |   | 0  | $0  |
| 9 |   | 0  |   | 0  | $0  |
| 10 |   | 0  |   | 0  | $0  |
| 11 |   | 0  |   | 0  | $0  |
| 12 |   | 0  |   | 0  | $0  |
| 13 |   | 0  |   | 0  | $0  |
| 14 |   | 0  |   | 0  | $0  |
| 15 |   | 0  |   | 0  | $0  |
| 16 |   | 0  |   | 0  | $0  |
| 17 |   | 0  |   | 0  | $0  |
| 18 |   | 0  |   | 0  | $0  |
| 19 |   | 0  |   | 0  | $0  |
| 20 |   | 0  |   | 0  | $0  |
|   |   |   |   |   | $0  |

**ATTACHMENT 6: OPERATIONS AND MAINTENANCE SCHEDULE**

ESCO/Developer provide detailed schedule of ongoing operation and maintenance of installed system.

**ATTACHMENT 7: COMMISSIONING PLAN**

ESCO/Developer provide detailed commissioning plan for installed system.

**ATTACHMENT 8: PROJECT SCHEDULE**

ESCO/Developer provide detailed construction project schedule.

**ATTACHMENT 9: TERMINATION PAYMENT SCHEDULE**

|  |  |  |
| --- | --- | --- |
| **Early TerminationOccurs in Year:** | **Early Termination Fee (including costs of removal)** | **Early Termination Fee (excluding costs of removal)** |
| 1 |  |  |
| 2 |  |  |
| 3 |  |  |
| 4 |  |  |
| 5 |  |  |
| 6 |  |  |
| 7 |  |  |
| 8 |  |  |
| 9 |  |  |
| 10 |  |  |
| 11 |  |  |
| 12 |  |  |
| 13 |  |  |
| 14 |  |  |
| 15 |  |  |
| 16 |  |  |
| 17 |  |  |
| 18 |  |  |
| 19 |  |  |
| 20 |  |  |
| At expiration | $0 | $0 |

1. Please note, the word “Customer” is used here as a general term for the Local Governmental Body and is intended as a placeholder. [↑](#footnote-ref-1)