

Attachment B:

GUARANTEED ENERGY SAVINGS CONTRACT

between

PHILADELPHIA ENERGY AUTHORITY

and

[ESCO]

Dated [date], 2021

GUARANTEED ENERGY SAVINGS CONTRACT

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GUARANTEED ENERGY SAVINGS CONTRACT

This Guaranteed Energy Savings Contract (the "**Contract**") is made and entered into as of this _ _ _ _ day of _ _ _ _ _ , 2021_ ("**Effective Date**") by and among the **PHILADELPHIA ENERGY AUTHORITY**, a body politic and corporate existing under the laws of the Commonwealth of Pennsylvania (the "**PEA**"); and [**CONTRACTOR**] (the "**Energy Services Company**" hereinafter referred to as "**ESCO**"), having offices at

_____.

I. **BACKGROUND**

WHEREAS, PEA is a body corporate and politic, organized under the Municipality Authorities Act, 53 Pa. C.S., Ch. 56, pursuant to ordinance of the Council of The City of Philadelphia; and

WHEREAS, the City of Philadelphia ("City") owns a municipal street lighting system ("**City Street Lighting System**") that is in need of Energy Conservation Measures

("ECMs") that include equipment, alterations or upgrades designed to reduce energy, or other measurable consumption or operating costs and otherwise improve performance of the City Street Lighting System; and

WHEREAS, the City and PEA solicited proposals from qualified firms through issuance of a Request for Proposals dated March 22, 2021 ("**RFP**"); and

WHEREAS, as part of the RFP selection process, PEA, the City and the ESCO proceeded with an initial feasibility analysis (the "**Initial Feasibility Analysis**") prior to entering into this Agreement to determine likely energy conservation measures, the associated energy savings, and estimates of the cost of installation. The Authority and City selected the Contractor based on the Initial Feasibility Analysis, a copy of which is attached as **Appendix A ("Initial Feasibility Analysis")** hereto, and the Contractor and the Authority agreed to enter into this Agreement.

WHEREAS, [It is anticipated that PEA will pay the Installation Price (as defined herein) to the Contractor from the proceeds of municipal bonds (the "**Bonds**") to be issued by [_____] [(the "**Issuer**")]] pursuant to a Trust Indenture (the "**Indenture**") between the Issuer and a financial institution approved by the Issuer (the "**Trustee**"), the proceeds of which will be deposited into various accounts established under the Indenture to fund the Project. [In consideration of the undertaking of the [Issuer] to fund the cost of the Project, the Authority will enter into a [Lease Agreement] in the form attached hereto as **Exhibit IX (Form of Lease Agreement)** (the "**Lease Agreement**"), pursuant to which the Authority will make lease payments described therein to the Trustee.]]

WHEREAS, PEA and the City have entered into an Intergovernmental Guaranteed Energy Savings Agreement contemporaneously with this Contract; and

WHEREAS, PEA is given responsibility for actions concerning the development or facilitation of energy efficiency projects under Ordinance No. 100163-AA, passed by the Philadelphia City Council on June 3, 2010 and signed by the Mayor on July 29, 2010; and

WHEREAS, by resolution dated _____, 2021, the Board of Directors of PEA authorized its President to execute this Contract.

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

II. PRELIMINARY MATTERS

ARTICLE 1.

BACKGROUND; DEFINITIONS

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

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

"**Acceptance Date**" has the meaning set forth in Paragraph 4.8.

"**Actual Cost**" has the meaning set forth in Section 7.11.2.3.

"**Additional Savings**" has the meaning set forth in Paragraph 5.3.4.

"**Amendment**" means a written modification or change to any Contract Document signed by both Parties.

"**Annual Guaranteed Savings**" means the Guaranteed Savings for each year of the Guarantee Period, as set forth in Schedule C.

"**Applicable Law**" means all applicable present and future federal, state or local laws, ordinances, executive orders, rules, regulations and court orders, injunctions, decrees, and other official interpretation thereof by any federal, state or local court, administrative agency or government body, including the City, the Commonwealth and the United States of America. Applicable Law includes, without limitation, the Philadelphia Home Rule Charter, The Philadelphia Code, the Guaranteed Energy Savings Act (62 Pa. C.S. § 3751

et seq.); Chapter 39 of Act 57 of May 5, 1998 (62 Pa. C.S. § 3901 *et seq.*); the Prevailing Wage Act (43 P.S. §165-1 *et seq.*); the Steel Products Procurement Act (73 P.S. § 1881 *et seq.*); the Trade Practices Act of July 23, 1968 (71 P.S. §686 *et seq.*); the Uniform Construction Code (13 P.S. § 1101 *et seq.*); the Pennsylvania Worker's Compensation Act, 77 P.S. § 1 *et seq.*); the Pennsylvania Solid Waste Management Act (35 P.S. § 6018. 101 *et seq.*); the Pennsylvania Hazardous Sites Cleanup Act (35 P.S. § 6020.101 *et seq.*); the Pennsylvania Clean Streams Law (35 P.S. § 691.1 *et seq.*); the Pennsylvania Storage Tank and Spill Prevention Act (35 P.S. § 6021.101, *et seq.*); the Pennsylvania Land Recycling and Environmental Remediation Standards Act (35 P.S. § 6026.101 *et seq.*); the Pennsylvania Hazardous Material Emergency Planning and Response Act, (35 P.S. § 6022. 101 *et seq.*); the Pennsylvania Air Pollution Control, 35 P.S. § 4001, *et seq.*), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*); the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 *et seq.*); the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*); the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*); the Hazardous Materials Transportation Act (49 U.S.C. § 1801 *et seq.*); the Clean Air Act (42 U.S.C. § 7401 *et seq.*); the Clean Water Act (33 U.S.C. § 1251 *et seq.*); the Oil Pollution Act of 1990 (33 U.S.C. § 2701 *et seq.*); the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 *et seq.*); and the other specific Applicable Laws set forth herein, each as amended from time to time.

“Application for Payment” means an application for payment of milestone amounts made by the ESCO to PEA under Paragraph 5.2.

"As-Built Documentation" means a final set of Design and Engineering Documents that has been updated to accurately and clearly depict the as- built conditions of each Project Unit implemented under this Contract, including any supplemental details, drawings, photos, or plans that are necessary to demonstrate the location and installed condition and configuration of each Project Unit, its relation to City Lighting Property, and any information necessary for making future alternations, connections or upgrades to the Project Unit, such as power supplies and interconnecting wiring between Project Units, installation of accessories, and related Contract Deliverables.

“Break Fee” has the meaning set forth in Paragraph 4.4.1.

"Business Days" means calendar days, excluding all Saturdays and Sundays in addition to New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, or the Monday thereafter when these days occur on Saturday or Sunday, and other day on which banks in the Commonwealth are closed.

"Change Order" means an instrument altering the Scope of Work under the Contract issued under Paragraph 7.3.3 below.

“Change Proposal” has the meaning set forth in Paragraph 7.11.2.2.

"City" means The City of Philadelphia, a corporation and body politic existing under the laws of the Commonwealth, and includes its various executive and administrative departments, agencies, boards, commissions and offices, including the Department, and its legislature, the City Council. The City is a City of the First Class under the laws of the Commonwealth.

“City Street Lighting System” means the streetlights, alleyway and parking area lights, and related wiring, safety devices, sensors, communication devices and controls used in connection therewith, and other related facilities, as identified in Schedule B (Description of City Lighting Systems; Pre-Existing Lighting and Lighting Controls Inventory) and as upgraded through the installation of the Project.

“City Lighting Property” means the City’s streets, alleys, parking areas, rights of way, easements, or other properties where the City Street Lighting Systems are located.

"Commonwealth" means the Commonwealth of Pennsylvania.

“Completion Date” has the meaning set forth in Paragraph 4.5.

"Concealed Conditions" means concealed physical conditions in the City Street Lighting System, such as failed wiring, that differ materially from those conditions ordinarily expected to exist and generally recognized as inherent in the Work anticipated by this Contract.

"Contract" means this Guaranteed Energy Savings Contract between the Parties as evidenced by the Contract Documents.

“Contract Deliverables” means all Contract Documents to be prepared by the ESCO during the performance of this Contract, including all Schedules, Design and Engineering Documents, energy savings reports, and operating manuals as more fully specified in **Exhibit XII (Contract Deliverables)**.

"Contract Documents" means this Contract; any and all exhibits, Schedules, drawings, specifications, diagrams, plans, addenda or other documents incorporated by reference; any

approved Design and Engineering Documents, as set forth in Paragraph 7.2.2 (Design and Engineering Approval); the Notice to Proceed with Project; the performance and payment bonds; operation manuals; and any and all Amendments to any of these documents.

"Design and Engineering Documents" means the drawings, plans, technical specifications, or other design and engineering documents prepared for PEA by or on behalf of the ESCO.

"Dispute" has the meaning set forth in Paragraph 28.1.

"Economic Opportunity Plan" means the plan meeting the requirements of **Exhibit IV (Economic Opportunity Requirements)** for employment of minority, disabled, and woman-owned subcontractors and diverse individuals attached here to as **Schedule P (Economic Opportunity Plan)**.

"Energy Conservation Measure" ("ECM") has the meaning set forth in 62 Pa. C.S. § 3752 (Definition of "Energy Conservation Measure").

"Energy Savings Guarantee" has the meaning set forth in Paragraph 5.2, and shall consist of both the Total Guaranteed Savings and the Annual Guaranteed Savings.

"Effective Date" has the meaning set forth in Paragraph 4.1.

"Environmental Incentives" means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the development or installation of the Project and the reduction of energy usage of the City Street Lighting System. Without limiting the forgoing, "Environmental Incentives" includes utility rebates or incentive programs, green tags, the right to apply for (and entitlement to receive) incentives under any state tax credit program, grants from nongovernmental organizations, and the right to claim federal income tax credits under Section 45 and/or 48 of the Internal Revenue Code.

"Equipment" means (i) the property described in the Scope of Work to be installed under this Contract including all luminaires, sensors and controls, wiring, support arms or decorative posts, and the Lighting Management System, together with all included software and materials, and (ii) all replacements, substitutions, repairs, restorations, modifications, attachments, accessions, additions and improvements thereof or thereto. Whenever reference is made in this Contract to Equipment, that reference shall be deemed to include all replacements, repairs, restorations, modifications, and improvements of that Equipment for which ESCO is responsible under this Contract.

"ESCO" has the meaning set forth in the Preamble.

"ESCO Bonds" has the meaning set forth in Paragraph 4.2.2.1.

"Event of Default" has the meanings for ESCO and PEA set forth in Article 26.

"Final Acceptance" has the meaning set forth in Paragraph 7.10.1.

"Fiscal Year" means the annual accounting year of the City, which currently begins on July 1 of each year.

"Guaranteed Completion Date" has the meaning set forth in Paragraph 4.6.

"Guaranteed Savings" means the amount of energy cost savings, operational cost savings or revenue increases resulting from the Project. The Guaranteed Savings may be referenced in this Contract (and the Schedules and Exhibits thereto) on either an annual basis, meaning the Annual Guaranteed Savings for any Savings Year, or on a grand total basis, meaning the Total Guaranteed Savings achieved during the twenty-year Guarantee Period.

"Guarantee Period" has the meaning set forth in Paragraph 4.4.

"Implementation Period" has the meaning set forth in Paragraph 4.2.

"Implementation Schedule" is the critical path schedule for the project as described in Paragraph 7.4.

"Implementation Price" has the meaning set forth in Paragraph 5.1.

"Initial Feasibility Assessment" has the meaning set forth in the Background.

"Investment Grade Audit Report" ("IGA") has the meaning set forth in Paragraph 3.1.

"Lighting Management System" ("LMS") means the equipment, software and database management system that monitors, controls and facilitates the operation and maintenance of the City Street Lighting System as more fully specified in the Scope of Work.

"M&V Services" has the meaning set forth in Paragraph 5.6.

"M&V Period" has the meaning set forth in Paragraph 5.6.

"Material Change" has the meaning set forth in Paragraph 17.1.

"Milestone Payment" means a payment made for completion of one or more milestones under Paragraph 5.2.

"Milestone Schedule" means the milestone payment schedule set forth in **Schedule D (ESCO Compensation and Milestone Payment Schedule)**.

"Notice of Non-appropriation" has the meaning set forth in Paragraph 6.2.

"Notice to Proceed" means a notice from the Project Manager to the ESCO authorizing the ESCO to commence Work on the Project as set forth in Paragraph 4.3.3. in substantially the form attached as **Exhibit VI (Form of Notice to Proceed)**.

"Other Services" means services to be performed by the ESCO (i) prior to the Notice to Proceed and (ii) after Final Acceptance, including the M&V Services.

"Parties" means PEA, and the ESCO, and a **"Party"** means either of PEA, or the ESCO.

"PECO" means the electric utility subsidiary of Exelon Corporation that serves Philadelphia and the surrounding area.

"Person" means any individual, sole proprietorship, association, company, firm, partnership, limited partnership, joint venture, corporation, limited liability company or other form of entity or association recognized at law.

"PJM" means the regional transmission organization operated by PJM Interconnection, LLC or any successor organization thereto.

"Project" means the Equipment and other Contract Deliverables described in the Scope of Work to be installed in the City Street Lighting System, the completion of the Work for design, implementation and installation and delivery of all Project Units at the City Lighting Property by the ESCO pursuant to this Contract.

"Project Development Period" means the period from the execution of this Contract until the date of the Notice to Proceed.

"Project Development Services" has the meaning set forth in Paragraph 3.1.

"Project Manager" means [_____], specifically designated by PEA as PEA's Project Manager, and any other individual who may be designated in writing by the Project Manager as his or her representative.

"Project Unit" means (i) each luminaire and its associated sensors, controls, wiring, support arm or separate post or other material or Equipment related to such luminaire supplied as a part of the Scope of Work, (ii) the Lighting Control System, (iii) any other unit of Equipment that is expected to be separately delivered and commissioned or tested that is designated as such in the Scope of Work, and (iv) any balance of Equipment, materials and Contract Deliverables not specifically designated.

"Requested Information" has the meaning set forth in Paragraph 48.3.

"Savings Year" means each fiscal year of the City or portion thereof beginning on the Guaranteed Completion Date through the end of the Term.

"Schedule" means any schedule to this Contract, substantially in the form of the schedules attached to this Contract, agreed to from time to time by the Parties hereto.

"Scope of Work" means the Equipment and materials to be installed as a part of the City Street Lighting System as described in **Schedule A (Scope of Work)**.

"Shortfall Payment" has the meaning set forth in Paragraph 5.3.2.

"Stop Work Order" has the meaning set forth in Paragraph 7.3.4.1.

"Subcontract" means a contract made between the ESCO and a Subcontractor, or between a Subcontractor and a sub-subcontractor at any tier, providing for the compensation of one or more persons for the Work which the ESCO has agreed to perform under the Contract.

"Subcontractor" means a Person performing at any tier under a subcontract with the ESCO or another Subcontractor one or more portions of the Work which the ESCO has agreed to perform under the Contract. Subcontractors shall include, without limitation, vendors or other Persons contracting with a Subcontractor or the ESCO for part of the Work under the Contract.

"Substantial Completion" has the meaning set forth in Paragraph 7.9.1

"System Service Responsibilities" has the meaning set forth in Paragraph 14.1.

"Technical Requirements" means the minimum technical specifications for the Project set forth in **Exhibit VIII (Service and Technical Requirements)**.

"Term" has the meaning set forth in Paragraph 4.5.

"Total Guaranteed Savings" means the total cumulative Guaranteed Savings during the twenty-year Guarantee Period, as set forth in Schedule C.

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

- (a) acts of God; labor disturbances; accidents; failure of a governmental entity to issue a permit or approval required for performance; civil disorders; acts of aggression; a pandemic or other public health emergency; a court order; explosions; failure of utilities; material shortages;
- (b) the adoption, promulgation, modification or reinterpretation after the date of this Agreement of any Applicable Law that was not adopted, and/or officially published in The Congressional Record, The Federal Register or the legislative or regulatory publication of the jurisdiction of the Applicable Law on or before the date of this Contract;
- (c) as to a party, the negligence, willful misconduct or unexcused failure to perform of the other party; and
- (d) as to the ESCO (i) any concealed condition in the City Street Lighting System or at the City Lighting Property that the ESCO could not have reasonably been expected to anticipate or to discover before entering into this Agreement, and (ii) the discovery of Hazardous Substances on the City Lighting Property for which the City is responsible pursuant to Paragraph 33.3;

Provided that, Uncontrollable Circumstance does not include (A) strikes or other labor actions arising from labor relations issues involving the employees of the ESCO or Subcontractors in connection with the performance of the Work or (B) any Hazardous Substance for which the Contractor is responsible under Paragraphs 33.2 or 33.3.

"Work" has the meaning set forth in Paragraph 7.1.

1.3 Interpretation. Unless otherwise expressly provided in this Agreement:

1.3.1 the words "herein" "hereof" and "hereunder" and other words of similar import refer to the Contract as a whole, including all Contract Documents, and not to any particular article, paragraph, subparagraph of clause contained in the Contract Documents

1.3.2 references to Persons include their successors and permitted assigns;

1.3.3 the term "include," "includes" or "including" means include, includes or including without limitation (as the case may be);

1.3.4 references to the Articles, Sections, Paragraphs, Schedules and Exhibits mean the articles, sections and paragraphs of, and the schedules and exhibits to, this

Agreement;

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

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

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

1.3.8 terms defined in the singular have the corresponding plural meaning when used in the plural, and terms defined in the plural have the corresponding singular meaning when used in the singular, and pronouns of any gender include the masculine, feminine and neutral genders.

ARTICLE 2.

EXHIBITS, SCHEDULES AND APPENDICES

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

Exhibit I	Performance Bond/Construction Bond
Exhibit II (i)	Certificate of Substantial Completion
Exhibit II (ii)	Certificate of Final Acceptance
Exhibit III	Indicative Prevailing Wage Rate Schedule
Exhibit IV	Economic Opportunity Requirements
Exhibit V	Permitted Energy Escalation Rates
Exhibit VI	Form of Notice to Proceed
Exhibit VII	Form of Project Price Proposal
Exhibit VIII	Service and Technical Requirements
Exhibit IX	[Form of Lease]
Exhibit X	Contract Deliverables
Exhibit XI	Form of Application for Payment

Exhibit XII. Requirements for Critical Path Schedule

2.2 Schedules. The Schedules set forth below are developed by the ESCO during the Development Phase and when agreed by the City and PEA are attached hereto as a condition to the Notice to Proceed. They are to be set forth in their entirety as Attachment II and made a part of this contract by reference.

Background

Schedule A	Scope of Work
Schedule B	Description of City Lighting Systems; Pre-Existing Lighting and Lighting Controls Inventory

Savings Guarantee and Payments

Schedule C	Energy Saving Guarantee
Schedule D	ESCO Compensation and Milestone Payment Schedule
Schedule E	Baseline Energy Consumption; Baseline Adjustments
Schedule F	Measurement and Verification
Schedule G	Analysis of Final Project Costs and Final Project Cash Flow

Schedule H Prevailing Wage Rates

Schedule I [Intentionally Left Blank]

Implementation Phase

Schedule J Implementation Schedule

Schedule K Commissioning and Integration Plan

Schedule L Standards of Illumination and Control

Schedule M ESCO's Training Responsibilities

Schedule N Waste and Hazardous Material Removal Responsibilities
Schedule O City Approved Subcontractor List

Schedule P Economic Opportunity Plan

Operation Phase

Schedule Q ESCO's System Service Responsibilities

Schedule R City's System Service Responsibilities

Schedule S System Service Responsibilities Checklist

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

Appendix A: Initial Feasibility Assessment

Appendix B: Investment Grade Audit Report

ARTICLE 3.

PROJECT DEVELOPMENT PHASE

3.1 Scope of Project Development Services and Investment Grade Audit Report. The ESCO, with the cooperation of PEA and the City, will perform comprehensive project development services as defined in **Exhibit VIII (ESCO Services and Technical Requirements)**, and summarized here in a phased implementation approach:

- **Phase 1: Project Development**
 - Project Kickoff
 - Existing Data Collection
 - Field Audit
 - Preliminary Design
 - Final Product Evaluation/Selection
 - Community Outreach/Trial Install
 - Final Design

- **Phase 2: Implementation**
 - Procurement/Pre-Construction
 - Construction & Project Management
 - Project Close-Out
 - PECO Bill Updates & Rebate Management
 - Project Documentation
- **Phase 3: Measurement and Verification**
 - M&V Services

All services provided in Phase 1 above are considered part of the “**Project Development Services**”. The ESCO shall prepare a detailed engineering-and economic report (the “**Investment Grade Audit Report**”) to be attached hereto as Appendix B that specifically identifies the Scope of Work and Installment Price for the Project. The Investment Grade Audit Report will contain detailed projections of energy and cost savings to be obtained from the City Street Lighting System as a result of the installation or implementation of the Project. The savings calculations will document and use assumptions, projections, and baselines that best represent the true value of future energy savings from the City Street Lighting System; documented material and non-staff labor costs actually avoided; adjustments to the baseline to reflect current conditions of the City Street Lighting System compared to the historic base period; calculations that account for the interactive effects of the recommended Equipment and its operation. The Investment Grade Audit Report must clearly describe how PECO tariffs were used to calculate savings for all aspects of the Project. The Investment Grade Audit Report must describe the ESCO's plan for installing or implementing the measures for the City Street Lighting System, including a final fixed Installation Price (subject to adjustment as specifically provided herein). The primary purpose of the Investment Grade Audit Report is to provide the engineering and economic basis for the Work and the Guaranteed Savings.

3.2. Fixed Prices; Annual Service Fee. The ESCO shall propose a fixed price for the installation, implementation and commissioning (including training for City personnel) of each proposed Project Unit. Any associated annual costs (e.g. system license fees, system communication costs) should be included for the 20-year performance period. Project cost data must be provided in the format set forth in **Exhibit VII (Form of Project Price Proposal)**.

3.3. Savings Estimates.

3.3.1 PEA and the City shall endeavor to provide the ESCO with sufficient general and specific guidance pursuant to this Article 2 to develop the savings estimates for the

Investment Grade Audit Report. If questions arise as to the calculation of savings or whether certain items will be allowed as savings, the ESCO shall seek written guidance and instructions from PEA. PEA may reject items claimed as savings that do not reflect reductions to items currently included in the City's budget or that have been claimed contrary to the terms of this Agreement or contrary to the written guidance or instructions provided by PEA. PEA may reject the ESCO's calculation of savings if it determines that there is another more suitable or preferable means of determining or calculating such savings.

3.3.2 For the purposes of completing the Savings Estimates, the annual escalation rate for electricity price listed **Exhibit V (Permitted Escalation Rates)** will be allowed in the development of savings estimates.

3.3.3 PEA and the city anticipate that savings estimates will be based on annual energy savings as billed under PECO tariffs and on maintenance savings based on equipment life and self reporting of maintenance issues through the control system. The following items will not typically be credited as savings derived from a proposed Project Unit: (i) the City's in-house labor cost, (ii) the City's deferred maintenance cost, (iii) offset of future capital costs of the City, and (iv) future PECO tariff or rate changes.. The ESCO may seek written exemptions from PEA on a case-by-case basis. However, the final determination of allowable savings in each case considered will reside with PEA.

3.4. Investment Grade Audit Report Format.

3.4.1 The ESCO shall prepare a two-volume report as follows:

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

3.4.1.2 Volume I shall include the presentation of information in the following schedules to also be attached to this Contract as a condition to the Implementation Phase including both information submitted in response to the to the extent the information has been requested and developed during the course of performing the Energy Audit. All Schedules must be consistent with the requirements of **Exhibit VIII (ESCO Services and Technical Requirements)** and other relevant Exhibits.

- Schedule A (Scope of Work) (identifying each proposed Project Unit to be installed by the ESCO, describing all work necessary for such installation and describing what obligations, if any, the ESCO proposes to undertake with respect to hazardous substances)
- Schedule B Description of City Lighting Systems; Pre-Existing Lighting and Lighting Controls Inventory
- Schedule C Energy Saving Guarantee
- Schedule D ESCO Compensation and Milestone Payment Schedule
- Schedule E Baseline Energy Consumption; Baseline Adjustments
- Schedule F Measurement and Verification
- Schedule G Analysis of Final Project Costs and Final Project Cashflow
- Schedule H Prevailing Wage Rates
- Schedule I [RESERVED]
- Schedule J Implementation Schedule

- Schedule K Startup and Commissioning Plan
- Schedule L Standards of Illumination
- Schedule M ESCO 's Training Responsibilities
- Schedule N Waste and Hazardous Material Removal Responsibilities
- Schedule O City Approved Subcontractor List
- Schedule P Economic Opportunity Plan
- Schedule Q ESCO's System Service Responsibilities
- Schedule R City's System Service Responsibilities
- Schedule S System Service Responsibilities Checklist
- Schedule T Annual Reporting Requirements

3.4.2 Volume 2 must include all of the information defined for Volume 2 of the Investment Grade Audit Report in **Exhibit VIII (ESCO Services and Technical Requirements)**.

3.5. Submission of the Investment Grade Audit Report. The Investment Grade Audit Report must be completed and submitted to PEA within 270 days of the date of execution of this Agreement. PEA will notify the ESCO in writing of any requested changes in the Investment Grade Audit Report and each party shall exercise good faith and due diligence in endeavoring to complete mutually acceptable Schedules. PEA will notify the

ESCO in writing of its acceptance of the final Investment Grade Audit Report and of its determination regarding whether or not PEA will go forward with the Construction Work within 120 days of its initial receipt of the Investment Grade Audit Report unless the parties agree to an extended period for negotiation.

III. DATES, SAVINGS GUARANTEE AND PAYMENTS

ARTICLE 4.

DATES, CONDITIONS TO IMPLEMENTATION AND CONTRACT TERM

The following dates are terms of this Contract and defined or established as follows:

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

4.2 Conditions Precedent to Implementation.

4.2.1 The obligations and liabilities of each party under this Agreement under Articles 4 through 17 (other than Paragraphs 4.3 and 4.4) are subject to the satisfaction or waiver of each of the following conditions precedent:

4.2.1.1 The ESCO shall have completed its Investment Grade Audit Report, the Investment Grade Audit Report shall offer to guarantee energy savings based on kwh savings that are equal to at least 90 percent of the energy savings (kwh) projected in the Initial Feasibility Analysis unless the Project is changed by PEA. The 90 percent of energy savings will be calculated as follows per fixture type: total energy savings (kwh) divided by total quantity of fixtures as projected in the Initial Feasibility Analysis compared to the total energy savings (kwh) divided by total quantity of fixtures as projected in the Investment Grade Audit. The ESCO shall provide final detailed pricing to confirm the Guaranteed Savings, and PEA and the ESCO shall have agreed upon the final terms of Schedules A through T thereto to be attached as Schedules A through T of this Agreement;

4.2.1.2 in the event that the inventory of the City Street Lighting System created during the Investment Grade Audit identifies discrepancies from the number and types of fixtures on which the City's energy bills for the City Street Lighting System are currently based, PEA and the ESCO shall have agreed on appropriate adjustments to the Baseline Energy Consumption against which the Guaranteed Savings will be measured;

4.2.1.3 the amount of the Guaranteed Savings for each Savings Year set forth in Schedule C (Energy Savings Guarantee) exceeds the amount required to pay all [Lease Payments] payable with respect to such Savings Year in the absence of adjustments resulting from a Change Order or Material Change;

4.2.1.4 [the Bonds have been issued, a portion of the net proceeds thereof have been deposited into the project account, and all conditions to making the initial draw thereof have been satisfied];

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

4.2.1.6 PEA shall have notified ESCO in writing of its acceptance of the

Investment Grade Audit Report and of its determination to go forward with the Work pursuant to Paragraph 3.10 above;

4.2.1.7 no action, suit, proceeding or official investigation shall have been overtly threatened, publicly announced or commenced by any Person or any federal, State or local governmental authority or agency, or in any federal, State or local court (excluding any action, suit, proceeding or official investigation which, in the opinion of counsel acceptable to PEA and the ESCO, is without merit) that challenges the validity of this Agreement or any of the agreements contemplated hereby or seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain any judgment, order or consent decree against either party hereto with respect to this Agreement or any of the transactions contemplated hereby; and

4.2.1.8 the representations of the other party set forth in Article 30 are true and correct in all material respects as of the date of the Notice to Proceed as if made on and as of such date; and such other party has delivered to such party a certificate of its authorized representative, dated the date of the Notice to Proceed, to such effect.

4.2.2 The obligations and liabilities of PEA under Articles 4 through 17 (except Paragraphs 4.3 and 4.4) are further subject to the satisfaction or waiver of each of the following conditions precedent:

4.2.2.1 as provided by the Act of 1967, December 20, P.L. 869 (8 P.S. § 193, *et seq.*, as amended) the ESCO has delivered to PEA payment and performance bonds, substantially in the form of **Exhibit I (Performance Bond/Construction Bond)**, and issued by a surety reasonably acceptable to PEA and the City (the “**ESCO Bonds**”) in support of the ESCO's obligation to perform the Construction Work and other obligations arising prior to Final Completion, in the amount of the Construction Price; and

4.2.2.2 the ESCO has submitted to PEA certificates of insurance evidencing that the Required Insurance is in effect.

4.3 Satisfaction of Conditions Precedent.

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

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

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

4.3.4 If either party delivers a notice that one or more conditions precedent cannot be satisfied pursuant to Paragraph 4.3.2 above, or if any condition

precedent is not satisfied or waived by 6 months following the completion of the Investment Grade Audit for reasons not due to the terminating party's failure to comply with its obligations under Paragraph 4.3.1, then (i) either party may at any time thereafter until such conditions have been satisfied or waived, by notice to the other party, terminate this Agreement, (ii) neither party will be liable to the other for any such termination and (iii) each party will bear its own expenses attributable to the transactions contemplated by this Agreement.

4.4 Right to Terminate Prior to Commencement of Implementation.

4.4.1 In addition to its rights under Paragraph 4.3, PEA shall have the right to terminate this agreement and not proceed with the Construction Work at any time prior to the issuance of the Notice to Proceed. Should PEA exercise such right, other than for a reason specified in Paragraph 4.3.4 PEA agrees to pay the ESCO \$_____ (the "**Break Fee**").

4.4.2 If this Agreement is terminated pursuant to this Paragraph 4.4, the ESCO agrees to provide PEA with copies of any preliminary notes, reports and analyses that were produced prior to the effective date of the termination. Such documentation shall be used by PEA to help determine the extent of work completed by the ESCO prior to termination and shall become the property of PEA.

4.5 Completion Date. "**Completion Date**" means the date when the Project has achieved Substantial Completion under Paragraph 7.9.

4.6 Guaranteed Completion Date. "**Guaranteed Completion Date**" means the date that is [730] days following the date of the Notice to Proceed, as that date may be extended from time to time by a Change Order.

4.7 Implementation Period. The period from the date of the Notice to Proceed until the Acceptance Date, shall be known as the Implementation Period ("**Implementation Period**"). The Work performed during the Implementation Period shall commence on the date specified in the Notice to Proceed.

4.8 Acceptance Date. The "**Acceptance Date**" is the date of Final Acceptance as established under Paragraph 7.10.

4.9 Guarantee Period. The "**Guarantee Period**" is 20 years, beginning on the Guaranteed Completion Date.

ARTICLE 5.

PAYMENT

5.1 Implementation Price. The agreed to Implementation Price for the Work is set forth in **Schedule G (Final Project Cost and Project Cash Flow Analysis)**. ESCO agrees that the Implementation Price shall include the total amount of compensation due to ESCO for the Work under this Contract as set forth in **Schedule D (ESCO Compensation and Milestone Payment Schedule)**.

5.2 Application for Payment

5.2.1 Not later than the 10th day of each month, the ESCO shall submit to the Authority for its approval an Application for Payment in the form attached as **Exhibit IV (Application for Payment)** with respect to milestones completed with respect to the Project in the prior month in accordance with **Schedule D (ESCO Compensation and Milestone Payment Schedule)**, accompanied by such supporting information as may be reasonably necessary to substantiate the ESCO's right to payment of the amounts requested.

5.2.2 Within 30 days of its receipt of an Application for Payment, PEA shall, subject to Paragraph 5.5 below, submit the Application for Payment to the [Trustee] for the payment of all undisputed amounts set forth thereon. If PEA disputes any portion of the Application for Payment, PEA shall authorize [the Trustee] to pay the undisputed amount and deliver notice to the ESCO stating its objections to the disputed amount and giving a detailed explanation therefor within such 30-day period. If the ESCO disputes any such objection, the dispute will be resolved pursuant to Article 28 below. If the dispute is resolved in favor of the ESCO, PEA shall pay interest on the amount determined to be owed to the ESCO at the Late Payment Rate from the date on which such amount was originally due until the date paid.

5.3 Retainage. Act 57 of 1998. 62 Pa.C.S. §3921 shall govern the withholding of retainage on this Contract, except that applications for payment of retained amounts shall be approved by the Project Manager. Retainage under the Contract shall be ten percent (10%) of the amount of each milestone due until fifty percent (50%) of the Work under the Contract is completed (at which time one-half (1/2) of the amount then retained shall be returned to the ESCO) and thereafter five percent (5%) of the amount of each milestone payment due until ESCO has completed ninety percent (90%) of the Work under the Contract in accordance with the Contract Documents and as certified by the Project Manager.

5.4 Energy Savings Guarantee. Pursuant to 62 Pa. Const. Stat. § 3754(b) of the

Pennsylvania Guaranteed Energy Savings Act, ESCO guarantees that the Total Guaranteed Savings will meet or exceed the cost of the Project. Additionally, ESCO guarantees that the Annual Guaranteed Savings set forth on an annual basis in **Schedule C (Energy Savings Guarantee)** shall be achieved on an annual basis. The guarantees made in this Paragraph 5.4 constitute the "Energy Savings Guarantee."

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

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

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

5.5 Annual Review and Reimbursement/Reconciliation. Cost savings shall be measured and/or calculated as specified in Schedule F (Measurement and Verification) and reported to PEA and the City within ninety (90) days of the end of Savings Year during the M&V Period for the just Completed Savings Year as set forth in Schedule T (Annual Reporting Requirements).

5.5.1 **Shortfall Payments.** In the event that the actual savings achieved during any Savings Year are less than the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** for such Savings Year, ESCO shall pay PEA an amount equal to the deficiency ("**Shortfall Payment**"). The ESCO shall remit all Shortfall Payments to PEA within thirty (30) days of the Annual Savings Report showing that such amounts are due (or with respect to any disputed portion of such amount, promptly upon resolution of any Dispute regarding such portion).

5.5.2 **Additional Savings.** ESCO agrees that any amount of actual savings achieved (i) prior to the Guaranteed Completion Date or (ii) during any Savings Year of the Guarantee Period that exceed the Annual Guaranteed Savings for such Savings Year are for the benefit of the City and shall in no event be used to offset the ESCO's shortfalls in any preceding or subsequent Savings Years.

5.6 **Measurement and Verification Fees.** PEA shall pay, from funds provided by the City, measurement and verification fees ("**Measurement and Verification Fees**") to ESCO for certain measurement and verification services rendered by ESCO ("**M&V Services**") during the period specified (the "**M&V Period**") pursuant to **Schedule F (Measurement and Verification)**. No payments will be made with respect to stipulated savings. The Measurement and Verification Fees shall be paid in annual installments as set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, with the first installment payment due thirty days after the Final Acceptance Date and each subsequent annual payment due within thirty days after the beginning of each Savings Year.

5.7 **Offset Provision.** Except as otherwise provided herein, ESCO agrees that PEA may set off the amount of any tax liability or other obligation of ESCO or its subsidiaries to PEA

or the City against any payments due ESCO under this Contract.

ARTICLE 6.

NONAPPROPRIATION OF FUNDS

6.1 In the event no City funds or insufficient City funds are appropriated and budgeted in any City Fiscal Year for payments due under this Contract, then PEA will immediately notify ESCO or its assignee of such occurrence and this Contract shall terminate on the last day of the City's Fiscal Year for which appropriations were received without penalty or expense to PEA, or the City of any kind whatsoever.

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

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IV. IMPLEMENTATION PHASE

ARTICLE 7.

PROJECT IMPLEMENTATION

7.1 The Work. ESCO shall provide in a good and workmanlike manner overall coordination, management, and responsibility for purchasing or providing all labor, materials, Equipment, software, tools, construction equipment and machinery, transportation and other facilities and services necessary for design, installation, commissioning and start-up of the Project, (collectively referred to as the "**Work**"). The Work includes the performance of each of the Contractor's other obligations under this Agreement, to be performed during the Implementation Period.

7.2 Status and Authority of the Project Manager. PEA's Project Manager and the City shall be responsible for the general direction of Project Implementation, including the interpretation the Contract Documents, the issuance of Change Orders, and the determination of final acceptance of the Work and Project. The Project Manager and the City shall give all orders and directions contemplated under the Contract. The Project Manager and the City shall in all cases determine the amount, quality, acceptability, and fitness of the several kinds of Work and materials which are to be paid for under the Contract and shall have authority and joint discretion to reject all Work and materials which in their opinion do not conform to the requirements of the Contract. The Project Manager and the City shall determine all other questions that may arise in relation to the execution of the Work and shall have the authority to issue a Stop Work Order whenever such action may be necessary to secure the safe and proper execution of the Contract. The provisions of this Paragraph 7.2 are not intended to supersede or limit ESCO's obligations under other provisions of this Contract or the Contract Documents.

7.2.1 Design and Engineering Documents.__The ESCO assumes complete responsibility for the development of the Design and Engineering Documents that are necessary for Project Implementation. The ESCO covenants and agrees that all Design and Engineering Documents shall be accurate and free from material errors or omissions, shall be in compliance with and accurately reflect all Applicable Laws, and, where required by law, shall bear the stamp or seal of a professional architect or engineer licensed in the Commonwealth. All Design and Engineering Documents shall conform to standards specified by the Project Manager or the City, and provisions of the Uniform Construction Code to the extent they are applicable to the Work.

7.2.2 Design and Engineering Approval. To the extent not completed in the Project Development Phase, the ESCO shall prepare and submit the Design and Engineering Documents for each Project Unit to the Project Manager and the City for review prior to commencement of Work on such Project Unit. By preparing and submitting the Design and Engineering Documents, the ESCO represents that it has determined and verified materials, field measurements, and field construction criteria related thereto and has checked and coordinated the information contained within the Design and Engineering Documents for consistency with one another and the requirements of the Contract Documents. The ESCO agrees that it shall not proceed with the implementation of a Project Unit until the Project Manager and the City have approved the Design and Engineering Documents by providing the ESCO with written notice of their approval. The Design and Engineering Documents, once approved by the Project Manager and the City, and the related notice of approval will become part of the Contract Documents.

7.2.3 As-Built Documentation. After the completion of the Work, the ESCO shall deliver an electronic copy of all As-Built Documentation to the Project Manager and the City prior to the Acceptance Date. As-built documentation will become the sole property of PEA and the City for their unrestricted use. The acceptance of As- Built Documentation shall not relieve the ESCO of responsibility for the proper fit of the Work, nor for its completion pursuant the Contract.

7.3 Construction and Installation.__Upon execution of the Notice to Proceed, the Contractor shall promptly begin and diligently prosecute to completion the Work. Subject to other

provisions of this Contract, ESCO will act as a turn-key general contractor assuming total responsibility for all phases of construction and installation, including but not limited to: (a) selecting Subcontractors in concert with the City; (b) awarding Subcontracts in accordance with **Schedule P (Economic Opportunity Plan)** as approved by the City and set forth in **Schedule O (City Approved Subcontractor List)** and notifying the City in writing of any changes in subcontractors prior to their selection and subcontract awards; (c) preparing and submitting all Design and Engineering Documents for approval by PEA's Project Manager and the City in accordance with Paragraph 7.2.2 (Design and Engineering Approval); (d) obtaining all necessary permits, licenses and approvals and coordination during installation in accordance with the provisions of Articles 10 (Coordination and Construction Requirements) and 33 (Compliance with Applicable Laws); (e) purchasing of Equipment, software and materials for the Project; (f) installation and start-up of the Equipment, software and materials for the Project; (g) progress inspections during installation; (h) developing and presenting punch lists in connection with the Substantial Completion of the Project; (i) receiving and evaluating record drawings and operation and maintenance manuals from Subcontractors; (j) training of staff and service providers on proper operation and service of each newly installed Project Unit in accordance with the provisions of Article 9 (Training by ESCO); and (k) final inspection and recommendation for approval by PEA and the City.

7.4 Implementation Schedule. Within 30 days after the date of the Notice to Proceed, the ESCO shall provide PEA with a critical path schedule meeting the requirements of **Exhibit XII (Requirements for Critical Path Schedule)**. The ESCO shall use the critical path method to monitor and analyze the factors that are delaying or could delay achieving Substantial Completion. The Contractor shall continually update the critical path schedule so that it at all times reflects the current status of the Work. Updates of the critical path schedule do not affect the Guaranteed Completion Date, which can only be modified by a Change Order.

7.5 Means and Methods. The ESCO's means and methods for the performance of the Work must be those best adapted for the safe, efficient, and expeditious prosecution of the Work, with a minimum of interference to adjoining work sites, to adjoining properties, and to public traffic and convenience. The ESCO shall prosecute the Work vigorously, without delay, and with such workforces and equipment as shall be satisfactory to the Project Manager and the City. The ESCO shall supervise and direct the Work, and ESCO shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for

coordinating all portions of its Work under this Contract, provided such Work shall always be performed subject to the City's rules and guidelines attached as Exhibit Ill, and shall interfere as little as possible with the regular use of the City Streets by the public. Before commencing the Work, the ESCO, when required by the Project Manager or the City, shall submit for approval its proposed methods of prosecution of the Work, including the maintenance of both vehicular and pedestrian traffic; street surfaces; drainage; and all other branches of its Work. Such approval is intended to safeguard the interests of PEA and the City, but such approval will not be deemed to relieve the ESCO of its obligation or responsibility for the safe and proper conduct of the Work. The ESCO shall at all times ensure that its work site, and its Subcontractor's personnel, while performing any part of the Work under this Contract, are and remain free of the influence of alcohol or illegal drugs. The ESCO shall at all times enforce good discipline and order among its employees, and shall not employ any unfit Person or anyone not skilled in the task assigned. Any contact by the ESCO or its employees with adjacent property owners, passing motorists or pedestrians, and the general public shall at all times be professional, courteous, and respectful.

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

7.7 Stop Work Order; ESCO's Right To Stop Work. If the ESCO fails to correct the Work, or any portion thereof, that is not in accordance with the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, and the ESCO, after receipt of written notice from PEA or the City, either (i) has not cured such failure within thirty (30) days or (ii) if the nature of the failure is such that it is not capable of cure within thirty (30) days, has not reached agreement with PEA and the City for a plan to cure such failure or has not commenced and diligently and continuously pursued the cure of such failure in accordance with such plan within such thirty (30) day period, then PEA or the City, by written order signed by PEA or the City or by an agent specifically so empowered by PEA or the City in writing, may order the ESCO to stop the Work ("Stop Work Order"), or any portion thereof, until the cause for such order has been eliminated or the ESCO has provided PEA and the City with a plan for corrective action acceptable to PEA and the City in their respective reasonable judgment. The right of PEA or the City to stop the Work shall not, however, give rise to a duty on the part of PEA or the City to exercise this right for the benefit of the ESCO or any other person or entity. If PEA

fails to make payments as required by Paragraph 5.4(d) then ESCO shall notify PEA in writing and have the right to stop work until it receives such required payments, provided PEA has not made payment within thirty (30) days of receiving such written notice.

7.7.1 Nothing contained in this Article 7 shall be construed to establish a period of limitation with respect to other obligations which the ESCO might have under the Contract Documents. Establishment of such time period as described in Paragraph 7.7 relates only to the specific obligation of the ESCO to correct Work that does not conform with the Contract Documents, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the ESCO's liability with respect to the ESCO's obligations other than specifically to correct the nonconforming Work.

7.8 Commissioning, Integration and Acceptance.

7.8.1 As detailed in **Schedule K (Commissioning and Integration Plan)**, the ESCO shall test each Project Unit. Testing must be designed to determine if each luminaire and other Project Unit is functioning in accordance with both its published specifications and the requirements of this Agreement and is integrated with the Lighting Management System as contemplated in the Scope of Work. The ESCO shall develop a protocol with PEA and the City to permit PEA and the City and/or their respective designees to monitor such tests and integration conducted by ESCO and/or manufacturers of Equipment. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in the operation of each Project Unit that may be observed during system commissioning procedures described in **Schedule K (Commissioning and Integration Plan)**.

7.8.2 The ESCO, in consultation with PEA and the City shall work with PECO to develop a mutually acceptable procedure for reporting the installation and commissioning of

new luminaires to PECO and establishing their eligibility for PECO's SL-C Tariff. The ESCO will report its commissioning and integration activities to the City in a format that supports reporting to PECO and will provide all needed assistance to assure prompt SL-C Tariff recognition for new luminaires.

7.8.3 When PEA and the City are satisfied in accordance with the protocol established pursuant to Paragraph 7.8.1 that a luminaire and its related Equipment have been installed, commissioned and integrated as required and that all information necessary to support submission of the luminaire to PECO has been delivered, the Project Manager shall accept delivery of the luminaire in accordance with the protocol. Acceptance shall not be unreasonably withheld or delayed. All other Equipment and Contract Deliverables, unless previously specifically accepted in writing will be deemed to be accepted at Substantial Completion except items listed on the punch list which will be deemed to be accepted at Final Acceptance.

7.9 Substantial Completion.

7.9.1 "Substantial Completion" will occur when the following conditions have been met:

7.9.1.1 the performance of the installation, commissioning and integration Work is complete except for those items specified in a punch list delivered pursuant to Paragraph 7.3, prepared by the Contractor and approved by the the Project Manager, listing all items of the Work that have not yet been completed, which items may not, during the period of time needed for their completion, materially impair the normal operation of the Project or activities at the City Lighting Property;

7.9.1.2 There are no liens or encumbrances on any portion of the Project or related portions of the City Lighting Property related to the performance of the Work;

7.9.1.3 All portions of the City Lighting Property affected by the Work on the Project are free and clear of all waste and rubbish related to the performance of the Work;

7.9.1.4 each Project Unit has been commissioned, tested and successfully integrated in accordance with **Schedule K (Commissioning and Integration Plan)**; and

7.9.1.5 the ESCO has delivered a certificate (the "**Substantial Completion Certificate**") certifying that all of the preceding conditions in this Paragraph 7.9.1 have been satisfied; provided that, if PEA or the City subsequently raises any valid objection to such certificate in accordance with Paragraph 7.9.2 below, such certificate will not be deemed to be delivered until such objection is satisfied.

7.9.2 Within 30 days of receipt of the Substantial Completion Certificate, PEA and the City shall either approve the Substantial Completion Certificate or state its objection and provide the ESCO with a detailed explanation therefor. If PEA and the City fail to approve or object to the Substantial Completion Certificate within such 30-day period, the Substantial Completion Certificate will be deemed to have been approved. If PEA and the City have approved or been deemed to have approved the Substantial Completion Certificate, or PEA and the City has objected to the Substantial Completion Certificate and such objection has subsequently been determined to be unsubstantiated, the approval or deemed approval will be considered to have been given as of the original date of delivery of the Substantial Completion Certificate. If PEA or the City validly objects to the Substantial Completion Certificate, then the date of approval will be considered to be the date that the ESCO has satisfied such objection.

7.10 Final Acceptance.

7.10.1 “Final Acceptance” will be achieved as of the latest date that any of the following conditions has been satisfied or deemed to have been satisfied:

- 7.10.1.1 the Project has achieved Substantial Completion;
- 7.10.1.2 the performance of the Work is complete, including all punch list items;
- 7.10.1.3 the ESCO has delivered all manufacturer’s warranties under Section 8.2;
- 7.10.1.4 the City Street Lighting Systems and the City Lighting Property are clear of all liens, claims, security interests or encumbrances arising out of or in connection with the performance of the Work;
- 7.10.1.5 the ESCO has delivered all Contract Documents and has completed the training program described in Article 9;
- 7.10.1.6 there are no outstanding ESCO Events of Default or events that with the passage of time or the giving of notice would become ESCO Events of Default;
- 7.10.1.7 All luminaires have been registered with PECO and are eligible for the SL-C Tariff;
- 7.10.1.8 The ESCO has completed to PECO’s satisfaction all documentation required to receive all rebates available to the Project under PECO’s Phase

4 Plan under Act 129,(66 Pa. C. S. § 2806.1);

7.10.1.9 [PJM Capacity Credits?]; and

7.10.1.10 the ESCO has delivered to the Authority a certificate (the "**Final Acceptance Certificate**"), certifying that all of the preceding conditions in this subsection (a) have been satisfied; provided that, if PEA or the City subsequently raises any valid objection to such certificate in accordance with Paragraph 7.10.2 below, such certificate will not be deemed to be delivered until such objection is satisfied.

7.10.2 Within 30 days of receipt of the Final Acceptance Certificate, the Authority shall either approve the Final Acceptance Certificate or state its objection and provide the ESCO with a detailed explanation therefor. If PEA and the City fail to approve or object to the Final Acceptance Certificate within such 30-day period, the Final Acceptance Certificate will be deemed to have been approved. If PEA and the City have approved or been deemed to have approved the Final Acceptance Certificate, or PEA or the City has objected to the Final Completion Certificate and such objection has subsequently been determined to be unsubstantiated, the approval or deemed approval will be considered to have been given as of the original date of delivery of the Final Acceptance Certificate. If PEA or the City validly objects to the Final Acceptance Certificate, then the date of approval will be considered to be the date that the ESCO has satisfied such objection.

7.11 Change Orders.

7.11.1 General. Except as provided in Paragraph 6.2(e) below, the ESCO may not implement any change to the Construction Work (a "**Change**"), unless the parties execute a written agreement (a "**Change Order**").

7.11.2 Change Orders.

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

7.11.2.2 Upon the Project Manager's written authorization following opportunity for PEA and the City to review ESCO's estimate pursuant to Paragraph 7.11.2.1, the ESCO shall prepare a written proposal for the Change (a "**Change Proposal**") setting forth (i) a description of the Change, (ii) the impact that such Change would have on (A) the Guaranteed Completion Date, (B) Guaranteed Savings and (C) the Milestone Schedule and (iii) a firm price for implementing such Change. Change proposals shall utilize unit pricing provided in the ESCO's RFP response and (as subsequently negotiated) included in **Schedule D ESCO Compensation and Milestone Payment Schedule** wherever applicable.

7.11.2.3 If PEA proposes a Change and the parties cannot agree on a firm price for implementing a Change Order pursuant to Paragraph 6.2(b), then, subject to agreement on the matters set forth in Paragraph 7.11.2.2(ii) above, PEA will have the right to require the ESCO to implement such Change for a price equal to (i) the Actual Cost of implementation times (ii) 1 + the ESCO's service cost percentage provided in the ESCO's RFP response (as subsequently negotiated) and set forth in **Schedule D (ESCO Compensation and Milestone Payment Schedule)** relating to the Change. As used herein, "**Actual Cost**" means the total cost of Subcontractors, materials and equipment. In no event will Actual Cost include any amounts paid to a Subcontractor that is an affiliate of the ESCO, which amounts are in excess of the price that would otherwise have been obtained from another Person in an arm's length transaction.

7.11.2.4 If the ESCO is entitled to a Change Order as a result of an

Uncontrollable Circumstance, the ESCO shall prepare and submit a Change Proposal to PEA. If the parties cannot agree on a firm fixed price for the Change Order, the ESCO will implement the Change under the terms set forth in Paragraph 7.11.2.3 above. Any amount payable to the ESCO pursuant to Paragraph 7.11.2.4 will be reduced so as to prevent double recovery by the net proceeds of insurance or other third-party payments received by the ESCO in connection with the Uncontrollable Circumstance.

7.11.2.5 If in connection with a proposed Change Order under either Paragraph 7.11.2.3 or 7.11.2.4 the parties cannot agree on any matters set forth in Paragraph 7.11.2.2 (ii), either party may seek resolution of the Dispute pursuant to Article 28 (Dispute Resolution).

7.11.2.6 Notwithstanding the provisions of this Paragraph 7.5 to the contrary, if an emergency arises due to an Uncontrollable Circumstance and the ESCO (i) after making a reasonable, good faith attempt to notify the Project Manager, is unable to communicate with, or fails to hear from, the Project Manager regarding such emergency and (B) reasonably believes a Change is necessary to mitigate adverse effects of such Uncontrollable Circumstance, the ESCO may proceed with such Change, the Actual Cost of which may not exceed the lesser of 10 percent of the Implementation Price or \$10,000. Any such change shall constitute a Change Order unless PEA or the City disputes the reasonableness of the ESCO's action or of the costs incurred by the ESCO in taking such action. Any such dispute shall be resolved in accordance Article 28 (Dispute Resolution).

7.11.3 The ESCO agrees and acknowledges that after a Change Order is negotiated and agreed to by the Parties as a result of an Uncontrollable Circumstance and then executed by PEA, the Change Order shall operate as a full and complete waiver and release of any and all claims of the ESCO related to or arising out of such Uncontrollable Circumstance, whether such Uncontrollable Circumstance is considered individually or cumulatively.

7.12 Co-operation with PECO. In addition to the requirements of Paragraph 7.8.2, the ESCO shall work with PECO to establish eligibility of the Project for all

available rebates under PECO's Phase 4 plan under Act 129 (66 Pa. C. S. § 2806.1).

ARTICLE 8.

WARRANTIES

8.1 ESCO Warranty. ESCO warrants that each item of Equipment and parts, or subsystems of any Project Unit installed as part of this Contract will be new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will functional properly for a period of one (1) year from the date of Substantial Completion ("**Warranty Period**"). Should any Equipment or or parts, or subsystems of any Project Unit, be found to be defective within one (1) year from such date, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim. This warranty does not extend to any Work that has been abused, altered, or misused, or repaired by the City or third parties without the supervision or prior written approval of the ESCO. OTHER THAN THESE WARRANTIES, NO OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE PROVIDED BY THE ESCO. For the avoidance of doubt, the Parties agree that the Energy Savings Guarantee is not a warranty for purposes of this Article 8.

8.1.1 Labor. On all Project Units installed pursuant to this Contract, ESCO shall provide, at no charge during the Warranty Period, any labor required to repair or replace any defective Equipment or any defective component, parts, or systems of any Project Unit. Such labor shall include adjustment of controls, correction of mechanical difficulties, or other reasonable adjustments if such adjustments are due to defective Equipment or materials or improper

installation.

8.1.2 Failure to Meet Guarantees. if the Project fails to fulfill the Energy Savings Guarantees during the M&V Period, the ESCO shall have a reasonable opportunity to make such changes as it deems necessary to alter the Equipment to fulfill such Energy Savings Guarantees subject to prior approval of the City. If a demonstration is required, ESCO shall be given the opportunity to test the Equipment, or the component parts, or systems of any Project Unit under requisite conditions.

8.1.3 Miscellaneous Costs. All shipping, transportation, or other miscellaneous costs involved in the repair or replacement of underperforming Equipment or the component parts, or systems of any Project Unit shall be paid by ESCO.

8.2 Manufacturers' Warranties. ESCO covenants and agrees that all Project installed as part of this Contract are protected by appropriate written manufacturers' warranties covering the performance of all component Equipment, parts, and systems of the Project.

8.2.1 Delivery of Manufacturers' Warranties. Prior to final acceptance of the Work and Project by PEA and the City, the ESCO shall deliver two (2) original complete sets of all manufacturer's warranty certificates, guarantees, parts lists, and operating or maintenance literature applicable to Equipment, systems, fittings, and furnishings included in the Work to the Project Manager and the City for inspection and approval. All manufacturers' warranties will be for applicable periods and contain terms not less favorable than those terms that are standard for the applicable industries and will either be issued in the first instance in the name and for the benefit of PEA or the City or be in a freely assignable form and be assigned to PEA or the City without limitations. All warranties shall be transferable and extend to the City. The manufacturers' warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessitated by malfunction.

8.2.2 The manufacturers' warranties are in addition to and not in lieu of the ESCO's Warranty provisions under Paragraph 8.1 and each of PEA, or the City are entitled to look to the ESCO for remedy in all cases where the ESCO's warranty applies regardless of whether a manufacturers' warranty also applies.

8.2.3 **Equipment Malfunction.** In the event of a malfunction or improper or defective function of any item of Equipment, or other defect in parts, workmanship and performance, during the Warranty Period for such Equipment, the ESCO agrees to (a) pursue rights and remedies against manufacturer of the Equipment under the manufacturers' warranties; (b) notify PEA and the City whenever defects in Equipment performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO; and (c) compensate PEA and the City for related expenses, damages to real or personal property, or liabilities assumed resulting from Equipment malfunction to the extent caused by nonperformance or error by the ESCO or its subcontractors.

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

ARTICLE 9.

TRAINING BY ESCO

The ESCO shall develop and conduct a training program, described in **Schedule M (ESCO's Training Responsibilities)** hereto, as necessary to provide City maintenance staff and service providers with the ability to comply with the terms of this Contract by maintaining system efficiencies during the Guarantee Period. This training program shall adequately prepare the City for the management of all ongoing services associated with the Project, including: (a) managing the ongoing service of the Project; (b) utilizing the ESCO's measurement and verification reports to maintain system efficiencies; (c) transitioning of City staff or service providers; and (d) communicating any Material Changes to ESCO. The ESCO must complete the training program specified in Schedule M prior to acceptance of the Project by PEA and the City; however, such acceptance shall not be unreasonably delayed by PEA or the City. The ESCO shall provide ongoing training upon request by PEA or the City with respect to updated or altered Equipment, including training for upgraded software, such training to be provided at an additional charge to PEA. The ESCO shall also provide additional future training for City staff or service providers to account for employee transition and renegotiations of service provider agreements during the Guarantee Period, such training to be provided at an additional charge to PEA.

ARTICLE 10.

COORDINATION AND CONSTRUCTION REQUIREMENTS

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

10.2 Maintenance of Traffic and Access to and across City Lighting Property. Traffic of all kinds shall be maintained continuously to and across City Lighting Property except

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

10.3 Access to Fire Hydrants and Fire Alarm Boxes. Fire hydrants shall be left at all times clear of obstructions and readily accessible to fire apparatus. No material or other obstructions shall be placed within ten (10) feet of a fire hydrant. Fire alarm boxes shall be supported and protected and maintained so as to be readily accessible and open to view.

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

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

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

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

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

10.9 Clean-up of City Lighting Properties. ESCO and its Subcontractors shall remove all rubbish or refuse and all unused materials and tools from each Work site on the City Lighting Properties daily, if required by the Project Manager or the City, and as the Work progresses the ESCO shall carefully clean and keep each Work site City Lighting Properties clean from any rubbish and refuse. The ESCO shall furnish to the Project Manager and the City upon request all

documentation regarding the proper disposal of all rubbish, soil, refuse and other debris. ESCO acknowledges that neither PEA nor the City will approve Substantial Completion of the Work or commissioning of any luminaire until the City Lighting Properties and any other place or places affected by the Work have been thoroughly cleared of all construction and other debris, and left clean, free from debris, and in as good condition as existed before the Work was begun. The ESCO shall resod or plant anew any grass plot or plots disturbed and replace any shrubbery destroyed. The clean-up work shall be governed by the record of existing conditions made and submitted to the Project Manager and the City prior to the commencement of Work.

10.10 Recycling. The ESCO shall cooperate with any recycling program established for the City Lighting Property. Upon request by the Project Manager and to the extent reasonably available, the ESCO shall furnish information and documentation regarding the recycled content of the Equipment and materials used in the Project and the amount of construction waste or other materials recycled by the ESCO in connection with the Work during the Implementation Period.

10.11 ESCO Bonds. ESCO shall maintain the ESCO Bonds in full force and effect during the Installation Period. If the ESCO fails to maintain the ESCO bonds, PEA or the City may purchase such bonds on behalf of the ESCO and the ESCO shall pay the cost thereof to PEA or the City upon demand.

ARTICLE 11.

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ARTICLE 12.

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ARTICLE 13.

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V. OPERATION PHASE

ARTICLE 14. SYSTEM SERVICE RESPONSIBILITIES

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

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

14.3 **City Responsibilities.** The City is responsible for all System Service Responsibilities set forth by ESCO on **Schedule R (City's System Service Responsibilities)** of this Contract.

14.4 **ESCO Inspections.** PEA and the City agree that ESCO shall have the right, upon written request, to inspect the City Lighting Property to determine if the City is complying, and shall have complied with, its System Service Responsibilities as set forth in **Schedule R (City's System Service Responsibilities)**. For the purpose of determining the City's compliance, the

ESCO agrees to utilize the checklist set forth at **Schedule S (System Service Responsibilities Checklist)** during its inspections to measure and record the City's compliance. The City shall make the City Lighting Property reasonably available to ESCO for and during each inspection, and shall have the right to witness each inspection and the entries recorded on the checklist. The ESCO further agrees to provide the City and PEA with copies of all inspection documentation, including a copy of the completed checklist and any related reports or studies, within seven (7) days of the completion of each inspection.

ARTICLE 15.

UPGRADING OR ALTERING THE PROJECT

15.1. **General.** ESCO shall at all times have the right, subject to PEA's and the City's prior written approval, which approval shall not be unreasonably withheld, to change any Equipment, or any, parts, software, or subsystems of any Project Unit, to revise any procedures for the operation of the Project, provided that: (a) the upgraded or altered Equipment is capable of complying with the Standards of Illumination and Control and services set forth in **Article 16 (Standard of Illumination)** herein; (b) such modifications or additions to, or replacement of the Project, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings at the City Lighting Property; and (c) any cost incurred relative to such modifications, additions or replacement of the Project, or operational changes or new procedures shall be the responsibility of the ESCO.

15.2. All modifications, additions or replacements of the Project or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to PEA and the City by ESCO for approval, which shall not be unreasonably withheld, provided that any replacement of the Project shall be new and have equal or better potential to reduce energy consumption at the City Lighting Property than the Project Units being replaced. The ESCO shall

update any and all software to be used in connection with the Project. All replacements of and alterations or additions to the Project shall become part of the Project described in The Scope of Work and shall be covered by the provisions and terms of Article 7 (Project Implementation).

ARTICLE 16.

STANDARDS OF ILLUMINATION AND CONTROL

The Project will be capable of operation at all times that meets the standards of brightness, illumination pattern, color, measurability and control described in **Schedule L (Standard of Illumination and Control)**. During the Guarantee Period, ESCO and the City will maintain, according to **Schedule Q (ESCO's System Service Responsibilities)** and **Schedule R (City's System Service Responsibilities)**, and operate the Project in a manner that will provide the Standard of Illumination and levels of operation as described in **Schedule L (Standard of Illumination and Control)**.

ARTICLE 17.

MATERIAL CHANGES

17.1 **Material Change Defined:** A Material Change means any change in or to the City

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

- (a) Manner of use of the City Street Lighting System by the City; or
- (b) Hours of operation for the City Street Lighting System ; or
- (c) Changes in the service parameters set forth in **Article 16 (Standard of Illumination)**; or
- (d) Structure of the City Street Lighting System; or
- (e) Types and quantities of luminaires used in the City Street Lighting System;
or
- (f) Modification, renovation or construction of the City Street Lighting System; or

- (g) The City's failure to perform its System Service Responsibilities in accordance with **Schedule R (City's System Service Responsibilities)**; or
- (h) Any other conditions other than climate affecting energy use of the City Street Lighting System.

17.2 Reporting of Material Changes; Effect of Material Changes: This Paragraph 17.2 shall apply only where the Material Change will affect the calculations described and set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)**.

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

Where there is a Material Change that affects the calculations described and set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)**, an equitable adjustment shall be made to the calculations

described and set forth in same, which may include an equitable adjustment to the baseline, the Annual Guaranteed Savings and the Total Guaranteed Savings.

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

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VI. ADMINISTRATION

ARTICLE 18.

OWNERSHIP AND ACCESS

18.1 **Ownership of Certain Proprietary Property Rights.** PEA and the City shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Project. To the extent software is provided by ESCO under this Contract or is embedded in ESCO products purchased hereunder, the ESCO shall grant to PEA and the City a perpetual royalty-free, limited license to use such ESCO software (including any accompanying documentation) for internal use only to operate, maintain, and repair the Project. PEA acknowledges that any software furnished in connection with the Work and/or M&V Services is proprietary and subject to the provisions of any software license agreement associated with such software. The parties acknowledge that third party products and third-party software are being provided by ESCO hereunder (the "**Non-ESCO Products**"). The parties acknowledge that any software that comprises or is embedded in such Non-ESCO Products is licensed by third parties and will be therefore be provided to PEA and the City under and subject to the terms and conditions of such third parties' separate software license agreements.

18.2 **Ownership of Existing Equipment.** Ownership of the equipment and materials presently existing at the City Lighting Property at the time of execution of this Contract shall remain the property of the City even if it is replaced or its operation made unnecessary by Work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise PEA and the City in writing of all equipment and materials to be replaced at the City Lighting Property and PEA and the City shall within ten (10) days designate in writing to the ESCO which equipment and materials that should not be disposed of off- site by the ESCO. It is understood and agreed to by all Parties that the City shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site.

18.3 Ownership of the Project. Upon installation and delivery of each Project Unit by ESCO, and unless and until rejected as defective by PEA and the City as set forth in Paragraph 7.6, PEA shall own each such Project Unit, and PEA shall transfer ownership to the City in accordance with their Intergovernmental Guaranteed Energy Savings Agreement.

18.4 Access to the City Lighting Property. Prior to commencement of the Work, and through further consultation from time to time as necessary, the ESCO shall provide the Project Manager and the City with a written description of the portions of the City Lighting Property for which it seeks access from the City for the installation and operation of the Project. The Project Manager and the City may approve or disapprove ESCO's access request, or suggest that the ESCO modify and resubmit a revised version for approval or disapproval. Upon approval of the ESCO's access requests by the Project Manager and the City, the City shall provide sufficient rent-free space on the City Lighting Property for the installation and operation of the Project as described in the critical path schedule. The ESCO shall confine its operations to the portions of the City Lighting Property approved by the City and shall not unreasonably encumber the portions of the City Lighting Property used for Work with materials, equipment, or similar items.. The City shall not unreasonably restrict the ESCO's access to City Lighting Property for Work in progress or emergency repairs or corrections as it may determine are needed.

ARTICLE 19.

INSURANCE

19.1 Requirements. Unless otherwise approved by the City's Risk Manager in writing, ESCO shall, at its sole cost and expense, procure and maintain, or cause to be procured and maintained, in full force and effect until the ESCO completes the Work under the Contract, the types and minimum limits of insurance specified below, covering the ESCO's performance of the Work required under the Contract. The ESCO shall procure, or cause to be procured, all insurance from reputable insurers admitted to do business on a direct basis in the Commonwealth or otherwise acceptable to the City. All insurance herein, except Professional Liability insurance,

shall be written on an "occurrence" basis and not a "claims-made" basis. In no event shall the ESCO perform any work under the Contract until the ESCO has delivered or caused to be delivered to the City's Risk Management Division the required evidence of insurance coverages. If ESCO fails to obtain or maintain the required insurance, PEA or the City shall have the right to treat such failure as a default under the Contract and to exercise all appropriate rights and remedies. The ESCO shall provide for at least thirty (30) days prior written notice to PEA and the City in the event coverage is materially changed, cancelled, or non-renewed. PEA and the City, their officers, employees, and agents, shall be named as additional insureds on the General Liability Insurance policy, Automobile Liability Insurance policy, Builders Risk Insurance policy, and Umbrella Liability Insurance policy in connection with this Contract. ESCO shall also deliver or cause to be delivered to PEA and City an endorsement stating that the coverage afforded PEA and the City and its officers, employees and agents, as additional insureds, will be primary to any other coverage available to them and that no act or omission of PEA or the City, their officers, employees or agents shall invalidate the coverage. The insurance requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in the Contract by the ESCO to PEA and the City or to limit ESCO's liability under this contract to the limits of the policies of insurance required to be maintained by the ESCO hereunder.

19.2 Insurance Amounts. ESCO will be required to carry the following types of insurance with the amounts listed below:

(a) Workers Compensation and Employers Liability:

(1) Workers Compensation: Statutory Limits.

(2) Employer's Liability:

\$1,000,000 each accident-bodily injury by accident;
\$1,000,000 each employee-bodily injury by disease; and

\$1,000,000 policy limit-bodily injury by disease.

- (3) Other states' coverage and Pennsylvania endorsement.

(b) General Liability Insurance:

- (1) Limit of Liability:

\$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability;

\$1,000,000 advertising injury; \$5,000,000 general aggregate and

\$1,000,000 aggregate for products and completed operations.

(2) Coverage: City Street Lighting Systems operations; blanket contractual liability; personal injury liability (employee exclusion deleted); products and completed operations; independent consultants, contractors, employees and volunteers as additional insureds; cross liability; and broad form property damage (including completed operations).

(c) Automobile Liability Insurance:

(1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.

(2) Coverage: Owned, non-owned, and hired vehicles.

(d) **Builder's Risk Insurance/Installation Floater:** During the entire period of any construction on the City Lighting Property, ESCO shall maintain "all risk" builder's risk insurance/installation floater in an amount equal to the Implementation Price as may be adjusted in accordance with the terms of this Contract.

(e) **Professional Liability Insurance:**

(1) Limit of Liability:

\$1,000,000 with a deductible not to exceed

\$50,000.

(2) Coverage: Errors and omissions including liability assumed under contract.

(3) Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences happening during the performance of the Services required under the Contract shall be maintained in full force and effect under the policy or "tail" coverage for a period of at least two (2) years after completion of the Services.

(f) **Umbrella Liability Insurance:** Limits totaling \$10,000,000.00 per occurrence when combined with insurance required under (1) Employer's Liability; (2) General Liability; and (3) Automobile Liability above.

19.3 Submission of Certificates of Insurance. Certificates of insurance evidencing the required coverages and additional insured endorsements must specifically reference the City contract Number for which they are being submitted. The original certificates of insurance shall

be submitted to the Project Manager, the City, and the Division of Risk Management at least ten (10) days before Work is to commence and upon renewal of the required insurance. The ten (10) day requirement for advance documentation of insurance coverage may be waived in situations where such waiver will benefit PEA or the City, but under no circumstances shall ESCO actually begin Work (or continue Work, in the case of renewal) without providing the required certificates of insurance and required endorsements. PEA reserves the right to require ESCO to furnish written responses from its authorized insurance broker representatives to all inquiries made pertaining to the insurance required under the Contract at any time upon ten (10) days written notice to ESCO.

ARTICLE 20.

INDEMNIFICATION

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

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

20.1.1 Without limiting the generality of **Article 19 (Insurance)** of this Contract, the provisions of this Article 20, as they apply to occurrences or actual or contingent liabilities arising during the Term, shall survive the expiration or earlier termination of this Contract.

20.2 Patent, Copyright and Trademark Indemnity. Subject to this Contract and to the fullest extent permitted by applicable law, the ESCO will defend PEA and the City against third party claims that the use of Equipment installed under this Contract infringes any valid United States patent, copyright or trademark. ESCO will not defend PEA or the City against claims for infringement due to: (a) the use of products sold to PEA, and the City by the ESCO under this Contract in combination with other products or materials, any misuse of such products, or any use of such products other than as intended or specified by the ESCO, (b) any product or portion or component of a product which are made in whole or in part in accordance with PEA's and the City's specifications, or (c) any product or portion or component of a product that is modified after delivery to PEA and the City. The ESCO may, in its sole discretion, elect to obtain a license to modify or replace the products to render them non-infringing. The indemnities in this Paragraph are provided subject to: (x) PEA or the City promptly notifying the ESCO in writing of any claim of which it has notice; (y) PEA or the City not making any admission as to liability or compromise or agreeing to settlement of any claim without the ESCO's prior written consent; and (z) the ESCO having sole conduct of any claim and PEA and the City giving the ESCO all reasonable assistance in connection with the claim. This Paragraph states PEA and the City's sole remedies for infringement claims.

ARTICLE 21.

RISK OF LOSS

21.1 Prior to (i) commissioning, integration and acceptance of each luminaire and related Equipment as contemplated by Paragraph 7.8 and (ii) Substantial Completion with respect to all other Equipment and Contract Deliverables, ESCO shall assume all risk and responsibility for casualties of every description in connection with the Work, shall have charge of the entire Work, and shall alone be liable and responsible for any injuries to persons and any loss or damage to the property, buildings, Equipment and adjacent work that may occur as a consequence of or during the progress of the Work under this Contract, whether such damage or accident is due to the ESCO's own negligence or that of its servants, agents, employees, or representatives, or whether such damage or accident be due to the inherent nature of the Work or whether such damage or accident be due to other causes.

21.2 Except as provided in Article 8 (Warranties), Article 14 (System Service Responsibilities), Article 19 (Insurance), and Article 20 (Indemnification), upon (i) the Commissioning, Integration and Acceptance of each luminaire and related materials and Equipment, and (ii) Substantial Completion with respect to all other Equipment and Contract Deliverables, PEA assumes all risk of loss of or damage to such luminaire or other Equipment and Contract Deliverables from any cause whatsoever and no such loss of or damage to the luminaire or other Equipment or Contract Deliverables shall relieve PEA of the obligation to make payments or to perform any other obligation under this Contract. In the event of damage to any Project Unit during the Warranty Period, PEA will immediately notify ESCO or its assignee. If PEA determines that the damaged items are repairable, and ESCO is not responsible for repair or replacement under this Contract, the City may repair the same. If the Parties determine that any Project Unit or portion thereof has been lost, stolen, destroyed, or damaged beyond repair, and ESCO is not responsible for repair or replacement under this Contract, then the Energy Savings Guarantee will be adjusted by mutual agreement to account for the losses associated with the Project in accordance with Paragraph 17.1 (Material Changes).

ARTICLE 22.

SUBCONTRACTS

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

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

22.3 Subcontractor Claims. ESCO shall pay or cause to be paid all Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have

any right against PEA or the City for labor, services, materials or equipment furnished for PEA or the City.

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

ARTICLE 23.

CASUALTY OR CONDEMNATION OF THE CITY STREET LIGHTING SYSTEM

Any construction or restoration of the City Street Lighting System following or necessitated by fire, flood, or other casualty, or any condemnation affecting any portion of the City Street Lighting System, shall be deemed a Material Change, and the provisions of **Article 17 (Material Changes)** shall be applicable. If the casualty or condemnation renders fifty percent (50%) or more of the City Street Lighting System unusable and, in the case of a casualty, the affected portion is not reconstructed or restored within one-hundred-and- twenty (120) days from the date of such casualty, PEA shall have the option to terminate this Contract by a notice to ESCO.

ARTICLE 24.

UNCONTROLLABLE CIRCUMSTANCES

24.1. **Excuse of Performance.** If, as a result of an Uncontrollable Circumstance, either party is prevented from performing or is delayed in the performance of any of its obligations under this Agreement (other than an obligation to pay money), such prevention of or delay in performance will, subject to such party's satisfaction of the conditions precedent in subsection (b) below, be excused during any period in which such performance is prevented or delayed by an Uncontrollable Circumstance, and for such period thereafter as necessary to correct the adverse effect of such Uncontrollable Circumstance; provided that the failure to pay any amounts owed hereunder (whether accruing prior to or during the Uncontrollable Circumstance) in a timely manner will not be excused by an Uncontrollable Circumstance. In the case of an Uncontrollable Circumstance affecting the ESCO, the ESCO will be entitled to a Change Order pursuant to Paragraph 7.11.

24.2. **Conditions.** A party will be excused from performance hereunder as a result of an Uncontrollable Circumstance subject to the following conditions:

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

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

24.2.3. If the Uncontrollable Circumstance delays completion of the Work by more than

[one-hundred-and- twenty (120) days] PEA shall have the option to terminate this Contract by a notice to ESCO.

ARTICLE 25.

TERMINATION FOR CONVENIENCE

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

ARTICLE 26.

EVENTS OF DEFAULT

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

(a) Any failure by PEA to pay ESCO any sum due for a period of more than sixty (60) days after written notification by ESCO that PEA is delinquent in making payment and PEA has not cured delinquency within thirty (30) days of such written notification; and provided that ESCO is not in default in its performance under the terms of this Contract; and/or

(b) Any other material failure by PEA or the City to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to PEA demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, PEA shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; and/or

(c) Any representation or warranty furnished by PEA or the City in this Contract that was false or misleading in any material respect when made.

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

(a) The Standard of Illumination and service set forth in **Schedule L**

(Standard of Illumination) cannot be provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Project or any Project Unit except that such failure, if corrected or cured within sixty (60) days after written notice by PEA to ESCO demanding that such failure be cured, shall be deemed cured for purposed of this Contract;

(b) Any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;

(c) Abandonment of the Work by the ESCO; any unexcused cessation of the Work for more than 30 days; or unexcused delays resulting in expected achievement of Substantial Completion more than 180 days later than the Guaranteed Completion Date in accordance with the Implementation Schedule

(d) Any other material failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, but, if corrected or cured within thirty (30) days after ESCO's receipt of such written notice such material failure shall be deemed cured for the purpose of this Contract;

(e) Any lien or encumbrance upon the Project by any Subcontractor, laborer or materialman of ESCO which is not released within 30 days of filing thereof;

(f) The filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within thirty (30) days of its

filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;

(g) Failure by the ESCO to pay any amount due PEA or the City within sixty (60) days of the required payment date;

(h) Repossession or removal of any Project Unit by ESCO or a third party, with whom ESCO has a contractual relationship related to the Work, without good cause;

ARTICLE 27.

REMEDIES UPON DEFAULT

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

(a) Exercise any and all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by PEA, and/or for damages that shall include all costs and expenses

reasonably incurred in exercise of its remedy;

(b) Without recourse to legal remedies, terminate this Contract by delivery of a notice declaring termination.

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

(a) Exercise any and all remedies 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 amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred;

(b) If the payments under this Contract have been assigned, and any payment milestones in accordance with **Schedule D (ESCO Compensation and Payment Schedule)** have been completed prior to a declaration of default, the PEA may declare ESCO to be in default, but shall continue to make the payments under **Schedule D (ESCO Compensation and Payment Schedule)** for such completed milestones. If there are no unpaid completed milestones, PEA may terminate this Contract without liability to make any payments;

(c) If the payments under this Contract have not been assigned, PEA may set off or counterclaim against its obligation to make any of the payments provided in default; or

(d) ESCO (but not the assignee) will be liable to PEA for damages incurred by PEA as a result of any default by ESCO. Such damages may include, but are not limited to:

(1) Payments made to ESCO or its assignee which represents payment towards a Project Unit for which acceptance was revoked because of a latent defect;

(2) The difference in price between the market price of any Project Unit that was either not delivered or rejected (or the actual purchase price if PEA purchases like-for-like replacements for any undelivered or rejected Project Unit) and the portion of the Installation Price indicated in the Contract for such Project Unit;

(3) Damages as a result of breach of warranty, failure to meet specifications, or damages incurred by PEA resulting from the delivery of Project that are defective or fail to meet specifications, or resulting from ESCO's failure to comply with any other requirements of this Contract, and

(4) Any other damages recoverable by law.

(e) Without recourse to any legal remedies, terminate this Contract by delivery of a notice declaring termination.

ARTICLE 28.

DISPUTE RESOLUTION

28.1 Disputes.

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

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

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

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

ARTICLE 29.

ASSIGNMENT

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

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

29.3 **Assignment by PEA and the City.** PEA and the City may transfer or assign this Contract and its rights and obligations herein to another affiliated entity of the City or to an assignee of the City Street Lighting System.

ARTICLE 30.

REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

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

(b) Its execution, delivery, and performance of this Contract have been

duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

(c) Its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any other contract, lease or instrument to which it is a party

or by which it or its properties may be bound or affected; or

(d) It has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any Applicable Laws which would materially and adversely affect its ability to perform hereunder.

ARTICLE 31.

ADDITIONAL REPRESENTATIONS OF THE PARTIES.

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

31.2 ESCO hereby warrants, represents and promises that:

(a) Before commencing performance of this Contract:

(1) It is or shall become licensed or otherwise permitted to do business in the Commonwealth.

(2) It has a City of Philadelphia Business Privilege License.

(3) it shall confirm that it and any of its Subcontractors to be employed in connection with any services rendered under the Contract and/or the parent company (ies) and subsidiary (ies) thereof, are not currently in default of the terms of any indebtedness to the City and, to the best of its knowledge, will not at any time during the Contract Term (including any extensions or renewals thereof) be indebted to the City, for or on account of any delinquent taxes, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. With respect to Subcontractors, ESCO will be deemed to have satisfied the requirements of this Paragraph 31.2(a)(3) so long as the following is included in each Subcontract:

"Subcontractor hereby certifies and represents that Subcontractor and Subcontractor's parent company(ies) and subsidiary(ies) are not currently indebted to the City and will not at any time during the term of ESCO's Agreement with City, including any extensions or renewals thereof, be indebted to the City, for or on account of any delinquent taxes, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. In addition to any other rights

or remedies available to the City and ESCO at law or in equity, Subcontractor acknowledges that any breach of failure to conform to this certification may, at the option and direction of the City and ESCO, result in the withholding of payments otherwise due to Subcontractor for services rendered in connection with the Contract and, if such breach or failure is not resolved to the City's or ESCO's satisfaction within a reasonable time frame specified by the City or ESCO in writing, may result in the offset of any such indebtedness against said payments otherwise due to Subcontractor and/or the termination of Subcontractor for default (in which case Subcontractor will be liable for all excess costs and other damages resulting from the termination)."

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

(4) It shall have provided proof and documentation of required insurance pursuant to **Article 19 (Insurance)**, and it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;

(5) It shall use Subcontractors and delegees that have the necessary experience and skill for the Work, and that are licensed and bonded in this state to perform the work so subcontracted or delegated pursuant to the terms hereof;

(6) It shall supply a sufficient number of properly skilled workers and necessary equipment to perform the Work;

(7) It is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

ARTICLE 32.

WAIVER OF LIENS

ESCO will obtain and furnish to PEA and the City a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each item of Equipment and its component parts, systems and related Contract Deliverables as a condition of achieving Substantial Completion.

ARTICLE 33.

COMPLIANCE WITH APPLICABLE LAWS

33.1 Compliance With Applicable Law and Standard Practices. ESCO and all Subcontractors, shall perform its obligations hereunder in compliance with all Applicable Laws, sound engineering and safety practices, and rules of the City related to the City Lighting Property, and shall give all notices required by all Applicable Laws. The Project shall at all times while under ESCO's control conform to all Applicable Laws. ESCO shall promptly remedy any violation of any such Applicable Laws that comes to its attention to the extent that the same results from its performance of the Work. ESCO shall promptly, and in no event later than the close of business five (5) business days following receipt, give notice to the Project Manager, by telephone, with confirmation in writing, of receipt by the ESCO of any information relating to violation of Applicable Laws.

33.2 **Wastes and Hazardous Materials.** Asbestos-Containing Materials: Neither party desires to or is licensed to undertake direct obligations relating to the identification, abatement, cleanup, control, removal or disposal of asbestos-containing materials ("ACM"). Consistent with Applicable Laws, PEA or the City shall supply ESCO with any information in its possession relating to the presence of ACM in areas where ESCO undertakes any Work or Other Services that may result in the disturbance of ACM. If either PEA, the City or ESCO becomes aware of or suspects the presence of ACM that may be disturbed by ESCO's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other parties. As between PEA, the City and ESCO, ESCO shall be responsible for engaging a subcontractor to address the potential for or the presence of ACM in conformance with all Applicable Laws and addressing the impact of its disturbance before ESCO continues with its Work or M&V Services. ESCO shall submit a Change Order in accordance with Article 7.3.3. for any ACM removal services provided by a subcontractor under this paragraph.

33.3 **Other Hazardous Materials:** ESCO shall be responsible for removing or disposing of any Hazardous Materials (as defined below) that it or its Subcontractors use in providing Work or Other Services ("**ESCO Hazardous Materials**") and for the remediation of any areas impacted by the release of ESCO Hazardous Materials. For other Hazardous Materials that may be otherwise present at the City Lighting Property ("**Non-ESCO Hazardous Materials**"), PEA or the City shall supply ESCO with any information in its possession relating to the presence of such materials if their presence may affect ESCO's performance of the Work or M&V Services. If either PEA, the City or ESCO becomes aware of or suspects the presence of Non-ESCO Hazardous Materials that may interfere with ESCO's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other. As between PEA, the City and ESCO, ESCO shall be responsible for engaging a subcontractor for removing and disposing of such Non-ESCO Hazardous Materials from the facilities and the remediation of any areas impacted by the release of Non-ESCO Hazardous Materials. ESCO shall submit a Change Order in accordance with Article 7.3.3. for any Non-ESCO Hazardous Materials removal or remediation services provided by a subcontractor under this paragraph. The Parties agree that ESCO shall not be liable for the removal or remediation of, or damages related to, mold in existence prior to commencement of the Work under this Contract or unrelated thereto. For purposes of this Contract, "**Hazardous Materials**" means any material or substance that, whether

by its nature or use, is now or hereafter defined or regulated as a hazardous waste, hazardous substance, pollutant or contaminant under applicable Law relating to or addressing public or employee health and safety and protection of the environment, or which is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, mutagenic or otherwise hazardous or which is or contains petroleum, gasoline, diesel, fuel, another petroleum hydrocarbon product, or polychlorinated biphenyls.

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

33.5 Environmental Provisions. In the performance of this Contract, ESCO shall use commercially reasonable efforts to minimize pollution and shall strictly comply with all Applicable Laws concerning the environment. The ESCO is responsible for any violations to the extent caused by ESCO or its Subcontractors and shall secure all required permits, licenses and approvals. Erosion control measures, if required, must be shown on drawings and specifications prepared by the ESCO, and the ESCO shall obtain an erosion control permit, if required.

ARTICLE 34.

INDEPENDENT CAPACITY OF ESCO

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

ARTICLE 35.

NO WAIVER

The failure of ESCO, the City, or PEA 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 this Contract in the event of a continuing or subsequent default on the part of ESCO, the City or PEA.

ARTICLE 36.

NON-DISCRIMINATION; FAIR PRACTICES

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

36.2 In accordance with Chapter 17-400 of the Philadelphia Code, as it may be amended from time to time, ESCO agrees that its payment or reimbursement of fees or other expenses in association with participation by ESCO or its employees in an exclusionary private organization, insofar as such participation confers an employment advantage or constitutes or results in discrimination with regard to hiring, tenure of employment, promotions, terms, privileges or conditions of employment on the basis of race, color, sex, sexual orientation, religion, national origin or ancestry, constitutes without limiting the generality of other provisions of this Contract a substantial breach of this Contract entitling PEA to all rights and remedies provided in this Contract or otherwise available in law or equity. ESCO agrees to include this subparagraph, with appropriate adjustments for the identity of the Parties, in all subcontracts that are entered into for work to be performed pursuant to the Contract.

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

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

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

36.6 ESCO and each Subcontractor shall furnish all necessary employment documents and records to permit access to its books, records and accounts by the City for purposes of investigation to ascertain compliance with the provision of this Article.

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

ARTICLE 37.

LABOR-MANAGEMENT RELATIONSHIPS; WAGES AND BENEFITS

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

As required by Section 17-107 of the Philadelphia Code, as same exists on the Effective Date of this Contract, all employees performing work under this Contract shall be paid at least the applicable prevailing wages for the respective occupational classifications designated, as set forth in Schedule H (Prevailing Wage Rates) and shall be given at least the applicable presently prevailing working conditions during the entire period of work under the Contract. Such working conditions are those that are given to employees pursuant to a bona fide collective bargaining agreement for the applicable craft, trade or industry in the Philadelphia area on the date the General Bidding and Contract Requirements are issued. The occupational classifications of all employees under the Contract shall be only the specific categories of jobs within a given craft, trade or industry for which a separate hourly wage rate for the Philadelphia area is determined by the Secretary of Labor of the United States, in accordance with the Davis-Bacon Act, and which are set forth in the applicable schedule attached to the General Bidding and Contract Requirements. In the event that ESCO believes that work under the Contract should be performed by employees in occupational classifications omitted from the schedule attached to the General Contract Requirements, it shall so advise the Managing Director's Office ("**MOO**") Labor Standards Division, which, shall remedy the omission if it agrees.

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

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

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

37.1.4 ESCO and its Subcontractors performing city work shall, upon request of PEA or the City, file with the MOO, Labor Standards Division a certified statement setting forth the name, address, occupational classification, wages and other benefits paid or provided, and number of hours worked with respect to each employee performing city work. Such statement shall be made weekly for each proceeding weekly period. The certification shall affirm that the statement is correct and complete, that the wages set forth therein are not less than those required by the Contract for city work and that the occupational classification set forth for each employee conforms with the work performed.

37.1.5 Nothing herein shall preclude the payment by the ESCO of wages at rates higher than those specified as the minimum in the applicable schedule attached to the General

Contract Requirements. However, no increase in any contract price shall be allowed or authorized on account of the payment of wages in excess of those so specified, or on account of wage increases granted hereafter.

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

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

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

ARTICLE 38.

BUSINESS INTEREST IN NORTHERN IRELAND, SUDAN AND IRAN

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

(a) ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) does not have, and will not have at any time during the Term (including any extensions thereof), any investments, licenses, franchises, management agreements or operations in Northern Ireland, unless ESCO has implemented the fair employment principles embodied in the MacBride Principles; and

(b) No product to be provided by ESCO will originate in Northern Ireland, unless the ESCO has implemented the fair employment principles embodied in the MacBride Principles;

(c) ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) does not, and will not at any time during the Term (including any extension thereof), do any business in Iran or Sudan; and

(d) No product to be provided under this Contract were, are or will be

manufactured by an entity doing business in Iran or Sudan, unless a federal override with respect to Iran or Sudan, as applicable, is in place or unless an exclusion from disqualification applies.

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

(a) Who have or whose parent(s), subsidiary(ies), exclusive distributor(s) or company affiliate(s) have any investments, licenses, franchises, management agreements or operations in Northern Ireland;

(b) Who will provide products originating in Northern Ireland unless said supplier, subconsultant or Subcontractor has implemented the fair employment principles embodied in the MacBride Principles.

(c) Who do or whose parent(s), subsidiary(ies), exclusive distributor(s) or company affiliate(s) do business in Iran or Sudan during the Term, or

(d) Who will provide products manufactured by an entity doing business in Iran or Sudan, as applicable, unless a federal override with respect to Iran or Sudan, as applicable, is in place or unless an exclusion from disqualification applies.

38.3 ESCO agrees to cooperate with the City's Director of Finance in any manner,

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

ARTICLE 39.

BUSINESS, CORPORATE AND SLAVERY ERA INSURANCE DISCLOSURE

39.1 In accordance with Section 17-104 of the Philadelphia Code, ESCO, after execution of the Contract agrees to complete an affidavit certifying and representing that ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) has searched any and all records of ESCO or any predecessor company regarding records of investments or profits from slavery or slaveholder insurance policies during the slavery era. The names of any slaves or slaveholders described in those records must be disclosed in the affidavit.

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

ARTICLE 40.

CONTRACTOR INTEGRITY PROVISIONS

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

(a) Confidential information means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with PEA and the City.

(b) Consent means written permission signed by a duly authorized officer or employee of PEA and the City provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, PEA and the City shall be deemed to have consented by virtue of execution of this Contract.

(c) Contractor means ESCO including its directors, officers, partners, managers, key employees, owners of more than a five percent (5%) interest, parent companies, and subsidiaries.

(d) Financial interest means:

(1) Ownership of more than a five percent (5%) interest in any business; or

(2) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.

(e) Gratuity means any payment of more than nominal monetary value in the form of case, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.

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

40.3 Contractor shall not disclose to others any confidential information gained by virtue of this Contract. Contractor acknowledges that all information provided to Contractor by PEA or the City or their agents or other contractors in the course of performing this contract remains the property of the City, and the Contractor may only make use of such information for purposes of performing its obligations under this Contract.

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

40.5 Contractor shall not, in connection with this or any other Contract

with the City, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of the City.

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

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

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

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

40.10 The Contractor, upon the inquiry or request of the Inspector General of the City or any of that official's agents or representatives, shall provide, or if appropriate, make promptly

available for inspection or copying, any information of any type or form reasonably necessary for a determination by the Inspector General to the contractor's integrity or responsibility, as those terms are defined by City statutes, regulations, or management directives. Such information may include, but shall not be limited to, the contractor's business or financial records, documents or files of any type or form, which refer to or concern this Contract. Such information shall be retained by the Contractor for a period of five (5) years beyond the termination of the Contract unless otherwise provided by law.

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

(a) Executive Order No. 03-11, which prohibits City employees from soliciting or accepting anything of value from any person seeking to initiate or maintain a business relationship with the City, including, but not limited to, any of its departments, boards, commissions or agencies. All City employees presented with gifts or gratuities as indicated in Executive Order 03-11 have been instructed to report these actions to the appropriate authorities. All bidders, agents or intermediaries who are solicited for gifts or gratuities by City employees are urged to report these actions to the appropriate authorities, including but not limited to the Inspector General.

(b) Section 10-102 of the Philadelphia Home Rule Charter, which prohibits any bid from being accepted from, or contract awarded to any City employee or official, or any firm in which City employee or official has a direct or indirect financial interest. All bidders are required to disclose any current City employees or officials of the bidder's firm, or who otherwise would have a financial interest in the contract.

(c) The State Ethics Act and the City Ethics Code, which prohibit a public employee from using his or her public office or any confidential information gained thereby to obtain financial gain for himself or herself, a member of his or her immediate family, or a business with which he or she or any member of his or her immediate family is associated. "Use of Public office" is avoided by the employee or official publicly disclosing the conflict and disqualifying him or herself from official action in the matter, as provided in the Philadelphia Code § 20-608.

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

ARTICLE 41.

ESCO RESPONSIBILITY PROVISIONS

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

If ESCO enters into any Subcontracts under this Contract with Subcontractors who are currently suspended or debarred by the City, the Commonwealth, or federal government or who become suspended or debarred by the City, the Commonwealth or

federal government during the Term or any extensions or renewals thereof, PEA or the City shall have the right to require ESCO to terminate such Subcontracts.

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

ARTICLE 42.

THE AMERICANS WITH DISABILITIES ACT

42.1 ESCO understands and agrees that, pursuant to federal regulations promulgated under the authority of the Americans With Disabilities Act, 28 C.F.R. § 35.101 *et seq.*, no individual with a disability shall, on the basis of the disability be excluded from participation in the Contract or from activities or services provided under the Contract. As a condition of accepting and executing the Contract, ESCO shall comply with all provisions of the Americans With Disabilities Act (the "ADA"), 42 U.S.C.

§§ 12101-12213, and all regulations promulgated thereunder, as the ADA and regulations may be amended from time to time, which are applicable to:

(a) the ESCO;

(b) the benefits, services, activities, facilities and programs provided in connection with the Contract; and

(c) the City or the Commonwealth;

and the benefits, services, activities, facilities and programs of the City or of the Commonwealth which are impacted by the Work performed by ESCO under the Contract. Without limiting the applicability of the preceding sentence, ESCO shall comply with the "General Prohibition Against Discrimination," 28 C.F.R. Part 35,130, and all other regulations promulgated under Title 11 of the ADA, as they may be amended from time to time, which are applicable to the benefits, services, programs and activities provided by the City through Contracts with outside contractors.

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

ARTICLE 43.

GENERAL PERFORMANCE REQUIREMENTS

43.1 Standards of Performance. ESCO shall perform all tasks/phases identified as ESCO responsibilities under this Contract, including construction and services required for Project Implementation, in such a manner so as to not to harm the structural integrity of the City Street Lighting System or the City Lighting Property and so as to conform to the standards set forth in **Schedule L (Standards of Illumination and Control)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. PEA and the City reserve the right to review the Work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of PEA or the City, the structural integrity of the City Lighting Property or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the Work shall be borne by ESCO.

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

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

43.4 **Documentation.** The ESCO and its Subcontractors shall furnish PEA with such documentation and information as PEA reasonably requests regarding the progress and execution of this Contract. The provisions of this Paragraph are not intended to supersede or limit the provisions of the Contract related to furnishing information or documents to PEA or the City.

ARTICLE 44.

STEEL PRODUCTS PROCUREMENT ACT

The Steel Products Procurement Act, 73 P.S. § 1881, et seq. shall govern payments to the ESCO under the Contract. In seeking payment under the Contract, the ESCO represents, warrants and covenants that only steel products made in the United States as defined by the Steel Products Procurement Act have been used or supplied in the

performance of the Contract and all Subcontracts thereunder. Where unidentified steel products are supplied or used under the Contract, PEA will not authorize, provide for, or make any payments to the ESCO for such steel products, unless and until the ESCO shall first provide to the Project Manager documentation, including, but not limited to, invoices, bills of lading, and mill certification, attesting that the steel was melted and manufactured in the United States. Where a steel product is identifiable from its face, PEA will authorize, provide for, and make payments to the ESCO for such steel products, only after the ESCO shall have submitted a certification, in a form satisfactory to the Project Manager, that the ESCO has fully complied with the requirements of the Steel Products Procurement Act. Where the Project Manager has determined, in writing, that a particular steel product is not produced in the United States in sufficient quantities to satisfy the requirements of the Contract, then this Paragraph shall not apply to payments for that steel product. Failure of the ESCO to comply with the Steel Products Procurement Act shall constitute a violation of the Contract which shall entitle PEA to exercise all rights and remedies provided to it by the Steel Products Procurement Act and provided to it under the Contract, either at law or in equity.

ARTICLE 45.

SALES AND USE TAX; FEDERAL EXCISE TAX

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

covenant, the City hereby consents to any filing by the ESCO for a refund of any Federal Excise Tax paid in connection with the work under this contract.

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

ARTICLE 46.

AUDITS; INSPECTION RIGHTS; RECORDS

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

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

46.3 From time to time during the performance of the Work under the Contract, and for

a period of five (5) years after the completion of the Work under the Contract, PEA or the City may audit any and all aspects of the ESCO's performance under the Contract, including but not limited to its billing and invoices. Representatives, agents or contractors of the City, including, without limitation, the City Controller may conduct audits. All books invoices, vouches, records, reports, cancelled checks and other materials are subject to inspection and review by the City, federal and state representatives, as may be applicable, or their designees, at the office of the ESCO in the City or in another location with the City's consent.

46.4 The ESCO shall cooperate with all City, state and federal inspections and reviews conducted in accordance with the provisions of the Contract. Such inspection and review of the ESCO's work hereunder shall be in the sole reasonable discretion of the inspecting or reviewing entity. Such inspection or review may include, without limitation, review of staffing ratios and job descriptions, and meetings with any of the ESCO's staff that are either directly or indirectly involved in providing all or any portion of the work hereunder. The ESCO shall make available within the City at reasonable times during the performance of work hereunder and for period set forth above in this Paragraph, all records pertaining to the Contract for the purpose of inspection, audit or reproduction by any authorized representative of the City (including any agent or contractor and the City Controller), the Commonwealth Auditor General, and any other federal or state auditors, as may be applicable, at no additional cost to the City.

ARTICLE 47.

COVENANT OF QUIET ENJOYMENT

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

ARTICLE 48.

RIGHT-TO-KNOW LAW

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

48.2 The City shall notify the ESCO using the legal contact information provided in this Contract if the City needs the ESCO's assistance in any matter arising out of the Right to Know Law ("RTKL"). The ESCO shall notify the City in writing of any change in the name or the contact information within a reasonable time of the change.

48.3 Upon notification from the City that the City received a RTKL request for records that contain trade secrets or confidential proprietary information ("**Requested Information**"), ESCO shall have five (5) Business Days from receipt of notification from the City to provide input on the release of the requested information and such other records and assistance as the City may request in order to comply with the RTKL. If the ESCO considers the Requested Information to include a request for a trade secret or confidential proprietary information, as those terms are defined by the RTKL, or other information that the ESCO considers exempt from production under the RTKL, the ESCO must notify the City and provide, within five (5) Business Days of receiving the written notification, a written statement signed by a representative of the ESCO explaining why the requested material is exempt from public disclosure under the RTKL.

48.4 The City's determination as to whether the Requested Information is a public record is dispositive of the question as between the parties, however the ESCO may intervene in any appeal concerning the release of said records to the public with the Office of Open Records, or in the Pennsylvania Courts.

48.5 The City will reimburse the ESCO for any costs associated with complying with this provision only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.

48.6 The ESCO agrees to abide by any decision to release a record to the public made by the Office of Open Records, or by the Pennsylvania courts. The ESCO agrees to waive all rights or remedies that may be available to it as a result of the City's disclosure of Requested Information pursuant to the RTKL. The ESCO's duties relating to the RTKL are continuing duties that survive the expiration of this Contract and shall continue as long as required by Applicable Law.

ARTICLE 49.

NOTICE

All notices from either party to the other shall be effective only if in writing and signed by the party giving notice and given by being delivered personally or sent electronically or by registered or certified mail, return receipt requested, postage prepaid, or delivered to a nationally recognized express mail service, charges prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice.

IF TO ESCO:

IF TO PEA/CITY:

Philadelphia Energy Authority City Hall,
Room 566

1400 JFK Boulevard

Philadelphia, PA 19107 Attention:
Executive Director

With copies to:

Office of Sustainability

One Parkway Building

1515 Arch Street, 13th Floor
Philadelphia, PA 19102 Attention:
Energy Manager

City of Philadelphia Law Department
Aramark Tower

1101 Market
Street, 5th Floor
Philadelphia, PA
19107

Attention: Divisional Deputy City Solicitor

ARTICLE 50.

ECONOMIC OPPORTUNITY PLAN

50.1 In accordance with the Philadelphia Code Section 17-1600 et seq., as it may be amended from time to time, the City has established a requirement for Economic Opportunity Plan(s) ("EOP") for this Agreement.

50.2 ESCO has committed itself to providing significant portions of the work required by this Contract to individual Minority-owned Business Enterprises (MBEs), Women-owned Business Enterprises (WBEs) and/or Disabled-owned Business Enterprises (DSBEs).

50.3 In furtherance of the participation commitments identified above, ESCO agrees to comply with and is subject to the EOP attached to this Agreement as **Exhibit IV (Economic Opportunity Plan)**.

50.4 Prior to the commencement of any Work, including any design or engineering work or the procurement and installation of any equipment, ESCO shall secure the prior written approval of the City Office of Economic Opportunity ("OEO") of the MBEs, WBEs and/or DSBEs to be utilized for the respective work. ESCO also shall have OEO approval prior to making any changes or modifications to the GEO-approved Agreement commitments made by ESCO herein, including without limitation, substitutions for its MBEs, WBEs and/or DSBEs, changes or reduction in work provided by its M/W/DSBE Subcontractors, or changes or reduction in the dollar and/or percentage amounts of commitments with its M/W/DSBE Subcontractors.

50.5 ESCO shall, within thirty days after receipt of payments from PEA under this Contract, deliver to its M/W/DSBE Subcontractors the proportionate share of such payment for work performed by its M/W/DSBE Subcontractors. In connection with payment of its M/W/DSBE Subcontractors, ESCO agrees to comply fully with PEA and the City's payment reporting process, which may include the use of electronic payment verification systems.

50.6 ESCO shall, in the event of an increase in units or work and/or compensation under this Contract, increase its commitments with its M/W/DSBE Subcontractors proportionately. The OEO may from time to time request documentation from ESCO evidencing compliance with this provision.

50.7 ESCO shall submit, within the time frames prescribed by the City, any and all documentation the City may request, including, but not limited to, copies of subcontractor(s) with M/W/DSBEs, participation summary reports, M/W/DSBE Subcontractor invoices, telephone logs and correspondence with M/W/DSBE Subcontractors, cancelled checks and certification of payments. ESCO shall maintain all documentation related to the EOP for a period of five (5) years from the date of receipt of final payment under this Contract.

ESCO agrees that the City may, in its reasonable discretion, conduct periodic reviews to monitor ESCO's compliance with the terms of the Contract and EOP. ESCO agrees that in the event the City determines that ESCO has materially failed to comply with any of the requirements of this Article or the EOP, which failure is not cured within sixty (60) days, the City may, in addition to any other rights and remedies it may have under Section 17-1605 of the Philadelphia Code or any rights and remedies the City may have under this Contract, or any bond filed in connection therewith or at law or in equity, exercise one or more of the following remedies, which shall be deemed cumulative and concurrent:

- (a) Withhold payment(s) or any part thereof until corrective action is taken.
- (b) Terminate the Contract, in whole or in part.
- (c) Suspend/Debar the successful bidder from bidding on and/or participating in any future City contracts for a period of up to three (3) years.

(d) Recover as liquidated damages, one percent of the total dollar amount of the Contract for each one percent (or fraction thereof) of the commitment shortfall. For purposes of this Article, the total dollar amount of the contract shall include approved change orders and amendments.

50.8 There is no privity of contract between PEA or the City and any M/W/DSBE Subcontractor(s) herein and PEA and the City do not intend to give or confer upon such M/W/DSBE Subcontractor(s) any legal rights or remedies in connection with the Subcontract work under Executive Orders 02-05 or 05-10 or by reason of this Contract except such rights or remedies that the M/W/DSBE Subcontractor may seek as a private cause of action under any legally binding contract to which it may be a party. The remedies enumerated above are for the sole benefit of PEA and the City and failure to enforce any provision or PEA or the City's indulgence of any non-compliance with any provision hereunder, shall not operate as a waiver of any of the rights in connection with this Contract nor shall it give rise to actions by any third parties including identified M/W/DSBE Subcontractors.

50.9 It is understood that false certification or representation is subject to prosecution under Title 18 Pa. C. S. §§ 4107.2 and 4904.

50.10 In accordance with Section 17-1402(f) of the Philadelphia Code, ESCO shall during the Term of the Contract, disclose the name and title of each City officer or employee who directly or indirectly advised the ESCO, any officer, director or management employee of the ESCO, or any person representing the ESCO that a particular Person could be used by the ESCO to satisfy any goals established in the Contract for participation of minority, women, disabled or disadvantaged business enterprises. The ESCO shall also disclose the date the advice was provided, and the name of such particular Person. Such disclosure shall be made on a form provided by the City, and the form shall be signed and filed with the City within five (5) Business Days after the ESCO as so advised. The City shall forward copies to the President and Chief Clerk of Council, and to the Mayor, Finance Director, Procurement Department, and the Department of Records.

ARTICLE 51.

APPROVALS BY PEA AND THE CITY; ENFORCEMENT BY PEA AND THE CITY

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

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

ARTICLE 52.

MISCELLANEOUS PROVISIONS

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

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

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

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

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

and Appendices, the following shall be the order of precedence:

1. Contract;
2. Schedules;
3. Exhibits; and
4. Appendices.

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

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

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

52.9 **Third Party Beneficiaries.** The parties acknowledge that the City is an intended third-party beneficiary of the Contract; provided, however, that the City shall have no rights or remedies available to it to a greater extent than those available to PEA under this Contract, and any exercise of such rights and remedies is subject to all limitations applicable to PEA as set forth in this Contract.

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

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

[Signatures Next Page]

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

PHILADELPHIA ENERGY AUTHORITY

Name

Title:

