

GUARANTEED ENERGY SAVINGS CONTRACT

between

PHILADELPHIA ENERGY AUTHORITY

and

[ESCO]

Dated _____, 2025

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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 _____, 2025 ("**Effective Date**") by and among the **PHILADELPHIA ENERGY AUTHORITY**, a body politic and corporate existing under the laws of the Commonwealth of Pennsylvania ("**PEA**"); and [ESCO] (the "**Contractor**" hereinafter referred to as "**ESCO**"), a _____ corporation.

BACKGROUND

A. PEA is a municipal authority and political subdivision of the Commonwealth of Pennsylvania, formed by the City of Philadelphia under the Municipality Authorities Act, 53 Pa. C.S., Ch. 56. PEA is given responsibility for actions concerning the development or facilitation of energy efficiency projects under Ordinance No. _____, passed by the Philadelphia City Council on _____ and signed by the Mayor on _____.

B. The City of Philadelphia ("**City**") is a municipal government governed under a Home Rule Charter authorized by the Commonwealth of Pennsylvania and is authorized to enter into long-term service agreements with municipal authorities established by the City.

C. The Philadelphia Water Department ("**PWD**") is a governmental department of the City that supplies drinking water, wastewater, and stormwater services to customers within the City. PWD is the owner and operator of the Northeast Water Pollution Control Plant and the Southwest Water Pollution Control Plant (collectively referred to hereinafter as the "**PWD Facilities**") at which it treats wastewater and stormwater runoff from its citywide collection system and from which it creates biomethane (hereinafter referred to as "**Biogas**"), from sludge in anaerobic digesters, which is currently consumed in a cogeneration and waste heat recovery facility located on-site or flared when it is in excess of the amounts used in the cogeneration facility. PWD aims to improve the Facilities by comprehensively implementing plant equipment/operations improvements, energy conservation measures, and biogas upgrading and interconnection facilities to reduce energy costs and greenhouse gas emissions and decarbonizing its footprint, among other goals.

D. The Philadelphia Gas Works ("**PGW**") is a municipally-owned utility operated by the Philadelphia Facilities Management Corporation ("**PFMC**"). PGW provides natural gas services in the City of Philadelphia and serves as a key

stakeholder, advisor and collaborative partner in assessing Philadelphia’s future needs related to Biogas and/or renewable natural gas (“**RNG**”) infrastructure and deployment. PGW is subject to the oversight of the Philadelphia Gas Commission, and the regulation of the Pennsylvania Public Utility Commission (“PUC”).

E. The Office of Sustainability (“**OOS**”) is a municipal division that provides energy management in the City and will provide internal project management, technical support and contract and execution facilitation to ensure that the project aligns with the City’s climate goals, and meets the needs and objectives of the various City partners.

F. PEA, the City, and PGW solicited proposals from qualified firms through issuance of a Request for Proposals dated _____, 2025 (“RFP”). The RFP Solicited proposals to provide integrated design and construction of improvements to the Facilities to increase their operating efficiency, to assure continued ability to operate in compliance with Applicable Law and to enhance and monetize Biogas. As part of the RFP selection process, the ESCO provided an RFP response including an initial feasibility analysis (the “**RFP Response**”) prior to entering into this Agreement to determine likely energy conservation measures, the associated energy savings, and estimates of the cost of installation. PEA, the City and PGW selected the Contractor based on the RFP Response, a copy of which is attached as **Appendix A** hereto, and the Contractor and PEA agreed to enter into this Agreement.

G. 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 PEA pursuant to a Trust Indenture (the “**Indenture**”) between PEA and a financial institution approved by the City (the “**Trustee**”), the proceeds of which will be deposited into various accounts established under the Indenture to fund the Project; and

H. PEA and each Beneficiary have entered into separate Intergovernmental Guaranteed Energy Savings Agreements contemporaneously with this Contract in which the City agrees to undertake the obligations of PEA with respect to the PWD Scope of Work and PGW agrees to undertake the obligations of PEA with respect to the PGW Scope of Work. [If appropriate, PFMC may separately contract directly with the ESCO on behalf of PGW.]

I. The City and PGW have entered into an Intergovernmental Agreement (the “**Phase 2 Agreement**”) with respect to the sale of Biogas to PGW by PWD and the marketing of RNG or Biogas by PGW.

AGREEMENTS

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:

I. 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" is defined Paragraph 4.8.

"Actual Cost" is defined in Paragraph 7.11.2.3.

"Additional Savings" is defined in Paragraph 5.5.2.

"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 (Energy Savings Guarantee)**.

"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 Payments made by the ESCO to PEA under Paragraph 5.2.1.

“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 the Project Site on which it is located, and any information necessary for making future alterations, connections or upgrades to the Project Unit, such as installation of accessories, and related Contract Deliverables.

“Beneficiary” means either the City or PGW pursuant to their respective Intergovernmental GESAs, and **“Beneficiaries”** means both Beneficiaries.

“Biogas” is defined in Paragraph C of the Background

“Bonds” is defined in Paragraph G of the Background.

“Break Fee” is defined 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 and/or the City are closed.

"Change Order" means an instrument altering the Scope of Work under the Contract issued under Paragraph 7.11 below.

“Change Proposal” is defined 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 PWD and OSS, and its legislature, the City Council. The City is a City of the First Class under the laws of the Commonwealth.

"Commonwealth" means the Commonwealth of Pennsylvania.

“Completion Date” is defined in Paragraph 4.5.

"Concealed Conditions" means subsurface or otherwise concealed physical conditions on the Project Sites of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in the Work anticipated by this Contract, and that the ESCO could not have anticipated based upon experience or discovered through the exercise of reasonable diligence prior to the completion of the Investment Grade Audit.

"Contract" means this Guaranteed Energy Savings Contract between the Parties, comprising 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 X (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 described 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" is defined in in Paragraph 25.1.

"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" is defined in Paragraph 5.4., and shall consist of both the Total Guaranteed Savings and the Annual Guaranteed Savings.

"Effective Date" is defined in in the Preamble.

"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 Project Sites. Without limiting the forgoing, "Environmental Incentives" includes (i) utility rebates or incentive programs, (ii) renewable energy credits or green tags, (iii) the right to apply for (and entitlement to receive) or allocate incentives under any state tax credit or tax deduction program, (iv) grants from nongovernmental organizations, and (v) the right to claim or allocate federal income tax benefits including credits under Section 45 and/or 48 and deductions under

Section 179D of the Internal Revenue Code.

"Equipment" means (i) the property described in the Scope of Work, 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" is defined in the Preamble.

"ESCO Bonds" is defined in Paragraph 4.2.8.1.

"ESCO Hazardous Materials" is defined in Paragraph 30.3.

"Event of Default" is defined for ESCO and PEA in Article 23.

"Facilities" means the PWD Facilities and the PGW Facilities.

"Final Acceptance" is defined 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" is defined 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" is defined in in Paragraph 4.9.

"Implementation Period" is defined in in Paragraph 4.7.

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

"Implementation Price" is defined in Paragraph 5.1.

"Indenture" is defined in Paragraph G of the Background."

"Intergovernmental GESA" ("IGESA") means the respective Intergovernmental Guaranteed Energy Savings Agreements between the City and PEA (the **"PWD IGESA"**) or PGW and PEA (the **"PGW IGESA"**)

"Investment Grade Audit Report" ("IGA") is defined in Paragraph 3.1.

"M&V Services" is defined in Paragraph 5.6.

"M&V Period" is defined in Paragraph 5.6.

"Material Change" is defined in Paragraph 14.1.

"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)**.

"Non-ESCO Hazardous Materials" has the meaning set forth in Paragraph 30.3.

"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 directing 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)**.

"OOS" is defined in Paragraph E of the Background

"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.

“**PEA**” is defined in the preamble.

“**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.

“**PGW**” is defined in the Paragraph D of Background.

“**PGW Facilities**” is defined in the Paragraph D of Background.

“**PGW Sites**” means the [sites] where PGW has provided the ESCO rent-free access for the installation and operation of the PGW Scope as more fully described in Schedule B.

“**PGW Scope of Work**” means the Selected ECMs to owned and operated by PGW and located on the PGW Site as described in **Schedule A (Scope of Work)**.

“**Phase 2 Agreement**” is defined in Paragraph I of the Background.

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

“**Project Sites**” means the PWD Sites and the PGW Sites.

“**Project**” means the Equipment and other Contract Deliverables, described in the Scope of Work to be installed in the Project Sites, the completion of the Work for design, implementation and installation and delivery of all Project Units on the Project Sites 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**” is defined in Paragraph 3.1.

“**Project Maintenance Responsibilities**” is defined in Paragraph 11.1.

"Project Manager" means the person specifically designated by PEA as PEA's Project Manager, and any substituted entity or individual who may be designated in writing by PEA or any individual designated by the Project Manager as his or her representative.

"Project Unit" means each group of Equipment, materials or deliverables that is expected to be separately delivered and commissioned, tested or accepted that is designated as such in the Scope of Work.

"PWD" is defined in Paragraph C of the Background

"PWD Facilities" is defined in Paragraph C of the Background.

"PWD Sites" means the portions of the Facilities for which the City has provided the ESCO rent-free access for the installation and operation of the PWD Scope as more fully described in Schedule B.

"PWD Scope of Work" means the Selected ECMs to owned and operated by PGW and located on the PWD Sites as described in **Schedule A (Scope of Work)**.

"Requested Information" has the meaning set forth in Paragraph 45.3.

"RFP Response" is defined in Paragraph F of the Background.

"RNG" is defined in Paragraph D of the Background

"Savings Year" means each Fiscal Year 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 PWD Scope of Work and the PGW Scope of Work.

"Selected ECMs" means the ECMs described in **Schedule A (Scope of Work)**.

"Shortfall Payment" is defined in in Paragraph 5.5.1.

"Stop Work Order" is defined in Paragraph 7.7.

"Subcontract" means a contract made between the ESCO and a Subcontractor, or between a Subcontractor and another 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" for each Project Unit has the meaning set forth in Paragraph 7.9.1, and for the Project has the meaning set forth in Paragraph 7.9.3.

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

"Term" is defined in Paragraph 4.10.

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

"Trustee" is defined in Paragraph G of the Background.

"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, but excluding 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; 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 and any related governmental mandates, orders, restrictions or declarations that unreasonably restrict performance; 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 Project Sites that the ESCO could not have reasonably been expected to anticipate or to discover before entering into this Agreement; (ii) the discovery of Hazardous Substances on the Project Sites for which a Beneficiary is responsible pursuant to Paragraph 30.3; and (iii) failure or delay by the Beneficiaries and/or PEA in issuing any consent or approval or taking any ministerial action required hereunder, including, without limitation, any approval or permission, or ministerial action, described in Section 7.3(a), Section 7.3(b), Section 10.8, Section 10.14, Section 47.7, Article 19 or Article 45 of this Agreement;

Under no condition do any of the following constitute an Uncontrollable Circumstance: (i) changes in economic conditions, market conditions, interest rates, inflation rates, wage rates, commodity prices, currency values, or exchange rates; (ii) changes in financial condition; (iii) changes in taxes or rates; (iv) failure to obtain any patent, license, or rights to use intellectual property; (v) any Hazardous Substance for which the Contractor is responsible under Paragraphs 30.2 or 30.3; and (vi) failure of equipment, unless caused by an Uncontrollable Circumstance.

"Work" is defined 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 and/or City 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;

1.3.9 a right or obligation of or to a Beneficiary arising with respect to the PWD Scope of Work or PWD Sites on the one hand or the PGW Scope of Work or PGW Sites on the other hand shall, unless the context otherwise clearly requires, be exercised by or owed to or on behalf of the City or PGW respectively.

ARTICLE 2. EXHIBITS, SCHEDULES AND APPENDICES

2.1 Exhibits. The Exhibits set forth below are attached hereto in their entirety

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	Approved Subcontractor List
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 Beneficiaries and PEA are attached hereto as a condition to the Notice to Proceed. They are to be set forth in their entirety and made a part of this contract by reference.

Background

Schedule A	Scope of Work
Schedule B	Description of Facilities, Project Sites, and Existing Equipment

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	Annual Reports and Measurement and Verification
Payments	

Implementation Phase

Schedule J	Implementation Schedule
Schedule K	Start-Up and Commissioning Plan
Schedule L	Operating Standards
Schedule M	ESCO's Training Responsibilities
Schedule N	Waste and Hazardous Material Removal Responsibilities
Schedule O	Commissioning and Performance Tests
Schedule P	Economic Opportunity Plan

Operation Phase

Schedule Q	ESCO's Project Maintenance Responsibilities
Schedule R	Beneficiaries' Project Maintenance Responsibilities
Schedule S	Beneficiaries' Maintenance Responsibilities Checklist

Each Schedule shall be divided into two sections, one reflecting the required information with respect to the PWD Scope of Work, and one reflecting the required information with respect to the PGW Scope of Work.

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

Appendix A: RFP Response

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 will perform, and PEA will cooperate and cause the Beneficiaries to cooperate with ESCO to complete, 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
 - 30% IGA Milestone Deliverable
 - Preliminary Design
 - 60% IGA Milestone Deliverable

- Final ECM Evaluation/Selection
- 90% IGA Milestone Deliverable
- Final Design
- 100% IGA Submission

- **Phase 2: Implementation**
 - Procurement/Pre-Construction
 - Construction & Project Management
 - Project Close-Out
 - PECO Bill Updates & Incentive/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 Implementation Price for the Project. The Investment Grade Audit Report will contain detailed projections of energy and cost savings and Biogas related revenues to be obtained from the Facilities 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 and Biogas related revenues from the Facilities; documented material and non-staff labor costs actually avoided; adjustments to the baseline to reflect current conditions of the Facilities 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 describe the ESCO’s plan for installing or implementing the ECMs for the Facilities, 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 Beneficiaries’ personnel) of each proposed Project Unit. All prices and scope proposals will be consistent with pricing, timing and technical commitments made in the RFP Response, as the same may be modified by the final Schedules to this Contract. Any associated annual costs (e.g., 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 shall endeavor to provide and shall cause the Beneficiaries to provide, the ESCO with sufficient general and specific guidance pursuant to this Article 3 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 respective Beneficiary'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 prices of electricity, natural gas, Biogas, and RNG listed **Exhibit V (Permitted Escalation Rates)** will be allowed in the development of savings estimates.

3.3.3. PEA anticipates that savings estimates will be based on annual energy savings as billed under PECO tariffs, on natural gas charges to PWD as billed by the PGW under its tariffs, and on maintenance savings based on equipment life. Revenue estimates from sales of Biogas, and RNG and from sales of credits or derivatives based on use of Biogas will be based on projections of market prices from qualified professionals. The following items will not typically be credited as savings derived from a proposed Project Unit: (i) the respective Beneficiary's in-house labor cost, (ii) the Beneficiary's deferred maintenance cost, (iii) offset of future capital costs of the relevant Beneficiary, and (iv) future PECO tariff or rate changes. Funding from sources other than the Beneficiaries, such as Investment tax credits, Pennsylvania grant funding, and Pennsylvania Act 129 rebates will reduce the cost of installation but will not be treated as savings. The measurement and verification plan required as Schedule F will not be based on "deemed" or stipulated savings. 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 electronically or 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 and include a Table of Contents and, if submitted on paper, tabbed with the visible titles of corresponding Schedules (Volume

1) or Sections (Volume 2).

3.4.1.2. Volume 1 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 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 Facilities, Project Sites and Pre-existing Equipment 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 Reporting Requirements; Measurement and Verification Payments
- Schedule J Implementation Schedule
- Schedule K Start-Up and Commissioning Plan
- Schedule L Standards of Comfort
- Schedule M ESCO's Training Responsibilities
- Schedule N Waste and Hazardous Material Removal Responsibilities
- Schedule O Commissioning and Performance Tests
- Schedule P Economic Opportunity Plan
- Schedule Q ESCO's Project Maintenance Responsibilities
- Schedule R Beneficiaries' Project Maintenance Responsibilities
- Schedule S Beneficiaries' Maintenance Responsibilities Checklist

3.4.1.3. 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 180 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.

II. 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 14 (other than Paragraphs 4.3 and 4.4) are subject to the satisfaction or waiver of each of the following conditions precedent:

4.2.2. The ESCO shall have completed its Investment Grade Audit Report, the Investment Grade Audit Report shall offer to guarantee energy savings based on MMBtu savings and/or revenues and natural gas savings that are equal to at least 90 percent of the energy savings and revenues (MMBtu) and natural gas savings for equivalent ECMs projected in the Initial Feasibility Analysis unless the Project is changed by PEA. 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 S thereto to be attached as Schedules A through S of this Agreement;

4.2.3. The amount of the Guaranteed Savings for each Savings Year set forth in Schedule C (Energy Savings Guarantee) exceeds the amount required to make all debt service payments under the Indenture with respect to such Savings Year in the absence of adjustments resulting from a Change Order or Material Change;

4.2.4. The Bonds have been issued, a portion of the net proceeds thereof have been deposited into the project account under the Indenture, and all conditions to

making the initial draw thereof have been satisfied;

4.2.5. All permits, licenses, authorizations and approvals required to be obtained to perform the Construction Work have been obtained;

4.2.6. 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 3.5 above;

4.2.7. 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

4.2.7.1. 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.

4.2.8. The obligations and liabilities of PEA under Articles 4 through 14 (except Paragraphs 4.3 and 4.4) are further subject to the satisfaction or waiver of each of the following additional conditions precedent:

4.2.8.1. 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 Beneficiaries (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

4.2.8.2. 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 (i) 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 (the “**Notice to Proceed**”) in which (A) each of them states that all of the conditions precedent to its obligations set forth in this Article 4 have been satisfied or waived and (B) PEA directs the ESCO to begin the Construction Work.

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 either party may at any time thereafter until such conditions have been satisfied or waived, by notice to the other party, terminate this Agreement. Neither party will be liable to the other for any such termination and, 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.

4.10. Term. "**Term**" means the period from the Effective Date to the end of the Guarantee Period or such earlier date as the Contract is terminated in accordance with its terms.

ARTICLE 5. PAYMENT

5.1. Implementation Price. The agreed-to implementation price (the "**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 PEA for its approval an application for payment ("**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 60 days of its receipt of an Application for Payment, PEA shall, subject to Paragraph 5.3 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 60-day period. If the ESCO disputes any such objection, the dispute will be resolved pursuant to Article 25 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. C. S. § 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 and Schedule C 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. As between the ESCO and PEA, the Parties agree that the PEA will own, and may assign in its sole discretion, all right, title, and interest associated with Environmental Incentives; [provided that the City hereby assigns to ESCO the right to claim the benefit of the federal tax deduction under Section 179D of the Internal Revenue Code, and the ESCO hereby agrees to treat the value of such benefit as a deduction from the calculation of the Installation Price during the preparation of Schedule G]. Environmental Incentives with ascertainable current value may be included in the determination of the Energy Savings Guarantee as a deduction from the cost of the Project but are not measured or included in the calculation of

savings, or otherwise, to reduce the ESCO's responsibility for achieving the Energy Savings Guarantee based on the performance of the ECMs included in the Project.

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

5.5. Annual Review and Reimbursement/Reconciliation. Cost savings and revenues shall be measured and/or calculated as specified in Schedule F (Measurement and Verification) and reported to PEA and the Beneficiaries 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 I (**Reporting Requirements; Measurement and Verification Payments**).

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 ("**Additional Savings**") are for the benefit of the respective Beneficiaries 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 Beneficiaries, 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 I (Reporting Requirements; Measurement and Verification Payments)**, 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. No Indebtedness to the City. ESCO and any and all entities controlling ESCO, under common control with ESCO, or controlled by ESCO are not currently indebted to the City, and will not at any time during the Term of this Agreement be indebted to the City, for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District of Philadelphia), water bills, sewer bills, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. ESCO shall remain current during the Term of this Agreement under all such agreements and payment plans, and shall inform PEA in writing of ESCO's receipt of any notices of delinquent payments under any such agreement or payment plan within five (5) days after receipt. In addition to any other rights or remedies available to PEA at law or in equity, ESCO acknowledges that any breach or failure to conform to this representation, warranty and covenant may, at the option of PEA, result in the withholding of payments otherwise due to ESCO under this Agreement or any other agreement with the City under which the City may then owe payment of any kind, and, if such breach or failure is not resolved to the City's satisfaction within a reasonable time frame specified by the City in writing, may result in the offset of any such indebtedness against said payments. In addition, ESCO understands that false certification, representation or warranty by it, is subject to prosecution under Title 18 Pa. C.S.A. § 4904.

ARTICLE 6. NON-APPROPRIATION 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. [PGW?]

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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III. 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 shall be responsible for the general direction of Project Implementation, including the interpretation of the Contract Documents, the issuance of Change Orders, and the determination of final acceptance of the Work and Project. The Project Manager shall give all orders and directions contemplated under the Contract. The Project Manager 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 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, 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 for review prior to commencement of the 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 has 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 related notice of approval will become part of the Contract Documents.

7.2.3. As-Built Documentation for Each Beneficiary's Project Scope of Work. After the completion of the Work, the ESCO shall deliver an electronic copy of all As-Built Documentation to the Project Manager and the respective Beneficiaries prior to the Acceptance Date. As-built documentation will become the sole property of PEA and the Beneficiaries 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.

7.2.4. Action on Behalf of the Project Manager. ESCO acknowledges that the Project Manager will work on behalf of PEA and for the benefit of the Beneficiaries and that performance of any obligation of the Project Manager by PEA or the respective Beneficiaries will constitute performance by the Project Manager.

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 (other than Subcontractors listed in **Exhibit IX (Approved Subcontractor List)**, which have been previously selected by ESCO and approved by the Beneficiaries) in concert with the respective Beneficiaries; (b) awarding Subcontracts in accordance with **Schedule P (Economic Opportunity Plan)** as approved by the City and set forth in **Exhibit IX (Approved Subcontractor List)** and notifying the respective Beneficiary 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 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 30 (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 each Project Unit; (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 the Project Manager.

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 “**Implementation Schedule**”). The ESCO shall use the critical path method to monitor and analyze the factors that are delaying or could delay achieving Substantial Completion of the Project. 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. 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 respective Beneficiaries' rules and guidelines attached as Exhibit III, 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, shall submit for approval its proposed methods of prosecution of the Work, including the maintenance of both vehicular and pedestrian traffic; underpinning, bulkheading, shoring; sinking foundations; handling spoil; lighting; fencing; street surfaces; drainage; and all other branches of its Work. Such approval is intended to safeguard the interests of PEA and the Beneficiaries, 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 shall have the right and authority to reject in writing, stating the reasons therefore, Work which does not conform with the Contract Documents. The ESCO shall promptly correct any Work rejected by the Project Manager for failing to conform with the Contract Documents in accordance with Article 8 (Warranties), whether observed before or after Final Acceptance by the Project Manager 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 the Project Manager, 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 the Project Manager 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 the Project Manager, by written order signed by or by an agent specifically so empowered by PEA 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 the Project Manager with a plan for corrective action acceptable to the Project Manager in the Project Manager's reasonable judgment. The right of PEA to stop the Work shall not, however, give rise to a duty on the part of PEA 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 5.2.2 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 (Start-Up and Commissioning Plan)**, the ESCO shall test each Selected ECM and all component Equipment. Testing must be designed to determine if each Selected ECM is functioning in accordance with both its published specifications and the requirements of this Agreement. The ESCO shall develop a protocol with PEA to permit PEA and each Beneficiary and/or their respective designees to monitor such tests conducted by ESCO and/or manufacturers of Equipment. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in the operation of the Selected ECMs that may be observed during system commissioning procedures described in **Schedule K (Start-Up and Commissioning Plan)**.

7.8.2. When PEA is satisfied in accordance with the protocol established pursuant to Paragraph 7.8.1 that a Selected ECM has been installed and commissioned as required, the Project Manager shall accept delivery of the Selected ECM 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 on the Completion Date except outstanding items listed on punch lists which will be deemed to be accepted at Final Acceptance.

7.9. Substantial Completion.

7.9.1. "Substantial Completion" will occur for each Project Unit when the following conditions have been met:

7.9.1.1. The performance of the installation and commissioning Work is complete for each Selected ECM in the Project Unit except for those items specified in a punch list delivered pursuant to Paragraph 7.3, prepared by the Contractor and approved by 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 Unit or activities at the Facilities;

7.9.1.2. There are no liens or encumbrances on any portion of the Project or related portions of the Project Sites related to the performance of the Work;

7.9.1.3. All portions of the Project Sites affected by the Work on the Project Unit are free and clear of all waste and rubbish related to the performance of the

Work;

7.9.1.4. Each Selected ECM in the Project Unit has been tested and commissioned in accordance with **Schedule K (Start-Up and Commissioning Plan)**, which may be accomplished separately for different Selected ECMs or other separately functional deliverables within a Project Unit; 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 with respect to the applicable Project Unit; provided that, if the Project Manager 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 for a Project Unit, the Project Manager shall either approve the Substantial Completion Certificate for such Project Unit or state its objection and provide the ESCO with a detailed explanation therefor. If the Project Manager fails 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 the Project Manager has approved or been deemed to have approved the Substantial Completion Certificate, or the Project Manager 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 the Project Manager 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.

7.9.3. Substantial Completion of the Project means Substantial Completion of all Project Units.

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 Paragraph 8.2.1;

7.10.1.4. the Facilities and Equipment 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. The ESCO has completed to PECO's satisfaction all documentation required to all rebates available to the Project under PECO's Phase 5 Plan under Act 129 (66 Pa. C. S. § 2806.1) or any successor plan under Act 129.

7.10.1.8. The ESCO has submitted all necessary Project-related documentation for the respective Beneficiaries to receive federal tax credit direct payments, as eligible;

7.10.1.9. The ESCO has submitted all necessary Project-related documentation for the Beneficiaries to receive PJM Capacity Credits; and

7.10.1.10. the ESCO has delivered to PEA a certificate (the "**Final Acceptance Certificate**"), certifying that all of the preceding conditions in this subsection (a) have been satisfied; provided that, if the Project Manager subsequently raises any valid objection to such certificate in accordance with Paragraph 7.10.1.11 below, such certificate will not be deemed to be delivered until such objection is satisfied.

7.10.1.11. Within 30 days of receipt of the Final Acceptance Certificate, PEA shall either approve the Final Acceptance Certificate or state its objection and provide the ESCO with a detailed explanation therefor. If the Project Manager fails 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 the Project Manager has approved or been deemed to have approved the Final Acceptance

Certificate, or the Project Manager 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 the Project Manager 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 7.11.2.6 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 to either Beneficiary's scope of work by 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 affected Beneficiary to review ESCO's estimates pursuant to Paragraph 7.11.2.1, the ESCO shall prepare a written proposal for the Change to the affected Scope of Work (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.

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 7.11.2.2, 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. In the event of an Uncontrollable Circumstance of uncertain duration, such Change Proposal may be submitted by ESCO at such time as ESCO is able to determine when Work will be restarted. 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 25 (Dispute Resolution).

7.11.2.6. Notwithstanding the provisions of this Paragraph 7.11 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 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 25 (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 5 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 each Selected ECM in 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 of the Project Unit ("**Warranty Period**"). Should any Equipment or parts, or subsystems of any Selected ECM, be found to be defective within one (1) year from such date, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim. This warranty does not extend to any Work that has been abused, altered, or misused, or repaired by the Beneficiary 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 each Project Unit installed pursuant to this Contract, ESCO shall provide, at no charge during the Warranty Period for any included Selected ECM, any labor required to repair or replace any defective Equipment or any defective component, parts, or systems of such Selected ECM. 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, and correction, removal or repair of any damage to other work or property that arises from the defect or breach of warranty.

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 PEA. If a demonstration is required, ESCO shall be given the opportunity to test the Equipment, or the component parts, or systems of any Selected ECM 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 Selected ECM that is repaired or replaced by ESCO as a result of a warranty claim during the applicable Warranty Period as set forth in Paragraph 8.1 hereof 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, 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 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 respective Beneficiary or be in a freely assignable form and be assigned to PEA or the respective Beneficiary without limitations. All warranties shall be transferable and extend to the respective Beneficiary. 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 respective Beneficiary 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 PEA notifies ESCO 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 respective Beneficiary whenever defects in Equipment performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO.

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

ARTICLE 9.

TRAINING BY ESCO

The ESCO shall develop and conduct a training program, described in **Schedule M (ESCO's Training Responsibilities)** hereto, as necessary to provide the Beneficiaries' 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 each Beneficiary 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 the Beneficiaries' 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; however, such acceptance shall not be unreasonably delayed by PEA. The ESCO shall provide ongoing training upon request by PEA 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 the Beneficiaries' 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 cooperate and coordinate with any other contractors on other work which is being performed concurrently on or adjacent to the Project Sites, The Project Manager shall facilitate any matters in dispute as to the performance of the Work, including access to the Project Sites and priority of performance on either side of any division line between contiguous sections of the Facilities where the ESCO and another contractor each work.

10.2. Continuous Use of Facilities. The ESCO acknowledges that the PWD Facilities are critical facilities to manage wastewater in an environmentally sound manner. The PWD Facilities must remain in continuous operation at all times. ESCO will coordinate closely with PWD with respect to scheduling of Work on particular items of equipment to assure that overall operation of the PWD Facilities is not disrupted.

10.3. 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.

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

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 workforce 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 15.4 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 PEA. 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, rock drills, riveting machinery, and blasting between the hours of 7:00 p.m. and 7:00 a.m. unless specifically permitted by the Project Manager 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 Facilities, included, but not limited to creating noise, odors, air pollution, ambient discomfort, poor lighting, or power interruptions.

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

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

10.10. Prevention of Dust and Smoke. The ESCO and its Subcontractors shall keep the surface of the sidewalks and streets affected by its work, including decking and temporary paving, in a clean, neat condition. The ESCO and its Subcontractors shall sprinkle with water or otherwise treat the surface sufficiently to keep down any dust generated during the progress of work. Piles of dirt or other material shall not be left on the surface. The aforementioned requirements are not intended to take the place of the usual duties of the Department of Streets but to supplement them. No fires of any kind or burning of debris on the Project Sites or adjacent to them will be permitted; the debris shall be disposed of off the Project Sites.

10.11. 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).

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

10.13. Clean-up of Project Sites. ESCO and its Subcontractors shall remove all rubbish or refuse and all unused materials and tools from each Work site on the Project Sites daily, if required by the Project Manager or the respective Beneficiary, and as the

Work progresses the ESCO shall carefully clean and keep the Project Site clean from any rubbish and refuse. The ESCO shall furnish to the Project Manager and the City? upon request all documentation regarding the proper disposal of all rubbish, soil, refuse and other debris. ESCO acknowledges that the Project Manager will not approve Substantial Completion of the Project or commissioning of any Selected ECM until the Project Site and any other place or places affected by the Work have been thoroughly cleared of all construction and other debris and dust, and left clean, free from debris, and in as good condition as existed before the Work was begun. The ESCO shall resod or plant anew any grass plot or plots disturbed and replace any shrubbery destroyed. The clean-up work shall be governed by the record of existing conditions made and submitted to the Project Manager and the respective Beneficiary prior to the commencement of Work.

10.14. Recycling. The ESCO shall cooperate with any recycling program established for the Facilities. 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.

10.15. 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 may purchase such bonds on behalf of the ESCO and the ESCO shall pay the cost thereof to PEA upon demand.

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IV. OPERATION PHASE

ARTICLE 11. PROJECT SERVICE RESPONSIBILITIES

11.1. 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 "**Project Maintenance Responsibilities**") are implemented and followed by PEA, and the respective Beneficiaries 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.

11.2. 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 Project Maintenance Responsibilities)**, and for the training of all City maintenance staff and service providers pursuant to **Schedule M (ESCO's Training Responsibilities)**.

11.3. Beneficiaries' Responsibilities. PEA shall cause the respective Beneficiaries to assume all Project Maintenance Responsibilities set forth by ESCO on **Schedule R (Beneficiaries' Project Maintenance Responsibilities)** of this Contract.

11.4. ESCO Inspections. PEA agrees that ESCO shall have the right, upon written request, to inspect the Facilities to determine if the Beneficiaries are complying, and shall have complied with, its Project Maintenance Responsibilities as set forth in **Schedule R (Beneficiaries' Project Maintenance Responsibilities)**. For the purpose of determining such compliance, the ESCO agrees to utilize the checklist set forth at **Schedule S (Project Maintenance Responsibilities Checklist)** during its inspections to measure and record the Beneficiaries' compliance. PEA shall cause the Beneficiaries to make the Facilities reasonably available to ESCO for and during each inspection, and PEA and the Beneficiaries shall have the right to witness each inspection, and the entries recorded on the checklist. The ESCO further agrees to provide the Beneficiaries 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 12.
UPGRADING OR ALTERING THE PROJECT

12.1. General. ESCO shall at all times have the right, subject to PEA's prior written approval, which approval shall not be unreasonably withheld, to change any Equipment, or any, parts, software, or subsystems of any Selected ECM, 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 Comfort and services set forth in **Article 13 (Standards of Comfort)** 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 Facilities; 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.

12.2. 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 the Project Manager 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 or increase Biogas related revenues at the Facilities than the Selected ECM 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 13.
OPERATING STANDARDS

The Project will be capable of operation at all times that meets all Applicable Laws and operating standards described in **Schedule L (Operating Standards)**. During the Guarantee Period, ESCO will maintain according to **Schedule Q (ESCO's Project Maintenance Responsibilities)** and PEA will cause the Beneficiaries to maintain according to **Schedule R (Beneficiaries' Project Maintenance Responsibilities)**, and operate the Project in a manner that will comply with Applicable Law and the operating standards and levels of operation as described in **Schedule L (Operating Standards)**.

ARTICLE 14.
MATERIAL CHANGES

14.1. Material Change Defined: A Material Change means any change in or to the Facilities, 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 Beneficiaries that may result in a Material Change include but are not limited to the following:

- (a) Manner of use of the Facilities by the Beneficiaries; or
- (b) Hours of operation for the Facilities or for any Selected ECM or energy-consuming system at the Facilities; or
- (c) Changes in the operating parameters set forth in **Article 13 (Operating Standards)**; or
- (d) Structure of the Facilities; or
- (e) Types and quantities of energy using equipment used in the Facilities; or
- (f) Modification, renovation or construction of the Facilities; or
- (g) The Beneficiaries' failure to perform their Project Maintenance Responsibilities in accordance with **Schedule R (Beneficiaries' Project Maintenance Responsibilities)**; or
- (h) Any other conditions other than climate affecting energy use or Biogas production of the Facilities.

14.2. Reporting of Material Changes; Effect of Material Changes: This Paragraph 14.2 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 Beneficiaries to use their best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Facilities or in the operations of the Facilities 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 Beneficiaries within seventy-two (72) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Beneficiaries 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.

14.3. 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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V. ADMINISTRATION

ARTICLE 15. OWNERSHIP AND ACCESS

15.1. Ownership of Certain Proprietary Property Rights. Beneficiaries 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 Beneficiaries 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 therefore be provided to Beneficiaries under and subject to the terms and conditions of such third parties’ separate software license agreements.

15.2. Ownership of Existing Equipment. Ownership of the equipment and materials presently existing at the Facilities at the time of execution of this Contract shall remain the property of the Beneficiaries even if it is replaced or its operation made unnecessary by Work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the Project Manager in writing of all equipment and materials to be replaced at the Facilities and the Project Manager 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 the Project Manager shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site.

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

15.4. Access to the Project Sites. Prior to commencement of the Work, and

through further consultation from time to time as necessary, the ESCO shall provide the Project Manager with a written description of the portions of the Project Sites for which it seeks access from the Beneficiaries for the installation and operation of the Project. The Project Manager may approve or disapprove ESCO's access request or suggest that the ESCO modify and resubmit a revised version for approval or disapproval. Upon approval of the ESCO's access requests by the Project Manager, PEA shall cause the Beneficiaries to provide sufficient rent-free space at the Facilities 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 Project Sites approved by the Project Manager and shall not unreasonably encumber the portions of the Project Sites used for Work with materials, equipment, or similar items. PEA shall cause the Beneficiaries to avoid unreasonably restricting the ESCO's access to the Project Sites for Work in progress or emergency repairs or corrections as it may determine are needed.

ARTICLE 16. INSURANCE

16.1. Requirements. The 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 respective Beneficiaries. 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 PGW and City's Risk Management Division the required evidence of insurance coverages. If ESCO fails to obtain or maintain the required insurance, PEA or the Beneficiaries 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 Beneficiaries in the event coverage is materially changed, cancelled, or non-renewed. PEA and each Beneficiary, 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 each Beneficiary an endorsement stating that the coverage afforded PEA and each Beneficiary 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 either Beneficiary, 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 Beneficiaries 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.

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

16.2.1. Workers Compensation and Employers Liability:

16.2.1.1. Workers Compensation: Statutory Limits.

16.2.1.2. 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.

16.2.1.3. Other states' coverage and Pennsylvania endorsement.

16.2.2. General Liability Insurance:

16.2.2.1. 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.

16.2.2.2. Coverage: Facilities 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).

16.2.3. Automobile Liability Insurance:

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

16.2.3.2. Coverage: Owned, non-owned, and hired vehicles.

16.2.4. Builder's Risk Insurance/Installation Floater: During the

entire period of any construction on the Project Sites, 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.

16.2.5. Professional Liability Insurance:

16.2.5.1. Limit of Liability: \$1,000,000 with a deductible not to exceed \$50,000.

16.2.5.2. Coverage: Errors and omissions, including liability assumed under contract.

16.2.5.3. 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.

16.2.6. 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.

16.3. 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 Beneficiaries, but under no circumstances shall ESCO 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 17.
INDEMNIFICATION**

17.1. General Indemnity. ESCO agrees to indemnify and hold harmless PEA and each Beneficiary, 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**”), (i) relating to any and all bodily injury (including death) and/or damage to property, to the extent such Claims arise from the fault, negligence or willful misconduct 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, and (ii) arising from the presence or the release of ESCO Hazardous Materials on or from the Project Sites except in each case under subsection (i) and (ii) above, 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, or as a result of the presence or release of any non-ESCO Hazardous Materials on or from the Project Sites. ESCO’s obligations set forth in this Article 17 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 a Beneficiary, or their respective officers, directors, agents, employees and representatives for which ESCO has indemnified PEA or the Beneficiaries, ESCO, shall upon written notice from PEA or a Beneficiary, resist or defend such claim by use of counsel approved by each affected Beneficiary in writing (which approval shall not be unreasonably withheld); provided that the Beneficiary’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 any Beneficiary may engage their own counsel to participate in the defense of such claim and the ESCO shall reimburse PEA’s or the Beneficiaries’ reasonable costs therefore if PEA or the Beneficiaries believe in their sole respective discretion that applicable insurance may be insufficient to satisfy the claim.

17.1.1. Without limiting the generality of **Article 16 (Insurance)** of this Contract, the provisions of this Article 17, as they apply to occurrences or actual or contingent liabilities arising during the Term, shall survive the expiration or earlier termination of this Contract.

17.2. 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 Beneficiaries 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 Beneficiaries against claims for infringement due to: (a) the use of products sold to PEA, and the Beneficiaries 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 Beneficiaries' specifications, or (c) any product or portion or component of a product that is modified after delivery to PEA and a Beneficiary. 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 any Beneficiary promptly notifying the ESCO in writing of any claim of which it has notice; (y) PEA or the Beneficiaries 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 Beneficiaries giving the ESCO all reasonable assistance in connection with the claim. This Paragraph states PEA and the Beneficiaries' sole remedies for infringement claims.

17.3. Consequential Damages. Notwithstanding anything stated to the contrary in this Agreement, except as otherwise provided in this Paragraph 17.3, none of the Parties shall be liable under this Agreement, whether based in contract, in tort (including negligence and strict liability), warranty or otherwise, for any indirect, incidental, special or consequential loss or damage of any type, including loss of use or loss of profit or revenue, and each Party hereby releases each other Party from any such liability; provided, that the provisions of this Paragraph 17.3 shall not limit Contractor's obligations to pay to PEA the Shortfall Payments due, if any, pursuant to Paragraph 5.5.1.

ARTICLE 18. RISK OF LOSS

18.1. ESCO Risk. Prior to (i) commissioning and acceptance of each Selected ECM 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.

18.2. PEA Risk. Except as provided in Article 8 (Warranties), Article 11 (Project Service Responsibilities), Article 16 (Insurance), and Article 17 (Indemnification), upon (i) the Commissioning and Acceptance of each Selected ECM and related materials and Equipment, and (ii) Substantial Completion of the Project with respect to all other Equipment and Contract Deliverables, PEA assumes all risk of loss of or damage to such Selected ECMs or other Equipment and Contract Deliverables from any cause whatsoever and no such loss of or damage to the Selected ECMs 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 of the Selected ECMs 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 Beneficiary may repair the same. If the Parties determine that any of the Selected ECMs 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 14.1 (Material Changes). Nothing herein shall waive or amend any defense or immunity which either Beneficiary, PEA, or their respective officers, agents or employees may have under the Pennsylvania Political subdivision Tort Claims Act, 42 Pa.C.S. § 8541, et seq., as amended.

ARTICLE 19. SUBCONTRACTS

19.1. Review and Approval of Permitted Subcontractors. PEA and the Beneficiaries 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 Beneficiaries written notice of its intention to engage a Subcontractor not listed on Exhibit IX (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.

19.2. 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 Uncontrollable Circumstance event as described in Article 21 or PEA fault. ESCO shall be responsible for settling and resolving with all Subcontractors all claims arising out of delay, disruption, interference, hindrance, or schedule extension.

19.3. 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 Beneficiaries for labor, services, materials or equipment furnished for PEA or the Beneficiaries.

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

ARTICLE 20. CASUALTY OR CONDEMNATION OF FACILITIES

Any construction or restoration of the Facilities following or necessitated by fire, flood, or other casualty, or any condemnation affecting any portion of the Facilities, shall be deemed a Material Change, and the provisions of **Article 14 (Material Changes)** shall be applicable. If the casualty or condemnation renders fifty percent (50%) or more of the Facilities 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 21. UNCONTROLLABLE CIRCUMSTANCES

21.1. 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 Paragraph 21.2 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.

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

21.2.1. 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

21.2.2. 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.

21.2.3. 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 the affected portion of the work by a notice to ESCO. Upon any termination by PEA under this Paragraph 21.2.3, ESCO shall have no further obligations or liability under this Agreement with respect to the terminated portion of the Work.

ARTICLE 22. 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 Beneficiaries. 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 25 (Dispute Resolution) of this Contract. In all cases of termination

under this Article 22, PEA shall compensate ESCO for all Work performed and equipment ordered (and which cannot be resold or repurposed and has been delivered to the Beneficiaries) 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 23. EVENTS OF DEFAULT

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

23.1.1. Any failure by PEA to pay ESCO any sum due on the date due, which failure is not cured within thirty (30) days after written notification by ESCO that PEA is delinquent in making payment; and/or

23.1.2. Any other material failure by PEA to perform or comply with the terms and conditions of this Contract (including any such terms and conditions which PEA is obligated hereunder to cause the City to perform or comply with), 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

23.1.3. Any representation or warranty furnished by PEA in this Contract that was false or misleading in any material respect when made.

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

23.2.1. The Operating Standards set forth in **Schedule L (Operating Standards)** cannot be met due to failure of ESCO to properly design, install, maintain, repair or adjust the Selected ECMs except that such failure, if corrected or cured within sixty (60) days after written notice by PEA to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;

23.2.2. Any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;

23.2.3. 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 of the Project more than 180 days later than the Guaranteed Completion Date in accordance with the Implementation Schedule;

23.2.4. 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, provided that such thirty (30) day period may be extended for an additional period not to exceed one hundred eighty (180) days, at the sole discretion of PEA, so long as (a) such failure is capable of being cured, (b) the ESCO shall have provided PEA, prior to the expiration of the initial 30-day period, with a reasonably detailed plan describing the actions it proposes to take to cure such failure, (c) the ESCO is diligently pursuing the cure of such failure, and (d) such cure is effected in such a manner and within such time that such failure to comply could not reasonably be expected to have a material adverse effect on PEA or PEA's ability to perform under this Agreement in accordance with the terms hereof or on the Project;

23.2.5. Any lien or encumbrance upon the Project by any Subcontractor, laborer or materialman of ESCO which is not released or bonded over within 30 days of filing thereof;

23.2.6. 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;

23.2.7. Failure by the ESCO to pay any amount due PEA or a Beneficiary within sixty (60) days of the required payment date;

23.2.8. Repossession or removal of the Selected ECMs by ESCO or a third party, with whom ESCO has a contractual relationship related to the Work, without good cause, provided that ESCO shall have the right to cure any such removal by a third party by installation of a replacement Selected ECM within thirty (30) days following written notice of such removal from PEA;

23.2.9. Failure to obtain and maintain any insurance coverage required by this Contract;

23.2.10. Failure to obtain or maintain in full force and effect, or renew or replace within thirty (30) days prior to expiration, any security instrument or commitment required by this Contract;

23.2.11. Any act, omission, or misrepresentation which renders the

ESCO ineligible for a City contract or renders the Contract voidable under Chapter 17-1400 of the Philadelphia Code; or

23.2.12. A violation of law which results in a conviction, guilty plea, or plea of nolo contendere for a criminal offense by the ESCO, its directors, or employees (1) directly or indirectly relating to this Contract or the services, performance, Work or other component of the Project provided under this Contract, whether or not such offense is ultimately adjudged to have occurred; or (2) which adversely affects the performance of this Contract.

ARTICLE 24. REMEDIES UPON DEFAULT

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

24.1.1. 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;

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

24.2. 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:

24.2.1. 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;

24.2.2. 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; or

24.2.3. 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:

24.2.3.1. Payments made to ESCO or its assignee which represents payment towards a Selected ECM for which acceptance was revoked because of a latent defect;

24.2.3.2. The difference in price between the market price of any Equipment or 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 Equipment or Project Unit) and the portion of the Installation Price indicated in the Contract for such Equipment or Project Unit;

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

24.2.3.4. Any other damages recoverable by law.

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

ARTICLE 25. DISPUTE RESOLUTION

25.1. Disputes. 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 25.1. 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.

25.1.1. **Mediation.** 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.

25.1.2. **Mediator's Fees.** The parties shall share the mediator's fee and any non-court filing fees equally. The mediation shall be held in PEA'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.

25.1.3. **Further Action.** If mediation is unsuccessful, the parties may proceed to address the Dispute at law or in equity as they deem appropriate.

ARTICLE 26. ASSIGNMENT

26.1. 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, with the exception that ESCO may subcontract all or certain portions of the Work to the Subcontractors.

26.2. Subcontracting. ESCO may, with prior written approval of PEA and the Beneficiaries, delegate its duties and performance under this Contract, and/or utilize Subcontractors, provided that any, delegate(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 for all of its obligations under this Contract.

26.3. Assignment by PEA. PEA may transfer or assign this Contract and its rights and obligations herein to another affiliated entity of the Beneficiaries or to an assignee of the Facilities.

ARTICLE 27. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

27.1. It has all requisite power, authority, licenses, permits, and franchises,

corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;

27.2. 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;

27.3. 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

27.4. 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 28. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

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

28.2. ESCO hereby warrants, represents, and promises that:

28.2.1. Before commencing performance of this Contract:

28.2.1.1. It is or shall become licensed or otherwise permitted to do business in the Commonwealth.

28.2.1.2. It has a City of Philadelphia Business Privilege License.

28.2.1.3. 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 28.2.1.3 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.

28.3. It shall have provided proof and documentation of required insurance pursuant to **Article 16 (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;

28.4. 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;

28.5. It shall supply a sufficient number of properly skilled workers and necessary equipment to perform the Work;

28.6. 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 29.
WAIVER OF LIENS**

ESCO will obtain and furnish to PEA and the respective Beneficiaries 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 of the Project.

**ARTICLE 30.
COMPLIANCE WITH APPLICABLE LAWS**

30.1. 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 Facilities, 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.

30.2. 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 shall supply or cause the Beneficiaries to supply ESCO with any information in the Beneficiaries' 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 Beneficiaries 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 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 Paragraph 7.11. for any ACM removal services provided by a subcontractor under this paragraph.

30.3. 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 Facilities ("**Non-ESCO Hazardous Materials**"), PEA shall supply, or cause the Beneficiaries to supply, ESCO with any information in the Beneficiaries' 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 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 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 Paragraph 7.11. 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.

30.4. 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.

30.5. 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 31.
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 Beneficiaries. 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 Beneficiaries.

**ARTICLE 32.
NO WAIVER**

The failure of ESCO 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 or PEA.

**ARTICLE 33.
NON-DISCRIMINATION; FAIR PRACTICES**

33.1. 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.

33.2. 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.

33.3. 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.

33.4. 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.

33.5. 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.

33.6. 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.

33.7. 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 34. LABOR-MANAGEMENT RELATIONSHIPS; WAGES AND BENEFITS

34.1. 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 City's Department of Labor, Office of Labor Standards, which shall remedy the omission if it agrees.

34.1.1. 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.

34.1.2. 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.

34.1.3. 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.

34.1.4. ESCO and its Subcontractors performing city work shall, upon request of PEA or the City, file with the Office of Labor Standards 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.

34.1.5. 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.

34.1.6. 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.

34.1.7. 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 Office of Labor Standards 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.

34.2. 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 35.

BUSINESS INTEREST IN NORTHERN IRELAND, SUDAN AND IRAN

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

35.1.1. 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

35.1.2. 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;

35.1.3. 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

35.1.4. 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.

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

35.2.1. 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;

35.2.2. 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.

35.2.3. 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

35.2.4. 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.

35.3. 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 36.
BUSINESS, CORPORATE AND SLAVERY ERA INSURANCE DISCLOSURE

36.1. 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.

36.2. 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 Beneficiaries 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 37.
CONTRACTOR INTEGRITY PROVISIONS

37.1. For purposes of this Article (Contractor Integrity Provisions), the following definitions shall have the meanings set forth in this Paragraph 37.1.

37.1.1. 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 Beneficiaries.

37.1.2. 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 Beneficiaries shall be deemed to have consented by virtue of execution of this Contract.

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

37.1.4. Financial interest means:

37.1.4.1. Ownership of more than a five percent (5%) interest in any business.

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

37.1.4.3. 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.

37.2. 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.

37.3. 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 Beneficiaries or their agents or other contractors in the course of performing this contract remains the property of the respective Beneficiary, and the Contractor may only make use of such information for purposes of performing its obligations under this Contract.

37.4. Contractor shall not, in connection with this or any other contract with PEA or the Beneficiaries, 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 Beneficiaries.

37.5. Contractor shall not, in connection with this or any other Contract with the Beneficiaries, 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.

37.6. Except with the consent of the Beneficiaries, 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.

37.7. Except with the consent of the Beneficiaries, the Contractor shall not have a financial interest in any other contractor, subcontractor, or supplier providing services,

labor, or material on this Project.

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

37.9. 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.

37.10. 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.

37.11. 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:

37.11.1. 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.

37.11.2. 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.

37.11.3. 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.

37.12. 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 Beneficiaries 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 anyone shall not preclude the use of all or any other. These rights and remedies are in addition to those PEA or the Beneficiaries may have under the law, statute, regulation, or otherwise.

ARTICLE 38. ESCO RESPONSIBILITY PROVISIONS

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

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

38.3. 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 39. THE AMERICANS WITH DISABILITIES ACT

39.1. 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:

39.1.1. the ESCO;

39.1.2. the benefits, services, activities, facilities and programs provided in connection with the Contract; and

39.1.3. 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.

39.2. 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 39.1 above.

ARTICLE 40. GENERAL PERFORMANCE REQUIREMENTS

40.1. 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 harm the structural integrity of the Facilities and their operating systems and so as to conform to the standards set forth in **Schedule L (Operation Standards)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. PEA reserves 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 Beneficiaries, the structural integrity of the Facilities 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.

40.2. 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 Beneficiaries relieve the ESCO of any liability or responsibility under this Contract, it being ultimately understood that PEA is relying upon the ESCO's skill, knowledge, and professional training and experience to complete the Work.

40.3. 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 included in the Facilities or adjacent thereto.

40.4. 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 Beneficiaries.

ARTICLE 41. 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 42.
SALES AND USE TAX; FEDERAL EXCISE TAX

42.1. The Beneficiaries are not subject to federal, state or local sales or use tax or federal excise tax. If ESCO bills PEA federal, state or local sales or use tax, and PEA pays such billings, then ESCO hereby assigns to PEA 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 PEA, shall not file a claim for any sales or use tax refund subject to this assignment. The ESCO authorizes PEA, 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 PEA for or otherwise pass-through to PEA for payment any Federal Excise Tax paid in connection with the work under this Contract; in consideration of the ESCO's foregoing covenant, PEA 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.

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

ARTICLE 43.
AUDITS; INSPECTION RIGHTS; RECORDS

43.1. 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.

43.2. 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, of 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.

43.3. 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 Beneficiaries 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 Beneficiaries, 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 Beneficiaries, 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 Beneficiaries' consent.

43.4. 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 PEA or either Beneficiary (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 Beneficiaries.

**ARTICLE 44.
COVENANT OF QUIET ENJOYMENT**

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

**ARTICLE 45.
RIGHT-TO-KNOW LAW**

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

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

45.3. Upon notification from the City or PEA (the "**Requestee**") that the Requestee 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 Requestee to provide input on the release of the requested information and such other records and assistance as the Requestee 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 Requestee 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.

45.4. The Requestee'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.

45.5. The Requestee 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 City Office of Open Records, PEA's RTKL Policy or as otherwise provided by the RTKL if a fee schedule is inapplicable.

45.6. 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 Requestee'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 46.

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:

[ESCO]

IF TO PEA:

Philadelphia Energy Authority
30 S.15th Street
Suite 801
Philadelphia, PA 19102
Attention: President

IF TO THE CITY/PWD:

Philadelphia Water Department

With Copies To:

Office of Sustainability, Municipal
Energy Office
One Parkway Building
1515 Arch Street, 18th Floor
Philadelphia, PA 19102

Attention: Deputy Director, Municipal
Services

City of Philadelphia Law Department
Aramark Tower
1101 Market Street, 5th Floor
Philadelphia, PA 19107
Attention: Divisional Deputy City Solicitor

IF TO PGW

ARTICLE 47.
ECONOMIC OPPORTUNITY PLAN

47.1. 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.

47.2. 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).

47.3. 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)**.

47.4. 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.

47.5. 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.

47.6. 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.

47.7. 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 PEA or 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 PEA or 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 the City 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:

47.7.1. Withhold payment(s) or any part thereof until corrective action is taken.

47.7.2. Terminate the Contract, in whole or in part.

47.7.3. 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.

47.7.4. 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.

47.8. 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.

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

47.10. 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 48.

APPROVALS BY PEA AND THE BENEFICIARIES; ENFORCEMENT BY PEA AND THE BENEFICIARIES

48.1. Approval Not a Guarantee or Warranty. PEA and the Beneficiaries' 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 Beneficiaries 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.

48.2. Approvals Under Applicable Law. No consent, approval, or agreement of PEA or the Beneficiaries 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.

48.3. Actions by PEA or the Beneficiaries in a Ministerial Capacity. In exercising rights or taking actions under Paragraphs 7.3(a) and (b), 10.8, 10.14, and 47.7 and Article 19, the City is acting in a ministerial capacity, not as a party to this contract, and neither the Beneficiaries nor PEA shall have any liability under this Contract for any action or failure to act under those provisions. In exercising rights or taking actions under Article 45, PEA and the Beneficiaries are each acting in a ministerial capacity, not as a party to this contract, and neither the Beneficiaries nor PEA shall have any liability under this Contract for any action or failure to act under those provisions.

ARTICLE 49. MISCELLANEOUS PROVISIONS

49.1. 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).

49.2. 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.

49.3. 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.

49.4. 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.

49.5. 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.

49.6. 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.

49.7. 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.

49.8. 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.

49.9. Third Party Beneficiaries. The parties acknowledge that the Beneficiaries are intended third-party beneficiaries of the Contract; provided, however, that the Beneficiaries shall have no rights or remedies available to them 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 Beneficiaries, 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.

49.10. No Beneficiaries' Liability. The Beneficiaries' status as third-party beneficiaries does not confer on ESCO any rights under this Contract against the Beneficiaries. Specifically, while the Contract sets forth certain actions expected to be performed by the Beneficiaries, and failure to take such actions may constitute a default under the Contract, ESCO's sole recourse for any failure by the Beneficiaries is against PEA, which is responsible hereunder for the complete performance of (or compliance with, as applicable) any terms and conditions which it is required to cause the Beneficiaries to perform or comply with hereunder.

49.11. 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.

49.12. Torts Claim Act. Nothing in this Agreement shall waive or be construed to waive or amend, or be deemed to waive or amend, any tort immunity which the PEA or Beneficiaries, or their officials, members, officers, agents, employees or representatives, may have under Title 42, Chapter 85 of the Pennsylvania Consolidated Statutes Annotated, as applicable, or other Applicable Law.

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.

AUTHORITY

PHILADELPHIA ENERGY

Name: Emily Schapira
Title: President & CEO

[ESCO]

Name:

Title:

Fed. Identification No. _____