

## Contracts+ Document Submittal Requirements

**Important Note: Delete this page from the Main Document prior to submitting the contract to the Internal Review Round.**

### **Construction Contract Award**

REMINDER: The following documents must be submitted as PDF unless otherwise noted for each Division of Work before contract review can begin. After document reviews are completed by UOCP, an Award posting on the Procurement Bulletin will be requested. A reminder that CEI Review and PPB Waiver will be issued no sooner than on the 15th calendar day after the Award has been published on the Bulletin.

- IPG Form A, Form B, or the submitted CPO Financial Disclosure Affidavit
- Bid Tabs for each Division of Work in Excel
- Attachment B for each Division of Work
- Signed Bid Tab
- Bid Award Summary for each division of work
- PSC Bid Evaluation/Recommendation Letter
- Conflict of Interest Review & Acceptance, if applicable
- Single Bid Justification(s) and Request for Approval, if applicable

## Energy Services Agreement

This Energy Services Agreement, (the "Agreement" or "ESA"), made and entered into in the city of [[ Agreement Location ]], state of Illinois, as of the last signature of the parties hereto, including on any schedules, by and between [[ Name (Primary Second Party) ]], [[ Street Line 1 (Primary Second Party) ]], [[ City/Town (Primary Second Party) ]], [[ State/Province (Primary Second Party) ]], [[ Postal Code (Primary Second Party) ]], (the "ESCO"), a [[ ESCO - Legal Structure ]], under the laws of the state of [[ ESCO - Laws of the State of ]] whose registered agent in Illinois is [[ ESCO - Registered Agent Name ]], [[ ESCO - Registered Agent Address ]], [[ ESCO - Registered Agent City ]], [[ ESCO - Registered Agent State Code ]], [[ ESCO - Registered Agent Zip Code ]], and the Board of Trustees of the University of Illinois, a body corporate and politic of the State of Illinois (the "Owner"), for the purpose of providing energy conservation measures (ECMs), consisting of services, systems and facilities designed to reduce energy consumption in buildings located #LOCATION#, owned and operated by the Owner which are referred to herein as the "Facility". The Owner and the ESCO are also referred to herein as the "Party" or "Parties" as appropriate.

**Whereas**, the ESCO was selected by the Owner as a qualified provider to provide professional services which will result in decreased energy consumption and guaranteed energy savings, which services may include, but are not limited to, the following: energy use analysis, the design and delivery of ECMs which consist of systems and devices to be installed and maintained on the Facility, the training of designated Owner employees, and the maintenance and monitoring of the ECMs as provided herein, and measurement, reporting and verification of energy savings; and

**Whereas**, under separate agreement with the Owner, the ESCO has performed a comprehensive energy use and energy savings analysis and has prepared an energy analysis report; and

**Whereas**, the Owner desires to retain the ESCO to provide certain ECMs and services for the purpose of achieving energy cost savings within the Facility, as more fully set forth herein; and

**Whereas**, the ESCO has agreed to guarantee a level of energy savings to be achieved as the result of the professional services to be provided under this Agreement sufficient to pay for all costs related to the ECMs including compensation to the ESCO as provided herein; and

**Now, therefore**, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, the Owner and the ESCO hereby covenant and agree as follows:

### ARTICLE 1: THE ESCO'S RIGHTS AND RESPONSIBILITIES

- 1.1 Independent ESCO Status. The ESCO is an independent ESCO and in providing its services under this Agreement, shall not represent to any third party that its authority is greater than that granted to it under the terms of this Agreement.
- 1.2 Legal Responsibility. The ESCO shall perform, or cause to be performed, the work and all other services required by this Agreement. The ESCO shall assure that all of the work is accomplished in a workmanlike manner and that all services which require the exercise of professional skills or judgment shall be accomplished by professionals qualified and competent in the applicable discipline and appropriately licensed in the State of Illinois, if required by law. All project documents which are required to be prepared by the ESCO shall be in accord with all applicable codes, standards and regulations and shall be prepared by qualified personnel. Where required by Illinois law, project documents shall bear the stamp or seal of architects or engineers licensed in the state of Illinois. The

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 Agreement.

If the ESCO fails to comply with the foregoing standards, the ESCO shall perform again, at its own expense, any and all work required to be reperformed as a direct or indirect result of such failure. Owner reserves the right to withhold payments from the ESCO for all or a portion of the costs associated with change orders and/or additional work required to address errors, omissions or negligent acts of the ESCO. Any review, approval, acceptance or payment for any and all of the ESCO's performance by the Owner shall not relieve the ESCO of its responsibility for the professional and technical accuracy of its performance. This provision in no way limits the Owner's rights against the ESCO either under this Agreement in law or in equity. Consequential damages, including any delay of work or damages incurred by other parties due to errors and omissions may be included in the recovery.

1.3 Standards of Comfort. The Owner shall be responsible for maintaining the levels of comfort and service for each building as set forth in Schedule I after substantial completion. During construction however, ESCO and Owner shall coordinate equipment operation to maintain standards of comfort in spaces deemed critical by the Owner and defined as those spaces that cannot tolerate a large or prolonged deviation from the standards of comfort. Examples of critical spaces are research laboratories in which there are active experiments, animal labs, and laser labs. When standards of comfort cannot be maintained in critical spaces while the main equipment is shut down, ESCO shall provide other means to maintain standards of comfort.

1.4 Insurance.

General Considerations. The ESCO shall purchase and maintain insurance coverage of the types, in the amounts and for the periods specified in Schedule Q and subsequent to the acceptance date described in Section 4.3 hereof, the Owner shall be responsible for providing insurance coverage on the commissioned ECMs.

The ESCO shall provide evidence of all required insurance policies in accordance with the provisions of this Agreement and Schedule Q attached hereto and made a part hereof. The ESCO may not commence performance of the work or other services under this Agreement until all required insurance is obtained and evidence of it is received and approved by the Owner as described in this Agreement. The failure of the Owner to obtain such evidence from the ESCO before permitting the ESCO to commence the work shall not be deemed to be a waiver by the Owner, and the ESCO shall remain under a continuing obligation to obtain and maintain the required coverage and to supply evidence of coverage in accordance with this section.

The ESCO's failure to obtain or keep such insurance in force shall constitute an Event of Default under this Agreement within the meaning of Article 11, and in addition to the remedies provided therein, the Owner reserves the right to stop the work until evidence of the requisite coverage is provided. The ESCO shall require all subcontractors performing any portion of the work to carry the insurance required in this section and the ESCO may, at its option, provide the coverage for any or all subcontractors, and, if so, the evidence of insurance submitted shall so stipulate. The ESCO and each of its subcontractors agree that each insurer shall waive its rights of subrogation against the Owner.

The ESCO shall timely renew the required insurance as necessary to keep such coverage in effect for the periods required in Schedule Q and shall supply the Owner, not less than thirty (30) calendar days prior to any expiration or renewal dates for such insurance policies, with evidence of all required insurance including updated replacement Certificates of Insurance and amendatory riders or endorsements that clearly evidence the continuation of all coverage in the same manner, limits of protection, and scope of coverage, as provided by the Certificates of Insurance, amendatory riders or endorsements originally supplied.

The ESCO expressly understands and agrees that any insurance protection furnished by the ESCO hereunder shall in no way limit its responsibility to indemnify and save harmless the Owner under the provisions of this Agreement. ESCO expressly understands and agrees that any insurance protection required by this Agreement shall in no way limit its responsibilities or liabilities or serve as a limit in recovery for any and all losses, demands, obligations, costs, damages, liabilities, suits, actions, judgments, claims and expenses, including, but not limited to, attorneys', consultants', and experts' fees and expenses, and including both litigation and pre-litigation expenses.

- 1.5 Performance Bond and Labor and Material Payment Bonds. The ESCO shall deliver with the ESA to the Owner a Performance Bond and a Labor and Material Payment Bond on a form provided by or acceptable to the Owner, securing its obligations to be performed under this Agreement until the acceptance of the work by the Owner. Each bond shall be in the amount of the project for which it is attained.

Effective immediately after, a Maintenance Bond will be provided for the one-year period commencing on the date of the Owner's Final Acceptance of the Project in the amount of ten percent (10%) of the total Contract Price. Notwithstanding any other provision of this Agreement or the Bonds, in no event and in no manner shall coverage under the Performance Bond and Payment Bond extend to any Energy Savings Guarantee, as set forth in Section 3.3 or Schedule B Energy Savings Guarantee, or any related provisions.

- 1.6 Cooperation with the Owner's Consultants. The Owner reserves the right to designate authorized representatives or to retain consultants at its expense, including an architect/engineer, to act on its behalf with respect to administering the performance required under this Agreement throughout its term. The Owner and its representatives and consultants shall at all times have access to the work. The ESCO agrees to cooperate with any representative of, or consultant retained by, the Owner.
- 1.7 Joint and Several Liability. Each and every obligation or undertaking herein to be fulfilled or performed by the ESCO shall be the joint and several obligation of the ESCO and its successors or assigns.
- 1.8 Miscellaneous. Other rights and responsibilities of the ESCO are set forth throughout this Agreement and in the Project Documents described in Section 3.5 hereof and are included under other titles, articles, sections and headings for convenience. It is the responsibility of the ESCO to familiarize itself with all provisions of this Agreement and the Project Documents in order to understand fully the entirety of its rights and responsibilities hereunder.
- 1.9 Submittals.

1.9.1 ECMs submittals shall provide sufficient detail to allow the Owner to complete the reviews described in Section 2.2.2, and shall include drawings, plans, specifications, shop drawings, product data, and where appropriate or reasonably required, product samples and calculations.

1.9.2 All design and supporting submittals shall meet Illinois Energy Code.

## **ARTICLE 2: THE OWNER'S RIGHTS AND RESPONSIBILITIES**

### **2.1 Project Administration.**

Owner Responsibility. The Owner shall be primarily responsible for monitoring the performance of the work by the ESCO and project coordination with Owner functions. The Owner's Project Manager shall be the principal point of contact between the Owner and the ESCO relative to the performance required under this Agreement.

### **2.2 Responsibilities of the Owner.** Tasks to be performed by the Owner in the administration and coordination of this Agreement include, but are not limited to the following areas:

2.2.1 Review and approve required insurance coverage and bonds within ten (10) business days following receipt of such documents by the Owner to ensure compliance with the terms of this Agreement;

2.2.2 Review and approve the ECM submittals required under Section 2.3 hereof within ten (10) business days after receipt by the Owner of such ECM submittals to ensure:

2.2.2.1 That the design and installation of the ECMs is adequately described and illustrated;

2.2.2.2 That the design and installation of the ECMs is consistent with current and known future capital projects at the Facility; and

2.2.3 Review and approve all submittals required under Article 7 herein, in accordance with the timeframes set forth in said Article and as necessary relative to determining Substantial and Final Completion;

2.2.4 Review and approve requests for change orders submitted by the ESCO in accordance with the provisions of Section 5.10.1 hereof; and

2.2.5 Attend project meetings.

### **2.3 ECMs Submittals.** ECMs submittals shall provide sufficient detail to allow the Owner to complete the reviews described in Section 2.2.2, and shall include: drawings, plans, specifications, shop drawings, product data, and where appropriate or reasonably required, product samples.

At the request of the Owner, and where appropriate or reasonably required, the ESCO shall provide on-site "mock-ups" and demonstrations of the ECMs at the Facility which shall also be construed as ECM submittals under the provisions of this paragraph.

2.3.1 Submittals shall include:

- 2.3.1.1 Date and revision dates;
- 2.3.1.2 Project number and title;
- 2.3.1.3 Names, as applicable, of the Owner representatives, subcontractor, sub-subcontractor, supplier, manufacturer or detailer;
- 2.3.1.4 Identification of product or material;
- 2.3.1.5 Relation to adjacent structure or material;
- 2.3.1.6 Field dimensions, clearly identified;
- 2.3.1.7 Specification page and number;
- 2.3.1.8 Specified standards, such as ASTM or ANSI;
- 2.3.1.9 Identification of previously approved deviation from Project documents;
- 2.3.1.10 Stamp or seal of the preparer of the ECM submittal, in accordance with Section 3.5.1, and the ESCO's certification that it has reviewed and approved the submittal as to its accuracy and compliance with the provisions of this Agreement; and
- 2.3.1.11 Drawings, plans, specifications, shop drawings, product data, and where appropriate or reasonably required, product samples.

Within ten (10) business days of receipt of the submittals, the Owner shall complete its review of the submittals and provide written approval of the submittal or if the submittal has not been approved, written explanation as to the reason therefore. The ESCO shall submit a revised submittal within ten (10) business days to the Owner for review and approval and the Owner shall have ten (10) business days from receipt thereof to complete its review of the revised submittal. The ESCO shall be responsible for any delays caused by rejection of incomplete or inadequate submittals. The ESCO may not commence any of the work which requires the submittals without written approval by the Owner.

The ESCO's responsibility for errors, omissions, deviation from existing conditions, or deviation from the Project Documents in submittals is not relieved by the Owner's review and approval thereof.

2.4 Delivery of Submittals. The ESCO shall deliver all submittals required by this Agreement, as well as any related correspondence or notices, to the Owner Project Manager, or as designated by the Owner Project Manager.

2.5 Drawings, Specifications and Surveys Provided by the Owner.

2.5.1 The Owner shall make available for review by the ESCO, any of its working drawings and specifications concerning the Facility which are available to the Owner and which are reasonably necessary for the execution of the work.

- 2.5.2 The Owner shall provide the ESCO with such surveys as it may have describing the physical characteristics, legal limitations and utility locations for the site of the work.
- 2.5.3 The Owner shall make available for review by the ESCO such working drawings, specifications, surveys and "As-Built" drawings concerning the Facility which are available and which relate to work being performed by other companies at the Facility.
- 2.5.4 All drawings, specifications, surveys and copies thereof furnished by the Owner are and shall remain Owner property. All "As-Built" drawings prepared under this Agreement, are and shall remain Owner property. With the exception of one set of such drawings, specifications, surveys and "As-Built" drawings for each party hereto, such drawings, specifications, surveys and "As-Built" drawings are to be returned or suitably accounted for to the Owner on request at the completion of the work.
- 2.5.5 Owner shall have the right to review, comment and approve all design and construction documents developed for the project. Formal reviews shall be held at completion of Schematic Design, Design Development, 50% Construction Documents and at 100% Construction Documents. The Owner shall require a minimum of two (2) weeks for each review cycle.
- 2.6 Ownership, Dissemination and Publication of Documents. The drawings, specifications, reports, renderings, models, electronic media and all such other documents to be prepared and furnished by the ESCO pursuant to this Agreement, shall be the property of the Owner and the Owner shall have a license to use any copyrighted material contained in such documents. All documents listed above may be issued for informational purposes by the Owner without additional compensation to the ESCO.
- 2.7 Interpretation of Agreement. The Owner shall have the authority to determine questions of fact that arise in relation to the interpretation of this Agreement and the ESCO's performance hereunder. Unless the Parties agree otherwise, or the work cannot be continued without a resolution of the question of fact, such determinations shall not be cause for delay of the work. The ESCO shall proceed diligently with the performance of this Agreement and in accordance with the Owner's decision whether or not the ESCO or anyone else has an active claim pending. Continuation of the work shall not be construed as a waiver of any rights accruing to the ESCO.

### **ARTICLE 3: THE ENERGY CONSERVATION PROJECT (THE "PROJECT")**

- 3.1 Project Defined. The ESCO shall complete design, as necessary, procure, fabricate and install the ECMs specified in Schedule A and provide training, commissioning, monitoring and all other services specified in this Agreement and the Project Documents set forth in Section 3.5 at the Facility described in Schedule D.
- 3.2 Energy Audit Report. The Energy Audit Report prepared by the ESCO and accepted by the Owner contains specific recommendations and documentation, including design documentation, concerning the ECMs, systems and services to be provided at the Facility and is incorporated herein by reference. Notwithstanding, the provisions of this Agreement and the Schedules referenced in Section 3.5 shall govern in the event of any inconsistencies between the Energy Audit Report and the provisions of this Agreement.

3.3 Energy Savings Guarantee. The ESCO has formulated and guaranteed the level of energy and operating cost savings which shall be achieved as a result of the performance by the ESCO of the services specified in this Agreement utilizing the Savings Calculation Methodology set forth in Schedule B. The ESCO has structured the Energy Savings Guarantee so as to be sufficient to cover, from the Acceptance Date to the #20<sup>th</sup># anniversary of the Acceptance Date:

3.3.1 any and all payments required to be made by the Owner pursuant to Section 6.1 and Schedule C hereof, and

3.3.2 any and all fees to be paid by the Owner to the ESCO for monitoring and training services to be provided by the ESCO pursuant to Section 6.2 and Schedule C.

3.4 Annual Review and Reimbursement. Energy savings achieved at the Facility shall be reported, reconciled and verified pursuant to the provisions of Schedule B. If said annual review, reconciliation and verification of energy savings discloses that the ESCO has failed to achieve the annual guaranteed energy savings and operating cost savings set forth in Schedule B, the ESCO shall pay the Owner or the Owner's designee, as may be directed by the Owner, the difference between the annual amount guaranteed and the amount of actual annual energy and operating cost savings achieved at the Facility. The ESCO shall remit such payments to the Owner within thirty (30) calendar days of written demand therefore by the Owner. The Owner has the right to perform independent analysis of energy savings to recover shortfalls from guarantees stated in Schedule. Recovery of energy savings shall be reconciled with the ESCO energy savings findings.

3.5 Project Documents. The Project Documents include (this list is non-inclusive):

- Owner's [[ Energy Services RFP Number ]] and phase II for [[ Project Name (FCPWeb Name Preferred) ]] [[ Capital Project Number (FCPWeb Project # Preferred) ]];
- ESCO's response to [[ Energy Services RFP Number ]] and phase II for [[ Project Name (FCPWeb Name Preferred) ]] [[ Capital Project Number (FCPWeb Project # Preferred) ]];
- The Energy Audit Agreement (EAA) between Owner and ESCO;
- All written correspondence between Owner and ESCO regarding [[ Energy Services RFP Number ]] and phase II for [[ Project Name (FCPWeb Name Preferred) ]] [[ Capital Project Number (FCPWeb Project # Preferred) ]];
- The executed ESA;
- The Energy Audit Report dated #DATE#;
- ESCO's submittals specified in Article 2 and Article 7;
- Certificates of Insurance;
- Executed Performance Bond and Labor and Material Payment Bond;
- Approved Change Orders; and
- Drawings, Specifications and Surveys furnished by the Owner in accordance with Article 2

The Project Documents also include the following Schedules which are incorporated herein and made a part of this ESA when approved by the Owner and ESCO:

- Schedule A ECMs to be Installed;
- Schedule B Energy Savings Guarantee and Savings Calculation Methodology;
- Schedule C Compensation to ESCO;



- Schedule D Facility;
- Schedule E Calculation of Baseline;
- Schedule F Financing Agreement;
- Schedule G ESCO Maintenance Responsibilities;
- Schedule H Owner Maintenance Responsibilities;
- Schedule I Operating Parameters for ECMs/Standards of Comfort and Service;
- Schedule J ESCO Training Responsibilities;
- Schedule K Project Installation Schedule;
- Schedule L Current and Known Future Capital Projects at the Facility;
- Schedule M Pre-Installation Equipment Inventory;
- Schedule N Pre-Existing Service Agreements;
- Schedule O Systems Startup and Commissioning of ECMs;
- Schedule P Working Conditions;
- Schedule Q Insurance and Bonds;
- Schedule R Interim Savings; and
- Schedule S Warranties
- Schedule T Form A, Form B Certifications and Disclosures, or CPO Financial Disclosure Affidavit
- Schedule U Supplemental University of Illinois Certifications
- Schedule V Project Labor Agreement (*Intentionally left blank*)
- Schedule W Subconsultants/Subcontractor Use Summary

The ESCO shall adhere to the guidelines as detailed in the [[ Agreement Location ]] University of Illinois project submittal requirements and design and Campus Building Standards. Project submittal requirements can be found at: <https://fs.illinois.edu/facilities-standards>

Note: For UIC/UIS projects, replace URL. (*help text only*)

Project construction documentation shall follow standard Owner document formats for contracting and construction activities, including the use of Owner's Project Management System as well as Owner 00 70 00 General Conditions and 00 60 00S Standard Forms (as applicable) which can be found at [https://www.uocpres.uillinois.edu/contracts\\_\\_forms/for\\_contractors](https://www.uocpres.uillinois.edu/contracts__forms/for_contractors)

Project scheduling shall be identified using Microsoft Project format.

- 3.5.1 Project Documents Prepared by the ESCO. All Project Documents which are required to be prepared by the ESCO shall be in accord with all applicable codes, standards and regulations and shall be prepared by qualified personnel. Where required by Illinois law, Project Documents shall bear the stamp or seal of architects or engineers licensed in the state of Illinois.
- 3.5.2 Project Documents Furnished by the Owner. Pursuant to Section 2.5, the Owner shall make available for the ESCO's review, inspection, and duplication at ESCO's expense, such Project Documents as it may possess which relate to any work being performed by other companies at the Facility under separate Agreements with the Owner unrelated to the ESCO's performance of the work under this Agreement, including but not limited to drawings, specifications, surveys and as-built drawings. The furnishing of such Project Documents by the Owner shall not constitute a warranty as to the accuracy or completeness of such Project Documents.

- 3.5.3 Review of Project Documents. Notification to the Owner. The ESCO shall carefully review all Project Documents, including all addenda, whether prepared by the ESCO, its subcontractors or furnished by the Owner, for errors, inconsistencies or omissions relative to the performance of the work. Upon completion of its review of the Project Documents, and prior to commencing the work, the ESCO shall provide written notice to the Owner that:
- 3.5.3.1 There are no inconsistencies in the Project Documents pertaining to the performance of the work at the Facility; or
- 3.5.3.2 Specifying the nature of any conflicts or inconsistencies noted from the ESCO's review of the Project Documents. All work to be performed under this Agreement by the ESCO or its subcontractors which the Project Documents indicate is in conflict with the Project Documents or the work of other Companies performing on the Facility shall be brought to the attention of the Owner before the work is commenced.
- 3.5.4 Correction of Conflicting Work. In the event that the ESCO fails to properly prepare or review Project Documents or commences the work without providing notice to the Owner of any conflict it discovers in the Project Documents, the ESCO shall, upon written direction from the Owner, remove all such work or portion thereof so conflicting, and rebuild it as directed at no additional cost to the Owner, provided that the Project Documents furnished by the Owner have put the ESCO on reasonable notice that an inconsistency, error, conflict or omission existed. Conflicting work which the ESCO did not have notice of by virtue of its reliance on Project Documents furnished by the Owner which were inaccurate or incomplete shall be corrected at the expense of the Owner.

#### **ARTICLE 4: TERMS; INTERIM PERIOD; AND ACCEPTANCE DATE**

- 4.1 Term of Agreement. This Agreement shall take effect as of the execution date hereof and shall end on the #20<sup>th</sup># anniversary of Acceptance Date, unless earlier terminated as provided herein.
- 4.2 Interim Period and Interim Savings. The period from the execution of this Agreement until the Acceptance Date described in Section 4.3 is referred to herein as the "Interim Period". During the Interim Period, the ESCO shall design, procure, fabricate, install and commission the ECMs described in Schedule A in accordance with the provisions of Article 5 hereof and shall provide Interim Period Training in accordance with Sections 7.2, 8.6 and Schedule J. The performance required during the Interim Period shall be substantially completed in accordance with Article 7 and the Project Installation Schedule set forth in Schedule K. The ESCO has identified in Schedule R the amount of energy and operating cost savings which it expects to achieve during the Interim Period as a direct result of its performance of the work, which savings are referred to herein as "Interim Savings." Banking of Interim Savings shall belong to the Owner and ESCO in accordance with Schedule R.
- 4.3 Acceptance Date. The Acceptance Date shall be the date on which the Owner accepts substantial completion. This shall occur after the ESCO submits its notification, as described herein and in Section 7.3.1, and after the Owner has inspected and approved in writing said installation and operation of the ECMs. The ESCO must certify that:
- 4.3.1 It has substantially completed the installation and commissioning and commenced operating all of the ECMs specified in Schedule A;

- 4.3.2 No Event of Default under Article 11 exists; and
- 4.3.3 The Energy Savings Guarantee set forth in Schedule B is in full force and effect.

## **ARTICLE 5: IMPLEMENTATION OF THE ENERGY CONSERVATION PROJECT ("THE WORK")**

### **5.1 Performance of the Work.**

- 5.1.1 Description of the Work. The completion of design, procurement, fabrication, installation and commissioning of the ECMs specified in Schedule A and the Interim Period Training services described in Schedule J, which are integral to the operation of the ECMs, are referred to in this Agreement as the "work". The maintenance and monitoring services detailed in Schedule G and the Post-Acceptance Training services detailed in Schedule J, performance of which does not commence until after the Acceptance Date, are not part of the work. The ESCO shall comply with the provisions of the working conditions set forth in Schedule P at all times during the term of this Agreement.
- 5.1.2 Supervision of the Work. The ESCO shall supervise and direct the performance of the work using its best skill, attention and judgment. The ESCO shall be solely responsible for site safety and for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under this Agreement.
- 5.1.3 Rejection of the Work by the Owner. The Owner may reject any sequences or procedures proposed by the ESCO in connection with the work which might constitute or create a hazard to the Facility, or to persons or property, or which deviate from the Project Documents or shall result in schedule delays or additional costs to the Owner. This provision shall not be construed to mean that work which is not rejected is therefore approved.
- 5.1.4 Responsibility for the Work. The ESCO shall not be relieved of its obligations to perform the work in accordance with the Project Documents by reason of observations or inspections, tests or approvals by any person or entity except as expressly agreed to in writing by an authorized representative of the Owner.
- 5.1.5 Coordination of the Work. In accordance with the working conditions set forth in Schedule P, the ESCO shall consult with the personnel designated by the Owner in order to coordinate the work, including installation of any ECM, and to provide appropriate training in the operation of any ECM. The ESCO shall not permit any act which shall interfere with the performance of the Owner's business activities at the Facility without the prior written approval of the Owner. The ESCO may install no ECM that shall require the hiring of additional personnel by the Owner unless specifically agreed to in writing by the Owner.

The ESCO shall consult with the Owner regarding the coordination of the work with any other work being performed by other Companies at the Facility.

- 5.1.6 Substitutions. If the Owner elects to accept any item(s) proposed by ESCO as a substitution, the ESCO will be expected to assume full responsibility for the proper performance of such substituted item(s) and will be expected to assume the costs of any changes in the Work which may be due to such substitution.

- 5.1.7 Sufficient Workforce. The ESCO shall furnish a competent and adequate staff as necessary for the proper administration, coordination and supervision of the work; organize the procurement of all materials and equipment so that they shall be available at the time they are needed for the work; and ensure that an adequate force of skilled workmen are available to complete the work in accordance with all requirements of this Agreement.
- 5.1.8 Competent Project Manager. The ESCO shall employ a competent project manager who shall be responsible for the coordination of the work, and who shall be authorized to commit the ESCO with regard to manpower, schedule, coordination and cooperation. The project manager shall not have less than two (2) years of documented experience in responsible field supervision for projects of comparable size and complexity. The ESCO shall give the Owner advance written notice if it intends to remove or replace the project manager. In the event the project manager fails to perform its duties under this Agreement the ESCO shall provide a competent replacement. The ESCO project manager will conduct project update meetings with the [[ Agreement Location ]] project manager and other parties as necessary once every two weeks on average.
- 5.1.9 Harm to Structure of the Facility. The ESCO shall perform the work under this Agreement and install the ECMs in such a manner so as not to harm the structural integrity of the Facility or the operating systems, except as specifically described in the Project Documents which have been approved by the Owner. The ESCO shall repair and restore to its condition immediately preceding the performance of the work, any area of damage caused by its performance under this Agreement which has not been so described in the Project Documents and approved by the Owner. The ESCO's failure to complete the repair or restoration required under this Section 5.1.8 shall constitute an Event of Default under Section 11.3 hereof.
- 5.1.10 Responsibility for Damages. The ESCO shall be responsible for all loss or damage to the work, the Facility, or to improvements or personal property thereon and the work of other Companies caused by the ESCO's performance of the work.
- 5.1.11 Laying out the Work. The ESCO shall be responsible for properly and accurately laying out the work, including, where appropriate, the laying out of all lines, levels, elevations and measurements for all of the work to be performed by the ESCO or its subcontractors under this Agreement.
- 5.1.12 Verification of Dimensions and Existing Conditions. The ESCO is responsible for becoming knowledgeable of the conditions of the Facility relating to the performance of the work and the conditions under which the work is to be performed, other than concealed conditions which the ESCO should not have reasonably been expected to discover or anticipate. All dimensions and existing conditions have been verified by the ESCO during the energy analysis conducted at the Facility by actual measurement and observation. All discrepancies between the requirements of the Project Documents and the existing conditions or dimensions shall be reported to the Owner as soon as they are discovered. Failure to verify and report shall constitute the ESCO's acceptance of existing conditions as fit for the proper execution of the work under this Agreement, other than concealed conditions which the ESCO should not have reasonably been expected to discover or anticipate.

5.1.13 Changed Conditions. Should the ESCO encounter subsurface or latent physical conditions at the site which differ materially from those indicated in the Project Documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, the ESCO shall give written notice to the Owner before any such condition is disturbed or further disturbed. No claim of the ESCO under this provision shall be allowed unless the ESCO has given the required notice. The Owner shall promptly investigate and, if it is determined that the conditions materially differ from those which ESCO should reasonably have been expected to discover or anticipate, the Owner shall approve such changes in the Project Documents as may be necessary. If such changed conditions cause an increase or decrease in the ESCO's cost or time of performance, the parties may execute an appropriate change order.

5.1.14 Post-Performance Review. The ESCO's performance will be evaluated on providing satisfactory service. A review may be conducted each year.

## 5.2 Subcontractors

5.2.1 ESCO to Subcontract. The ESCO shall enter into Subcontracts with Subcontractors for the performance of those portions of the resulting Agreement not performed directly by the ESCO. For purposes of this section, "Subcontractors" are those firms or vendors specifically hired to provide the ESCO some or all of the goods and services that are the subject of this Agreement. The ESCO shall, within thirty (30) calendar days after notification of award of the Agreement, notify the Owner in writing of the names of those and any additional Subcontractors proposed for the principal parts of the Work that are not already identified in Schedule W. The ESCO shall simultaneously provide the Owner's Representative with such written information as the Owner deems necessary in order to determine whether to object to the hiring of any Subcontractor, including proof of license. If no objection is interposed by the Owner within seven (7) calendar days of its receipt of such information, the Owner shall be deemed to have no such objection and the ESCO may execute such Subcontract and shall furnish the Owner a copy of same. The ESCO shall not subcontract with any Subcontractor (including affiliates and subsidiaries of Contractor) who is not properly licensed or against whom the Owner has a reasonable objection. The ESCO shall bind every Subcontractor by all of the provisions of the Agreement Documents which are applicable to such Subcontractor's Work unless specifically noted to the contrary in a Subcontract approved in writing by the Owner. The ESCO shall pay the Subcontractor the amount allowed to the ESCO on account of the Subcontractor's work to the extent of the Subcontractor's interest therein, or pay the Subcontractor to such extent as may be provided by the Agreement Documents or the Subcontract, if either of these provides for earlier or larger payments than the above.

5.2.1.1 Vendor Services Application. The ESCO will be required to register with the Owner's Vendor Services Application and will be required to ensure that all subcontractors and subconsultants of the Agreement are also registered in the Owner's Vendor Services Application. The vendor registration module of the Vendor Services Application can be accessed at:

<https://appserv6.admin.uillinois.edu/VendorRegistration/open/VendorSearch.jsp>

- 5.2.2 Related Parties. The ESCO is expected to notify the Owner in writing of the specific nature of any contemplated transaction with any Related Party and any such transaction must be approved in writing by the Owner before the transaction is consummated or costs are incurred. A “Related Party” may include any of the following: a parent, subsidiary or other entity having common ownership or management with the successful proposer; entities in which stockholders in, or management employees of, the successful proposer owns an interest; any person or entity with the right to control the business or affairs of the successful proposer; and any member of the immediate family of any such person. The terms of any such transaction shall conform to the requirements of the Agreement Documents, including, but not limited to, the right to audit books and records pertaining to the Work undertaken by such Related Party, which audit may be undertaken by the Owner or its representatives. All other terms and provisions of any such subcontract are subject to the Owner’s approval. All savings under any such subcontract shall be applied to reduce the Owner’s costs under the Agreement and profit related to the transaction shall not be payable to any such Related Party.
- 5.2.3 Subcontract Requirements. All Subcontracts shall afford the ESCO rights against its Subcontractors which correspond to the rights afforded to the Owner against the ESCO herein, including those rights of Agreement suspension, termination, replacement of unsatisfactory personnel at Owner's request, and documentation of Subcontractor charges as set forth herein. Except as otherwise approved by the Owner in writing, all Subcontracts shall provide for the retention of ten percent (10%) of amounts earned under the Subcontracts (“Subcontract Retainage”), and the Owner shall not be responsible for releasing, paying, or compensating the ESCO any amount on account of such Subcontract Retainage until such time as specified herein.
- 5.2.4 Coordination of the Subcontracts. The Owner shall not assume any responsibility for defining the limits on any Subcontracts on account of the arrangement of the specifications or drawings. As part of the bidding and award of Subcontracts, the ESCO is expected to ensure that the Subcontracts are coordinated so that all of the Work is properly and clearly allocated among, and assigned to, the ESCO and Subcontractors without omission, conflict, or duplication. The ESCO is expected to carefully review all Subcontracts to ensure: (a) that all subcontracted parts of the Work are assigned to appropriate Subcontractors; (b) that, unless provided for by the ESCO, provisions are made for temporary facilities and utilities necessary for the performance of the Work and for Project site facilities necessary for the ESCO and the Owner to perform their duties in the management, inspection, and supervision of the Work; (c) that responsibility for Project safety programs is properly assigned; (d) that they are in compliance with Applicable Laws; and (e) that they are in compliance with Owner’s and ESCO’s guidelines, if any.
- 5.2.5 Competitive Procurement. If directed by the Owner, the ESCO will be expected to use competitive procurement methods in conformance with the Owner’s procurement policies and with any rules and regulations of any governing authority that has jurisdiction over the Project.
- 5.2.6 ESCO Responsible for Acts of Subcontractors. The ESCO’s subcontracting of the Work, and the Owner's consent and approval of subcontracting with any Subcontractor, shall not relieve the ESCO from any liability or obligation under the Agreement Documents or under any Applicable Laws. The ESCO shall be responsible for any and all acts, defaults, omissions or negligence of its Subcontractors and consultants, and shall be and remain liable and obligated to the Owner for all Work subcontracted. No relationship of agency, employment, contract, obligation or otherwise shall be created between the Owner and any Subcontractor or consultant of the ESCO,

and a provision to this effect shall be inserted into all Subcontracts and other agreements between the ESCO and its Subcontractors and consultants. In no event will the Owner be liable to any of the Subcontractors for Work performed by such Subcontractor on behalf of the ESCO or for the Project.

- 5.2.7 Procurement of Special Services. The ESCO will be expected to schedule and coordinate services from surveyors, testing laboratories, and other special consultants required for the completion of the Work.
- 5.2.8 Orders of Materials and Equipment. The ESCO will be expected to schedule, coordinate, expedite, and effect the purchase and delivery to the Project site of materials and equipment required to be provided by the ESCO pursuant to the Agreement Documents. The ESCO will be expected to perform expediting and inspection services after the placement of all such orders.
- 5.2.9 Procurement of Materials and Equipment on Owner’s Behalf. The ESCO will be expected to be responsible for scheduling and coordinating, and if requested by the Owner’s Representative, for purchasing and for arranging appropriate delivery, storage and security for, all materials, furnishings, tools, fixtures, computers, and equipment to be furnished by Owner under the terms of the Agreement Documents for use in performance and completion of the Work. The purchase price and transportation and storage costs associated with such items shall be borne by the Owner.
- 5.2.10 The ESCO shall identify in Schedule W the names and addresses of all subcontractors to be utilized by ESCO in the performance of the Agreement, together with the anticipated amount of money each subcontractor is expected to receive pursuant to the Agreement.
- 5.2.11 The documents and information for the subcontractors listed in Table 1 and as described below must be provided by the Owner to the Chief Procurement Officer for Higher Education.

Table 1: Contracts and Level Descriptions

Contract Type	Level	Contract	Dollar amount
Energy Services Agreement	1	With Owner	All
Subcontractor*	2	With Level 1	> \$50,000
Subcontractors’ Subcontractor*	3 and below	With Level 2 and below	> \$50,000

\* Certifications are required for >\$50,000 and Financial Disclosures are required for >\$100,000

Level 1 ESCO

1. The Form A, Form B Certifications and Disclosures, or the submitted CPO Financial Disclosure Affidavit submitted by the Level 1 ESCO with the bid documents are hereby made a part of this Agreement.
2. The Supplemental University of Illinois Certifications identified in the Statutory Certifications section on the Agreement in addition to the Form A, Form B Certifications and Disclosures, or CPO Financial Disclosure Affidavit are incorporated into this contract. By executing this Agreement, the Level 1 ESCO acknowledges and agrees that it is in compliance with the requirements of Article 50 of the Illinois Procurement Code (30 ILCS 500/50). These requirements remain in effect for the term of the Agreement.

The Level 1 ESCO certifies compliance and is under a continuing obligation to remain in compliance and to immediately report any non-compliance.

It is the responsibility of the Level 1 ESCO to provide the following with respect to each Level subcontracts\* which exceed \$50,000. The forms shall be completed and signed by each Level subcontractor.

- subcontractor(s) name(s)
- address(es)
- subcontract value(s)
- general type(s) of work to be performed
- Form A, Form B, or CPO Financial Disclosure Affidavit
  - Certifications are required for greater than \$50,000.
  - Financial Disclosures are required for greater than \$100,000.

Note: Filling out Form A or Form B will satisfy the above certifications and financial disclosure requirements. However, in circumstances where the contractor has an active contract with the owner and has already vetted their financial disclosures and potential conflicts of interest from that active contract within the last 12 months from the date of contract award on the Illinois Procurement Bulletin, the contractor may submit a signed CPO Financial Disclosure Affidavit attesting that the original submission of its financial disclosures and potential conflicts of interest have not been altered or changed. This affidavit may be used, under the circumstances referenced in 30 ILCS 500/50-35(j), in place of the full Financial Disclosures and Conflicts of Interest form otherwise required by the Procurement Code and will satisfy the certification requirements referenced above.

The Supplemental University of Illinois Certifications identified in the Statutory Certifications section below are to be implemented into all subcontracts on this project.

The documents submitted to the Owner shall be in electronic pdf format and follow the Owner's file naming convention. The forms and file naming convention can be found at:

[https://www.uocpres.uillinois.edu/contracts\\_forms\\_for\\_contractors](https://www.uocpres.uillinois.edu/contracts_forms_for_contractors).

These documents shall be provided to the Owner within fifteen (15) calendar days after the execution of the Agreement or after execution of the subcontract, whichever is later.

The Level 1 ESCO must provide the above information for any Level subcontractors added or changed which results in a contract value exceeding \$50K during the term of the contract.

- 5.2.12 If at any time during the term of the Agreement, the ESCO adds or changes any subconsultants/subcontractors, the ESCO will be required to promptly notify the Owner and identify the firm(s) name(s) and address(es) and the expected amount of money that each new or replaced subconsultant/subcontractor will receive pursuant to the Agreement.
- 5.2.13 Any subconsultant/subcontractor agreements entered into prior to receiving a fully executed copy of the Agreement are done at the ESCO's and subconsultant's/subcontractor's risk.

### 5.3 The Owner's Right to Carry out the Work.



5.3.1 In the event that the ESCO neglects or fails to carry out the work in accordance with this Agreement and the Project Documents, the Owner may correct such deficiencies after giving thirty (30) calendar days written notice to the ESCO and its surety. This shall be without prejudice to any other remedy the Owner may have. Owner may deduct from the payments to be made to the ESCO for the work, pursuant to Section 6.1 hereof and Schedule C, the amount of all costs incurred in correcting deficiencies made necessary by such neglect or failure. If such payments to be made to the ESCO are not sufficient to cover such amount, the ESCO shall be liable in such amount to the Owner.

5.3.2 Emergencies. In case of bona fide emergencies, as determined by the Owner, involving public health or public safety or to protect against further loss or damage to the Owner's property or to prevent or minimize serious disruption of Owner services or to ensure the integrity of Owner's records, the Owner may cause such work as is necessary to be performed without prior notice to the ESCO or its surety.

5.3.3 Right to Reject or Stop the Work. The Owner may reject any of the work which does not conform to the Project Documents. If the ESCO fails to correct defective work or fails to supply labor, materials or equipment in accordance with the Project Documents or to execute the work in a workmanlike manner, the Owner may order the ESCO to stop the work, or any portion thereof, until the cause for such order has been eliminated. Notwithstanding the preceding, the ESCO shall retain exclusive control over all duties and responsibilities.

5.4 Permits and Approvals. The ESCO shall obtain and pay for all necessary permits and approvals for the design and installation of the work.

The ESCO shall furnish copies of each permit or license which is required to perform the work to the Owner before the ESCO commences the portion of the work requiring such permit or license.

If the ESCO observes that any of the Project Documents are at variance with permits or licenses granted, or laws, ordinances, codes, rules or regulations of governmental authorities, the ESCO shall promptly notify the Owner in writing and shall make any necessary changes, subject to the approval thereof by the Owner in accordance with the terms of this Agreement. If the ESCO performs any work which is contrary to any permit or license granted, or any applicable laws, ordinances, codes, rules or regulations, the ESCO shall make changes as required to comply therewith and shall bear all costs arising therefrom without additional compensation from the Owner.

5.5 Taxes. Purchases of materials and equipment for installation at the Facility are not subject to the Illinois Retailer's Occupation and Use Tax (sales tax). Such taxes should not be included in the ESCO's Compensation for the work set forth in Schedule C. The ESCO shall pay all social security and unemployment taxes on its labor. The ESCO shall be responsible for all withholding taxes and any other state or federal requirements in this regard, and the ESCO shall pay all workers' compensation payments in this regard.

5.6 Royalties and Patents. The ESCO shall pay all royalties and license fees due to third parties in connection with the work. The approval of any method of construction, invention, appliance, process, article, device, material or equipment of any kind by the Owner shall only be an approval of its adequacy for the work, and shall not be an approval of the use thereof by the ESCO in violation of any

patents or other rights of any third person. The ESCO shall indemnify the Owner against all suits and claims that may be based on an infringement of patents, trademark or trademark on designs.

5.7 Project Schedule. The ESCO shall consult with the Owner concerning the development of a detailed Project Installation Schedule and, recognizing that time is of the essence of this Agreement, shall perform the work in such manner and with such sufficient equipment and forces to complete the work in accordance with Schedule K.

5.8 Extensions. Extensions of time shall be allowed for delays which affect critical items on the Project Installation Schedule arising from unforeseeable causes beyond the control and without the fault or negligence of the ESCO or of its subcontractors or suppliers, including but not restricted to:

A request for an extension of time must be made in writing to the Owner within fifteen (15) calendar days after the cause of delay. In the case of a continuing cause of delay, only one request is necessary. The grant of an extension of time to the ESCO shall not impair or prejudice the rights of the Owner hereunder.

5.9 Compensation for Delay.

5.9.1 Certain risks and uncertainties in connection with the work are assumed by the ESCO as a part of this Agreement and are included in the ESCO Compensation for the work. Thus, the ESCO, except as otherwise definitely specified herein, shall bear all loss or damage for hindrances or delays, from any cause, during the progress of any portion of the work and also all loss or damage arising out of the nature of the work to be done, or from the action of elements, inclement weather and floods, or from any unforeseen and unexpected conditions or circumstances encountered in connection with the work, and except as otherwise definitely specified in this Agreement, no payment shall be made by the Owner for such loss or damage.

5.9.2 The ESCO shall be entitled to payment from the Owner only for those actual damages, costs or expenses which are directly attributable to delays in the performance of the work which are caused by the Owner.

5.10 Change Orders; Interim Savings; and Utility Rebates.

5.10.1 Change Orders. The Owner may order changes in the work not previously contemplated in the approved discipline, or approve changes in the work not previously contemplated in the approved discipline initiated by the ESCO, consisting of additions, deletions or modifications to the work only as provided herein. The work shall be changed and the ESCO's compensation for the work if contingency does not cover these new costs and the Project Installation Schedule shall be modified only pursuant to a written change order which has been reviewed and approved in writing by the Owner, prior to the commencement of any work which is the subject of the change order.

5.10.2 Change Order Markups for Lump Sum and Time and Materials Changes. The following percentages for overhead and profit shall be added to, or as applicable, deleted from, job costs for the net amount of Work added to or deleted from the contract by written lump sum or time and material Change Orders approved by the Owner in accordance with the General Conditions. Insurance, bond, and taxes are considered as job cost items and are not included in the percentages listed below. In any one quotation for added work involving a series of Subcontractors, the

cumulative percentages for the Contractor's and Subcontractor's overhead and profit shall not exceed twenty-five percent (25%). All costs shall be net costs including discounts realized by the contractor.

Add to the net extra job costs for added Work to be performed by:

- Contractor's own forces 15 %
- Subcontractors 5 %.

Add to the net credit for job costs deleted for Work originally to have been performed by:

- Contractor's own forces 5 %
- Subcontractors 0 %.

5.10.3 Interim Savings. The ESCO has projected the amount of Interim Savings to be realized at the Facility during the Interim Period, as a direct result of the ESCO's performance under this Agreement in Schedule R. The ESCO shall measure the Interim Savings realized from the operation of the ECMs installed by the ESCO during the Interim Period and shall provide a report to the Owner annually, at Substantial Completion and upon final acceptance setting forth the amount of Interim Savings achieved at the Facility. Banking of Interim Savings achieved at the Facility belongs to the Owner and in accordance with Schedule R.

5.10.4 Utility Rebates. Utility rebates secured or obtained due to the installation of the ECMs at the Facility belong to the Owner. Owner may, at its discretion, utilize utility rebates to pay for authorized change orders.

#### 5.11 Hazardous Materials.

5.11.1 The ESCO acknowledges that compliance with the National Emission Standard for Hazardous Air Pollutants as promulgated by the United States Environmental Protection Agency pursuant to Section 112 of the Clean Air Act is a continuing obligation requiring any and all demolition or renovation activity completed by or on behalf of the Owner, to conform to the standards for such activity as set forth in 40 CFR 61.145. The ESCO shall observe all notification procedures established by the United States and Illinois Environmental Protection agencies in the execution of the work under this Agreement.

The pertinent provisions of the Hazardous Substances Construction Disclosure Act, 415 ILCS 70/1, (the "Act") shall apply in the event that the ESCO or any of its subcontractors encounters any hazardous substance or material covered by the Act in the performance of the work, the existence of which has not previously been disclosed to the ESCO by the Owner. The ESCO shall, before disturbing such materials, immediately notify the Owner of the location thereof. The ESCO shall advise the Owner as to whether it is feasible to re-route the work as to avoid such materials. If such re-routing is reasonably feasible, the ESCO shall do so without additional compensation hereunder. If the Owner agrees that additional compensation is required, a change order shall be executed pursuant to Section 5.10.1 hereof.

5.11.2 If such re-routing or avoidance is not reasonably feasible in the judgment of the Owner and such material must be disturbed or relocated to complete the work, and if:

- 5.11.2.1 removal or containment of the hazardous substance or material cannot be effectuated without a cessation of the work; or
- 5.11.2.2 applicable law, rule or regulation requires cessation of the work; or
- 5.11.2.3 continuation of the work exposes any person to a substantial risk.

The ESCO may suspend its performance of the work without penalty until the substance or material is removed or contained by the Owner.

5.11.3 The following options are available to the Owner in the event that undisclosed hazardous materials are encountered in the performance of the work by the ESCO or its subcontractors:

- 5.11.3.1 If feasible, the Owner may direct the ESCO to modify the scope of the work to eliminate portions of the work affected by the undisclosed hazardous substance or material. If an acceptable modification is proposed by the ESCO, the parties shall execute a change order pursuant to Section 5.10.1; or
- 5.11.3.2 The Owner may terminate this Agreement upon payment to the ESCO of the amount due for services or materials and equipment supplied by the ESCO prior to suspension of the work, including damages caused by the delay as prescribed by the Act. Provided, however, that the Owner shall not be liable for damages or other costs or expenses incurred by the ESCO if the existence of the hazardous substance or material was disclosed to the ESCO by the Owner or, if as a result of the ESCO's review of the Project Documents, including any Asbestos Management Plan developed for the Facility and its investigation of the Facility, the ESCO should reasonably have been expected to discover or anticipate the existence of the hazardous substance or material and the ESCO could have developed the scope of the work in such a manner as to avoid said hazardous substance or material.

5.11.4 The ESCO and the Owner agree that any unforeseen or undiscovered work (e.g. not identified in original project scope by ESCO/Owner) relating to:

- 5.11.4.1 asbestos, material containing asbestos, or the existence, use, detection, removal, containment or treatment thereof; or
- 5.11.4.2 pollutants, hazardous wastes, hazardous materials, contaminants (collectively "Hazardous Materials") or the storage, handling, use, transportation, treatment or the disposal, discharge, leakage, detection removal or containment thereof which is not specifically provided for in this Agreement or through an approved change order;

is the responsibility of the Owner. Notwithstanding the foregoing, the ESCO shall utilize due diligence in order to determine whether the work shall require the removal of PCB ballasts and whether asbestos is likely to be encountered in the performance of the work. The ESCO shall provide the Owner with an estimate for the cost of removal and disposition of PCB ballasts and asbestos it expects may be encountered in the performance of the work and shall allow for an amount equal to the estimated cost of removal and disposal in the Guaranteed Savings detailed in Schedule B.

An Asbestos Management Plan has been developed for the Facility. The Owner shall make said plan available for the ESCO's review and inspection, through substantial completion.

5.12 Material and Workmanship.

5.12.1 The ESCO shall ensure that all materials used by the ESCO and its subcontractors and workmanship performed or caused to be performed by the ESCO in connection with the work meets or exceeds all applicable codes. Where conflicts exist between applicable codes, the more stringent provision shall apply.

5.12.2 The ESCO shall ensure that all equipment and materials to be used in the work for which Underwriters Laboratory labeling services is provided shall be UL labeled.

5.12.3 The ESCO shall ensure the work conforms to all applicable codes including but not limited to:

5.12.3.1 Applicable construction and electrical code;

5.12.3.2 Underwriters Laboratories (UL);

5.12.3.3 Insulated Power Cable Engineers Association (IPCEA);

5.12.3.4 National Fire Protection Association (NFPA);

5.12.3.5 American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE);

5.12.3.6 National Electrical Manufacturers Association (NEMA);

5.12.3.7 American National Standards Institute (ANSI);

5.12.3.8 Institute of Electrical and Electronic Engineers (IEEE); and

5.12.3.9 The Building Industry Consulting Services International (BICSI).

5.12.4 The ESCO shall advise the Owner in writing in a timely manner of all existing equipment and materials to be replaced at the Facility as part of the work and the Owner shall within thirty (30) calendar days designate in writing to the ESCO the equipment and materials which should not be disposed of off-site by the ESCO. The ESCO shall be responsible for the disposal of all equipment and materials removed or replaced through its performance of the work in accordance with all applicable laws and regulations regarding such disposal, except those items designated by the Owner as nondisposable. The cost of disposal to be performed by the ESCO is included in the ESCO compensation for the work set forth in Schedule C.

5.13 Warranty of Materials. The ESCO warrants that all materials and equipment installed as part of the work shall be new unless otherwise specified, and that all work shall be of good quality, free from faults and defects and in conformance with the Project Documents. All work not so conforming to these requirements may be considered defective. Defective work shall be replaced by the ESCO at the

ESCO's expense at the request of the Owner during the term of the warranty period. This warranty is not limited by the provisions of Section 8.1 herein. This warranty of materials, equipment and workmanship is separate from, independent of, and in addition to any other guarantees in this Agreement or any other warranties in this Agreement or required by the Project Documents.

- 5.14 Responsibility for Materials. The Owner does not assume any responsibility for the suitability or availability of any controlled materials or other materials and equipment required for the work. The ESCO shall be responsible for the contracted quality and standards of all materials, components or completed work furnished by the ESCO pursuant to the terms hereof. Materials, components or completed work which fails to comply with this Agreement and the Project Documents may be rejected by the Owner during the term of this agreement and shall be replaced by the ESCO at no cost to the Owner. The ESCO shall remove from the Facility within a reasonable time any materials or components so rejected at the entire expense of the ESCO, after written notice has been delivered by the Owner to the ESCO that such materials or components have been rejected.
- 5.15 Inspections.
- 5.15.1 All materials and equipment and each part of the detail of the work shall be subject at all times to inspection by the Owner or its designated representatives or consultants, and the ESCO shall be held strictly to the true intent of this Agreement and the Project Documents with regard to quality of materials, workmanship, and the diligent execution of the work.
- 5.15.2 The ESCO shall allow the Owner access to all parts of the work, and shall furnish such information and assistance as is required to make a complete and detailed inspection or inspections.
- 5.15.3 When requested by the Owner, material and equipment installed as part of the work must be inspected, tested and approved in accordance with the Project Documents and this Agreement prior to its use.
- 5.15.4 The ESCO shall, if the Owner requests, remove or uncover such portions of the finished work as the Owner may direct. After the examination, the ESCO shall restore said portion of the work to the standard required by this Agreement and the Project Documents. If the work thus exposed or examined proves acceptable, the expenses of uncovering or removing and the replacing of the parts removed shall be the responsibility of the Owner and such uncovering, removing and replacing shall be deemed to be an excusable event of delay, if a delay in completion is caused thereby. If the work so exposed or examined has not been performed in accordance with the Project Documents, the expense of uncovering, removing and replacing any portion of the work necessary to comply with this Agreement and the Project Documents shall be borne by the ESCO and requests for a time extension or claims for delay shall not be granted.
- 5.15.5 Upon written request by the ESCO, the Owner shall schedule preliminary inspections of the work as soon as practicable after notification by the ESCO that major ECMs or systems are substantially installed. If such work is not acceptable to the Owner at the time of such preliminary inspections, the ESCO shall be provided written notice as to the particular defects to be remedied before the work shall be accepted. The date such work is approved by the Owner, shall be the date of beneficial use to the Owner for the applicable ECM, relative to the commencement of the warranty period set forth in Schedule S for such ECM.

Notwithstanding the foregoing, the Acceptance Certificate shall not be executed until the Substantial Completion Inspection has been performed and the Substantial Completion package has been processed pursuant to Section 7.3.4 for all ECMs.

- 5.16 Project Meetings. The ESCO shall provide for regularly scheduled project meetings in the Project Installation Schedule, and shall give timely advance written notice and agenda of such meetings to the Owner. The ESCO shall record minutes and distribute copies of minutes of meetings to the Owner within five (5) business days after each meeting. The ESCO shall schedule additional project meetings if requested by the Owner.
- 5.17 Assignment(s) of Claims. The Owner shall not be bound by any Assignment(s) by the ESCO to third parties of moneys due or to become due or of any other claims it may have under this Agreement except where the Owner consents in writing to be so bound.
- 5.18 Claims and Disputes. The ESCO shall promptly notify the Owner in writing of any claims or disputes relating to the work. Failure to notify the Owner in such instances may result in rejection of any such claim.

## **ARTICLE 6: ESCO COMPENSATION**

- 6.1 ESCO Compensation for the Work. Payments to the ESCO for the work shall be made by the Owner in the amounts and in accordance with Schedule C hereto. The amount specified as Compensation for the work including monthly progress payments requested during the installation period is inclusive of all costs and fees to be paid for the work pursuant to this Agreement including interim period training services.
- 6.2 Maintenance, Monitoring and Training Fees. Payment to the ESCO for maintenance, monitoring and post-acceptance training services performed after the Acceptance Date shall be made by the Owner pursuant to and in accordance with Schedule C.
- 6.3 Price Disclosure. Upon request by the Owner, the ESCO shall be required to fully disclose all costs and fees associated with this project, and shall follow industry standards for open book pricing, including audit, design, engineering, equipment, installation, financing, commissioning, monitoring, overhead, profit, etc.
- 6.4 Open Book Pricing. Open book pricing will be required such that the ESCO will fully disclose all labor and material costs. Costs will be evaluated by the Owner through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices.

## **ARTICLE 7: SUBSTANTIAL COMPLETION, FINAL ACCEPTANCE**

- 7.1 Systems Startup/Commissioning. The ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed ECMs in accordance with Schedule O. The ESCO shall provide advance written notice of at least ten (10) business days to the Owner of the scheduled test(s). The Owner shall have the right to designate representatives to be present at any or all such tests including representatives of the manufacturers of the ECMs. The ESCO shall demonstrate that all ECMs installed comply with the requirements of the Project Documents. The ESCO shall test all components

and systems of the installed ECMs. The ESCO, or its subcontractor(s), shall correct or adjust all deficiencies in operation of the ECMs.

- 7.2 Interim Period Training. As part of the work to be performed under Article 5, the ESCO shall provide training covering the operation and maintenance of the installed ECMs to designated Owner personnel as detailed in Section 8.6 and Schedule J.
- 7.3 Substantial Completion of the Work Defined. Substantial Completion of the work shall occur when the ESCO's performance of the entire scope of the work is sufficiently complete, in accordance with the Project Documents so that the Owner can utilize the installed ECMs for their intended use and the Energy Savings Guarantee provided by ESCO under Section 3.3 and Schedule B becomes effective.
- 7.3.1 Notice. When the ESCO considers the work substantially complete, and after systems startup/commissioning and interim period training of Owner personnel has been successfully accomplished in accordance with the requirements of this Agreement, the ESCO shall submit a written certification to the Owner that the work is substantially complete, that no Event of Default under Article 11 exists, and that the Energy Savings Guarantee is in full force and effect.
- 7.3.2 Substantial Completion Inspection. The Owner shall schedule an inspection to take place no later than seven (7) business days following the Owner's receipt of the ESCO's Notice of Substantial Completion and the submittals required by Section 7.3.3, to determine whether Substantial Completion of the work has been achieved.

The Substantial Completion Inspection shall be conducted in accordance with the provisions of Section 5.15 herein and shall be attended by representatives of the ESCO and the Owner. In the event that the Owner has performed preliminary inspections of the work pursuant to Section 5.15, the Substantial Completion Inspection shall be limited to the inspection of work not previously inspected and previously approved by the Owner. It should be noted that prior to submission of a notice of substantial completion inspection to Owner, the ESCO shall have itself performed a thorough inspection, and created a punch-list containing incomplete or incorrectly completed items of work. The punch-list shall have been prepared by the ESCO and delivered to the Owner at least fifteen (15) business days prior to the scheduled date of the substantial completion inspection.

Within fifteen (15) business days after the Substantial Completion Inspection is complete, the Owner shall either process the Substantial Completion package described in Section 7.3.4 hereof or give the ESCO written notice of all corrections required for the work to be substantially complete. If the Owner gives such notice to the ESCO, the ESCO shall have the right to submit another Notice of Substantial Completion to the Owner as soon as the ESCO has completed all corrections described in the Owner's notice, and the Owner shall hold another Substantial Completion Inspection within fifteen (15) business days following receipt of ESCO's notice that it has completed all such corrections.

- 7.3.3 Required Substantial Completion Submittals by the ESCO. The ESCO shall submit the following documents to the Owner with its Notice of Substantial Completion:
- 7.3.3.1 All guarantees, warranties, lien waivers, required permits, licenses or Certificates of Inspection, six (6) sets of operation and maintenance manuals, and six (6) sets of



record drawings for the work. ESCO shall deliver O&M requirements in such a way as to allow them to be imported directly into Owner's work order management/preventive maintenance database system.

7.3.3.2 Owner shall not make any Substantial Completion payment to the ESCO until the ESCO shall deliver to the Owner a complete release of all liens arising out of this Agreement, or receipts in full in lieu thereof and in either case, an affidavit that so far as the ESCO has knowledge or information the releases and receipts include all labor and material for which a lien could be filed. The ESCO shall submit lien waivers, sworn statements, guarantees, full releases or other evidence reasonably satisfactory to the Owner that there are no liens, claims or stop notices pending, filed or threatened against the Owner, the ESCO, the work or the ECMs. The ESCO may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner, to indemnify the Owner against any lien. If any lien remains unsatisfied after the ESCO has received payment for the work, the ESCO shall refund to the Owner all moneys that the latter may be compelled to pay in discharging the lien, including all costs and reasonable attorney fees.

7.3.3.3 The ESCO's invoice for 90% of the ESCO Compensation for the work, as set forth in Schedule C.

7.3.4 Substantial Completion Package. Within ten (10) business days after the Owner confirms that the work is substantially complete pursuant to the procedures set forth in this Article 7, the Owner shall prepare and deliver a Substantial Completion package to the ESCO, containing:

7.3.4.1 Acceptance Certificate;

7.3.4.2 Punch list of items to be completed or corrected;

7.3.4.3 The time within which punch list items shall be completed or corrected; and

7.3.4.4 Date and time the Owner shall take possession of the ECMs.

7.4 Final Completion. The ESCO shall complete all work necessary to finally complete the installation of the ECMs and complete all punch list work identified at Substantial Completion Package. The ESCO shall achieve Final Completion of the Project within thirty (30) calendar days after substantial completion.

7.4.1 Notice of Final Completion. The ESCO shall submit a written certification to the Owner that the work complies with all aspects of the Project Documents, that all items on the Substantial Completion punch list have been completed, that no Event of Default under Article 11 exists and that the Energy Savings Guarantee set forth in Schedule B which became effective on the Acceptance Date, remains in full force and effect. The ESCO shall certify that all adjustments to materials, equipment, or systems as a result of system commissioning are complete. All of the ESCO's tools, construction equipment and surplus materials shall have been removed.

7.4.2 Required Final Completion Submittals by the ESCO. The ESCO shall submit the following documents to the Owner with its notice of Final Completion:

- 7.4.2.1 All Project Record Documents as described in Section 7.4.4 hereof;
- 7.4.2.2 All releases of liens arising out of this Agreement, or receipts in full in lieu thereof, which were not delivered at Substantial Completion, and an affidavit that so far as the ESCO has knowledge or information, the releases and receipts include all labor and material for which a lien could be filed. The ESCO shall submit lien waivers, sworn statements, guarantees, full releases or other evidence reasonably satisfactory to the Owner that there are no liens, claims or stop notices pending, filed or threatened against the Owner, the ESCO, the work or the ECMs whatsoever. The ESCO may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner to indemnify the Owner against any lien. If any lien remains unsatisfied after the ESCO has received payment due for the work, the ESCO shall refund to the Owner all moneys that the Owner may be compelled to pay in discharging the lien, including all costs and reasonable attorney fees;
- 7.4.2.3 Certificates of inspection for all ECMs which require local government inspection;
- 7.4.2.4 Asbestos abatement compliance records, if applicable;
- 7.4.2.5 An invoice for any amounts of the ESCO's compensation for the work retained in accordance with Schedule C; and
- 7.4.2.6 A separate invoice reflecting the amount requested by the ESCO for approved change orders.

7.4.3 Final Completion Inspection; Execution of Completion Certificate. The Owner shall schedule a Final Completion inspection to take place no later than seven (7) business days following the Owner's receipt of the ESCO's Notice of Final Completion and all submittals required in Section 7.4.2, to determine whether Final Completion of the work has been achieved.

The Final Completion Inspection shall be conducted in accordance with the provisions of Section 5.15 hereof and shall be attended by representatives of the Owner and the ESCO. The Final Completion Inspection shall be limited to the inspection of work not previously inspected and previously approved by the Owner.

7.4.3.1 Completion Certificate. Within ten (10) business days after the Final Completion Inspection is complete, the Owner shall either execute and deliver an appropriate Completion Certificate to the ESCO, or the Owner shall give written notice to the ESCO of all corrections required for the work to be finally complete. In the latter event, the Owner shall hold another Final Completion Inspection no later than seven (7) business days following receipt of ESCO's notice that it has completed all such corrections.

7.4.3.2 Acceptance of Retainage and Change Order Payment. The acceptance by the ESCO of the final payment in the amount authorized by the Completion Certificate shall operate as and shall be a release of the Owner from all present and future claims

or liabilities, of whatever kind or nature; arising under, relating to or in connection with this Agreement for anything done or furnished or relating to the work or from any act or omission of the Owner relating to or connected with this Agreement or the work.

#### 7.4.4 Project Record Documents.

7.4.4.1 The ESCO shall provide one complete set of all ECM submittals, all Project Documents, any modifications to this Agreement, field test records, all schedules, and correspondence to the Owner as such documents are generated or disseminated.

7.4.4.2 The ESCO shall label each document "Project Record Document"; shall legibly record actual construction, depths of foundations, horizontal and vertical location of underground utilities, references to permanent surface improvements, location of internal utilities and appurtenances concealed in construction, field changes of dimension and detail and changes made by change order, if the performance of the work has impacted the existing conditions described above.

7.4.4.3 The ESCO shall make Project Record Documents available at all times for inspection by the Owner.

7.4.4.4 At final completion of the work, the ESCO shall deliver any Project Record Documents not previously provided.

7.4.4.5 At least six (6) operation and maintenance manuals (O&M) for each site shall be provided for all equipment replacements and/or upgrades. Manuals are subject to approval of the Owner.

7.4.4.6 Where applicable, the ESCO must provide reproducible "as built" and record drawings (or such electronic equivalents as may be agreed to by the Owner) of all existing and modified conditions associated with the project, conforming to typical engineering standards. These should include architectural, mechanical, electrical, structural, and control drawings and operating manuals within thirty (30) calendar days of completed project installation. A minimum of one (1) set of record drawings must be provided electronically in AutoCAD. An additional set of PDF files shall be provided as well.

7.4.5 Final Cleaning. At completion of the work, or when directed by the Owner, the ESCO shall perform the final cleaning pursuant to the working conditions set forth in Schedule Q. The ESCO is responsible for the cleaning operations of its subcontractors.

7.4.6 Maintenance of the Work. The ESCO shall maintain the work until the work or designated portions of the work are accepted by the Owner. No partial or entire use of the ECMs by the Owner shall constitute acceptance of the work, or any labor, goods or materials provided under this Agreement which are not in accordance with the Project Documents or the terms of this Agreement.

## ARTICLE 8: THE ENERGY CONSERVATION MEASURES (ECMS)

8.1 ECM Warranties. The ESCO warrants that all ECMs designed, procured, fabricated and installed pursuant to this Agreement are new, in good and proper working condition and are of merchantable quality and fit for the particular purposes of enabling the Owner to reduce energy consumption and operating cost. The ESCO further warrants that the ECMs are protected by appropriate written warranties covering all parts and equipment performance for the periods specified in Schedule S. The ESCO shall deliver to the Owner for inspection and approval all such written warranties and shall pursue rights and remedies against the manufacturer and each prior seller of the ECMs under the warranties in the event of equipment malfunction, improper or defective function, or defects in parts, workmanship or performance. The ESCO shall be responsible for managing all warranty activity during the warranty periods set forth in Schedule S and shall notify the Owner whenever defects in equipment, parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by the ESCO. The cost of any damage, loss or claims by any person arising out of the use or operation of the ECMs or damage to the ECMs and their performance, including damage to other property and equipment of the Owner or the Facility, due to the ESCO's failure to exercise its warranty rights shall be borne solely by the ESCO.

All warranties shall be transferable and extend to the Owner. The warranties shall specify that only new, and not reconditioned, parts may be used and installed when repair is necessitated by malfunction. The ESCO warrants that all workmanship, materials, and equipment used in conjunction with the ECMs shall be in conformance with the Project Documents and free from defects for the period, commencing with the date of the beneficial use of each ECM to the Owner and continuing for the period set forth in Schedule S.

### 8.2 Correction of Warranted Work.

8.2.1 Commencing with the date of beneficial use of each ECM to the Owner and continuing for the warranty periods set forth in Schedule S for each ECM, or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Project Documents, the ESCO shall correct or replace all defective or nonconforming work and all faulty or defective work in accordance with the timeframes set forth in Section 8.2, after receipt of written notice from the Owner to do so whether such fault or defect was observed before or after final acceptance of the work and whether such work was fabricated, installed or complete unless the Owner has previously given the ESCO a written waiver of the specific fault or defect. Notice may be given by telephone in the event of an emergency situation. The ESCO shall bear all costs of replacing or correcting such rejected or faulty or defective work.

8.2.2 The ESCO shall, at its own expense, remove from the Facility all portions of defective and nonconforming work which the ESCO is obligated to replace or correct under this Section 8.2 unless removal has been waived in writing by the Owner.

8.2.3 If the ESCO fails to correct defective or nonconforming work as provided in this Section within twenty-four (24) hours after notice, in the case of emergency conditions, or within five (5) business days in other cases after the ESCO's receipt of written notice from the Owner of such defective or nonconforming work, the Owner may correct such work at the ESCO's expense including costs incurred due to the removal of non-conforming or defective work and removal and storage of equipment or materials left at the Facility by the ESCO.

- 8.2.4 If the ESCO does not pay the cost incurred by the Owner for such repair, removal and storage within ten (10) calendar days of written demand therefore, the Owner may upon ten (10) additional calendar days' written notice, sell any material and equipment not removed by the ESCO at auction or at private sale and shall account for the net proceeds thereof, after deducting all the costs that should have been borne by the ESCO. If such proceeds of sale do not cover all costs which the ESCO should have borne, the difference shall be charged to the ESCO. If the payments then or thereafter due the ESCO are not sufficient to cover such amount, the ESCO shall pay the difference to the Owner.
- 8.2.5 The ESCO shall bear the cost of repairing or replacing all work of other Companies destroyed or damaged by such removal or correction.
- 8.2.6 Nothing contained in this Section shall be construed to establish a period of limitation with respect to any other obligation which the ESCO might have under the Project Documents. The establishment of the time period set forth in Section 8.2.3 above, relates only to the specific obligation of the ESCO to correct the work and has no relationship to the time within which its obligation to comply with the Project 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 its obligations other than to specifically correct the work. Notwithstanding the provisions of this Section 8.2, the ESCO shall, on demand made by the Owner, at any time within the twenty (20) year period following substantial completion, promptly repair or replace all defective or non-conforming work resulting from fraudulent misrepresentation, fraudulent concealment or negligence by the ESCO or its subcontractors in the performance of the work.
- 8.3 Location and Access. The Owner may provide sufficient space, if available, free of charge at the Facility for the installation and operation of the ECMs for the term of this Agreement, including access to office space with a telephone line, if necessary to allow the ESCO to perform required maintenance, monitoring and training services. The Owner shall provide access to the Facility for the ESCO and its employees or subcontractors to install, adjust, inspect, maintain and repair the ECMs in accordance with the terms of this Agreement during regular business hours, or such other reasonable hours as may be requested by the ESCO and acceptable to the Owner. The ESCO's access to correct any emergency condition shall be subject to the provisions of the working conditions detailed in Schedule P, and shall not be unreasonably restricted by the Owner.
- 8.4 ESCO Maintenance and Monitoring Responsibilities for ECMs. The ESCO shall be responsible for providing the maintenance, monitoring, repairs, and adjustments to the ECMs as set forth in Schedule G. All replacements of and alterations or additions to the ECMs shall become part of the ECMs and shall become the property of the Owner. Any replacements of and alterations or additions made by the ESCO to the Owner's pre-existing equipment, or equipment acquired by the Owner during the term of this Agreement, shall become part of said equipment and be owned by the Owner. The ESCO shall be compensated for such maintenance and monitoring services pursuant to Schedule C hereof. In the event of the ESCO's failure to provide maintenance, service, repairs and adjustments to the ECMs, as provided in Schedule G or if an Event of Default exists pursuant to Article 11, the Owner may withhold fees due to the ESCO for such services until such repairs or adjustments are completed or such Event of Default is cured. The Owner shall notify the ESCO in writing when any payments are so withheld. The withholding of fees by the Owner under this Section 8.4 shall not release the ESCO from its obligation to provide the Energy Savings Guarantee pursuant to Section 3.3 and Schedule B hereof.

- 8.5 Owner Operating and ECMs Maintenance Responsibilities. The Owner shall be responsible for providing the maintenance, service, repairs and adjustments to the ECMs as set forth in Schedule H. Except as set forth in Schedule H, the Owner shall not move, modify, remove, adjust, alter or change in any material way the ECMs, or any part thereof, during the term of this Agreement, without prior written direction or approval of the ESCO, except in the event of an occurrence reasonably deemed by the Owner or the ESCO to constitute a bona fide emergency. The Owner acknowledges that substantial deviations from the operating parameters set forth in the Schedules to the ESA may constitute a material change in accordance with Section 9.3 hereof. In addition to the responsibilities set forth in Schedule H, the Owner shall use its best efforts to maintain the Facility in good repair and to protect and preserve the ECMs in good repair and condition in accordance with applicable manufacturers' recommendations which shall be provided to the Owner by the ESCO and to maintain the operating conditions of all mechanical systems and energy related systems located at the Facility. The ESCO shall notify the Owner of any improper maintenance or repair as soon as ESCO has notice thereof. The Owner acknowledges that improper repairs or maintenance of the ECMs may constitute a material change in accordance with Section 9.3, and that the provisions of Section 9.5 may be applicable.
- 8.6 Training by the ESCO. The ESCO shall conduct the training program described in Schedule J hereto. The interim period training specified in Schedule J must be completed prior to acceptance of the ECMs. The post-acceptance training specified in Schedule J shall be performed after the acceptance date in accordance with the provisions of Schedule J. The ESCO shall provide ongoing training whenever needed, with respect to updated or altered ECMs, including updated software.
- 8.7 ECMs Upgrades; Alterations. The ESCO shall have the right, at all times during the term of this Agreement, subject to the Owner's written approval, to modify or replace any of the ECMs or install additional ECMs and to revise any procedures for the operation of the ECMs or implement other procedures at the Facility provided that:
- 8.7.1 Such actions by the ESCO do not result in modifying the standards of comfort and service set forth in Schedule I without the express written approval of the Owner;
- 8.7.2 Such modifications or additions to, or replacements of the ECMs, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings guaranteed by the ESCO at the Facility; and
- 8.7.3 Any costs incurred relative to such modifications, additions or replacements of the ECMs, or operational changes or new procedures shall be the responsibility of the ESCO.

All modifications, additions or replacements of the ECMs or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Owner for approval, which shall not be unreasonably withheld, and incorporated into this Agreement provided that any replacement ECM shall be new and have equal or better potential to reduce energy consumption at the Facility than the ECM being replaced. The ESCO shall update any and all software to be used in connection with the ECMs in accordance with the provisions of Schedule G. All replacements of and alterations or additions to the ECMs shall become part of the ECMs described in Schedule A and shall become the property of the Owner. The ESCO and the Owner shall determine in accordance with the provisions of Section 9.5, what, if any, adjustments to the Baseline set forth in Schedule E are necessary due to upgrades or

alterations of the ECMs which are necessary to enable the ESCO to achieve the level of energy savings guaranteed by the ESCO.

8.8 Malfunction and Emergencies. The Owner shall use its best efforts to notify the ESCO or its designee within forty-eight (48) hours after the Owner's actual knowledge of the occurrence of:

8.8.1 Any material malfunction in the operation of the ECMs or any pre-existing energy-related equipment;

8.8.2 Any material interruption or alteration of the energy supply to the Facility;

8.8.3 Any material alteration or modification in the ECMs or their operation; and

8.8.4 Any material alteration, modification or change in the Facility or the use of the Facility.

The Owner's obligation to use its best efforts to notify the ESCO as soon as reasonably possible shall be deemed satisfied if the Owner reports any said material malfunction, interruption, alteration, modification or change within forty-eight (48) hours of the Owner's actual knowledge thereof.

The ESCO and the Owner shall determine in accordance with Section 9.5 what, if any, adjustments to the Baseline set forth in Schedule E are necessary due to any of the events described in this Section 8.8.

8.9 Responsibility for ECM Malfunction. The ESCO agrees to compensate the Owner for business expenses, damages to real or personal property, lost profits, lost revenues, resulting from ECM malfunction due solely or in part to nonperformance or error by the ESCO.

8.10 Ownership of Certain Proprietary Property Rights. The Owner shall acquire no ownership interest in any software, formulas, patterns, devices, secret inventions or processes, or copyright, patents, and other intellectual and proprietary rights or similar items of property which are or may become used in connection with the ECMs. The ESCO shall grant to the Owner a perpetual, irrevocable royalty-free license of any and all software or other intellectual property rights necessary for the Owner to continue to operate, maintain, and repair the ECMs in a manner that shall maximize energy consumption reductions beyond the expiration of this Agreement.

## **ARTICLE 9: THE FACILITY**

9.1 Description of the Facility. The Facility in which the ECMs are to be installed and services are to be provided by the ESCO under this Agreement are described in Schedule D.

9.2 Ownership of Existing Property. The Facility and all equipment and materials existing at the Facility at the time of execution of this Agreement shall remain the property of the Owner.

9.3 Material Change Defined. A Material Change shall include any change in or to the Facility, not covered by Schedule D, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Owner is expected to increase or decrease annual costs of energy consumption by at least 1%, in the aggregate, after adjustments for weather variations. Actions by the Owner which may result in a Material Change which is subject to this Section 9.3, include, but are not

limited to the following:

- 9.3.1 Changes in the manner of use of the Facility by the Owner; or
  - 9.3.2 Changes in the hours of operation for the Facility or for any equipment or energy using systems operating at the Facility; or
  - 9.3.3 Permanent changes in the comfort and service parameters set forth in Schedule I; or
  - 9.3.4 Changes in the occupancy of the Facility; or
  - 9.3.5 Changes in the structure of the Facility; or
  - 9.3.6 Changes in the types and quantities of equipment used at the Facility; or
  - 9.3.7 Modification, renovation or construction at the Facility; or
  - 9.3.8 The Owner's failure to provide maintenance of and repairs to the ECMs pursuant to Section 8.5 hereof; or
  - 9.3.9 Any significant damage to the Facility or the ECMs caused by fire, flood, other casualty, or any condemnation affecting a significant portion of the Facility; or
  - 9.3.10 The permanent or temporary closing of a building at the Facility; or
  - 9.3.11 Any other substantially changed condition, other than weather, affecting energy use at the Facility.
  - 9.3.12 Owner Energy Improvement Projects. The Owner reserves the right to make utility improvements to the facility and to negotiate adjustments to the savings measurement and verification methodology to account for such improvements.
- 9.4 Reported Material Changes; Notice by Owner. The Owner shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Facility or in the operations of the Facility no less than thirty (30) calendar days before any actual or proposed Material Change is implemented. 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 Owner within forty-eight (48) hours after the event constituting the Material Change occurred or was discovered by the Owner to have occurred.
- 9.5 Reported Material Changes; Adjustments to Baseline. Any changes in energy usage which occur as the result of a Reported Material Change shall be timely reviewed by the ESCO and the Owner to determine what, if any, adjustments to the Baseline set forth in Schedule E are necessitated by such Material Change(s). The ESCO and the Owner agree that any adjustments made to the Baseline shall be in accordance with generally accepted engineering principles. Any disputes between the ESCO and the Owner concerning any such adjustment shall be resolved in accordance with Section 10.3.



- 9.6 Unreported Material Changes. Upon and after the Acceptance Date and in the absence of any reported Material Change(s) in the Facility or in their operations, if energy savings deviates more than eight percent (8%) during an annual basis from projected energy savings for that year, after adjustment for changes in climatic conditions, then the ESCO shall review such changes in a timely manner to ascertain the cause of such deviation. The ESCO shall report its findings to the Owner in a timely manner. The ESCO and the Owner shall determine what, if any, adjustments to the Baseline set forth in Schedule E are necessary. Any disputes between the ESCO and the Owner concerning any such adjustment shall be resolved in accordance with Section 10.3.

## **ARTICLE 10: GENERAL TERMS AND CONDITIONS**

- 10.1 Assignment(s). The ESCO acknowledges that the Owner is induced to enter into this Agreement by, among other things, the professional qualifications of the ESCO. The ESCO agrees that neither this Agreement nor any right or obligation hereunder may be assigned in whole or in part, without the prior written approval of the Owner.
- 10.1.1 Assignment(s) by ESCO. The ESCO may, with prior written consent of the Owner, which consent shall not be unreasonably withheld, delegate its duties and its performance under this Agreement, and/or utilize subcontractors, provided that any assignee(s), delegee(s), or subcontractor(s) shall honor the terms of this Agreement. Notwithstanding the provisions of this paragraph, the ESCO shall remain jointly and severally liable with its assignee(s) or transferee(s) to the Owner for all of its obligations under this Agreement.
- 10.1.2 Assignment(s) by the Owner. The Owner may transfer or assign this Agreement and its rights and obligations herein to a successor or purchaser of the Facility, or an interest therein, subject to the approval of the ESCO which shall not be unreasonably withheld.
- 10.2 Indemnification.
- 10.2.1 Indemnification. To the fullest extent permitted by law the ESCO agrees to pay and reimburse and indemnify, keep and hold harmless the Owner, its Trustees, officials, agents, employees, servants and their respective heirs, executors, administrators, officers, directors, successors and assigns from and against any and all losses, demands, obligations, costs, damages, liabilities, suits, actions, judgments, claims (including, but not limited to, claims for the infringement of any patents, copyrights, licenses or other intellectual property rights) and expenses, including, but not limited to attorneys' consultants', and experts' fees and expenses, and including both litigation and pre-litigation expenses, arising out of or connected with: (a) any injury to or death of persons or damage to or loss of destruction of property (other than the Work itself) to the extent caused by or attributable to errors or omissions or negligent acts or willful acts, of the ESCO, its sub-consultants, sub-contractors, officers, agents, representatives, or employees; (b) any error, omission, or negligent act; (c) any breach by the ESCO or its sub-consultants, sub-contractors, officers, agents, representatives, or employees under this Agreement. ESCO expressly understands and agrees that any insurance protection required by this Agreement shall in no way limit its responsibilities or liabilities or serve as a limit in recovery.
- 10.2.2 Effect of Statutory Limitations. In the event of any claim against the Owner or against any of its officials or employees, in either their personal or official capacities, made by any direct or indirect employee or agent of the ESCO or of any subcontractor, the ESCO's indemnification

obligation shall not be affected by any limitation on the amount or type of damages, compensation or benefits payable to said employee or agent contained in any other type of employee benefit act.

- 10.3 Disputes. Any dispute between the Parties to this Agreement, if not amicably settled by the Parties within thirty (30) calendar days following notice of dispute, shall be referred to senior management of the Parties for resolution. In the event a dispute has not been resolved within forty-five (45) calendar days following referral to senior management, or such longer period as the Parties may mutually agree, then either Party may then pursue available remedies at law in the state or federal courts of the State of Illinois, including the Illinois Court of Claims. Pending any decision, appeal, or judgment in such proceedings, or the settlement of any dispute arising under this Agreement, the ESCO shall proceed diligently with the performance of this Agreement in accordance with the decision of the Owner.
- 10.4 No Waiver. The failure of ESCO or the Owner 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 Agreement in the event of a continuing or subsequent default on the part of the ESCO or the Owner.
- 10.5 Entire Agreement. This Agreement, when fully executed, will supersede any and all prior and existing agreements, either oral or in writing, and will contain all of the covenants and agreements between the parties with respect to the subject matter of this agreement.
- 10.6 Agreement Inclusion Statement. The provisions of the [[ Energy Services RFP Number ]] and phase II for [[ Project Name (FCPWeb Name Preferred) ]] shall be incorporated into the Agreement and made part thereof. If there is any conflict between the terms of the RFP and the provisions of the Agreement, the terms of the Agreement shall control over the terms of the RFP. The Proposal shall not be controlling between the parties. The ESCO shall acknowledge and agree to all terms and conditions of the RFP, except those modified by the Agreement. The Agreement between the Owner and the ESCO shall consist of the RFP and any amendments thereto along with any other information or documentation that the Owner determines necessary.
- The Owner reserves the right to clarify any contractual relationship in writing with the concurrence of the ESCO, and such written clarification shall govern in case of conflict with the applicable requirements stated in the RFP or the related Proposal. In all matters not affected by the written clarification, the RFP shall govern.
- 10.7 Amendments. This Agreement shall not be amended, modified, altered or changed except by mutual consent confirmed in writing by an authorized representative of each party to the Agreement.
- 10.8 Severability. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction or other competent tribunal or rendered invalid by any legislative or regulatory enactment, the remaining provisions shall remain in full force and effect, and such holding or enactment shall not invalidate or render unenforceable any other provision hereof.
- 10.9 Further Documents. The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

10.10 Applicable Law. This Agreement shall be construed, interpreted and enforced in accordance with the laws of the State of Illinois, including but not limited to The Public University Energy Conservation Act, 110 ILCS 62.

10.11 Notices. All notices required under this Agreement shall be in writing and shall be deemed properly served if delivered in person to the individual to whom it is addressed or, three (3) business days after deposit in the United States mail, if sent postage prepaid by United States registered or certified mail, return receipt requested, as follows:

Six (6) copies of all submittals, correspondence and notices required under the ESA:

To the Owner:

Chris Rogan  
University Office of Capital Programs and Real Estate Services  
807 South Wright Street, Suite 340  
Champaign, IL 61820

Project Manager:

[[ Capital Project Manager Name ]]  
[[ Capital Organization - Name ]]  
[[ Capital Organization - Address ]]  
[[ Capital Organization - City ]], [[ Capital Organization - State Code ]], [[ Capital Organization - Zip Code ]]

To the ESCO:

[[ ESCO - Name ]]  
[[ ESCO - Address ]]  
[[ ESCO - City ]], [[ ESCO - State Code ]], [[ ESCO - Zip Code ]]  
ATTN: [[ ESCO - Contact Name ]]

10.12 Publicity/Endorsement. Unless specifically authorized in writing by the Owner on a case-by-case basis, the ESCO shall have no right to use, and shall not use, the name of the Board of Trustees of University of Illinois, its officials or employees, or the seal or marks of the Owner in advertising, publicity, or promotions; nor to express or imply any endorsement of the ESCO's supplies or services.

10.13 Appropriations. Obligations of the Owner shall cease immediately without penalty or further payment being required if in any fiscal year covered by the Agreement term, the Owner fails to appropriate, reappropriate or otherwise make available funds for this Agreement. Owner shall provide written notification to the ESCO of any impending change in the status of appropriations which may affect this Agreement of which it has notice.

## **ARTICLE 11: EVENTS OF DEFAULT; REMEDIES; TERMINATION; RIGHT TO OFFSET**

11.1 Termination for Convenience by the Owner. Subsequent to the Final Acceptance Date, this Agreement may be terminated at the sole discretion of the Owner in accordance with the provisions of this Section 11.1.

The Owner shall provide notice of its election to terminate to the ESCO no later than thirty (30) calendar

days in advance of the end of the Guarantee period. The termination shall become effective on the last calendar day of said Guarantee period. The ESCO's obligation to report, reconcile and verify the energy savings achieved during the Guarantee period preceding termination remains in full force and effect, as does its obligation, pursuant to Section 3.4 of this Agreement, to remit payment to the Owner in the event that the energy savings have not been achieved at the level guaranteed by the ESCO.

The termination of this Agreement by the Owner shall release the ESCO from its obligation to provide maintenance, monitoring and training services after the effective date of termination, as well as its obligation to provide the Energy Savings Guarantee after the termination date. Termination by the Owner shall release it from the obligation to make any payments to the ESCO for maintenance, monitoring and training services after the termination date, provided, however, that the Owner is responsible for payment for maintenance, monitoring and training services performed in accordance with the terms of this Agreement prior to the termination date.

- 11.2 Right to Terminate the ESCO's Performance of the Work. If the ESCO fails or refuses to prosecute the work with such diligence as to allow completion of the work substantially in accordance with the Project Installation Schedule, or commits a material breach of any other provision of this Agreement or the Project Documents, and provided that such breach continues for thirty (30) calendar days after written notice to the ESCO demanding that such breach be cured or if cure cannot be effected in such thirty (30) calendar days, ESCO's failure to propose and commence a cure acceptable to the Owner within such thirty (30) calendar days, the Owner may terminate the ESCO's right to proceed with the work as specified herein. In no event shall the Owner have any obligation to compensate the ESCO for delays arising pursuant to the ESCO's failure or refusal to complete the work and damages arising in connection therewith.

In such case, the Owner shall give the ESCO and its surety written notice of intention to terminate the ESCO's right to complete the work and the reason therefore and, unless within seven (7) business days the delay or violation shall cease or a cure acceptable to the Owner for correcting the situation is proposed, the Owner may issue a termination notice to such effect for the ESCO and its surety. Thereupon, the surety shall be given the opportunity to complete the work in accordance with the Project Documents. Such completion may include, but not be limited to, the use of a completing ESCO, satisfactory to the Owner, pursuant to a written takeover agreement, the payment of a sum of money required to allow the Owner to complete the work, or other arrangements agreed to by the Owner and the surety.

If within fifteen (15) business days following the issuance of the termination notice, the surety fails to notify the Owner that it intends to exercise its right to undertake the work, the Owner may take over the work, exclude the ESCO from the Facility and take possession of all of the ESCO's tools, appliances, equipment and machinery at the Facility and use the same to the full extent they could have been used by the ESCO (without liability for trespass or conversion), incorporate into the work all materials and equipment stored at the Facility and finish the work as the Owner may deem expedient.

In the event the Owner terminates the ESCO's right to complete the work under this Section 11.2.4, the ESCO shall not be entitled to receive further payments until an Acceptance Certificate has been delivered pursuant to Section 4.3 hereof specifying the amount, if any, payable to the ESCO pursuant to Article 7 hereof. If the Owner's expenses in completing the work exceed the ESCO's Compensation for the work, the ESCO shall pay the difference to the Owner upon demand therefore.

Provided further, that an Acceptance Certificate or Completion Certificate directing payment to the ESCO for any portion of the work upon Substantial Completion or Final Completion shall be issued only if the notification required pursuant to Article 7, as the case may be, has been delivered by the ESCO. If the ESCO is not able to deliver such notification, the Owner shall not execute and deliver an Acceptance Certificate or Completion Certificate, as the case may be, and may terminate this Agreement in accordance with the provisions of Article 11 and may pursue any and all remedies provided therein.

- 11.3 Events of Default by the Owner. Each of the following events or conditions shall constitute an "Event of Default" by the Owner with respect to its obligations under this Agreement:
- 11.3.1 Any failure to make payments to the ESCO in accordance with the provisions of Schedule C hereof more than thirty (30) calendar days after written notification by ESCO that Owner is delinquent in making such payment, provided that the ESCO is not in default in its performance under the terms of this Agreement. All payments shall be made pursuant to the Illinois State Prompt Payment Act (30 ILCS 540);
  - 11.3.2 Any representation or warranty known to be false as the time furnished by the Owner in this Agreement and such representation or warranty proves to be false or misleading in any material respect when made; and
  - 11.3.3 Any other material failure by the Owner to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein except, provided that such failure if corrected or cured within thirty (30) calendar days after written notice to the Owner demanding that such failure to perform be cured shall be deemed cured for purposes of this Agreement.
- 11.4 Remedies upon Default by the Owner. If an Event of Default by the Owner described in Section 11.1 occurs, the ESCO may exercise all remedies available at law or in equity or other appropriate proceedings for recovery of amounts due and unpaid by the Owner in accordance with Schedule C, and/or for damages.
- 11.5 Events of Default by the ESCO. Each of the following events or conditions shall constitute an "Event of Default" by the ESCO for purposes of this Agreement with respect to obligations of the ESCO:
- 11.5.1 The ESCO's failure to furnish and install the ECMs in accordance with the provisions of this Agreement and within the time specified by this Agreement;
  - 11.5.2 Failure by the ESCO to pay any amount owing to the Owner due to the ESCO's failure to achieve its Energy Savings Guarantee during any Guarantee Year throughout the term of this Agreement or to perform any obligation under the Energy Savings Guarantee;
  - 11.5.3 The standards of comfort and service set forth in Schedule I are not provided due to failure of the ESCO to properly design, install, maintain, repair or adjust the ECMs except that such failure, if corrected or cured within thirty (30) calendar days after written notice to the ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Agreement;
  - 11.5.4 Failure to perform its obligations in accordance with the terms of this Agreement, including failure to provide sufficient personnel, equipment or material to ensure the performance required

and failure to meet the Project Installation Schedule provided in Schedule K, due to a reason or circumstance within the ESCO's reasonable control;

- 11.5.5 The ESCO's failure to promptly re-perform within a reasonable time work or services that were rejected as defective or nonconforming;
  - 11.5.6 The ESCO's discontinuance of the required performance for reasons not beyond the ESCO's reasonable control;
  - 11.5.7 Any lien or encumbrance upon the ECMs by any subcontractor, laborer, material supplier or other creditor of the ESCO;
  - 11.5.8 Any change in ownership or control of the ESCO without the prior approval of the Owner, which shall not be unreasonably withheld;
  - 11.5.9 Default under any other agreement the ESCO may presently have or may enter into with the Owner during the term of this Agreement. The ESCO acknowledges and agrees that in the event of a default under this Agreement the Owner may also declare a default under any such other agreements;
  - 11.5.10 Any material misrepresentation, whether negligent or willful and whether in the inducement or in the performance, made by the ESCO to the Owner, the Owner or a third party;
  - 11.5.11 The filing of a bankruptcy petition whether by the ESCO or its creditors against the ESCO which proceeding shall not have been dismissed within sixty (60) calendar days of its filing, or an involuntary Assignment(s) for the benefit of creditors or the liquidation or insolvency of the ESCO; and
  - 11.5.12 Any failure by the ESCO to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) calendar days after notice to the ESCO demanding that such failure to perform be cured, shall be deemed cured for purpose of this Agreement.
- 11.6 Remedies upon Default by the ESCO. The occurrence of any Event of Default described in Section 11.5.8 or 11.5.11 shall constitute an immediate default. The occurrence of any Event of Default other than an Event of Default described in Section 11.5.8 or 11.5.11 which the ESCO has failed to cure within thirty (30) calendar days after receipt of notice given in accordance with the terms of this Agreement and specifying the Event of Default shall, at the sole option of the Owner, permit the Owner to declare the ESCO in default; provided however, that if such Event of Default cannot reasonably be cured within such thirty (30) calendar day period, such Event of Default shall not constitute a default if the ESCO begins to cure such Event of Default within such thirty (30) calendar day period and diligently pursues the actions necessary to cure such Event of Default so that the Event of Default is cured as soon as reasonably possible. Written notification of the Event of Default, and the intention of the Owner to terminate this Agreement, shall be provided to the ESCO and such decision shall be final and effective upon the ESCO's receipt, as defined herein, of such notice. Upon the giving of such notice as provided herein, the ESCO must discontinue any services, unless otherwise directed in the notice, and deliver all materials accumulated in the performance of this Agreement, whether completed or in process, to the Owner. At such time the Owner may invoke any or all of the following remedies:

11.6.1 The right to take over and complete the work, or any part thereof, pursuant to the applicable provisions of Section 5.3 hereof;

11.6.2 The right to immediately terminate this Agreement as to any or all of the work or other services yet to be performed by the ESCO;

11.6.3 The right of specific performance, injunctive relief or any other appropriate equitable remedy;

11.6.4 The right to money damages;

11.6.5 The right to withhold all or any part of the ESCO's compensation hereunder; and

If the Owner considers it to be in its best interests, it may elect not to declare default or to terminate this Agreement. The parties acknowledge that this provision is solely for the benefit of the Owner and that if the Owner permits the ESCO to continue to perform the work and other services despite one or more Events of Default, the ESCO shall in no way be relieved of any of its responsibilities, duties or obligations under this Agreement nor shall the Owner waive or relinquish any of its rights.

The remedies under the terms of this Agreement are not intended to be exclusive of any other remedies provided, but each and every such remedy shall be cumulative and shall be in addition to any other remedies, existing now or hereafter, at law, in equity or by statute. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power nor shall it be construed as a waiver of any Event of Default or acquiescence therein, and every such right and power may be exercised from time to time and as often as may be deemed expedient.

11.7 Right to Offset. Any excess costs incurred by the Owner in the event of termination of this Agreement for default or otherwise resulting from the ESCO's performance or non-performance under this Agreement, including the exercise by the Owner of any of the remedies available to it under Section 11.6 hereof, and any credits due to or overpayments made by the Owner may be offset by use of any payment due for the work or other services completed before the termination for default or before the exercise of any remedies. If such amount offset is insufficient to cover such excess costs, the ESCO shall be liable for, and promptly remit to the Owner, the difference upon written demand therefore. This right to offset is in addition to and not a limitation of any other remedies available to the Owner.

## **ARTICLE 12: REPRESENTATIONS AND WARRANTIES**

12.1 Each party warrants and represents to the other that:

12.1.1 It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;

12.1.2 Its execution, delivery, and performance of this Agreement have been duly authorized by, or are in accordance with, its organic instruments, and this Agreement has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

12.1.3 Its execution, delivery, and performance of this Agreement shall not result in a breach or violation of, or constitute a default under, any agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected; and

12.1.4 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, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

12.2 Representations and Warranties by the Owner. The Owner hereby warrants and represents to the ESCO that:

12.2.1 It shall provide throughout the term of this Agreement (or cause its energy suppliers to furnish) to the ESCO, upon its request, copies of all available records and data concerning energy usage for the Facility including but not limited to the following data: utility records and rate schedules; occupancy information; descriptions of any major changes in the structure or use of the buildings or heating, cooling, lighting or other systems or energy requirements; descriptions of all energy consuming or saving equipment used in the Facility; descriptions of energy management procedures presently utilized; and any prior energy analyses of the Facility. The Owner shall make knowledgeable employees and agents available for consultations and discussions with the ESCO concerning energy usage of the Facility.

12.2.2 It has not entered into any leases, contracts or agreements with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Facility or with regard to servicing any of the energy related equipment located in the Facility other than those identified in Schedule N.

12.3 Representations and Warranties by the ESCO. The ESCO represents and warrants the following to the Owner (in addition to the other representations and warranties contained in the Project Documents), as an inducement to the Owner to execute this Agreement, which representations and warranties shall survive the execution and delivery of this Agreement and the Final Completion of the work.

12.3.1 That 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 Agreement;

12.3.2 That it and each of its employees, agents and subcontractors of any tier are competent to perform its obligations under this Agreement;

12.3.3 That it is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the work and perform its obligations hereunder and has sufficient experience and competence to do so;

12.3.4 That it is authorized to do business in the state of Illinois and is properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over it and over the work and the Facility;

12.3.5 That its execution of this Agreement and its performance thereof is within its duly authorized powers; and



12.3.6 That its duly authorized representative has visited the Facility, familiarized itself with the local conditions under which the work is to be performed and correlated its observations with the requirements of the Project Documents.

## **ARTICLE 13: CONSTITUTIONAL AND STATUTORY PROVISIONS**

13.1 If this Agreement is funded from State of Illinois appropriated funds, the ESCO understands and agrees that this Agreement is subject to termination and cancellation without any penalty in any fiscal year in which the Illinois General Assembly fails to make an appropriation for payments under the terms of this Agreement. In the event of termination and cancellation for lack of appropriation, the ESCO shall be paid for services performed under this Agreement up to the effective date of the termination and cancellation.

### **13.2 The Prevailing Wage Act.**

Pursuant to the Prevailing Wage Act, ESCO shall pay a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, to all laborers, workers and mechanics, pursuant to definitions, guidelines and procedures set forth in 820 ILCS 130/0.01 et. seq. (2010).

The ESCO shall submit monthly to Owner, via the Owner's electronic Project Management System, a certified copy of the records required under section 130/5(a)(1) of the Act. The certified payroll shall include records of all laborers, mechanics, and other workers employed by the ESCO, including assigned subcontractors, for services performed. The records shall include each worker's name, address, telephone number when available, social security number, classification or classifications, hourly wages paid in each pay period, number of hours worked each day, and the starting and ending times of each work day. The certified payroll shall be accompanied by a statement signed by the ESCO and statements signed by each subcontractor where appropriate which aver that: (1) such records are true and accurate, (2) the hourly rate paid to each worker is not less than the general prevailing rate of hourly wages required under the Act; and (3) the ESCO acknowledges that filing a certified payroll that he or she knows to be false is a Class B misdemeanor.

Any subcontracts entered into prior to receiving a fully executed copy of the Contract are done at the ESCO and subcontractors own risk.

## **ARTICLE 14: STATUTORY CERTIFICATIONS**

14.1 The ESCO certifies that it has completed a Form A, Form B Certifications and Disclosures, or CPO Financial Disclosure Affidavit available at [https://www.uocpres.uillinois.edu/contracts\\_forms\\_for\\_contractors](https://www.uocpres.uillinois.edu/contracts_forms_for_contractors) which are hereby made part of this agreement. Additionally, Supplemental University of Illinois Certifications identified below are incorporated into the contract. By executing this Agreement, the ESCO acknowledges and agrees that it is in compliance with the requirements of Article 50 of the Illinois Procurement Code (30 ILCS 500/50). These requirements remain in effect for the term of the Agreement. The ESCO certifies compliance, and is under a continuing obligation to remain in compliance and to immediately report any non-compliance.

At the time of ESA, the ESCO shall provide an electronic copy of each subcontract with an annual value of more than \$50,000, issued pursuant to the ESA to the University within 15 calendar days after the

execution of the ESA or after execution of the subcontract, whichever is later. The copies shall be in electronic pdf format and follow the University's file naming conventions, found at:

[https://www.uocpres.uillinois.edu/contracts\\_forms/for\\_contractors](https://www.uocpres.uillinois.edu/contracts_forms/for_contractors).

At the time of ESA, All subcontractor's contracts must include the Form A, Form B Certifications and Disclosures, or CPO Financial Disclosure Affidavit completed and signed by each subcontractor. The Supplemental University of Illinois Certifications identified in the Statutory Certifications section below are to be implemented into all subcontracts on this project. The documents submitted to the University shall be scanned electronic pdf format of the original signed document and follow the University's file naming conventions, found at: [https://www.uocpres.uillinois.edu/contracts\\_forms/for\\_contractors](https://www.uocpres.uillinois.edu/contracts_forms/for_contractors).

If at any time during the term of the Agreement, the ESCO adds or changes any subcontractors, the ESCO will be required to promptly notify the Owner via revised ESCO Schedule of Values, of the firm(s) name(s) and address(es) and the expected amount of money that each new or replaced subcontractor will receive pursuant to the Agreement. The ESCO will provide all documentation required by Public Act 096-795 and this Agreement for each new or replaced subcontractor.

- 14.2 The ESCO certifies that [[ ESCO - Federal Tax Identification Number ]] is its Federal Taxpayer Identification Number and that it is doing business as a [[ ESCO - Legal Structure ]].
- 14.3 The ESCO certifies that it is authorized to practice the professional services specified in this Agreement under the applicable Illinois licensing and registration statutes.
- 14.4 The ESCO certifies that it has complied with the Substance Abuse Prevention on Public Works Projects Act (820 ILCS 265) including the requirement to file with Owner a written program that meets or exceeds the requirements of the Act. The requirements of this certification and disclosure are a material part of this Agreement and the ESCO shall require this certification provision to be included in all Subcontracts.

## **ARTICLE 15: ERRORS AND OMISSIONS POLICY**

Pursuant to Owner's Error and Omission Policy, Owner reserves the right to recover from the ESCO all or a portion of the costs associated with change orders, and/or additional work by others if not incorporated as a contract change order, issued to correct errors or work omitted in the construction documents prepared by the ESCO. Consequential damages, including any delay of work or damages incurred by other parties due to errors and omissions may be included in the recovery. The Error and Omission Policy is incorporated herein and by reference made a part hereof and is available from Owner or can be referenced at the following web link [https://www.uocpres.uillinois.edu/policies/for\\_faculty\\_staff](https://www.uocpres.uillinois.edu/policies/for_faculty_staff)

## **ARTICLE 16: OWNER'S WEB-BASED PROJECT MANAGEMENT SYSTEM**

ESCO shall use the Owner's web-based Project Management System to access and exchange project information with team members throughout the Project's life. This includes processing payment applications, schedule, change requests/clarifications, project related submittals, information sharing and other services as identified in this Agreement. Training on this system is available and is required to be taken by ESCO representative(s).

## **ARTICLE 17: COUNTERPARTS/FACSIMILE SIGNATURE**

**This Agreement may be signed in counterparts. Facsimile signatures constitute original signatures for all purposes.**

**(signature page immediately following)**

IN WITNESS WHEREOF, the parties hereto have executed this Agreement all as and of the day and year first hereinabove set forth.

ESCO:

<p>University of Illinois Signature Block</p>	[[ Name (Primary Second Party) ]]
	By: _____
	Printed: _____
	Title: _____
	Date: _____
Comptroller Delegate Signature _____	
Signature Date _____	

## SCHEDULES

(Word templates to be maintained by UOCPRES and shared w/ CCU to be passed on to ESCO as required)

- Schedule A - ECMs to be Installed ESCO prepare
- Schedule B - Energy Savings Guarantee and M&V Plan ESCO prepare
- Schedule C - Compensation to ESCO ESCO prepare – same format as RFP response
- Schedule D - Facility Owner prepare
- Schedule E - Calculation of Baseline ESCO prepare
- Schedule F - Financing Agreement Owner prepare
- Schedule G - ESCO Maintenance Responsibilities ESCO prepare
- Schedule H - Owner Maintenance Responsibilities ESCO/Owner prepare
- Schedule I - Operating Parameters for ECMs/Standards of Comfort & Service ESCO/Owner  
prepare
- Schedule J - ESCO Training Responsibilities ESCO/Owner prepare
- Schedule K - Project Installation Schedule ESCO/Owner prepare
- Schedule L - Current and Known Future Capital Projects at the Facility Owner prepare
- Schedule M - Pre-Installation Equipment Inventory ESCO/Owner prepare
- Schedule N - Pre-Existing Service Agreements Owner prepare
- Schedule O - Systems Startup and Commissioning of ECMs ESCO prepare
- Schedule P - Working Conditions Owner prepare
- Schedule Q - Insurance and Bonds Owner prepare
- Schedule R - Interim Savings Owner prepare
- Schedule S - Warranties ESCO prepare
- Schedule T - Form A, Form B Certifications and Disclosures, or CPO Financial Disclosure
- Schedule U - Supplemental University of Illinois Disclosures
- Schedule V - Project Labor Agreement: Intentionally left blank UIUC Only: Owner prepare
- Schedule W - Subconsultant/Subcontractor Use Summary ESCO prepare

SCHEDULE A  
ECMs TO BE INSTALLED

This Schedule A provides a description of the Energy Conservation Measures (“ECMs”) to be installed by ESCO at the Facilities described on Schedule D. Installation of the ECMs and included equipment is subject to change under certain circumstances as more particularly described in the Agreement.

**SCHEDULE B**  
**ENERGY SAVINGS GUARANTEE AND M&V PLAN**

**SCHEDULE C  
COMPENSATION TO ESCO**

- A) ESCO Compensation for the Work.** In consideration of ESCO’s performance of the work necessary for the completion of the Project, ESCO shall be paid a sum of [[ ESCO - Contract Amount Written in Words ]] [[ Value ]] herein the “Contract Price”.
- B) Monthly Progress Payments.** ESCO shall submit invoices to the Owner for monthly progress payments to ESCO based upon the percentage of the Project construction and equipment procurement completed at the end of each month (the “Monthly Completion Percentage”), so that ESCO is paid the percentage of the Contract Price that is commensurate with the Monthly Completion Percentage (less retainage in the amount of 10%, if required by (c) below). The Owner shall make payment to ESCO, within thirty (60) calendar days after the proper submission / approval of each such invoice. The Owner shall not unreasonably withhold, condition or delay the payment of any invoice.
- C) Retainage.** Until such time as the Monthly Completion Percentage is equal to or exceeds ninety percent (90%) for any individual subconsultant/subcontractor/ ESCO contract value each disbursement pursuant to (b) above shall be subject to retainage in the amount of ten percent (10%) of such disbursement. Retainage shall be released and paid to ESCO on Substantial Completion less twice the anticipated value of remaining punchlist items. Notwithstanding the forgoing, the Owner may elect, in its sole discretion, to release and pay some or all of the Retainage prior to Substantial Completion.
- D) Price Disclosure/Open Book Pricing.** The Contract Price includes the elements outlined in the table below. Pursuant to Section 6.3, Price Disclosure, and Section 6.4, Open Book Pricing, of this Agreement, ESCO will, upon request by the Owner, fully disclose all required information related to Subconsultant/ Subcontract Construction, Subconsultant/ Subcontract Engineering, and Contingency.



The total compensation to the ESCO for the Project includes the following:

Item	Cost	% of Total Agreement Price
Subconsultant/Subcontractor Construction		
Subconsultant/Subcontract Engineering		
ESCO Engineering		
ESCO Project Management		
ESCO Commissioning		
ESCO Training		
Contingency		
ESCO M&V		
ESCO Permits / Bonds		
ESCO Overhead		
ESCO Profit		
ESCO Others (Builders Risk Insurance, Etc.)		
<b>Total Agreement Price</b>		<b>100%</b>

**Maintenance, Monitoring and Training Fees.** Fees for ESCO’s construction period, Maintenance, Monitoring, and Training obligations as set forth in this Agreement are included in the Contract Price. M&V Services (as such term is defined in Schedule B) are not included in this contract or the Contract Price. The Owner will purchase M&V Services for at least Guarantee Year 1 and may purchase annual M&V Services for each year during the term of the Energy Services Agreement. M&V Services will be purchased via purchase order for the separate M&V Services agreement. M&V Services are the method to determine the savings actually realized by the Owner in consequence of the Energy Services Agreement. M&V Services also allow the ESCO to detect and promptly remedy the root cause of any missed saving guarantee. The ESCO’s fee for M&V Services for the first five Guarantee Years are listed below.

	Annual M&V Fee
Guarantee Year 1	###\$##
Guarantee Year 2	###\$##
Guarantee Year 3	###\$##
Guarantee Year 4	###\$##
Guarantee Year 5	###\$##

In the event Owner elects, by written notice to ESCO as provided in Schedule B, to revise the initial purchase order or issue a new purchase order to continue M&V Services beyond the fifth Guarantee Year, the M&V Services Fee for Guarantee Year 6 and beyond shall be ###\$##. The Owner shall pay the ESCO the M&V Services Fee within sixty (60) calendar days following delivery of the M&V report.

If the Owner becomes satisfied that the ESCO has delivered the guaranteed savings then the Owner may, at any time after the first Guarantee Year, cancel the annual M&V Services by providing written notice to ESCO at least 30 calendar days prior to the beginning of the next annual guarantee period. If the Owner cancels the M&V Services then the parties stipulate and agree that the ESCO will no longer be obligated to perform additional annual M&V Services and that the energy savings guaranteed by the ESCO during the remaining term of the Energy Services Agreement shall be considered satisfied in full.

If the Owner fails to pay the annual M&V Services fee when due, and after an additional thirty calendar day notice and opportunity to cure, then the ESCO has the right to terminate the obligation to provide additional M&V Services in addition to whatever other rights it may have to collect the payment. In this event, both parties stipulate and agree that the energy savings guaranteed by the ESCO during and after the time covered by the unpaid services, and thereafter, shall be considered satisfied in full. The parties further agree that upon this occurrence the ESCO will no longer be obligated to perform M&V Services and the energy savings guaranteed in the Energy Services Agreement will be considered satisfied in full.

**SCHEDULE D  
FACILITY**

**SCHEDULE E**  
**CALCULATION OF BASELINE**

**SCHEDULE F**

**FINANCING AGREEMENT**

The Financing Agreement and supporting documentation between the Owner and \_\_\_\_\_  
\_\_\_\_\_ is attached.

**SCHEDULE G  
ESCO MAINTENANCE RESPONSIBILITIES**

[[ Name (Primary Second Party) ]] shall turn over operating equipment to the Owner at the completion of the project. All equipment shall be maintained by the Owner after substantial completion.

**ESCO Maintenance Services:**

ESCO shall provide all equipment maintenance (including labor and materials) from construction start through substantial completion per Owner standards. Extended warranties will be provided to cover gaps until utility systems are turned over to the Owner.

Following turnover to the Owner, ESCO has no maintenance responsibilities under this Agreement after substantial completion. The Owner shall be responsible for providing the maintenance to the ECMs as set forth in Schedule H. ESCO shall have no responsibility for repairs and/or adjustments to the ECMs except to the extent set forth, and during the warranty period provided, in Schedule S. ESCO shall have no obligation to provide updates to any software after the Acceptance Date (as such term is defined in Section 4.3 of this Agreement).

ESCO Monitoring Activities will be ongoing as described in Schedule B.

## SCHEDULE H OWNER MAINTENANCE RESPONSIBILITIES

Owner, at its own expense, will keep and maintain, or cause to be kept and maintained, the Equipment in as good operating condition as when delivered to Owner hereunder, ordinary wear and tear resulting from proper use thereof alone excepted, and will provide all maintenance and service and make all repairs reasonably necessary for such purpose. All replacement parts and accessions shall be free and clear of all liens, encumbrances, or rights of others and have a value and utility at least equal to the parts or accessions replaced. Owner shall not make any material alterations to the Equipment that is expected to result in an increase or decrease by 1% of annual costs of energy consumption in the aggregate after adjustments of weather variations without the prior written consent of Assignee, which consent shall not be unreasonably withheld. All additions to the Equipment which are essential to its operation, or which cannot be detached without materially interfering with such operation or adversely affecting the Equipment's value and utility, shall immediately be deemed incorporated in the Equipment and subject to the terms of this Agreement as if originally leased hereunder, and subject to the security interest of Assignee.

Responsibility for the proper maintenance, service, repair and adjustments to each ECM, ECM system and related ancillary systems and equipment, including related expenses, shall transfer to the Owner on an ECM by ECM basis on the date of "**Beneficial Use**" of each ECM as such date is determined in accordance with Section 5.15.5 of the Agreement. The Owner will be responsible for such maintenance, service, repair and adjustments for the remainder of the Term. Operation and Maintenance Manuals (O&M Manuals) will be provided to the Owner, by the ESCO. Included with the O&M manuals will be a list of maintenance responsibilities and tasks for the Owner. Owner maintenance responsibilities and tasks will also be given to the Owner in a format acceptable for input into the Owner's maintenance tracking system.

*Start-up and Shutdown:* The Owner's responsibilities include all system start-ups and shut-downs. System start-up (beginning of season) and shut-down (end of season) refers to specific manufacturer recommendations with respect to "proper" system start-up, operation, maintenance, and shut-down as defined in the manufacturer's installation / operation / maintenance (O&M) manuals which will be provided to the Owner upon Beneficial Use, Substantial Completion and / or Final Completion, as appropriate.

*Operations:* The Owner shall operate the equipment installed hereunder in accordance with parameters noted in Schedule I, the manufacturers' recommendations, and any supplemental procedures supplied to the Owner by ESCO, including those set forth in the O&M manuals. The Owner shall also operate the equipment and systems (including ancillary related systems) in accordance with Schedule I.

*Maintenance:* The Owner's maintenance responsibilities include the proper operation and prompt repair and maintenance of each ECM, ECM system and related ancillary systems and equipment such that they are maintained in good working order during the Term. The

Owner shall repair and maintain (i) the equipment and all other components which comprise the ECM and (ii) all other equipment which is attached thereto and/or is integral to the proper functioning of the ECM, including performance of the maintenance tasks, manufacturer's recommendations and supplemental procedures included in the O&M Manuals. Maintenance also refers to performing required maintenance of ancillary systems.

ESCO shall provide Owner specific equipment maintenance responsibilities in a format for Owner to be able to input this information into the Owner's maintenance tracking system.



**SCHEDULE I**  
**Operating Parameters for ECMs/Standards of Comfort and Service**

**SCHEDULE J**  
**ESCO TRAINING RESPONSIBILITIES**

ESCO will implement a comprehensive training program that involves classroom and hands-on/field training. Training sessions will include a review of the overall installation and performance characteristics of installed Energy Conservation Measures. Documentation will include review of O&M manuals, drawings, and equipment specification literature. Facilities personnel, and select building occupants, will receive comprehensive manuals for reference. The primary goal of [[ Name (Primary Second Party) ]] training program will be to educate designated operations, maintenance, and building staff in the key areas that relate to the ECMs installed throughout the project.

**SCHEDULE K**  
**PROJECT INSTALLATION SCHEDULE**

This Schedule K contains the preliminary Project Installation Schedule. The Parties expect to revise the Project Installation Schedule prior to commencing construction.

The Project Installation Schedule is subject to refinement and adjustment from time to time as the work progresses as set forth herein and in the Agreement.

**SCHEDULE L  
CURRENT AND KNOWN FUTURE CAPITAL PROJECTS AT THE FACILITY**

Listed below are the known, or potential, future capital projects at the Facility:

Building Number	Project Number	Project Title

**SCHEDULE M**  
**PRE-INSTALLATION EQUIPMENT INVENTORY**

**SCHEDULE N**  
**PRE-EXISTING SERVICE AGREEMENTS**

The building(s) affected by this Project currently has/have no existing service agreements with any entity outside the Owner. Any needed services are executed by [[ Name (Primary Second Party) ]].

**SCHEDULE O**  
**SYSTEMS STARTUP AND COMMISSIONING OF ECMS**

System start up and commissioning shall be in accordance with sections # [REDACTED] # of ESCO Project Specifications dated #DATE#.

## **SCHEDULE P WORKING CONDITIONS**

The ESCO shall confine its apparatus, the storage of materials and the operations of its workers to limits indicated by law, ordinances, permits or directions of the Owner or the Architect/Engineer and shall not unreasonably encumber the premises with its materials. The ESCO shall not load or permit any parts of the structure to be loaded with a weight that will endanger its safety. The ESCO shall enforce the Owner's requirements regarding signs, advertisements, fires and smoking.

The ESCO shall continuously maintain adequate protection of all its work from damage and shall protect the Owner's property from injury or loss arising in connection with the Agreement. It shall make good such damages, injury or loss, except such as may be directly due to errors caused by agents or employees of the Owner. It shall adequately protect adjacent property as provided for by law and the Contract Documents. The ESCO shall take all necessary precautions for the safety of employees on the Work. The ESCO shall comply with all applicable provisions of federal, state and municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the Work is being performed.

The ESCO shall erect and properly maintain at all times, as required by the conditions and progress of the Work, all necessary safeguards for the protection of workers and the public and shall post danger signs warning the hazards created by such features of construction as protruding hoists, scaffolding, window openings, stairways and falling materials, and it shall designate a responsible member of its organization on the Work, whose duty shall be the prevention of accidents. The name and position of the person so designated shall be reported to the Owner by the ESCO. The ESCO shall provide and erect and maintain all necessary barricades, warning lights and other protection required by the Owner or by local laws and ordinances, or local authorities having jurisdiction over same, and shall also protect all walks, drives, curbs, lamp posts, underground conduits, overhead wires, water, sewer, gas mains and the like, until the Owner assumes responsibility therefore.

The ESCO shall at all times keep the premises free from accumulation of waste material or rubbish caused by its employees or work, and at the completion of the Work it shall remove all its rubbish from and about the area of the Work and all its tools, scaffolding and surplus materials and shall leave the Work "broom clean" or its equivalent, unless more exactly specified. In case of dispute the Owner may remove the rubbish and charge the cost to the ESCO. The ESCO shall use its own equipment and receptacles for the removal of waste materials and rubbish.



## SCHEDULE Q INSURANCE AND BONDS

### Insurance

The ESCO shall purchase and maintain insurance coverage of the types, in the amounts and for the periods specified in this Schedule Q and subsequent to the Acceptance Date described in Section 4.3 hereof, the Owner shall be responsible for providing insurance coverage on the commissioned ECMs.

1. Professional Liability. The ESCO agrees to procure and maintain during the term of this Agreement, and as long as necessary thereafter to cover claims with respect to its performance under this Agreement, Professional Liability insurance with limits and deductibles as follows: 1) for Projects with estimated construction costs less than Twenty Five Million Dollars (\$25,000,000): the greater of (a) One Million Dollars (\$1,000,000.00) or (b) twenty percent (20%) of the Owner's original estimated construction costs not to exceed Five Million Dollars (\$5,000,000.00) and with a deductible amount of not more than the lesser of (a) five percent (5%) of the limits of the policy or (b) One Hundred Thousand Dollars (\$100,000.00), 2) For Projects with the Owner's original estimated construction costs of Twenty Five Million Dollars (\$25,000,000.00) or greater, the Owner shall determine if additional professional liability insurance is required and may require limits up to twenty percent (20%) of the Owner's original estimated construction costs. The ESCO shall submit to the Owner a certificate of insurance as evidence of said coverage.
  - a. The professional liability insurance policy shall provide that the insurer will pay on behalf of the ESCO, all amounts and damages which the ESCO shall become legally obligated to pay to any person or entity (including, but not limited to, the Owner), and their officers, trustees, directors, agents and employees, arising out of the performance of professional services by the ESCO. The ESCO shall pay any amounts and damages not paid by the insurer, including but not limited to deductibles or for any amounts and damages in excess of the policy limits, and any other costs which may have been incurred by the Owner as approved by a court or other tribunal of competent jurisdiction.
  - b. The insurance carrier shall have a policyholder's rating not lower than "A-" and a financial rating not lower than "VI" in the current edition of Best's Key Rating Guide.
  - c. All subconsultants must carry a minimum of one million dollars (\$1,000,000.00) professional liability insurance coverage except as otherwise agreed to in writing by the Owner. The ESCO is responsible for collecting certificate(s) of insurance evidencing such coverage.

- d. When claims-made policies are renewed or replaced, any retroactive date must coincide with, or precede commencement of services by Contractor or sub-contractor under this Contract. A claims-made policy that is replaced or not renewed must have an extended reporting period not less than two (2) years.
2. ESCO's Liability Insurance. In addition to the professional liability insurance referenced above, the ESCO agrees to maintain the following minimum insurance coverage for the duration of the project or the term for which services will be rendered, and as long as necessary thereafter to cover claims with respect to its performance under this Agreement.
- a. The ESCO shall cause a Certificate of Insurance to be issued showing the following required coverage in no less than the minimum coverage limits listed below. The insurance companies providing coverage must have a policyholder's rating not lower than "A-" and a financial rating not lower than "VI" in the current edition of Best's Key Rating Guide for property/casualty insurance companies.

<u>Coverage</u>	<u>Minimum Limits of Liability</u>
1. Worker's Compensation and Occupational Diseases Employer's Liability (Part B)	Illinois Statutory Limits \$1,000,000 per occurrence
2. Commercial General Liability	
Each Occurrence	\$1,000,000
General Aggregate	\$2,000,000
Products Completed	\$2,000,000
Operations Aggregate	
Personal and Advertising Injury	\$1,000,000
Fire Damage	\$ 100,000
3. Commercial Auto Liability	
Combined Single Limit	\$1,000,000 per occurrence
OR	
Bodily Injury	\$1,000,000 per occurrence
Property Damage	\$1,000,000 per occurrence
4. Evidence of Umbrella or Excess liability insurance may be used to meet the above required liability limits.	
5. Evidence of waiver of subrogation must be expressly stated on the certificate of insurance form.	

6. Subconsultants must comply with the same underlying Liability insurance coverage requirements set forth in this Section 2, as ESCO and shall submit the required Certificate of Insurance to the primary ESCO.
7. With respect to the required Commercial General Liability insurance, the Certificate of Insurance should include Additional Insured wording that conveys the following: “The Board of Trustees of the University of Illinois is an additional insured on a primary and non-contributory basis for any liability incurred arising from the activities of ESCO and/or Subconsultant performing work on behalf of ESCO.”
8. The ESCO’s general liability insurance shall provide the following coverages:
  - a. Contractual Liability – coverage shall cover all contractual obligations which the ESCO has assumed including the Indemnity clause identified in section 10.2 of this Agreement, for the liability limits set forth above. A Owner/Contractor’s protective liability policy may be provided in lieu of a commercial general liability policy for the liability limits set forth above.
  - b. The ESCO’s liability insurance policies shall include a waiver of subrogation clause which must be expressly stated on the Certificate of Insurance that conveys the following:

“It is agreed that in no event shall any insurance company of the ESCO have any right of recovery against Owner for any and all damage or loss unless such damage or loss results from the sole gross negligence or willful misconduct of Owner.”
9. Owner will require all contractors to add the ESCO as an additional insured on Project Builders Risk policy (limited to site activities only).

b. Terms and Conditions

1. Modification or Cancellation.

The ESCO shall use commercially reasonable efforts to make sure that the insurance documentation shall provide that the ESCO’s insurance policies shall be modifiable or cancelable only after written notice has been delivered by the ESCO to the Owner by certified or registered mail thirty (30) calendar days in advance of such modification or cancellation. If the insurance carriers will not agree, it is the ESCO’s responsibility to provide the Owner with thirty (30) calendar days advance written notice of modification or cancellation.

2. Delivery of Policies. Upon request the ESCO shall deliver copies of its newly issued or renewal insurance policies to the Owner within ten (10) calendar days following the Owner's request for such copies. Failure to request copies of new or renewal insurance policies does not relieve the ESCO of its contractual obligation to provide the insurance coverages set forth.
3. Notification of Insurance Carriers. The ESCO shall be responsible for notifying all of its liability insurance carriers of the provisions of this Agreement and for procuring insurance coverage for this contract on a timely basis. The ESCO shall not commence Work under this contract until it has obtained all the insurance required under this Article and until certificates of such insurance have been approved by the Owner.
4. ESCO's Liability. The ESCO shall remain liable and responsible for all such obligations and liabilities assumed under this agreement, including, but not limited to, the obligation to indemnify the Owner assumed under paragraph 10.2 whether or not the insurance provided by it is approved by the Owner and whether or not such insurance is sufficient in amount, quality or coverage to protect it against such liability. The ESCO shall pay and make good all such obligations to the full extent thereof and to the extent that such insurance does not cover them.
5. Enforcement of this Contract. In the event Owner retains legal counsel to secure performance by the ESCO of any of its obligations under this contract, or if Owner retains or utilizes such counsel to represent its interest with respect to any matter for which the ESCO has an indemnity obligation to Owner under any provision of this contract or otherwise, the ESCO shall pay and reimburse Owner for the cost of such counsel and shall further pay and reimburse Owner for any and all other cost and expense incurred in preparing, negotiating, or prosecuting any claim against the ESCO, including but not limited to, any and all expert witness fees and expenses.
6. Lapse of Insurance. In the event the ESCO loses insurance coverage, the ESCO shall stop work and shall immediately notify Owner of such cancellation or other loss of insurance coverage. Owner shall withhold any future payments due to the ESCO until the matter is resolved. Owner reserves the right to pursue any legal action necessary to cover losses. If the ESCO procures replacement insurance in accordance with Contract Documents, Owner reserves the right to allow the ESCO to continue work. There shall be no time credit for days not worked pursuant to this section.
7. Uninsured Loss Occurrence. In the event a loss occurs during the uninsured period, Owner reserves the right to withhold payment due to the ESCO. The ESCO shall immediately notify Owner of any loss. Owner

shall withhold any future payments due to the ESCO. Owner reserves the right to pursue any legal action necessary to cover losses. If the ESCO remedies the loss and obtains the required insurance coverages, Owner reserves the right to allow the ESCO to continue work. There shall be no time credit for days not worked pursuant to this section.

8. The ESCO's failure to comply with any insurance requirements set forth herein shall be deemed a material breach of the contract terms.
9. The ESCO shall furnish any original Certificate(s) of Insurance evidencing the required coverage to be in force on the date of this Agreement, and any renewal Certificate(s) of Insurance if coverage has an expiration or renewal date occurring during the term of this Agreement to the appropriate contact person as designated under section M herein. The receipt of any certificate does not constitute an admission by the Owner that insurance requirements have been met. Failure of the Owner to obtain certificates or other insurance evidence from the ESCO shall not be deemed a waiver by the Owner.

### 3. Builder's Risk Insurance

- a. The Owner's Risk. Owner bears the risk of loss or damage for Owner-procured equipment while in transit or in storage away from the jobsite until responsibility for the Owner-procured equipment is accepted by the ESCO or the property is transferred to the custody of the ESCO or the custody of any contractor subject to the supervision of the ESCO, or any contractor named as an additional insured, or named insured, under the Builder's Risk/Installation Floater. The ESCO is responsible for providing and paying for the builder's risk insurance and any loss or cost of repair not covered by such insurance shall be borne by the ESCO without additional cost to the Owner.
- b. The ESCO's Risk.
  1. The ESCO will provide an insurance policy that insures against all risks of direct physical loss or damage to the Project. Risk of transit and storage for equipment not Owner-procured is the responsibility of each individual Contractor until such time as the equipment is delivered to the jobsite. Contractors will be responsible for payment of the policy deductible for losses to their portion of the Work. Contractors will be responsible for submitting and negotiating their claims, if any, under the Builder's Risk policy, and/or for any other coverages that they might procure on their own behalf.
  2. Deductible  
The policy shall be subject to the following deductible schedule unless a different deductible is approved by the Owner under separate cover:

<u>Policy Limit of Builder's Risk</u>	<u>Maximum Amount of Deductible</u>
Up to \$10,000,000	\$ 5,000
Over \$10,000,000	\$50,000

The Owner shall not be responsible for any portion of the deductible.

c. Builder's Risk Policy.

1. The policy shall be a Completed Value All Risk Builder's Risk/Installation Floater form or equivalent form issued under an ISO (hereinafter referred to as "Builder's Risk" or "policy") with the policy limit equal to one hundred percent (100%) of the Agreement Price and shall include the value of Owner-purchased building materials and supplies, equipment, machinery and fixtures intended to become a permanent part of the Project.
2. The policy shall be issued in the name of the ESCO, with the Owner (The Board of Trustees of the University of Illinois), all subcontractors of every tier, mortgagees and/or loss payees, if applicable, as additional insureds, as their interests may appear.
3. The insurance companies providing coverage must have a policyholder's rating not lower than A- and a financial rating not lower than VI in the current edition of Best's Key Rating Guide.
4. The policy will, at a minimum, comply with the requirements set forth. Further, the policy shall include a waiver of subrogation clause which must be expressly stated on the Evidence of Property form that conveys the following:  
  
"It is agreed that in no event shall any insurance company of the ESCO have any right of recovery against Owner for any and all damage or loss unless such damage or loss results from the sole negligence or willful misconduct of Owner."
5. The ESCO shall furnish Evidence of Property Insurance Form evidencing the required Builder's Risk coverage to be in force on the start of construction at the jobsite, and any renewals if coverage has an expiration or renewal date occurring prior to the date of Final Acceptance.
6. The ESCO is responsible for and may carry whatever additional insurance it may deem necessary to protect itself against hazards or perils not covered by the Builder's Risk insurance policy. Any loss or cost of repair not covered

by the Builder's Risk insurance shall be borne by the ESCO without additional cost to the Owner.

7. Required Coverage. Policy shall cover all risks of direct physical loss or damage to covered property during the policy term, including where applicable, Flood and Earthquake.
  - a. *Covered Property* (this may be property of the Insured and/or the property of others for which the Insured has assumed responsibility):
    1. Property which will become a permanent part of the project.  
This includes materials, supplies, equipment, machinery, foundations, and underground pipes and wiring; Owner supplied materials, equipment, machinery and supplies, the value of which has been included in the total project value. Coverage to include commissioning and testing of equipment and systems including boilers, chillers, pumps and other similar equipment.
    2. Temporary structures including all scaffolding, construction forms, falsework, shoring, cribbing, fencing, and temporary buildings at the job site, when the value has been included in the total project value.
    3. Property while in transit from the time of loading until unloading at the final destination (the job site, a temporary offsite location).
    4. Property while at any location other than the job site, and on a temporary basis.
  - b. *Required Coverage Extensions*. Policy shall additionally cover the following, subject to policy sub-limits sufficient to cover the exposure, which shall be listed in the policy Declarations.
    1. Occupancy. The policy shall specifically permit and allow for beneficial or partial occupancy prior to Substantial

Completion of the Project and Final Acceptance by the Owner.

2. Landscaping. Coverage shall extend to trees, shrubs, plants, lawns or sod to be planted as part of the insured project.
3. Extra Expenses. Extra expenses shall cover reasonable and necessary excess costs incurred during the period of repair of the damaged property and include equipment rental, emergency expenses, and other expenses necessarily incurred to reduce loss. Extra Expenses would not include additional interest or debt service expense, business interruption, loss of earnings/income, or other delay in completion.
4. Construction Documents. Construction Documents shall cover Plans, Blueprints, Drawings, Models or other such Documents related to the project.
5. Debris Removal. In the event of direct physical loss or damage to the covered property the policy shall pay the necessary and reasonable costs: 1) to remove debris, including necessary demolition expenses, and/or 2) cost of cleanup at the insured site.
6. Architects and Engineers Fees
7. Expediting Expense
8. Fire Dept. Service Charges and Fire Protective Equipment Refill
9. Ordinance or Law/Demolition and Increased Cost of Construction
10. Water Damage. Flood, as defined by the Owner in Section I.4 may or may not be required depending on the Project; however, the following Water Damage coverage is always required: back-up of sewers, drains and sumps; weight of snow, ice, sleet; sprinkler leakage; water under the ground surface pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces – basements, whether paved or not; or doors, windows or other openings.

OPTIONAL CLAUSES:

11. Delay in Completion. Policy shall cover business income and extra expense (loss of rental income and/or gross earnings including concession and/or merchandise revenue; soft costs such as legal/accounting fees, design professional fees, insurance premiums for extending or renewing coverage, general overhead, etc.) in the event direct physical loss or damage to the covered project results in delay. Limit of Owner's coverage under the Policy shall be



### \_\_\_\_\_ ##. Coverage must be expressly stated on the Evidence of Property Insurance form.

12. Flood. As defined by the Owner means the overflow of a body of water onto normally dry land. The policy shall include coverage for loss due to Flood as defined above. The limit of liability for this peril must be equal to the completed value or \$5,000,000, whichever is less. The deductible for this peril may be as high as \$25,000. Loss limitations or higher deductibles do not relieve the Contractor of responsibility for the uninsured portion of the loss. Coverage must be expressly stated on the Evidence of Property Insurance form.

13. Earthquake. The policy shall include coverage for loss due to earth movement, including earth sinking, rising or shifting related to such event: landslide, including any earth sinking, rising or shifting related to such event, and including mine subsidence, whether man-made or not; earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. The limit of liability for this peril must be equal to the completed value or \$5,000,000, whichever is less. The deductible for this peril may be as high as \$25,000. Loss limitations or higher deductibles do not relieve the Contractor of responsibility for the uninsured portion of the loss. Coverage must be expressly stated on the Evidence of Property Insurance form.

c. *Coverage options.* Owner **may**, at their option, additionally require these Coverage options:

1. Delay in completion. Policy shall cover business income and extra expense (loss of rental income and/or gross earnings including concession and/or merchandise revenue; soft costs such as legal/accounting fees, design professional fees, insurance premiums for extending or renewing coverage, general overhead, etc.) in the event direct physical loss or damage to the covered project results in delay.

2. Flood. As defined by the Owner means the overflow of a body of water onto normally dry land. The policy shall include coverage for loss due to Flood as defined above. The limit of liability for this peril must be equal to the completed value or \$5,000,000, whichever is less. The deductible for this peril may be as high as \$25,000. Loss limitations or higher deductibles do not relieve the Contractor of responsibility for the uninsured portion of the loss.

3. Earthquake. The policy shall include coverage for loss due to earth movement, including earth sinking, rising or shifting related to such event: landslide, including any earth sinking, rising or shifting related to such event, and including mine subsidence, whether man-made or not; earth sinking (other than sinkhole collapse), rising or shifting including soil conditions which cause settling, cracking or other disarrangement of foundations or other parts of realty. The limit of liability for this peril must be equal to the completed value or \$5,000,000, whichever is less. The deductible for this peril may be as high as \$25,000. Loss limitations or higher deductibles do not relieve the Contractor of responsibility for the uninsured portion of the loss.

8. Policy shall not be required to cover these types of property:
- a. Machinery, tools, and equipment that will not become a permanent part of the project.
  - b. Vehicles licensed for road use, aircraft, watercraft, rolling stock.
  - c. Existing property at the job site; unless required by contract.
  - d. Money, securities, accounts, bills, stamps, and other similar items; precious metals and/or stones.
  - e. Water, timber, crops, animals; trees, shrubs, plants, and lawn or sod *already existing at the job site*.
  - f. Land, except excavations, grading, backfilling, filling or other movement of land if such Work is part of the project.
9. Acceptable Policy exclusions:
- a. War and Military Action, including:
    - 1. War, including undeclared or civil war
    - 2. Hostile or warlike action by a military force in time of peace or war;
    - 3. Insurrection, rebellion, revolution, civil war, usurped power or action taken by governmental authority in hindering, combating, or defending against any of these;
    - 4. Seizure or destruction of property by order of governmental authority.

- b. Nuclear reaction, nuclear radiation or radioactive contamination from any other cause, however, loss or damage arising out of a resultant fire shall be covered (subject to the provisions of the insurance policy).
- c. Mysterious disappearance or shortage found upon taking inventory;
- d. Dishonest or criminal acts of the insured or its employees;
- e. Seizure or destruction of property by order of any governmental authority; unless such action is ordered to prevent the spread of fire, in which case the policy shall pay for the damage to the covered property.
- f. Loss from fungus, mold, mildew, and the like, unless otherwise specified in the insurance policy;
- g. Actual, alleged or threatened release, discharge, seepage, escape, or dispersal of Contaminants or Pollutants. However, if fire arises directly or indirectly from the actual release, discharge, seepage, escape or dispersal of Contaminants or Pollutants, any loss or damage insured under the policy arising directly from that fire shall be covered;
- h. Asbestos removal per governmental order, plus any additional costs for such things as demolition, or cost of reconstruction or debris removal, arising out of such order.
- i. Normal subsidence and/or normal settling, cracking, shrinking or expanding of foundations or any other part of the covered property;
- j. Normal wear and tear, gradual deterioration, rust, corrosion, hidden or latent defect or any quality in the property that causes it to damage or destroy itself;
- k. Omission or error in planning, zoning, development, surveying, design or specifications;
- l. Defective or inadequate workmanship, materials, or maintenance.

d. Terms and Conditions

1. Modification or Cancellation. The ESCO's Builders Risk insurance policies shall be modifiable or cancelable only after written notice has been delivered by the ESCO to the Owner by certified or registered mail thirty (30) calendar days in advance of such modification or cancellation. The ESCO must agree to maintain such insurance until substantial completion of the project and final acceptance by the Owner.

2. Delivery of Policies. Upon request, the ESCO shall deliver copies of its newly issued or renewal insurance policies to the Owner within ten (10) calendar days following the Owner's request for such copies. Failure to request such copies of new or renewal insurance policies does not relieve the ESCO of its contractual obligation to provide the insurance coverages set forth.
3. Notification of Insurance Carriers. The ESCO shall be responsible for notifying its insurance carriers of the provisions of this Agreement and for procuring insurance coverage for this contract on a timely basis. The ESCO shall not allow the Contractor to commence work under this contract until it has obtained all the insurance required and until evidence of such insurance has been approved by the Owner.
4. Contractor's Liability. The procuring of the insurance required under this contract shall be considered solely as securing ESCO's obligations or liabilities assumed under this Agreement, including, but not limited to, the obligation to indemnify the Owner assumed under Section I and shall not be considered as satisfaction of, or a substitution for, such obligations and liabilities. The ESCO shall remain liable and responsible for all such obligations whether or not the insurance provided by it is approved by the Owner and whether or not such insurance is sufficient in amount, quality or coverage to protect it against such liability. The ESCO shall pay and make good all such obligations to the full extent thereof and to the extent that such insurance does not cover them.
5. Enforcement of this Contract. In the event Owner retains legal counsel to secure performance by the ESCO of any of its obligations under this contract, or if Owner retains or utilizes such counsel to represent its interest with respect to any matter for which the ESCO has an indemnity obligation to Owner under any provision of this contract or otherwise, the ESCO shall pay and reimburse Owner for the cost of such counsel and shall further pay and reimburse Owner for any and all other cost and expense incurred in preparing, negotiating, or prosecuting any such claim against the ESCO, including, but not limited to, any and all expert witness fees and expenses.
6. Lapse of Insurance. In the event the ESCO loses insurance coverage, the ESCO shall cause all work on the project to stop and shall immediately notify Owner of such cancellation or other loss of insurance coverage. Owner shall withhold any future payments due to the ESCO until the matter is resolved. Owner reserves the right to pursue any legal action necessary to cover losses. If the ESCO procures replacement insurance in accordance with Contract Documents, Owner reserves the right to allow the ESCO to continue work. There shall be no time credit for days not worked pursuant to this section.

7. Uninsured Loss Occurrence. In the event a loss occurs during the uninsured period, Owner reserves the right to withhold payment due to the ESCO. The ESCO shall immediately notify Owner of any loss. Owner shall withhold any future payments due to the ESCO. Owner reserves the right to pursue any legal action necessary to cover losses. If the ESCO remedies the loss and obtains the required insurance coverages, Owner reserves the right to allow the ESCO to continue work. There shall be no time credit for days not worked pursuant to this section.

**Performance Bond and Labor and Material Payment Bonds.** The ESCO shall deliver with the ESA to the Owner a Performance Bond and a Labor and Material Payment Bond on the forms provided by the Owner, securing its obligations to be performed under this Agreement until the date of Final Completion of the work by the Owner. Each bond shall be in an amount equal to the Contract Price. The Payment and Performance Bonds shall apply only to the installation portion of this Agreement and do not apply in any way to energy savings guarantees, payments or maintenance provisions.

Effective immediately after the date of Final Completion a Maintenance Bond covering defective workmanship and materials will be provided for the one-year period commencing on the date of the Owner's Final Acceptance of the Project in the amount of 10% of the total Contract Price. Notwithstanding any other provision of this Agreement or the Bonds, in no event and in no manner shall coverage under the Performance Bond and Payment Bond extend to any warranty obligations of the ESCO or the Energy Savings Guarantee, as set forth in Section 3.3 or Schedule B Energy Savings Guarantee, or any related provisions.

**SCHEDULE R  
INTERIM SAVINGS**

All Interim saving belong to the Owner.

**SCHEDULE S  
WARRANTIES**

ESCO shall provide a one year manufacturer's warranty on all equipment being installed except for equipment identified below which have extended warranties.

To be filled in as appropriate.

**SCHEDULE T**  
**FORM A, FORM B CERTIFICATIONS AND DISCLOSURES, or CPO Financial**  
**Disclosure Affidavit**

The ESCO certifies that it has fully and properly submitted a Form A, Form B Certifications and Disclosures, or CPO Financial Disclosure Affidavit which are hereby made a part of this agreement.



**SCHEDULE U**  
**SUPPLEMENTAL UNIVERSITY OF ILLINOIS CERTIFICATIONS**

The ESCO certifies and acknowledges the following Supplemental University of Illinois Certifications are hereby made a part of this agreement.

Supplemental University of Illinois Certifications:

- a. Vendor is required under 30 ILCS 500/20-65 to maintain, for a period of three (3) years after the later of the date of completion of this Contract or the date of final payment under the Contract, all books and records relating to the performance of the Contract and necessary to support amounts charged to the Owner under the Contract. The Contract and all books and records related to the Contract shall be available for review and audit by the Owner and the Illinois Auditor General. If this Contract is funded from contract/grant funds provided by the U.S. Government, the Contract, books, and records shall be available for review and audit by the Comptroller General of the U.S. and/or the Inspector General of the federal sponsoring agency. The Vendor agrees to cooperate fully with any audit and to provide full access to all relevant materials. Failure to maintain the required books and records shall establish a presumption in favor of the Owner for the recovery of any funds paid by the Owner under this Contract for which adequate books and records are not available.
- b. Vendor certifies that it has not retained a person or entity to attempt to influence the outcome of a procurement decision for compensation contingent in whole or in part upon the decision or procurement. Vendor further certifies that it has not and will not, pursuant to this subcontract or otherwise, bill or otherwise cause the State of Illinois to pay for any of the lobbyist's costs, fees, compensation, reimbursement or other remuneration (30 ILCS 500/50-38).
- c. This applies only if procuring Owner receives Medicare or Medicaid funding. Vendor certifies that neither it nor any of its directors, officers, employees, agents or subVendors who may provide services pursuant to this Contract (collectively "Agents") is presently debarred, suspended, proposed for debarment, declared ineligible or otherwise excluded from transactions with the U.S. Government or by any federal government agency. Vendor shall provide University immediate written notice if Vendor learns that this certification was erroneous when made or if Vendor or any of its Agents hereafter becomes debarred, suspended, proposed for debarment, declared ineligible or otherwise excluded from transactions with the U.S. Government or by any Federal agency.

- d. Vendor further certifies that neither it nor any of its Agents is presently subject to an investigation or proceeding to exclude it as a provider under Medicare or Medicaid or under any other federal or state health care program or under any third party insurance program, nor is currently excluded or debarred from submitting claims to Medicare or Medicaid or to any other federal or state health care program or to any third party insurer.
- e. The following certification is applicable for professional services consultants and subconsultants only. Vendor shall comply with the Copeland “Anti Kickback” Act, as codified in 18 USC 874 (2010), and comply with the payment provisions and obligations detailed by the Office of the Secretary of Labor in 29 CFR, Part 3 (2010).
- f. The following certification is applicable for professional services consultants and subVendors and this applies only if procuring Owner receives Medicare or Medicaid funding. Vendor agrees to make available, upon written request, to the Secretary of Health and Human Services, the Comptroller General of the United States, or any of their duly authorized representatives, this contract and any books, documents and records necessary to verify the costs of services rendered under this agreement. Vendor further agrees to make said contract and any books, documents and necessary records available until the expiration of four years after the completion of the agreement. In the event Vendor subcontracts any and all of its duties under this contract to another party and said subcontract has a value or cost of \$10,000 or more over a twelve (12) month period, Vendor agrees that the subcontract shall contain a clause requiring the subVendor to make available, upon written request, to the Secretary of Health and Human Services, the Comptroller General of the United States or any of their duly authorized representatives, the subcontract and any books, documents and records of the subVendor that are necessary to verify the nature of the costs under the subcontract. Vendor agrees to indemnify and hold harmless the Owner in the event that any of its Medicare reimbursement is denied or disallowed due to the failure of Vendor or any of its subVendors to comply with the requirements of this provision. Such indemnity shall include but not be limited to the amount of reimbursement denied or disallowed, plus any interest, penalties and fees.
- g. The following certification is applicable for contractors and subcontractors only. Pursuant to the Prevailing Wage Act, Vendor shall pay a wage of no less than the general prevailing hourly rate as paid for work of a similar character in the locality in which the work is performed, to all laborers, workers and mechanics, pursuant to definitions, guidelines and procedures set forth in 820 ILCS 130/0.01 et. seq. (2010).

- h. The vendor shall submit monthly to Owner a certified copy of the records required under section 130/5(a)(1) of the Act. The certified payroll shall include records of all laborers, mechanics, and other workers employed by the vendor, including assigned subcontractors, for services performed. The records shall include each worker's name, address, telephone number when available, social security number, classification or classifications, hourly wages paid in each pay period, number of hours worked each day, and the starting and ending times of each work day. The certified payroll shall be accompanied by a statement signed by the vendor and statements signed by each subcontractor where appropriate which aver that: (1) such records are true and accurate, (2) the hourly rate paid to each worker is not less than the general prevailing rate of hourly wages required under the Act; and (3) the vendor acknowledges that filing a certified payroll that he or she knows to be false is a Class B misdemeanor.
- i. Pursuant to the Veterans Preference Act, Vendor shall give preference to veterans of the United States military and naval service in appointments and employment upon public works by, or for the use of, the State or its political subdivisions, pursuant to the guidelines in 330 ILCS 55/0.01 et. seq. (2010)
- j. The following certification is applicable for contractors only. Affidavit to Maintain a Primary Place of Employment in Illinois. By his/her signature, the officer of Vendor signing these certifications makes the following affirmation on behalf of Vendor as required by 30 ILCS 500/30-22(8): If awarded a Contract, Vendor will maintain an Illinois office as the primary place of employment for persons employed in the construction authorized by the Contract throughout the term of the Contract.

**SCHEDULE V  
PROJECT LABOR AGREEMENT  
(UIUC Only)**

**SCHEDULE W**  
**ESCO/Subconsultant/Subcontractor/Supplier Use Summary**

	Vendor Name	ESCO Total Contract Value	Construction Contract Value (\$)	MBE/WBE/PBE/VOSB/SDVOSB/Or NA Classification (Must be certified with CEI)	MBE/WBE/PBE/VOSB/SDVOSB Participation (shown as percentage of Construction Contract Value)	Professional Services Contract Value (\$)	MBE/WBE/PBE/VOSB/SDVOSB/Or NA Classification (Must be certified with CEI)	MBE/WBE/PBE/VOSB/SDVOSB Participation (shown as percentage of PSC Value)
Level 1								
Level 2								
Level 2								
Level 2								
Level 2								
Level 2								
Level 2								
Level 2								
Level 2								
Level 2								
Level 2								
Note: Level 3 tier subcontract values are included as a part of some Level 2 tier subcontract values								
Level 3								
Level 3								
Level 3								
Level 3								
Level 3								
Level 3								
Total Subcontract Construction Value								
Total Subcontract PSC Value								
Total ESCO Contract Value								

The MBE/WBE/PBE/VOSB/SDVOSB Subconsultant/Subcontractors/Supplier Certification form attached to the Notice of Intent to Award Letter (Attachment A) to be filled out for each MBE/WBE/PBE/VOSB/SDVOSB vendor. If for any reason an approved MBE/WBE subcontractor or supplier fails to meet its contractual commitment to the ESCO or wishes to reduce the scope / compensation to the MBE/WBE subcontractor or supplier, the ESCO may request approval of an alternate MBE/WBE subcontractor or supplier. All requests shall be in writing on the Bidder's letterhead and submitted with documented evidence of cause to Owner's Office of Procurement Diversity. Owner may require supporting documentation from the MBE/WBE subcontractor or supplier.

Utilization of WMBE certified vendors must designate full participation as either a MBE or WBE when split goals are identified for purposes of meeting diversity goals. WMBE value may not be split between MBE and WBE. A firm cannot be designated as more than one business enterprise between MBE/WBE/PBE and VOSB/SDVOSB.

The Owner has established a target goal for total dollar amount of thirty percent (30%) comprising of Professional Service Consultants for design work and a target goal of thirty percent (30%) comprising of contractors and suppliers for construction work. In addition, the Owner has established a target Veteran Owned Small Business/Service-Disabled

Veteran Owned Small Business (VOSB/SDVOSB) goal of 3% comprising of Professional Service Consultant's for design work and 3% for construction work. The University of Illinois values the utilization of certified minority, women and veteran business enterprises in capital construction. All such enterprises must perform a commercially useful function. Enterprises which might be considered "pass-throughs" or "fronts" are not permitted. Failure to comply with this requirement or false representations may result in termination of contracts related to Owner capital construction projects and result in criminal and civil penalties.