

EXHIBIT A

INTERGOVERNMENTAL GUARANTEED ENERGY SAVINGS AGREEMENT

THIS INTERGOVERNMENTAL GUARANTEED ENERGY SAVINGS AGREEMENT is dated as of _____, 201_ (the “Contract Effective Date”) by and between THE CITY OF PHILADELPHIA (“City”) acting through its Procurement Department and THE PHILADELPHIA ENERGY AUTHORITY, a body corporate and politic organized and existing under the laws of the Commonwealth of Pennsylvania (“Authority” or “PEA”).

RECITALS

WHEREAS, the Authority is a body corporate and politic organized under the provisions of the Municipalities Authorities Act of 2001 (the Act of June 19, 2001, P.L. 287, No. 22, as amended) pursuant to ordinances of the Council of the City; and

WHEREAS, the Authority is authorized by an Ordinance approved on July 29, 2010 (Bill No. 100163-AA) to take actions concerning the development or facilitation of energy efficiency projects on behalf of the City; and

WHEREAS, the City has requested that the Authority enter into a Guaranteed Energy Savings Agreement (the “Guaranteed Energy Savings Agreement” or “GESA Agreement”) with Johnson Controls Inc. (the “Vendor”) and the Philadelphia Museum of Art, to provide and install energy conservation measures at (1) 2600 Benjamin Franklin Parkway, Philadelphia, Pennsylvania 19130; (2) 2525 Pennsylvania Ave, Philadelphia, Pennsylvania 19130; and (3) 2151 Benjamin Franklin Parkway, Philadelphia, Pennsylvania 19130 (respectively: Philadelphia Museum of Art Main Building, Perelman Building and Rodin Museum)(collectively, the “Facility” or “Facilities); and

WHEREAS, the Council of the City of Philadelphia enacted an ordinance, Bill No. _____, approved by the Mayor on _____ duly empowering the City and the Authority to enter this Intergovernmental Guaranteed Energy Savings Agreement and Exhibits thereto; and

WHEREAS, by resolution dated _____, the Board of Directors of the Authority has authorized its Chairman, Vice-Chairman or its Executive Director to, among other things, execute this Intergovernmental Guaranteed Energy Savings Agreement and the GESA Agreement; and

WHEREAS, the Vendor, the Philadelphia Museum of Art and the Authority have entered into the GESA Agreement, in the form attached hereto as Exhibit A, contemporaneously with this Intergovernmental Guaranteed Energy Savings Agreement.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein and for other valuable consideration, the City and the Authority (collectively, the “Parties”), intending to be legally bound, hereby agree as follows:

1. Definitions.

Capitalized terms used and not defined in this Intergovernmental Guaranteed Energy Savings Agreement shall have the meanings ascribed to them in the GESA Agreement.

2. Term.

The term of this Intergovernmental Guaranteed Energy Savings Agreement shall commence on the Contract Effective Date and shall terminate one day after the expiration or termination of the GESA Agreement; provided that to the extent that any obligations of the Authority under the GESA Agreement survive expiration or termination of the GESA Agreement, the City’s corresponding obligations under this Intergovernmental Guaranteed Energy Savings Agreement shall remain in effect and be enforceable following such expiration or termination.

3. Obligations of the Authority.

(a) Authority shall provide all required administrative services necessary to fulfill its obligations to the Vendor and the City for the prompt and timely submission of any required representations and documents required under the GESA Agreement (the “Administrative Obligations”).

(b) The Authority shall provide the City with copies of any notices received by the Authority from the Vendor, unless the Authority shall have determined by reasonable means that the City received a copy of such notice directly from such party.

(c) The Authority shall provide the City with a copy of any notices received from any governmental authority with respect to the Facilities in relation to the performance or transactions contemplated by this Intergovernmental Guaranteed Energy Savings Agreement, the GESA Agreement, or the other Operative Documents.

(d) The Authority shall not amend, modify, alter or otherwise change the GESA Agreement, once fully executed, without the prior written consent of the City.

(f) The Authority shall not assign the GESA Agreement once fully executed, without the prior written consent of the City.

(g) The Authority shall pay over to the City any payments due from the Vendor with respect to the GESA Agreement.

4. Obligations of the City

(a) With the exception of Administrative Obligations, the City assumes and shall perform all other non-financial obligations of the Authority to the Vendor under the GESA Agreement. The City shall make timely payments to the Authority for invoices submitted to the City by the Authority for services provided under the GESA Agreement.

(b) The City shall timely and promptly review all required representation and documents required under the GESA Agreement.

5. Indemnification.

Subject to the provisions and limitations of this Section, the City hereby indemnifies and holds harmless the Authority and each member, officer, and employee of the Authority against any and all claims, losses, damages or liabilities, joint and several, to which the Authority or any member, officer or employee of the Authority or any member, officer or employee of the Authority may become subject, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of this Intergovernmental Guaranteed Energy Savings Agreement or the GESA Agreement, unless the losses, damages or liabilities arise from an adjudication of bad faith, fraud or deceit of the member, officer or employee of the Authority. In the event any claim is made or action brought against the Authority, or any member, officer, or employee of the Authority, the Authority may request that the City assume the defense of the claim and any action brought thereon and pay all reasonable expenses incurred therein; or the Authority may assume the defense of any such claim or action, provided, however, that counsel selected by the Authority shall be approved by the City, and further provided that the City may engage its own counsel to participate in the defense of any such action. The defense of any such claim shall include the taking of all actions necessary or appropriate thereto.

6. Successor Authority.

In the event that the Authority ceases to exist or otherwise does not perform its obligations hereunder, or the City chooses to cause the Authority to assign the GESA Agreement to another Authority, the City shall have the right to appoint and substitute a successor authority (the "Successor Authority") to succeed to the rights and assume the obligations of the Authority hereunder. The City's right to appoint a Successor Authority shall be a continuing right and shall not be exhausted by the exercise thereof.

7. Limitation of Liability: Special Obligations of the Authority.

Notwithstanding anything contained in this Intergovernmental Guaranteed Energy Savings Agreement to the contrary, the payment obligations of the Authority arising under this Intergovernmental Guaranteed Energy Savings Agreement are special obligations of the Authority, payable solely from payments received from the City. The Authority will do all things lawfully within its power to obtain, maintain and properly request from the City and pursue funds from which the payments may be made.

8. Tort Claims Act.

Nothing in this Intergovernmental Guaranteed Energy Savings Agreement or the GESA Agreement shall waive or be construed to waive or amend, or be deemed to waive or amend, any immunity which the City or the Authority, or their officials, members, officers, agents, employees or representatives, may have under Title 42, Chapter 85 of the Pennsylvania Consolidated Statutes Annotated, as applicable, or other Applicable Law.

9. Representations and Warranties of Authority.

The Authority represents and warrants that:

(a) The Authority is a body corporate and politic, validly existing under the Constitution and laws of the Commonwealth of Pennsylvania with full legal right, power and authority to enter into and perform the obligations under this Intergovernmental Guaranteed Energy Savings Agreement.

(b) The Authority has duly authorized the execution and delivery of this Intergovernmental Guaranteed Energy Savings Agreement. This Intergovernmental Guaranteed Energy Savings Agreement has been duly executed and delivered by the Authority and constitutes a legal, valid and binding obligation of the Authority.

(c) Neither the execution nor the delivery by the Authority of this Intergovernmental Guaranteed Energy Savings Agreement nor the performance by the Authority of its obligations hereunder nor the consummation by the Authority of the transactions contemplated hereby (1) conflicts with, violates or results in a breach of any Applicable Law or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, decree, agreement or instrument to which the Authority is a party or by which the Authority or any of its properties or assets are bound, or constitutes a default thereunder.

(d) (1) The Authority and the Vendor will execute the GESA Agreement. The Authority and the Vendor are duly authorized to execute and deliver the GESA Agreement. The GESA Agreement will constitute legal, valid and binding obligations of the Authority and the Vendor, enforceable against the Authority or the Vendor in accordance with its terms except insofar as such enforcement may be affected by bankruptcy, insolvency, moratorium and other laws affecting creditors' rights generally; and (2) the City was allowed to review and approve the form of the GESA Agreement prior to its execution, in the form executed by the Authority and the Vendor.

(e) There is no action, suit or other proceeding as of the Contract Effective Date, at law or in equity, before or by any court or governmental authority, pending or, to the Authority's best knowledge, threatened against the Authority or the Vendor which is likely to result in an unfavorable decision, ruling or finding which would materially and adversely affect the execution or delivery of this Agreement or the validity or

enforceability of the GESA Agreement or any other agreement or instrument entered into by the Authority in connection with the transactions contemplated hereby.

(f) The Authority has abided with the provisions of Chapter 17-1400 of the Philadelphia Code, including the provisions of Subsection 17-1404(3), in awarding the GESA Agreement as though such agreement was directly subject to the provisions of Chapter 17-1400.

10. Representations and Warranties of the City.

The City hereby represents and warrants that:

(a) The City is a body corporate and politic validly existing under the Constitution and laws of the Commonwealth of Pennsylvania with full legal right, power and authority to enter into and perform its obligations under this Intergovernmental Guaranteed Energy Savings Agreement.

(b) The City has duly authorized the execution and delivery of this Intergovernmental Guaranteed Energy Savings Agreement and the taking of any and all actions as may be required on its part to carry out and to give effect and to consummate the transactions contemplated by this Intergovernmental Guaranteed Energy Savings Agreement and this Intergovernmental Guaranteed Energy Savings Agreement has been duly executed and delivered by it and constitutes a legal, valid and binding obligation of City, enforceable against City in accordance with its terms.

(c) Neither the execution nor the delivery by it of this Intergovernmental Guaranteed Energy Savings Agreement, nor its performance of its obligations in connection with the transactions contemplated hereby nor its fulfillment of the terms or conditions hereof (1) conflicts with, violates or results in a breach of any Applicable Laws, or (2) conflicts with, violates or results in a breach of any term or condition of any judgment or decree, or any agreement or instrument, to which City is a party or by which City or any of its properties or assets are bound, or constitutes a default thereunder.

(d) There is no action, suit or other proceeding as of the Contract Effective Date, at law or in equity, before or by any court or governmental authority, pending or, to the City's best knowledge, threatened against the City having a material adverse effect on the right of the City to execute this Intergovernmental Guaranteed Energy Savings Agreement or its ability to comply with its obligations under this Agreement.

(e) The City has no knowledge of any Applicable Law in effect on the date as of which this representation is being made which would prohibit the performance by the City of this Intergovernmental Guaranteed Energy Savings Agreement and the transactions contemplated hereby.

11. Effect of City Approval

Review, approval or acceptance by the City of any documents submitted to the City by the Authority, the Vendor, or any other party under or in connection with the Intergovernmental Guaranteed Energy Savings Agreement or the GESA Agreement shall not constitute approval otherwise required under Applicable Law by any and all City departments, boards or commissioner, or by any other federal, state, or local governmental authority having jurisdiction.

12. No Merger.

The rights and obligations of the Parties under this Intergovernmental Guaranteed Energy Savings Agreement shall remain in effect and shall not merge, even if the same Party holds rights of both Parties hereunder, unless such Party terminates this Intergovernmental Guaranteed Energy Savings Agreement in writing.

13. Severability.

In the event that any of the provisions, or portions or applications thereof of this Intergovernmental Guaranteed Energy Savings Agreement are held to be unenforceable or invalid by any court of competent jurisdiction, the Parties shall negotiate an equitable adjustment in the provisions of this Intergovernmental Guaranteed Energy Savings Agreement with a view toward effecting the purpose of this Intergovernmental Guaranteed Energy Savings Agreement, and the validity and enforceability of the remaining provisions, or portions or applications thereof, shall not be affected thereby.

14. Notice.

Any notice required to be given by City to the Authority hereunder shall be in writing and shall be addressed to:

The Philadelphia Energy Authority
City Hall, Room 566
1400 JFK Boulevard
Philadelphia, PA 19107
Attention: Executive Director

Any notice required to be given by the Authority to the City hereunder shall be in writing and shall be addressed to:

City of Philadelphia Office of Sustainability
1515 Arch Street, 13th Floor
Philadelphia, PA 19102
Attention: Energy Manager

All notices under this Section shall be delivered in person, sent via certified mail with a return receipt requested or sent via facsimile and shall be effective when received at the address specified above. The Parties hereto, by like notice in writing, may

designate, from time to time, another address or facsimile number to which notices may be given pursuant to this Intergovernmental Guaranteed Energy Savings Agreement.

15. Entire Agreement.

This Intergovernmental Guaranteed Energy Savings Agreement contains the entire agreement between the Parties hereto and supersedes any and all prior written and oral agreements, proposals, negotiations, understandings and representations pertaining to the subject matter hereof.

16. Amendments.

The parties acknowledge that from time to time the Intergovernmental Guaranteed Energy Savings Agreement may require amendments to support the Parties interests and obligations under the GESA Agreement. Such requests for amendment from either Party shall not be unreasonably denied or delayed. However, no amendments or modifications of this Intergovernmental Guaranteed Energy Savings Agreement shall be valid unless evidenced in writing and signed by a duly authorized representative of the Party against which enforcement is sought.

17. No Third Party Rights.

The Parties hereby acknowledge the Vendor is a third party beneficiary to this Intergovernmental Guaranteed Energy Savings Agreement. Except with respect to the Vendor as a third party beneficiary, this Intergovernmental Guaranteed Energy Savings Agreement and all rights hereunder are intended for the sole benefit of the Parties and shall not imply or create any rights on the part of, or obligations to, any other Person.

18. No Conflict.

To the extent of any conflict between the terms and conditions set forth in this Agreement (other than the fact that the City will be performing obligations of the Authority under the Guaranteed Energy Savings Agreement) and the Guaranteed Energy Savings Agreement, the terms and conditions of the Guaranteed Energy Savings Agreement shall govern.

[Signature pages follow]

IN WITNESS WHEREOF, the Parties have executed this Intergovernmental Guaranteed Energy Savings Agreement as of the date first above written.

APPROVED AS TO FORM:
Sozi Pedro Tulante, City Solicitor

CITY OF PHILADELPHIA, acting
through its Procurement Department

By: _____

By: _____
Trevor Day
Commissioner

**PHILADELPHIA ENERGY
AUTHORITY**

By: _____
Emily Schapira
Executive Director

Exhibit A
Form of Guaranteed Energy Savings Agreement

EXHIBIT B

GUARANTEED ENERGY SAVINGS CONTRACT
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GUARANTEED ENERGY SAVINGS CONTRACT

This Guaranteed Energy Savings Contract (the "**Contract**") is made and entered into as of this _____ day of _____, 201_ ("**Effective Date**") by and between the **PHILADELPHIA ENERGY AUTHORITY**, a body politic and corporate existing under the laws of the Commonwealth of Pennsylvania (the "**PEA**"); the **PHILADELPHIA MUSEUM of ART**, (the "**PMA**"); and **JOHNSON CONTROLS INC.** (the "**Energy Services Company**" hereinafter referred to as "**ESCO**" or "**JCI**"), having its principal offices at _____.

I. BACKGROUND

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

WHEREAS, the City of Philadelphia ("City") owns the three (3) properties located at: (1) 2600 Benjamin Franklin Parkway, Philadelphia, Pennsylvania 19130; (2) 2525 Pennsylvania Ave., Philadelphia, Pennsylvania 19130; and (3) 2151 Benjamin Franklin Parkway, Philadelphia, Pennsylvania 19130 (respectively; Philadelphia Museum of Art Main Building, Perelman Building and Rodin Museum; collectively referred to hereinafter as the "**Premises**"); and the buildings are in need of Energy Conservation Measures ("**ECMs**") that include programs, facility alternations or upgrades designed to reduce energy, water, wastewater or other measurable consumption or operating costs at said Premises; and

WHEREAS, the City and PEA solicited proposals from qualified firms through issuance of the Request for Proposals ("**RFP**") set forth in **Appendix A: RFP for ESCO Solicitation**; and

WHEREAS, ESCO submitted a proposal, dated July 6, 2017 and set forth in **Appendix B: ESCO Proposal** (the "**Proposal**"); and

WHEREAS, ESCO has made an assessment of the energy and water consumption characteristics of the Premises and pre-existing equipment described in **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)**, and

WHEREAS, PEA desires to retain ESCO to purchase, install and service certain energy conservation measures described in the Proposal, such energy and water cost saving equipment of the type or class described in **Schedule A (Selected ECMs to be Installed by ESCO)**, attached hereto and made part hereof, and to provide measurement and verification services designed to measure cost savings, as more fully set forth herein; and

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

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

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

ARTICLE 1. INCORPORATION OF BACKGROUND; DEFINITIONS

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

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

- (a) **“Acceptance Date”** has the meaning set forth in Paragraph 4.3.
- (b) **“Amendment”** means a written modification or change to any Contract Document signed by both Parties.
- (c) **“Annual Guaranteed Savings”** means the Guaranteed Savings for each year of the Guarantee Period, as set forth in Schedule C.
- (d) **“Applicable Law”** means all applicable present and future federal, state or local laws, ordinances, executive orders, rules, regulations and court orders, injunctions, decrees, and other official interpretation thereof by any federal, state or local court, administrative agency or government body, including the City, the Commonwealth and the United States of America. Applicable Law includes, without limitation, the Philadelphia Home Rule Charter, The Philadelphia Code, the Guaranteed Energy Savings Act (62 Pa. C.S. § 3751 *et seq.*); Chapter 39 of Act 57 of May 5, 1998 (62 Pa. C.S. § 3901 *et seq.*); the Prevailing Wage Act (43 P.S. §165-1 *et seq.*); the Steel Products Procurement Act (73 P.S. § 1881 *et seq.*); the Trade Practices Act of July 23, 1968 (71 P.S. §686 *et seq.*); the Uniform Construction Code (13 P.S. § 1101 *et seq.*); the Pennsylvania Worker’s Compensation Act, 77 P.S. § 1 *et seq.*); the Pennsylvania Solid Waste Management Act (35 P.S. § 6018. 101 *et seq.*); the Pennsylvania Hazardous Sites Cleanup Act (35 P.S. § 6020.101 *et seq.*); the Pennsylvania Clean Streams Law (35 P.S. § 691.1 *et seq.*); the Pennsylvania Storage Tank and Spill Prevention Act (35 P.S. § 6021.101,

et seq.); the Pennsylvania Land Recycling and Environmental Remediation Standards Act (35 P.S. § 6026.101 *et seq.*); the Pennsylvania Hazardous Material Emergency Planning and Response Act, (35 P.S. § 6022. 101 *et seq.*); the Pennsylvania Air Pollution Control, 35 P.S. § 4001, *et seq.*), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*); the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. § 9601 *et seq.*); the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*); the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.*); the Hazardous Materials Transportation Act (49 U.S.C. § 1801 *et seq.*); the Clean Air Act (42 U.S.C. § 7401 *et seq.*); the Clean Water Act (33 U.S.C. § 1251 *et seq.*); the Oil Pollution Act of 1990 (33 U.S.C. § 2701 *et seq.*); the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. § 136 *et seq.*); and the other specific Applicable Laws set forth herein, each as amended from time to time.

- (e) **“As-Built Documentation”** means a final set of Design and Engineering Documents that has been updated to accurately and clearly depict the as-built conditions of each of the Selected ECMs to be implemented under this Contract, including any supplemental details, drawings, or plans that are necessary to demonstrate the location of each Selected ECM, its relation to Premises, and any information necessary for making future alternations, connections or upgrades to the Selected ECM, such as power supplies and interconnecting wiring between units, installation of accessories, and appurtenances.
- (f) **“Business Days”** means calendar days, excluding all Saturdays and Sundays in addition to New Year’s Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, or the Monday thereafter when these days occur on Saturday or Sunday, and other day on which banks in the Commonwealth are closed.
- (g) **“Capacity Rights”** means the rights associated with the electric generation and load reduction capacity and capability of the selected ECMs, including the right to use and receive payment for generation capacity or load reduction capability of Selected ECMs in the PJM Reliability Price Model Base Residual Auctions and/or in other appropriate PJM capacity, emergency load reduction or demand response programs or markets.
- (h) **“Change Order”** means an instrument altering the scope of work under the Contract issued under Paragraph 7.3.3 below.
- (i) **“Contract Sum”** has the meaning set forth in Paragraph 5.1.

- (j) The **“City”** means The City of Philadelphia, a corporation and body politic existing under the laws of the Commonwealth, and includes its various executive and administrative departments, agencies, boards, commissions and offices, including the Department, and its legislature, the City Council. The City is a City of the First Class under the laws of the Commonwealth.
- (k) **“Commonwealth”** means the Commonwealth of Pennsylvania.
- (l) **“Concealed Conditions”** means subsurface or otherwise concealed physical conditions on the Premises that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in the Work anticipated by this Contract.
- (m) **“Contract”** means this Guaranteed Energy Savings Contract between the Parties as evidenced by the Contract Documents.
- (n) **“Contract Documents”** means this Contract; any and all exhibits, Schedules, drawings, specifications, diagrams, plans, addenda or other documents incorporated by reference; any approved Design and Engineering Documents, as set forth in Paragraph 7.2.2 (Design and Engineering Approval); the Notice(s) to Proceed with Selected ECMs; the performance and payment bonds; and any and all Amendments to any of these documents.
- (o) **“Department”** means the department, board, commission, office or agency of the City for which the ESCO carries out the Work under this Contract, as designated in writing by the City from time to time.
- (p) **“Design and Engineering Documents”** means the drawings, plans, technical specifications, or other design and engineering documents prepared for the PEA by or on behalf of the ESCO.
- (q) **“ECM Implementation”** has the meaning set forth in Paragraph 7.1.
- (r) **“ECM Service Responsibilities”** has the meaning set forth in Paragraph 14.1.
- (s) **“Energy Conservation Measure” (“ECM”)** has the meaning set forth in 62 Pa. C.S. § 3752 (Definition of “Energy Conservation Measure”).
- (t) **“Energy Savings Guarantee”** has the meaning set forth in Paragraph 5.2, and shall consist of both the Total Guaranteed Savings and the Annual Guaranteed Savings.
- (u) **“Effective Date”** has the meaning set forth in Paragraph 4.1.

- (v) "**Environmental Incentives**" means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the development or installation of the ECMs and the reduction of energy usage at the Site. Without limiting the forgoing, "Environmental Incentives" includes utility rebates or incentive programs, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit program, grants from nongovernmental organizations, and the right to claim federal income tax credits under Section 45 and/or 48 of the Internal Revenue Code.
- (w) "**Equipment**" means the property described in Schedule A and all replacements, substitutions, repairs, restorations, modifications, attachments, accessions, additions and improvements thereof or thereto. Whenever reference is made in this Contract to Equipment listed in a Schedule, that reference shall be deemed to include all replacements, repairs, restorations, modifications, and improvements of that Equipment for which ESCO is responsible under this Contract.
- (x) "**Excessive Shortfall Penalty**" has the meaning set forth in Paragraph 5.3.3.
- (y) "**Excessive Savings**" has the meaning set forth in Paragraph 5.3.4.
- (z) "**Fiscal Year**" means the annual accounting year of the City, which currently begins on July 1 of each year.
- (aa) "**Force Majeure Event**" has the meaning set forth in Article 24.
- (bb) "**General Contract Requirements**" means the additional contract conditions and requirements specifically prepared by the City and PEA and applicable to the Selected ECMs and may from time to time include, but not be limited to, special or additional or supplementary instructions, minimum wage rate schedules, prevailing wage rate schedules, contingent price lists, requirements of the City's Minority Business Enterprise Council, and general tax requirements.
- (cc) "**Guaranteed Savings**" means the amount of energy, water or wastewater cost savings, operational cost savings or revenue increases resulting from the Selected ECMs. The Guaranteed Savings may be referenced in this Contract (and the Schedules and Exhibits thereto) on either an annual basis, meaning the Annual Guaranteed Savings for any single year of the Guarantee Period, or on a grand total basis, meaning

the Total Guaranteed Savings achieved during the twenty-year Guarantee Period.

- (dd) **“Guarantee Period”** has the meaning set forth in Paragraph 4.4.
- (ee) **“Implementation Period”** has the meaning set forth in Paragraph 4.2.
- (ff) **“Implementation Schedule”** has the meaning set forth in Paragraph 7.3.1.
- (gg) **“Material Change”** has the meaning set forth in Paragraph 17.1.
- (hh) **“Notice of Nonappropriation”** has the meaning set forth in Paragraph 6.2.
- (ii) **“Notice to Proceed”** means a notice from the City to the ESCO authorizing the ESCO to commence work on Selected ECMs under the Contract as set forth in Paragraph 4.2. (Dates and Contract Term).
- (jj) **“Parties”** means the PEA and the ESCO, and a **“Party”** means either the PEA or the ESCO.
- (kk) **“Person”** means any individual, sole proprietorship, association, company, firm, partnership, limited partnership, joint venture, corporation, limited liability company or other form of entity or association recognized at law.
- (ll) **“PJM”** means the regional transmission organization operated by PJM Interconnection, LLC or any successor organization thereto.
- (mm) **“Premises”** means the Philadelphia Museum of Art Main Building, Perelman Building and Rodin Museum, as more fully described in the Background and Schedule B.
- (nn) **“Project Site”** means all portions of the Premises for which the City and PEA has provided the ESCO rent-free access for the installation and commissioning of the Selected ECM as more fully described in Article 18 (Ownership and Access).
- (oo) **“Project Manager”** means the individual specifically designated in writing by the PEA as the PEA’s Project Manger, and any other individual who may be designated in writing by the Project Manager as his or her representative.
- (pp) **“Requested Information”** has the meaning set forth in Paragraph 48.3.

- (qq) **“Schedule”** means any schedule to this Contract, substantially in the form of the schedules attached to this Contract, agreed to from time to time by the Parties hereto.
- (rr) **“Selected ECMs”** means the ECMs selected from the Proposal by the PEA for design, implementation and installation at the Premises by the ESCO pursuant to this Contract.
- (ss) **“Shortfall Payment”** has the meaning set forth in Paragraph 5.3.2.
- (tt) **“Stop Work Order”** has the meaning set forth in Paragraph 7.3.4.1.
- (uu) **“Subcontract”** means a contract made between the ESCO and a Subcontractor, or between a Subcontractor and a sub-subcontractor at any tier, providing for the compensation of one or more persons for the Work which the ESCO has agreed to perform under the Contract.
- (vv) **“Subcontractor”** means a Person performing at any tier under the contract with the ESCO or another Subcontractor one or more portions of the Work which the ESCO has agreed to perform under the Contract. Subcontractors shall include, without limitation, vendors or other Persons contracting with a Subcontractor or the Contractor for part of the Work under the Contract.
- (ww) **“Term”** has the meaning set forth in Paragraph 4.5.
- (xx) **“Total Guaranteed Savings”** means the total cumulative Guaranteed Savings during the twenty-year Guarantee Period, as set forth in Schedule C.
- (yy) **“True-Up Period”** has the meaning set forth in Paragraph 5.3.1.
- (zz) **“Work”** means all professional services, Equipment, software and construction services that are required for the design, implementation and installation of the Selected ECMs.

1.3 **Interpretation; number; gender** The words “herein” “hereof” and “hereunder” and other words of similar import refer to the Contract as a whole, including all Contract Documents, and not to any particular article, paragraph, subparagraph or clause contained in the Contract Documents. Whenever the context requires, words used in the singular shall be construed to include the plural and vice versa, and pronouns of any gender shall be deemed to include the masculine, feminine and neutral genders.

ARTICLE 2. SCHEDULES, EXHIBITS AND APPENDICES

2.1 **Schedules.** The Schedules set forth below, copies of which are attached hereto (or will be as provided for in the contract), are set forth in their entirety as Attachment I and made a part of this contract by reference.

Background

- Schedule A Selected ECMs to be Installed by ESCO
- Schedule B Description of Premises; Pre-Existing Equipment Inventory

Savings Guarantee and Payments

- Schedule C Energy Saving Guarantee
- Schedule D ESCO Compensation and Payment Schedule
- Schedule E Baseline Energy Consumption; Baseline Adjustments
- Schedule F Measurement and Verification
- Schedule G Analysis Final Project Costs and Final Project Cash Flow
- Schedule H [Intentionally Left Blank]
- Schedule I [Intentionally Left Blank]

Implementation Phase

- Schedule J Implementation Schedule
- Schedule K Start-Up and Commissioning Plan
- Schedule L Standards of Comfort
- Schedule M ESCO's Training Responsibilities
- Schedule N Waste and Hazardous Material Removal Responsibilities
- Schedule O City Approved Subcontractor List
- Schedule P [Intentionally Left Blank]

Post-Implementation Phase

- Schedule Q ESCO's ECM Service Responsibilities
- Schedule R City's ECM Service Responsibilities
- Schedule S ECM Service Responsibilities Checklist
- Schedule T Annual Reporting Requirements

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

- Exhibit I Performance Bond/Construction Bond
- Exhibit II (i) Certificate of Acceptance – ECM Substantial Completion
- Exhibit II (ii) Certificate of Acceptance—Final Acceptance
- Exhibit II (iii) Certificate of Acceptance—Hazardous Material Removal
- Exhibit III General Contracting Requirements – Prevailing Wage Rate Schedule
- Exhibit IV Economic Opportunity Plan
- Exhibit V Financing Agreement and Payment Schedule [If Applicable]

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

Appendix A: RFP for ESCO Solicitation

Appendix B: ESCO Proposal

ARTICLE 3. ENERGY USAGE RECORDS AND DATA

The City has furnished or PEA shall furnish (or cause its energy suppliers to furnish) to ESCO, upon its request, all of its records and complete data concerning energy usage and energy-related maintenance for the Premises described in **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)**, including the following data for the most current thirty-six (36) month period:

- (a) utility records;
- (b) occupancy information;
- (c) descriptions of any changes in the building structure or its heating, cooling, lighting or other systems or energy requirements;
- (d) descriptions of all energy consuming or saving equipment used in the Premises;
- (e) bills and records relating to maintenance of energy-related equipment, and a description of energy management procedures presently utilized.

If requested, the PEA shall also provide any prior energy audits of the Premises, and copies of the City's financial statements and records related to energy usage and operations for said thirty-six (36) month period at said Premises, and shall make agents and employees familiar with such records available for consultations and discussions with ESCO. Any information or documentation provided by the PEA to the ESCO relating to the Premises is provided only for the convenience of the ESCO. Neither the City or PEA makes any representation or warranty as to the sufficiency, completeness, or accuracy of any information submitted to the ESCO.

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II. SAVINGS GUARANTEE AND PAYMENTS

ARTICLE 4. DATES AND CONTRACT TERM

The following dates are terms in this Contract are to be defined as follows:

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

4.2 **Implementation Period.** The period from the Effective Date until the Acceptance Date, as further defined herein, shall be known as the Implementation Period ("**Implementation Period**"). The Work performed during the Implementation Period shall commence on the date specified in a Notice to Proceed. Prior to issuing a Notice to Proceed, the PEA shall secure or cause the City to secure funds in an amount necessary to cover the total project cost listed in Table D-1 on **Schedule D (ESCO Compensation and Payment Schedule)**.

4.3 **Acceptance Date.** The "**Acceptance Date**" shall be defined as the first day of the month after the month in which ESCO has delivered a notice to the PEA that it has installed, commenced operating, and completed training for all of the Selected ECMs specified in **Schedule A (Selected ECMs to be Installed by ESCO)** and in accordance with the provisions of **Article 7 (ECM Implementation)**, **Article 9 (Training by ESCO)** and **Schedule K (Start-Up and Commissioning Plan)**; and the PEA has inspected and provided written notice of final acceptance of Work and all Selected ECMs, as evidenced by a signed Certificate of Final Acceptance as set forth in **Exhibit II (iii) (Certificate of Acceptance—Final Acceptance)**, such that both parties agree that the Guarantee Period, as defined in **Paragraph 4.4 (Guarantee Period)** below, has commenced and is now in effect.

4.4 **Guarantee Period.** The "Guarantee Period" is 20 years, beginning on the Acceptance Date, as defined above, unless, prior to the Acceptance Date, the PEA provides ESCO with written notice that it has opted to defer the beginning of the Guarantee Period to the first day of the City's Fiscal Year after the Acceptance Date, in which event the Guarantee Period will be 20 years, beginning on the first day of the Fiscal Year after the Acceptance Date. The exercise of the forgoing option to defer the beginning of the Guarantee Period shall be in the PEA's sole discretion. Where the Guarantee Period is deferred to the first day of the Fiscal Year, an equitable adjustment to the Annual Guaranteed Savings and Total Guaranteed Savings shall be mutually agreed to between the Parties.

4.5 **Term.** The Term of this Contract shall commence on the Effective Date and, unless earlier terminated in accordance with this Contract, shall expire on the last day of the Guarantee Period, as defined above ("**Term**").

ARTICLE 5. PAYMENT

5.1 **Contract Sum.** The agreed to Contract Sum for the Work is \$10,734,880.00 as set forth in **Schedule G (Final Project Cost and Project Cash Flow Analysis)**. ESCO agrees that the Contract Sum shall include the total amount of compensation due to ESCO under this Contract as set forth in **Schedule D (ESCO Compensation and Payment Schedule)**.

5.2 **Energy Savings Guarantee.** Pursuant to 62 Pa. Const. Stat. § 3754(b) of the Pennsylvania Guaranteed Energy Savings Act, ESCO guarantees that the Total Guaranteed Savings will meet or exceed the cost of the Selected ECMs. Additionally, ESCO guarantees that the Annual Guaranteed Savings set forth on an annual basis in **Schedule C (Energy Savings Guarantee)** shall be achieved on an annual basis. The guarantees made in this Section 5.2 constitute the “Energy Savings Guarantee.”

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

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

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

5.3 **Annual Review and Reimbursement/Reconciliation.** Cost savings shall be measured and/or calculated as specified in **Schedule F (Measurement and Verification)** and reported to the PEA and the City within ninety (90) days of the end of year for the previous year for each year of the Guarantee Period as set forth in **Schedule T (Annual Reporting Requirements)**.

5.3.1 **True-Up Period.** All annual cost savings during the Guarantee Period shall be calculated from an anniversary date of July 1st to coincide with the first day of City’s Fiscal Year. The period after the Acceptance Date and before the July 1st subsequent to ECM Implementation shall be known as the “**True-Up Period**.” All guaranteed savings achieved during the True-Up Period shall be accounted for in **Schedule C (Energy Savings Guarantee)** and, if applicable, shall cover any

corresponding annual payments required to be made by the City during the True-Up Period.

5.3.2 **Shortfall Payments.** In the event that the actual savings achieved during any one year of the Guarantee Period are less than the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)**, ESCO shall pay the City an amount equal to the deficiency (“**Shortfall Payment**”). The ESCO shall remit all Shortfall Payments to the City within thirty (30) days of written notice by the City of such monies due.

5.3.3 **Excess Savings.** ESCO agrees that any amount of actual savings achieved during any one year of the Guarantee Period that exceed the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** shall be available for use by the City in subsequent years as “**Excess Savings,**” and that in no event shall said Excess Savings be used to reimburse the ESCO for Shortfall Payments or penalties incurred by the ESCO in any preceding or subsequent years or be attributable to the Annual Guaranteed Savings of any preceding or subsequent years.

5.4 **Progress Payments and Final Payment.** During the Implementation Period, PEA will make monthly progress payments (“Progress Payments”) to ESCO for the portion of the Work complete at the end of each month in accordance with the terms of this Contract, including the terms set forth in **Schedule D (ESCO Compensation and Payment Schedule)**. The Estimated Progress Payments in **Schedule D (ESCO Compensation and Payment Schedule)** shall be reduced by the retainage required under Paragraph 5.4.1 of this Contract. PEA shall ensure that Progress Payments as reduced by the required retainage are made within sixty (60) days after receipt by PEA of a request for payment by ESCO. The last payment to be made to ESCO for Work performed during the Implementation Period (“Final Payment”) shall be paid under the same terms as the Progress Payments.

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

5.5. **Measurement and Verification Fees.** PEA shall pay measurement and verification fees (“**Measurement and Verification Fees**”) to ESCO for certain measurement and verification services rendered by ESCO (“**M&V Services**”) pursuant

to **Schedule F (Measurement and Verification)**. The Measurement and Verification Fees shall be paid in annual installments as set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, with the first installment payment due thirty (30) days after the commencement of the Guarantee Period and each subsequent annual payment due within thirty days of the date of each anniversary of the commencement of the Guarantee Period.

5.6. **Offset Provision.** Except as otherwise provided herein, ESCO agrees that PEA may set off the amount of any tax liability or other obligation of ESCO or its subsidiaries to PEA or the City against any payments due ESCO under this Contract.

ARTICLE 6. NONAPPROPRIATION OF FUNDS

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

6.1.1 If, in the event that ESCO has a rightful claim to title of the Selected ECMs at the time of such termination, then the City agrees to peaceably surrender possession of all the Selected ECMs in good operating condition, subject to normal wear and tear, to ESCO or its assignee on the date of such termination. ESCO or its assignee will have all legal and equitable rights and remedies to take possession of the Selected ECMs. Upon such termination, title to the Selected ECMs will revert to ESCO or its assignee.

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

III. IMPLEMENTATION PHASE

ARTICLE 7. ECM IMPLEMENTATION

7.1 **General.** ESCO shall provide overall coordination, management, and responsibility for purchasing or providing all labor, materials, Equipment, software, tools, construction equipment and machinery, transportation and other facilities and services necessary for design, installation and start-up of the Selected ECMs, and completion of the Work necessary to install and implement all of the Selected ECMs (collectively referred to as “**ECM Implementation**”), and shall assure that all Selected ECMs are installed in a good and workmanlike manner during the Implementation Period.

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

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

7.2.2 **Design and Engineering Approval.** The ESCO shall prepare and submit the Design and Engineering Documents for each of the Selected ECMs to the Project Manager for review prior to commencement of the Work. By preparing and submitting the Design and Engineering Documents, the ESCO represents that it has determined and verified materials, field measurements, and field construction criteria related thereto and has checked and coordinated the information contained within the Design and Engineering Documents for consistency with one another and the

requirements of the Contract Documents. Following the review of the Design and Engineering Drawings and prior to the ESCO's commencement of Work on a Selected ECM, the Project Manager will issue Notices to Proceed authorizing the ESCO to proceed with the installation of one or more of the Selected ECMs. The ESCO agrees that it shall not proceed with the implementation of any Selected ECM until the Project Manager has approved the Design and Engineering Documents by providing the ESCO with written Notice to Proceed with the Selected ECM. The Design and Engineering Documents, once approved by the Project Manager, and the Notice(s) to Proceed will become part of the Contract Documents. To the extent the PEA or the City rejects the Design and Engineering Documents or any portion thereof, and such rejection causes a change to the Contract Sum, the time of completion, the Annual Guaranteed Savings, the Total Guaranteed Savings or any component of this Contract, there shall be an equitable adjustment made. Where the Parties disagree as to the appropriate equitable adjustment, the equitable adjustment may be determined in accordance with any remedies available to the Parties under this Contract.

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

7.3 Construction and Installation. Subject to other provisions of this Contract, ESCO will act as a turn-key general contractor assuming total responsibility for all phases of construction and installation, including but no limited to: (a) selecting Subcontractors in concert with the City; (b) awarding Subcontracts in accordance with **Exhibit IV (Economic Opportunity Plan)** as approved by the City and set forth in **Schedule O (City Approved Subcontractor List)** and notifying the City in writing of any changes in subcontractors prior to their selection and subcontract awards; (c) preparing and submitting all Design and Engineering Documents for approval by the PEA's Project Manager in accordance with **Paragraph 7.2.2 (Design and Engineering Approval)**; (d) obtaining all necessary permits, licenses and approvals and coordination during installation in accordance with the provisions of **Articles 10 (Coordination and Construction Requirements)** and **33 (Compliance with Applicable Laws)**; (e) purchasing of Equipment, software and materials for the Selected ECMs; (f) installation and start-up of the Equipment, software and materials for the Selected ECMs; (g) progress inspections during installation; (h) developing and presenting subcontractor punch lists after each inspection; (i) receiving and evaluating record drawings and operation and maintenance manuals from Subcontractors; (i) training of staff and service providers on proper operation and service of the newly installed Selected ECMs in accordance with the provisions of **Article 9 (Training by ESCO)**; and (k) final inspection and recommendation for approval by the PEA and City.

7.3.1 **Implementation Schedule.** Construction and installation of all Selected ECMs shall proceed in accordance with the Implementation Schedule approved by PEA and attached hereto as **Schedule J (Implementation Schedule)**.

7.3.2 **Means and Methods.** The ESCO's means and methods for the performance of the Work must be those best adapted for the safe, efficient, and expeditious prosecution of the Work, with a minimum of interference to adjoining work sites, to adjoining properties, and to public traffic and convenience. The ESCO shall prosecute the Work vigorously, without delay, and with such workforces and equipment as shall be satisfactory to the Project Manager. The ESCO shall supervise and direct the Work, and ESCO shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for coordinating all portions of its Work under this Contract. Before commencing the Work, the ESCO, when required by the Project Manager, shall submit for approval its proposed methods of prosecution of the Work, including the maintenance of both vehicular and pedestrian traffic; underpinning, bulkheading, shoring; sinking foundations; handling spoil; lighting; fencing; street surfaces; drainage; and all other branches of its work operation. Such approval is intended to safeguard the PEA and City's interest, but such approval will not be deemed to relieve the ESCO of its obligation or responsibility for the safe and proper conduct of the Work. The ESCO shall at all times ensure that its work site, and its Subcontractor's personnel, while performing any part of the Work under this Contract, are and remain free of the influence of alcohol or illegal drugs. The ESCO shall at all times enforce good discipline and order among its employees, and shall not employ any unfit Person or anyone not skilled in the task assigned. Any contact by the ESCO or its employees with adjacent property owners, passing motorists or pedestrians, and the general public shall at all times be professional, courteous, and respectful.

7.3.3 **Change Orders.** The Project Manager may issue Change Orders if necessary to address an increase in the scope or cost of the Work arising from "**Concealed Conditions**" or other circumstances that were unforeseeable to the ESCO upon commencement of the Work, or Force Majeure Events. Changes to the Contract Sum and/or the Implementation Schedule will be allowed based upon a cost and schedule impact proposal submitted by the ESCO to the Project Manager and approved by both the PEA and the City. The proposal shall detail the costs in substantially the same manner as is set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, as well as any proposed changes to **Schedule J (Implementation Schedule)**. If such alterations or changes reduce the cost of the Work to the ESCO, the amount of such reduction shall be credited to the PEA during the Implementation Period. Credit Change Orders will include the same mark-ups as chargeable Change Orders. The ESCO shall submit its cost proposal within twenty (20) days after the Project Manager gives notification to the ESCO that the change is permissible. Thereafter, a formal Change Order will be executed and signed by the PEA reflecting all changes, including any changes to the Contract sum and the Implementation Schedule.

7.3.3.1 A Change Order negotiated and agreed to by the ESCO and the PEA and then executed as a Change Order by the PEA and the ESCO shall cover all of the ESCO's costs associated with the change or alteration to the Work, as reflected in the Change Order, including all costs and expenses incurred by the ESCO for time, material, labor, and extended or field office or home office overhead. No loss of profit on account of any changes or alterations to the Work or on account of Work not executed or performed by the ESCO will be allowed, except that the ESCO may be entitled to an extension of time on account of changes or alterations to the Work. Mark-ups for Equipment and Subcontractors in the cost proposal for any Change Order shall not exceed the percentages set forth by the ESCO in **Schedule D (ESCO Compensation and Payment Schedule)**.

7.3.3.2 The ESCO agrees and acknowledges that after a Change Order is negotiated and agreed to by the Parties and then executed by the PEA, the Change Order shall operate as a full and complete waiver and release of any and all claims of the ESCO related to or arising out of such change or alteration, whether such change or alteration is considered individually or cumulatively, including, but not limited to, any claim by the ESCO for extended home office overhead, extended field office overhead, time-impact costs, schedule delay costs, acceleration costs, compression costs, loss of productivity costs, extra work, additional work, and interference costs, or any combination of such costs.

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

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

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

7.3.4.2 Nothing contained in this **Article 7 (ECM Implementation)** shall be construed to establish a period of limitation with respect to other obligations which the ESCO might have under the Contract Documents. Establishment of such time period as described in **Paragraph 7.3.4.1 (Stop Work Order)** relates only to the specific obligation of the ESCO to correct Work that does not conform with the Contract Documents, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the ESCO's liability with respect to the ESCO's obligations other than specifically to correct the nonconforming Work.

7.4 **Start-Up and Commissioning Plan.** To the extent detailed in **Schedule K (Start-Up and Commissioning Plan)**, the ESCO shall test each Selected ECM, and all component Equipment, and all parts of each Selected ECM. All such tests must be completed prior to final acceptance of the Selected ECMs by the PEA. The ESCO shall provide notice to the PEA of the scheduled test(s) and the PEA and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Selected ECMs. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in the operation of the Selected ECMs that may be observed during system commissioning procedures described in **Schedule K (Start-Up and Commissioning Plan)**.

7.5 **Performance Bond/Construction Bond.** As provided by the Act of 1967, December 20, P.L. 869 (8 P.S. § 193, *et seq.*, as amended), ESCO shall at the time of execution of this Contract furnish to the PEA and the City security for the faithful performance and completion of the Work and for compliance with the Contract in the form of a performance bond, with a surety company approved by the PEA and the City, in a sum equal to 100% of the amount of the Contract Sum. In addition, as provided by the Act of 1967, December 20, P.L. 869 (8 P.S. § 193, as amended), the ESCO will be required at the time of execution of the Contract to give a payment bond, with a surety company approved by the City, in a sum one hundred percent (100%) of the amount of the Contract Sum, conditioned for the full payment of Subcontractors and others furnishing labor and materials in the performance of the Contract. The ESCO shall provide evidence of bonding in **Exhibit I (Performance Bond/Construction Bond)**, include evidence satisfactory to the City that the party issuing the bonds has the authority to bind the issuing surety company. If the ESCO fails to furnish and maintain such bonds, the PEA or the City may purchase such bonds on behalf of the ESCO and the ESCO shall pay the cost thereof to the PEA or the City upon demand.

ARTICLE 8. WARRANTIES

8.1 **ESCO Warranty.** ESCO warrants that each Selected ECMs installed as part of this Contract will be new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will functional properly for a period of one (1) year from the Date of Substantial Completion of such Selected ECM (“**Warranty Period**”). For purposes of this Article 8, “Substantial Completion” shall mean the date on which the Selected ECM is operating in accordance with the manufacturer’s intended use. With respect to the Selected ECMs described on Schedule A as “material only,” ESCO shall transfer the related manufacturer’s warranty to the PEA upon PEA’s acceptance of such material. Such Selected ECMs are not covered by the foregoing workmanship warranty. Should any Selected ECM, or any component systems, Equipment or parts of any Selected ECM, be found to be defective within one (1) year from such date, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim. This warranty does not extend to any Work that has been abused, altered, or misused, or repaired by City or third parties without the supervision or prior written approval of the ESCO. NO OTHER EXPRESS OR IMPLIED WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARE PROVIDED BY THE ESCO.

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

8.1.2 **ECM Failure.** If any Selected ECM, or any Equipment, parts, or systems of any Selected ECM, fails to fulfill the performance guarantees during the Warranty Period, ESCO shall have a reasonable opportunity to make such changes as it deems necessary to fulfill such guarantees. If a demonstration is required, ESCO shall be given the opportunity to test the Selected ECM, or its component Equipment, parts, or systems under requisite conditions.

8.1.3 **Misc. Costs.** All shipping, transportation, or other miscellaneous costs involved in the repair or replacement of the defective Selected ECMs shall be paid by ESCO.

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

8.2.1 **Delivery of Manufacturers’ Warranties.** Prior to final acceptance of the Work and Selected ECMs by the PEA, the ESCO shall deliver two (2) original

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

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

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

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

ARTICLE 9. TRAINING BY ESCO

The ESCO shall develop and conduct a training program, described in **Schedule M (ESCO's Training Responsibilities)** hereto, as necessary to provide City or PMA maintenance staff and service providers with the ability to comply with the terms of this Contract by maintaining system efficiencies during the Guarantee Period. This training program shall adequately prepare the City or PMA for the management of all ongoing services associated with the project, including: (a) managing the ongoing service of all Selected ECMs; (b) utilizing the ESCO's measurement and verification reports to maintain system efficiencies; (c) transitioning of City or PMA staff or service providers; and (d) communicating any Material Changes to ESCO. The ESCO must complete the training program specified in Exhibit M prior to acceptance of the Selected ECMs by the PEA; however, such acceptance shall not be unreasonably delayed by the

PEA. The ESCO shall provide ongoing training upon request by the PEA or City with respect to updated or altered Selected ECMs, including training for upgraded software, such training to be provided at an additional charge to the PEA. The ESCO shall also provide additional future training for City or PMA staff or service providers to account for employee transition and renegotiations of service provider agreements during the Guarantee Period, such training to be provided at an additional charge to the PEA.

ARTICLE 10. COORDINATION AND CONSTRUCTION REQUIREMENTS

10.1 **Coordination During Installation.** The ESCO shall have the duty to cooperate and coordinate with any other contractors on other work which is being performed concurrently on or adjacent to the Project Site, including specifically the City and its employees and agents, the Philadelphia Gas Works and the Philadelphia Water Department, or their contractors, or any other non-City utilities or authorities, and shall afford reasonable access to them. The Project Manager will facilitate any matters in dispute as to the performance of the Work, including access to the Project Site and priority of performance on either side of any division line between contiguous sections of the Project Site where the ESCO and another contractor each work. If ESCO is delayed in the commencement, performance, or completion of the Work and/or M&V Services by causes beyond its control and without its fault, including but not limited to inability to access property as a result of PEA, City or PMA action; failure by the PEA or City to perform its obligations under this Agreement; or failure by the PEA or the City to cooperate with ESCO in the timely completion of the Work, ESCO shall provide written notice to the PEA of the existence, extent of, and reason for such delays and impacts. Under such circumstances, an equitable adjustment in the time for performance, price and payment terms.

10.2 **Maintenance of Traffic and Access to Buildings.** Traffic of all kinds shall be maintained continuously and access to buildings shall be provided for at all times, except where otherwise specifically permitted by this Contract, or where temporary interference is authorized by the Project Manager, in which case it shall be interrupted only for such time as is necessary to provide temporary substitutes for surfaces disturbed by the construction and to restore street and sidewalk surfaces after the completion of the Work. Suitable bridges or other means of access shall be built and maintained to permit owners and occupants to reach their premises. Where necessary, the ESCO shall maintain proper and easy means for passengers to enter or exit public transportation. Where partial occupation of the street is allowed, materials and equipment shall be so placed as to ensure a minimum of interference with traffic; no materials shall be placed on the sidewalk within one foot of the curb line, and a clear sidewalk passage not less than four (4) feet in width shall be maintained at all times. The Work shall be so conducted that annoyance to residents and interference with the normal use of the properties will be reduced to a minimum. The flow in gutters and inlets shall be maintained. When access to any adjacent property is temporarily cut off, owing to occupancy of the street by the ESCO or its Subcontractors, the ESCO shall render assistance to the owner or occupant in handling materials of every description that must be delivered to or removed from such property, including recyclables, rubbish,

and garbage, and such materials shall be taken to or from the nearest accessible point that, in the opinion of the Project Manager, is convenient for handling. No additional compensation will be allowed for the various items of expense above noted.

10.3 **Access to Fire Hydrants and Fire Alarm Boxes.** Fire hydrants shall be left at all times clear of obstructions and readily accessible to fire apparatus. No material or other obstructions shall be placed within ten (10) feet of a fire hydrant. Fire alarm boxes shall be supported and protected and maintained so as to be readily accessible and open to view. Excavation shall be decked or bridged, where necessary, to permit the safe passage of fire apparatus and to give access to fire hydrants and to adjacent buildings for the extinguishing of fires. Where necessary, branch pipes shall be extended from the nozzles of the fire hydrants to the mains. Fire hydrants and any branch pipes shall be protected from freezing, and the fire hydrants (particularly the high pressure type) shall, where necessary, be braced or tied to the connecting pipes to prevent movement under water pressure.

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

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

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

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

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

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

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

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

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

10.13 **Work in Freezing Weather.** Masonry of all kinds, pointing, grouting, plastering, and other work subject to the action of frost shall not be done when exposed to freezing weather, except under conditions where the Project Manager may specifically direct or permit such work, subject to the heating of materials, the protection of finished work and such other measures as may be deemed necessary. If operations are suspended on account of freezing weather, the entire work shall be properly

protected until the resumption of work is permitted. If a suspension of the work on account of freezing weather or from any other cause is necessary, the site shall be cleaned up, left in good order, and continuously maintained by the ESCO and its Subcontractors during the period of such suspension.

10.14 **Clean-up of Project Site.** ESCO and its Subcontractors shall remove all rubbish or refuse and all unused materials and tools from the Project Site daily, if required by the Project Manager, and as the Work progresses the ESCO shall carefully clean and keep the Project Site clean from any rubbish and refuse. The ESCO shall furnish to the Project Manager upon request all documentation regarding the proper disposal of all rubbish, soil, refuse and other debris. ESCO acknowledges that the PEA will not approve the completion of the Work under the Contract until the Project Site and any other place or places affected by the Work have been thoroughly cleared of all construction and other debris and dust, and left clean, free from debris, and in as good condition as existed before the Work was begun. The ESCO shall resod or plant anew any grass plot or plots disturbed and replace any shrubbery destroyed. Structures shall be broom clean, free from stains, spots or other blemishes, and ready for use and all glass shall be washed. The clean-up work shall be governed by the record of existing conditions made and submitted to the Project Manager prior to the commencement of Work.

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

ARTICLE 11. [Intentionally Left Blank]

ARTICLE 12. [Intentionally Left Blank]

ARTICLE 13. [Intentionally Left Blank]

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IV. POST-IMPLEMENTATION PHASE

ARTICLE 14. ECM SERVICE RESPONSIBILITIES

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

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

14.3 **City and PMA Responsibilities.** City and PMA are responsible for all ECM Service Responsibilities set forth by ESCO on **Schedule R (City’s ECM Service Responsibilities)** of this Contract.

14.4 **ESCO Inspections.** PEA and PMA agree that ESCO shall have the right, upon written request, to inspect the Premises to determine if City or PMA are complying, and shall have complied with, its ECM Service Responsibilities as set forth in **Schedule R (City’s ECM Service Responsibilities)**. For the purpose of determining City and PMA’s said compliance, the ESCO agrees to utilize the checklist set forth at **Schedule S (ECM Service Responsibilities Checklist)** during its inspections to measure and record the City and PMA’s said compliance. City or PMA shall make the Premises available to ESCO for and during each inspection, and shall have the right to witness each inspection and the recordations on the checklist. The ESCO further agrees to provide the City, PEA and PMA with copies of all inspection documentation, including a copy of the completed checklist and any related reports or studies, within seven (7) days of the completion of each inspection.

ARTICLE 15. UPGRADING OR ALTERING THE ECMS

15.1 **General.** ESCO shall at all times have the right, subject to the PEA’s prior written approval, which approval shall not be unreasonably withheld, to change any Selected ECMs, or any component equipment, parts, software, or systems of any Selected ECMs, to revise any procedures for the operation of the Selected ECMs, or to implement any alternative ECMs on the Premises, provided that: (a) the ESCO

complies with the standards of comfort and services set forth in **Article 16 (Standards of Comfort)** herein; (b) such modifications or additions to, or replacement of the Selected ECMs, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings at the Premises; and (c) any cost incurred relative to such modifications, additions or replacement of the Selected ECMs, or operational changes or new procedures shall be the responsibility of the ESCO.

15.2 All modifications, additions or replacements of the Selected ECMs or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the PEA by ESCO for approval, which shall not be unreasonably withheld, provided that any replacement of the Selected ECMs shall be new and have equal or better potential to reduce energy consumption at the Premises than the Selected ECMs being replaced. The ESCO shall update any and all software to be used in connection with the Selected ECMs. All replacements of and alterations or additions to the Selected ECMs shall become part of the Selected ECMs described in **Schedule A (Selected ECMs to be Installed by ESCO)** and shall be covered by the provisions and terms of **Article 7 (ECM Implementation)**.

ARTICLE 16. STANDARDS OF COMFORT

ESCO will maintain and operate the Selected ECMs in a manner that will provide the standards of heating, cooling, hot water, and lighting as described in **Schedule L (Standards of Comfort)**. During the Guarantee Period, ESCO and the City or PMA will maintain, according to **Schedule Q (ESCO's ECM Service Responsibilities)** and **Schedule R (City's ECM Service Responsibilities)**, and operate the Selected ECMs in a manner that will provide the standards of comfort and levels of operation as described in **Schedule L (Standards of Comfort)**.

ARTICLE 17. MATERIAL CHANGES

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

- (a) Manner of use of the Premises by the City; or
- (b) Hours of operation for the Premises or for any Selected ECM or energy using systems operating at the Premises; or

- (c) Changes in the comfort and service parameters set forth in **Article 16 (Standards of Comfort)**; or
- (d) Occupancy of the Premises; or
- (e) Structure of the Premises; or
- (f) Types and quantities of ECMs used at the Premises; or
- (g) Modification, renovation or construction at the Premises; or
- (h) The City's failure to perform its ECM Service Responsibilities in accordance with **Schedule R (City's ECM Service Responsibilities)**; or
- (i) Any other conditions other than climate affecting energy use at the Premises.

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

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

Where there is a Material Change that affects the calculations described and set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)**, an equitable adjustment shall be made to the calculations described and set forth in same, which may include an equitable adjustment to the baseline, the Annual Guaranteed Savings and the Total Guaranteed Savings.

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

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V. ADMINISTRATION

ARTICLE 18. OWNERSHIP AND ACCESS

18.1 **Ownership of Certain Proprietary Property Rights.** The PEA shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Selected ECMs. The ESCO shall grant to the PEA, City and PMA a perpetual royalty-free, limited license for any and all software or other intellectual property rights necessary for the City to continue to operate, maintain, and repair the Selected ECMs. The PEA acknowledges that any software furnished in connection with the Work and/or M&V Services is proprietary and subject to the provisions of any software license agreement associated with such software.

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

18.3 **Ownership of New ECMs.** Upon installation of the Selected ECMs by ESCO, and upon final acceptance by the City as set forth in **Paragraph 4.3 (Acceptance Date)**, and upon payment to ESCO for same and release of retainage set forth in Article 5, the City shall own the Selected ECMs.

18.4 **Access to the Premises.** Prior to commencement of the Work, the ESCO shall provide the Project Manager with a written description of the portions of the Premises for which it seeks access from the City or PMA for the installation and operation of the Selected ECMs. The Project Manager may approve or disapprove ESCO's access request, or suggest that the ESCO modify and resubmit a revised version for approval or disapproval. Upon approval of the ESCO's access request by the Project Manager, the City or PMA shall provide sufficient rent-free space on the Premises for the installation and operation of the Selected ECMs and shall take reasonable steps to protect such Selected ECMs from harm, theft and misuse, as specified in the logistics plan. The ESCO shall confine its operations to the portions of the Premises approved by the City and PMA, and shall not unreasonably encumber the portions of the Premises used for Work with materials, equipment, or similar items. The ESCO and all Subcontractors shall only use such entrances to the Premises as are designated by the City or PMA. The City or PMA shall not unreasonably restrict the

ESCO's access to Premises for Work in progress or emergency repairs or corrections as it may determine are needed.

ARTICLE 19. INSURANCE

19.1 **Requirements.** Unless otherwise approved by the City's Risk Manager in writing, ESCO shall, at its sole cost and expense, procure and maintain, or cause to be procured and maintained, in full force and effect until the ESCO completes the Work under the Contract, the types and minimum limits of insurance specified below, covering the ESCO's performance of the Work required under the Contract. The ESCO shall procure, or cause to be procured, all insurance from reputable insurers admitted to do business on a direct basis in the Commonwealth or otherwise acceptable to the City. All insurance herein, except Professional Liability insurance, shall be written on an "occurrence" basis and not a "claims-made" basis. In no event shall the ESCO perform any work under the Contract until the ESCO has delivered or caused to be delivered to the City's Risk Management Division the required evidence of insurance coverages. If ESCO fails to obtain or maintain the required insurance, the PEA or PMA shall have the right to treat such failure as a default under the Contract and to exercise all appropriate rights and remedies. The ESCO shall provide for at least thirty (30) days prior written notice to the PEA, PMA, and the City in the event coverage is materially changed, cancelled, or non-renewed. The PEA, PMA and the City, their officers, employees, and agents, shall be named as additional insureds on the General Liability Insurance policy, Automobile Liability Insurance policy, Builders Risk Insurance policy, and Umbrella Liability Insurance policy in connection with this Contract. ESCO shall also deliver or cause to be delivered to the PEA, PMA and City an endorsement stating that the coverage afforded the PEA, PMA and the City and its officers, employees and agents, as additional insureds, will be primary to any other coverage available to them and that no act or omission of the PEA, PMA or the City, their officers, employees or agents shall invalidate the coverage. The insurance requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in the Contract by the ESCO to the PEA, PMA and the City or to limit ESCO's liability under this contract to the limits of the policies of insurance required to be maintained by the ESCO hereunder.

19.2 **Minimum Limits.** ESCO will be required to carry the following types of insurance with the minimum limits listed below:

- (a) **Workers Compensation and Employers Liability:**
 - (1) Workers Compensation: Statutory Limits.
 - (2) Employer's Liability: \$100,000 each accident—bodily injury by accident; \$100,000 each employee—bodily injury by disease; and \$500,000 policy limit—bodily injury by disease.
 - (3) Other states' coverage and Pennsylvania endorsement.

- (b) **General Liability Insurance:**
 - (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability; \$1,000,000 advertising injury; \$2,000,000 general aggregate and \$1,000,000 aggregate for products and completed operations.
 - (2) Coverage: Premises operations; blanket contractual liability; personal injury liability (employee exclusion deleted); products and completed operations; independent consultants, contractors, employees and volunteers as additional insureds; cross liability; and broad form property damage (including completed operations).

- (c) **Automobile Liability Insurance:**
 - (1) Limit of Liability: \$1,000,000 per occurrence combined single limit for bodily injury (including death) and property damage liability.
 - (2) Coverage: Owned, non-owned, and hired vehicles.

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

- (e) **Professional Liability Insurance:**
 - (1) Limit of Liability: \$1,000,000 with a deductible not to exceed \$50,000.
 - (2) Coverage: Errors and omissions including liability assumed under contract.
 - (3) Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences happening during the performance of the Services required under the Contract shall be maintained in full force and effect under the policy or "tail" coverage for a period of at least two (2) years after completion of the Services.

- (f) **Umbrella Liability Insurance:** Limits totaling \$5,000,000.00 per occurrence when combined with insurance required under (1) Employer's Liability; (2) General Liability; and (3) Automobile Liability above.

19.3. **Submission of Certificates of Insurance.** Certificates of insurance evidencing the required coverages and additional insured endorsements must specifically reference the City contract Number for which they are being submitted. The original certificates of insurance shall be submitted to the Project Manager and the Division of Risk Management at least ten (10) days before work is to commence and upon renewal of the required insurance. The ten (10) day requirement for advance documentation of insurance coverage may be waived in situations where such waiver will benefit the PEA,

PMA, or the City, but under no circumstances shall ESCO actually begin work (or continue work, in the case of renewal) without providing the required certificates of insurance and required endorsements. The PEA reserves the right to require ESCO to furnish written responses from its authorized insurance carrier representatives to all inquiries made pertaining to the insurance required under the Contract at any time upon ten (10) days written notice to ESCO.

ARTICLE 20. INDEMNIFICATION

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

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

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

ARTICLE 21. RISK OF LOSS

21.1 Prior to Substantial Completion of each Selected ECM, as that term is used in Article 8.1, ESCO shall assume all risk and responsibility for casualties of every description in connection with the Work, shall have charge of the entire Work, and shall alone be liable and responsible for any injuries to persons and any loss or damage to the property, buildings, Equipment and adjacent work that may occur as a consequence of or during the progress of the Work under this Contract, whether such damage or accident is due to the ESCO's own negligence or that of its servants, agents, employees, or representatives, or whether such damage or accident be due to the inherent nature of the Work or whether such damage or accident be due to other causes.

21.2 Except as provided in **Article 8 (Warranties)**, **Article 14 (ECM Service Responsibilities)**, **Article 19 (insurance)**, and **Article 20 (Indemnification)**, upon the Substantial Completion of each Selected ECM as described in Article 8.1, the PEA assumes all risk of loss of or damage to the Selected ECM from any cause whatsoever and no such loss of or damage to the Selected ECM shall relieve the PEA of the obligation to make payments or to perform any other obligation under this Contract. In the event of damage to any Selected ECMs, or any Equipment, parts or systems of the Selected ECMs during the Warranty Period, the PEA will immediately notify ESCO or its assignee. If the PEA determines that the damaged Selected ECMs are repairable, and ESCO is not responsible for repair or replacement under this Contract, City may repair the same. If the Parties determine that any of the Selected ECMs have been lost, stolen, destroyed, or damaged beyond repair, and ESCO is not responsible for repair or replacement under this Contract, then the Energy Savings Guarantee will be adjusted by mutual agreement to account for the losses associated with the Selected ECMs.

ARTICLE 22. SUBCONTRACTS

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

22.2 **Subcontract Terms and Subcontractor Actions.** The ESCO shall remain responsible for performance of the Work, regardless of any Work that may be subcontracted. No failure of any Subcontractor used by ESCO to perform the Work shall relieve the ESCO from its obligations hereunder to perform the Work, unless such failure, if experienced directly by ESCO, would be excused under the terms of this Contract, such as in the case of an Event as defined in Article 24 or PEA or PMA fault.

ESCO shall be responsible for settling and resolving with all Subcontractors all claims arising out of delay, disruption, interference, hindrance, or schedule extension.

22.3 **Subcontractor Claims.** ESCO shall pay or cause to be paid all Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have any right against the PEA, PMA, or the City for labor, services, materials or equipment furnished for the PEA, PMA, or the City.

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

ARTICLE 23. CASUALTY OR CONDEMNATION OF PREMISES

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

ARTICLE 24. CONDITIONS BEYOND CONTROL OF THE PARTIES

If a Party ("**performing party**") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, similar events, or causes beyond that party's control (collectively, "**Event**" or "**Events**", or "**Force Majeure Events**"), this Contract shall at the other party's option: (a) remain in effect but said performing party's obligations shall be suspended until the said Events shall have ended; or (b) be terminated upon ten (10) days' notice to the performing party, in which event neither party shall have any further liability to the other, with the exception that ESCO shall be paid for all Work performed. Where the Contract is not terminated under this Article 24, an equitable adjustment shall be made to the Contract Sum, Implementation Period and to any other contract terms necessitated by the Event.

ARTICLE 25. TERMINATION FOR CONVENIENCE

The PEA may terminate this Contract, in whole or in part, during the Contract Term, for any reason, including, without limitation, the PEA's own convenience upon thirty (30) days' written notice whenever PEA shall determine that such termination is in the best interest of the PEA, PMA, or the City. Any such termination shall be effected by delivery to ESCO of a notice of termination specifying the extent to which performance under this Contract is terminated either in whole or in part and the date on which termination becomes effective. Upon receipt of such notice of termination, ESCO

shall stop all Work under the Contract. The Contract shall be equitably adjusted to compensate for such termination and the Contract modified accordingly. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of **Article 28 (Controversies and Dispute Resolution)** of this Contract. In all cases of termination under this Article 25, PEA shall compensate ESCO for all Work performed and equipment ordered (and which cannot be resold or repurposed and has been delivered to PMA or the City) prior to receipt of the notice of termination. In no event, however, shall ESCO be paid for loss of anticipated profits on Work not yet performed.

ARTICLE 26. EVENTS OF DEFAULT

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

- (a) Any failure by PEA to pay ESCO any sum due for a period of more than sixty (60) days after written notification by ESCO that the City is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract; and/or
- (b) Any other material failure by PEA to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to PEA demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, PEA shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; and/or
- (c) Any representation or warranty furnished by PEA in this Contract that was false or misleading in any material respect when made.

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

- (a) [Reserved];
- (b) The standards of comfort and service set forth in **Schedule L (Standards of Comfort)** are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Selected ECMs except that such failure, if corrected or cured within sixty (60) days after written notice by PEA to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;
- (c) Any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;

- (d) Failure to furnish and install all of the Selected ECMs and make them ready for use within the time specified by this Contract as set forth in **Schedule A (Selected ECMs to be Installed by ESCO)** and **Schedule J (Implementation Schedule)**;
- (e) Any other material failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, but, if corrected or cured within thirty (30) days after ESCO's receipt of such written notice such material failure shall be deemed cured for the purpose of this Contract;
- (f) Any lien or encumbrance upon the Selected ECMs by any Subcontractor, laborer or materialman of ESCO which is not released within 30 days of filing thereof;
- (g) The filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within thirty (30) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;
- (h) Failure by the ESCO to pay any amount due the PEA or the City within sixty (60) days of the required payment date;
- (i) Repossession or removal of the Selected ECMs by ESCO or a third party without good cause

ARTICLE 27. REMEDIES UPON DEFAULT

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

- (a) Exercise any and all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by PEA, and/or for damages that shall include all costs and expenses reasonably incurred in exercise of its remedy;
- (b) Without recourse to legal remedies, terminate this Contract by delivery of a notice declaring termination.

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

- (a) Exercise any and all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred;
- (b) If the payments under this Contract have been assigned, and the Selected ECM has been accepted by PEA, the PEA shall declare ESCO to be in default, but continue to make the payments under **Schedule D (ESCO Compensation and Payment Schedule)** for the Selected ECMs that have been so accepted. If no Selected ECM has been so accepted, PEA may terminate this Contract without liability to make any payments;
- (c) If the payments under this Contract have not been assigned, PEA may set off or counterclaim against its obligation to make any of the payments provided in default; or
- (d) ESCO (but not the assignee) will be liable to PEA for damages incurred by PEA as a result of any default by ESCO. Such damages may include, but are not limited to:
 - (1) Payments made to ESCO or its assignee which represents payment towards the Selected ECMs for which acceptance was revoked because of a latent defect;
 - (2) The difference in price between the market price of the Selected ECMs that were either not delivered or rejected (or the actual purchase price if PEA purchases like-for-like replacements for any undelivered or rejected Selected ECMs) and the purchase price indicated in the Contract for such Selected ECMs;
 - (3) Damages as a result of breach of warranty, failure to meet specifications, or damages incurred by PEA resulting from the delivery of Selected ECMs that are defective or fail to meet specifications, or resulting from ESCO's failure to comply with any other requirements of this Contract, and
 - (4) Any other damages recoverable by law.
- (e) Without recourse to any legal remedies, terminate this Contract by delivery of a notice declaring termination.

ARTICLE 28. CONTROVERS AND DISPUTE RESOLUTION

28.1 Claims.

a. Except as otherwise provided in this Contract, the ESCO must notify the Project Manager in writing of any and all claims whatsoever relating to or arising out of ESCO's performance of the Work under the Contract within ten (10) days of the event or occurrence giving rise to the claim or ESCO's discovery of such event, whichever is later, except where a shorter time is specified by the Contract Documents. The written notice of claim to the Project Manager shall provide a detailed statement of and basis for the claim, with supporting documentation attached. For purposes of this Article, a "claim" shall mean a demand or assertion seeking, as a matter of right, an adjustment or interpretation of the Contract, payment of money, extension of time or other specific relief with respect to the terms and conditions of the Contract. The Project Manager will review all claims submitted by the ESCO and shall approve or reject each claim in whole or part, or shall request additional documentation in support of the claim from the ESCO.

b. The PEA and PMA and the ESCO hereby release and waive any and all claims against each other for consequential damages arising out of or related to the Contract and the Work performed thereunder.

This mutual release and waiver includes damages incurred by the ESCO for principal home office expenses, including home office overhead and the compensation of personnel stationed there, for losses of financing, business, and reputation, and for loss of profit associated with any other work, except anticipated profit arising directly from the ESCO and the work thereunder. Nothing hereunder shall preclude, however, the assessment by the PEA of penalties, liquidated direct damages, or other damages when applicable in accordance with any provision of this Contract.

c. Prior to the final acceptance by the PEA, the ESCO shall notify the Project Manager in writing of any and all unresolved and previously asserted claims relating to or arising out of the Work. The ESCO's written notice of claims to the Project Manager shall list the claims by number, assign a dollar value to each claim, and provide a detailed statement of each claim, with supporting documentation attached, including a copy of the notice by which the ESCO first brought the claim to the attention of the Project Manager. d. Failure of the ESCO to notify the Project Manager of any claims in accordance with subparagraphs (a) and (c) above shall constitute and operate as a full and final release and a waiver of all such claims by the ESCO.

28.2 Review by Project Manager of ESCO Claims and Compulsory Non-Binding Mediation of Claims.

a. Within thirty (30) days after receipt of the ESCO's notice to the Project Manager under Paragraph 28.1 above, the Project Manager shall review all identified claims of the ESCO and shall notify the ESCO whether the claims are approved or rejected, in whole or in part.

b. Any claim of the ESCO which shall have been rejected by the Project Manager, in whole or in part, shall be subject to non-binding mediation. Mediation of the claim shall be an irrevocable condition precedent to institution of legal proceedings by the ESCO against the City with respect to such claim.

c. The ESCO must submit its demand for mediation to the Project Manager and the City of Philadelphia Law Department, c/o Chief Deputy City Solicitor, Commercial Litigation Unit not later than 30 days after the Project Manager's notice of rejection. Failure of the ESCO to submit such claim to mediation within this time period shall be an absolute bar to institution of legal proceedings by the ESCO.

d. The ESCO shall submit a written timely request for mediation by the Project Manager and the City of Philadelphia Law Department, c/o Chief Deputy City Solicitor, Commercial Litigation Unit. Upon submission of the claim to mediation, the PEA and the ESCO shall endeavor to resolve the claim by mediation in accordance with such rules as may be mutually agreed upon by the PEA and the ESCO.

e. The fee of the mediator, who shall be selected jointly by the Parties, and the common expenses and costs incurred in connection with conduct of the mediation, shall be borne equally by the PEA and the ESCO. The mediation shall be conducted in the City of Philadelphia. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

ARTICLE 29. ASSIGNMENT

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

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

29.3 **Assignment by the City.** The PEA and PMA may transfer or assign this Contract and its rights and obligations herein to a purchaser, landlord, tenant or subsequent owner of the Premises or an interest therein. The PEA and PMA shall remain jointly and severally liable with its assignees or transferees to the ESCO for all of its obligations under this Contract.

ARTICLE 30. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

- (a) It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
- (b) Its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
- (c) Its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any other contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or
- (d) It has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any Applicable Laws which would materially and adversely affect its ability to perform hereunder.

ARTICLE 31. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

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

31.2 ESCO hereby warrants, represents and promises that:

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

“Subcontractor hereby certifies and represents that Subcontractor and Subcontractor’s parent company(ies) and subsidiary(ies) are not currently indebted to the City and will not at any time during the term of ESCO’s Agreement with City, including any extensions or renewals thereof, be indebted to the City, for or on account of any delinquent taxes, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the City has been established. In addition to any other rights or remedies available to City and ESCO at law or in equity, Subcontractor acknowledges that any breach of failure to conform to this certification may, at the option and direction of City and ESCO, result in the withholding of payments otherwise due to Subcontractor for services rendered in connection with the Contract and, if such breach or failure is not resolved to City’s or ESCO’s satisfaction within a reasonable time frame specified by City of ESCO in writing, may result in the offset of any such indebtedness against said payments otherwise due to Subcontractor and/or the termination of Subcontractor for default (in which case Subcontractor will be liable for all excess costs and other damages resulting from the termination).”

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

- (4) It shall have provided proof and documentation of required insurance pursuant to **Article 19 (Insurance)**, and it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- (b) It shall use Subcontractors and delegees that have the necessary experience and skill for the Work, and that are licensed and bonded in this state to perform the work so subcontracted or delegated pursuant to the terms hereof;
- (c) It shall supply a sufficient number of properly skilled workers and necessary equipment to perform the Work;
- (d) It is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

ARTICLE 32. WAIVER OF LIENS

ESCO will obtain and furnish to PEA and the City a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each Selected ECM and the component equipment, parts, and systems of each Selected ECM.

ARTICLE 33. COMPLIANCE WITH APPLICABLE LAWS

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

33.2 Wastes and Hazardous Materials. Asbestos-Containing Materials: Neither party desires to or is licensed to undertake direct obligations relating to the identification, abatement, cleanup, control, removal or disposal of asbestos-containing materials ("ACM"). Consistent with applicable Laws, PEA or PMA shall supply ESCO with any information in its possession relating to the presence of ACM in areas where ESCO undertakes any Work or M&V Services that may result in the disturbance of ACM. If either PEA, PMA or ESCO becomes aware of or suspects the presence of ACM

that may be disturbed by ESCO's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other. As between PEA, PMA and ESCO, ESCO shall be responsible for [engaging a subcontractor to address] the potential for or the presence of ACM in conformance with all applicable Laws and addressing the impact of its disturbance before ESCO continues with its Work or M&V Services. ESCO shall submit a Change Order in accordance with Article 7.3.3. for any ACM removal services provided [by a subcontractor] under this paragraph.

Other Hazardous Materials: ESCO shall be responsible for removing or disposing of any Hazardous Materials (as defined below) that it uses in providing Work or M&V Services ("ESCO Hazardous Materials") and for the remediation of any areas impacted by the release of ESCO Hazardous Materials. For other Hazardous Materials that may be otherwise present at the Premises ("Non-ESCO Hazardous Materials"), PEA or PMA shall supply ESCO with any information in its possession relating to the presence of such materials if their presence may affect ESCO's performance of the Work or M&V Services. If either PEA, PMA or ESCO becomes aware of or suspects the presence of Non-ESCO Hazardous Materials that may interfere with ESCO's Work or M&V Services, it shall promptly stop the Work or M&V Services in the affected area and notify the other. As between PEA, PMA and ESCO, ESCO shall be responsible for removing and disposing of Non-ESCO Hazardous Materials from its facilities and the remediation of any areas impacted by the release of Non-ESCO Hazardous Materials. For purposes of this Agreement, "Hazardous Materials" means any material or substance that, whether by its nature or use, is now or hereafter defined or regulated as a hazardous waste, hazardous substance, pollutant or contaminant under applicable Law relating to or addressing public or employee health and safety and protection of the environment, or which is toxic, explosive, corrosive, flammable, radioactive, carcinogenic, mutagenic or otherwise hazardous or which is or contains petroleum, gasoline, diesel, fuel, another petroleum hydrocarbon product, or polychlorinated biphenyls.

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

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

be shown on drawings and specifications prepared by the ESCO, and the ESCO shall obtain an erosion control permit, if required.

ARTICLE 34. INDEPENDENT CAPACITY OF ESCO

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

ARTICLE 35. NO WAIVER

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

ARTICLE 36. NON-DISCRIMINATION; FAIR PRACTICES

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

36.2 In accordance with Chapter 17-400 of the Philadelphia Code, as it may be amended from time to time, ESCO agrees that its payment or reimbursement of fees or other expenses in association with participation by ESCO or its employees in an exclusionary private organization, insofar as such participation confers an employment advantage or constitutes or results in discrimination with regard to hiring, tenure of employment, promotions, terms, privileges or conditions of employment on the basis of race, color, sex, sexual orientation, religion, national origin or ancestry, constitutes

without limiting the generality of other provisions of this Contract a substantial breach of this Contract entitling the PEA to all rights and remedies provided in this Contract or otherwise available in law or equity. ESCO agrees to include this subparagraph, with appropriate adjustments for the identity of the Parties, in all subcontracts that are entered into for work to be performed pursuant to the Contract.

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

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

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

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

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

ARTICLE 37. LABOR-MANAGEMENT RELATIONSHIPS; WAGES AND BENEFITS

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

37.1.1 As required by Section 17-107 of the Philadelphia Code, as same exists on the Effective Date of this Contract, all employees performing work under this

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

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

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

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

37.1.5 ESCO and its Subcontractors performing city work shall, upon request of the PEA or the City, file with the MDO, Labor Standards Division a certified statement setting forth the name, address, occupational classification, wages and other

benefits paid or provided and number of hours worked with respect to each employee performing city work. Such statement shall be made weekly for each proceeding weekly period. The certification shall affirm that the statement is correct and complete, that the wages set forth therein are not less than those required by the Contract for city work and that the occupational classification set forth for each employee conforms with the work performed.

37.1.6 Nothing herein shall preclude the payment by the ESCO of wages at rates higher than those specified as the minimum in the applicable schedule attached to the General Contract Requirements. However, no increase in any contract price shall be allowed or authorized on account of the payment of wages in excess of those so specified, or on account of wage increases granted hereafter.

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

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

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

ARTICLE 38. BUSINESS INTEREST IN NORTHERN IRELAND, SUDAN AND IRAN

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

- (a) ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) does not have, and will not have at any time during the Term (including any extensions thereof), any investments, licenses, franchises, management agreements or operations in Northern Ireland, unless ESCO has implemented the fair employment principles embodied in the MacBride Principles; and
- (b) No product to be provided by ESCO will originate in Northern Ireland, unless the ESCO has implemented the fair employment principles embodied in the MacBride Principles;
- (c) ESCO (including any parent company, subsidiary, exclusive distributor or company affiliated with ESCO) does not, and will not at any time during the Term (including any extension thereof), do any business in Iran or Sudan; and
- (d) No product to be provided under this Contract were, are or will be manufactured by an entity doing business in Iran or Sudan, unless a federal override with respect to Iran or Sudan, as applicable, is in place or unless an exclusion from disqualification applies.

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

- (a) Who have or whose parent(s), subsidiary(ies), exclusive distributor(s) or company affiliate(s) have any investments, licenses, franchises, management agreements or operations in Northern Ireland;
- (b) Who will provide products originating in Northern Ireland unless said supplier, subconsultant or Subcontractor has implemented the fair employment principles embodied in the MacBride Principles.
- (c) Who do or whose parent(s), subsidiary(ies), exclusive distributor(s) or company affiliate(s) do business in Iran or Sudan during the Term, or
- (d) Who will provide products manufactured by an entity doing business in Iran or Sudan, as applicable, unless a federal override with respect to Iran or Sudan, as applicable, is in place or unless an exclusion from disqualification applies.

38.3 ESCO agrees to cooperate with the City's Director of Finance in any manner, which such Director deems reasonable and necessary to carry out the Director's responsibilities under Section 17-104 of the Philadelphia Code. ESCO expressly understands and agrees that any false certification or representation in connection with this section and/or any failure to comply with the provisions of this section shall constitute a substantial breach of this Contract entitling the City to all rights

and remedies provided in this Contract or otherwise Applicable Law (including, but not limited to, Section 17-104 of the Philadelphia Code or equity). In addition, it is understood that false certification or representation is subject to prosecution under Title 18 Pa. S. C. A. § 4904.

ARTICLE 39. BUSINESS, CORPORATE AND SLAVERY ERA INSURANCE DISCLOSURE

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

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

ARTICLE 40. CONTRACTOR INTEGRITY PROVISIONS

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

- (a) Confidential information means information that is not public knowledge, or available to the public on request, disclosure of which would give an unfair, unethical, or illegal advantage to another desiring to contract with the City.
- (b) Consent means written permission signed by a duly authorized officer or employee of the City, provided that where the material facts have been disclosed, in writing, by prequalification, bid, proposal, or contractual terms, the City shall be deemed to have consented by virtue of execution of this Contract.
- (c) Contractor means ESCO including its directors, officers, partners, managers, key employees, owners of more than a five percent (5%) interest, parent companies, and subsidiaries.
- (d) Financial interest means:

- (1) Ownership of more than a five percent (5%) interest in any business; or
 - (2) Holding a position as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- (e) Gratuity means any payment of more than nominal monetary value in the form of case, travel, entertainment, gifts, meals, lodging, loans, subscriptions, advances, deposits of money, services, employment, or contracts of any kind.

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

40.3 Contractor shall not disclose to others any confidential information gained by virtue of this Contract.

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

40.5 Contractor shall not, in connection with this or any other Contract with the City, directly or indirectly, offer, give, or agree or promise to give to anyone any gratuity for the benefit of or at the direction or request of any officer or employee of City.

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

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

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

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

40.10 The Contractor, upon the inquiry or request of the Inspector General of the City or any of that official's agents or representatives, shall provide, or if appropriate, make promptly available for inspection or copying, any information of any type or form

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

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

- (a) Executive Order No. 03-11, which prohibits City employees from soliciting or accepting anything of value from any person seeking to initiate or maintain a business relationship with the City, including, but not limited to, any of its departments, boards, commissions or agencies. All City employees presented with gifts or gratuities as indicated in Executive Order 03-11 have been instructed to report these actions to the appropriate authorities. All bidders, agents or intermediaries who are solicited for gifts or gratuities by City employees are urged to report these actions to the appropriate authorities, including but not limited to the Inspector General.
- (b) Section 10-102 of the Philadelphia Home Rule Charter, which prohibits any bid from being accepted from, or contract awarded to any city employee or official, or any firm in which City employee or official has a direct or indirect financial interest. All bidders are required to disclose any current City employees or officials of the bidder's firm, or who otherwise would have a financial interest in the contract.
- (c) The State Ethics Act and the City Ethics Code, which prohibit a public employee from using his or her public office or any confidential information gained thereby to obtain financial gain for himself or herself, a member of his or her immediate family, or a business with which he or she or any member of his or her immediate family is associated. "Use of Public office" is avoided by the employee or official publicly disclosing the conflict and disqualifying him or herself from official action in the matter, as provided in the Philadelphia Code § 20-608.

40.12 For violation of any of the above provisions as a result of violations of this Article by the ESCO or its subcontractors in connection with this Agreement, the City may terminate this and any other Contract with the ESCO, claim liquidated damages in an amount equal to the value of anything received in breach of these provisions, claim damages for all expenses incurred in obtaining another contractor to complete performance hereunder, and debar and suspend the Contractor from doing business

with Commonwealth. These rights and remedies are cumulative, and the use or nonuse of any one shall not preclude the use of all or any other. These rights and remedies are in addition to those the City may have under the law, statute, regulation, or otherwise.

ARTICLE 41. CONTRACTOR RESPONSIBILITY PROVISIONS

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

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

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

ARTICLE 42. THE AMERICANS WITH DISABILITIES ACT

42.1 ESCO understands and agrees that, pursuant to federal regulations promulgated under the authority of the Americans With Disabilities Act, 28 C.F.R. § 35.101 *et seq.*, no individual with a disability shall, on the basis of the disability be excluded from participation in the Contract or from activities or services provided under the Contract. As a condition of accepting and executing the Contract, ESCO shall comply with all provisions of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101-12213, and all regulations promulgated thereunder, as the ADA and regulations may be amended from time to time, which are applicable to: (a) the ESCO; (b) the benefits, services, activities, facilities and programs provided in connection with the Contract; (c) the City or the Commonwealth; and the benefits, services, activities, facilities and programs of the City or of the Commonwealth, and, (d) if any funds for payments or otherwise under the Contract are provided by the federal government and its benefits, services, activities, facilities and programs the benefits. Without limiting the applicability of the preceding sentence, ESCO shall comply with the "General Prohibition Against Discrimination," 28 C.F.R. Part 35,130, and all other regulations promulgated under Title II of the ADA, as they may be amended from time to time, which are applicable to the benefits, services, programs and activities provided by the City through Contracts with outside contractors.

42.2 ESCO shall be responsible for and agrees to indemnify and hold

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

ARTICLE 43. GENERAL PERFORMANCE REQUIREMENTS

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

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

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

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

ARTICLE 44. STEEL PRODUCTS PROCUREMENT ACT

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

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

ARTICLE 45. SALES AND USE TAX; FEDERAL EXCISE TAX

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

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

ARTICLE 46. AUDITS; INSPECTION RIGHTS; RECORDS

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

46.2 The ESCO shall retain, and shall provide the PEA and its representatives access, to all records, books of account, correspondence, instructions, shop drawings,

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

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

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

ARTICLE 47. COVENANT OF QUIET ENJOYMENT

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

ARTICLE 48. RIGHT-TO-KNOW LAW

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

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

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

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

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

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

ARTICLE 49. NOTICE

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

IF TO ESCO:

IF TO PEA/CITY:

Philadelphia Energy Authority
City Hall, Room 566
1400 JFK Boulevard

Philadelphia, PA 19107
Attention: Executive Director
Facsimile: (215)

With copies to:

Office of Sustainability
One Parkway Building
1515 Arch Street, 13th Floor
Philadelphia, PA 19102
Attention: Energy Manager

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

ARTICLE 50. ECONOMIC OPPORTUNITY PLAN

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

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

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

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

50.5 ESCO shall, within thirty days after receipt of payments from the PEA under this Contract, deliver to its M/W/DSBE Subcontractors the proportionate share of such payment for work performed by its M/W/DSBE Subcontractors. In connection with

payment of its M/W/DSBE Subcontractors, ESCO agrees to comply fully with the PEA and City's payment reporting process, which may include the use of electronic payment verification systems.

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

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

50.8 ESCO agrees that the City may, in its reasonable discretion, conduct periodic reviews to monitor ESCO's compliance with the terms of the Contract and EOP.

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

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

(b) Terminate the Contract, in whole or in part.

(c) Suspend/Debar the successful bidder from bidding on and/or participating in any future City contracts for a period of up to three (3) years.

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

50.10 There is no privity of contract between PEA, PMA, or City and any M/W/DSBE Subcontractor(s) herein and PEA, PMA and the City do not intend to give or confer upon such M/W/DSBE Subcontractor(s) any legal rights or remedies in connection with the Subcontract work under Executive Orders 02-05 or 05-10 or by

reason of this Contract except such rights or remedies that the M/W/DSBE Subcontractor may seek as a private cause of action under any legally binding contract to which it may be a party. The remedies enumerated above are for the sole benefit of the PEA, PMA and the City and failure to enforce any provision or the PEA, PMA or, the City's indulgence of any non-compliance with any provision hereunder, shall not operate as a waiver of any of the rights in connection with this Contract nor shall it give rise to actions by any third parties including identified M/W/DSBE Subcontractors.

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

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

ARTICLE 51. APPROVALS BY PEA, PMA, AND CITY; ENFORCEMENT BY PEA, PMA AND CITY

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

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

ARTICLE 52. MISCELLANEOUS PROVISIONS

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

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

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

52.4 **Further 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 Contract.

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

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

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

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

52.9 **No Third Party Beneficiaries.** Nothing in the Contract, express or implied, is intended or shall be construed to confer upon or give to any Person, other than the Parties, any rights, remedies, or other benefits, including but not limited to third-party beneficiary rights, under or by reason of the Contract. The Contract shall not provide any third party with any remedy, claim, liability, reimbursement, cause of action or other right other than any such remedy, claim, etc. existing without reference to the term of or the existence of the Contract.

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

[Remainder of Page Intentionally Left Blank]

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

PHILADELPHIA ENERGY AUTHORITY

Name:

Title:

PHILADELPHIA MUSEUM OF ART

Name:

Title:

JOHNSON CONTROLS, INC. (ESCO)

[Name]

Signature of Secretary, Assistant
Secretary, Treasurer or Assistant
Treasurer

Signature of President or Vice President

Title

Title

(Corporate Seal)

Fed. Identification No. _____

ATTACHMENT F
Economic Opportunity Plan

Guaranteed Energy Savings Project at Philadelphia Museum of Art

Introduction, Definitions and Diversity Practices

A. Chapter 17-1600 of The Philadelphia Code requires the development and implementation of “Economic Opportunity Plan(s)” for certain classes of contracts and covered projects as defined in Section 17-1601. This Economic Opportunity Plan (“Plan”) memorializes the Contractor’s “Best and Good Faith Efforts” to provide meaningful and representative opportunities for Minority Business Enterprises (“MBEs”), Woman Business Enterprises (“WBEs”) and Disabled Business Enterprises (“DSBEs”) (collectively, “M/W/DSBEs” which also includes firms designated as Disadvantaged Business Enterprises or “DBEs”¹) and employ an appropriately diverse workforce in [Project Description] (“Project”). The term “Best and Good Faith Efforts,” the sufficiency of which shall be in the sole determination of the City, means: a Contractor’s efforts, the scope, intensity and appropriateness of which are designed and performed to foster meaningful and representative opportunities for participation by M/W/DSBEs and an appropriately diverse workforce and to achieve the objectives of Chapter 17-1600 within this project. Best and Good Faith Efforts are rebuttably presumed met, when a Contractor makes commitments and causes its professional services providers and contractors retained by Contractor (collectively, the "Participants" and each a "Participant") to make commitments within the M/W/DSBE Participation Ranges established for this RFP and employ a diverse workforce as enumerated herein.

This contract is subject to the Plan requirements as described in Section 17-1603 (1). Accordingly, by submission of this Plan, a responsive and responsible Contractor makes a legally binding commitment to abide by the provisions of this Plan which include its commitment to exercise its Best and Good Faith Efforts throughout the project and its commitment to cause its Participants to use their Best and Good Faith Efforts to provide subcontracting opportunities for M/W/DSBEs in all phases of the project and to employ a diverse workforce. This Plan expressly applies to all contracts awarded in connection with the project. The objectives set forth in this Plan shall be incorporated in all Contractor requests for proposals, bids and solicitations and communicated to all Participant levels.

B. For the purposes of this Plan, MBE, WBE, DBE and DSBE shall refer to certified businesses so recognized by the City of Philadelphia through its Office of Economic Opportunity (“OEO”). Only the work or supply effort of firms that are certified as M/W/DSBEs by an OEO approved certifying agency² or identified in the OEO Registry will be eligible to receive credit as a Best and Good Faith Effort. In order to be counted, certified firms must successfully complete and submit to the OEO an application to be included in the OEO Registry which is a list of registered M/W/DSBEs maintained by the OEO and available online at www.phila.gov/oeo/directory. If Contractor is certified by an approved certifying agency, a copy of that certification should be furnished with the proposal.

C. Contractor is required to submit a statement summarizing current and past practices relating to its diversity practices (“Diversity Practices Statement”). This statement shall identify and describe examples

¹ “DBE” or “Disadvantaged Business Enterprise” means a socially and economically disadvantaged minority or woman owned business that is certified under 49 C.F.R. Part 26. If applicant makes solicitation(s) and commitment(s) with a DBE, applicant shall indicate which category, MBE or WBE, is submitted for counting.

²A list of “OEO approved certifying agencies” can be found at www.phila.gov/oeo

of processes used to develop diversity at all levels of Contractor's organization including, but not limited to, board and managerial positions. This Diversity Practices Statement should also summarize Contractor's strategic business plans specific to its current or past practices of M/W/DSBE utilization on its government and non-government projects and procurement activities. Attachment "A" to this Plan is provided for this purpose and should be submitted with Contractor's proposal although the City reserves the right to request it at any time prior to contract award.

D. Contractor also agrees to identify in this Plan, any "Equity Ownership" which shall mean the percentage of beneficial ownership in the Contractor's firm or development team that is held by minority persons, women and disabled persons. In the event Equity Ownership is identified, Contractor agrees to abide by the reporting requirements enumerated in Section 17-1603 (1)(g)(.3).

E. Contractor and its Participant(s) hereby verify that all information submitted to the City including without limitation, the Plan and all forms and attachments thereto, are true and correct and are notified that the submission of false information is subject to the penalties of 18 Pa.C.S. Section 4904 relating to unsworn falsification to authorities. Contractor and its Participants also acknowledge that if awarded a contract/subcontract resulting from this RFP, it is a felony in the third degree under 18 Pa.C.S. Section 4107.2 (a)(4) if, in the course of the contract/subcontract, Contractor and/or its Participant(s) fraudulently obtains public moneys reserved for or allocated or available to minority business enterprises or women's business enterprises.

Goals

A. M/W/DSBE Participation

The citywide goal of 35% M/W/DSBE participation should be used as a benchmark for the Contractor's expression of Best and Good Faith Efforts, which are Contractor's efforts to provide meaningful and representative opportunities for M/W/DSBEs in the contract. In consideration of the size and scope of the project, the availability of M/W/DSBEs and this citywide goal of 35%, Contractor shall make solicitations of and commitments with M/W/DSBEs in furtherance of the objectives stated herein. The Administrator acknowledges that prior to the final execution of the construction contract, Contractor may need to make updates to this Plan. The final Plan, which is subject to the prior review and approval of OEO, will include the M/W/DSBE Participation and Workforce Commitments form which will be incorporated by reference into the construction contract.

In order to maximize opportunities for as many businesses as possible, a firm that is certified in two or more categories (e.g. MBE and WBE and DSBE or WBE and DSBE) will only be credited once as either an MBE or WBE or DSBE. The firm will not be credited toward more than one category but a Best and Good Faith Effort will demonstrate commitments with both MBEs and WBEs.

B. Workforce Diversity Goals and Requirements

Contractor and its Participants agree to exhaust their Best and Good Faith Efforts to employ minority persons, by race and ethnicity, and females in its workforce of apprentices and journeypersons at the following levels³:

African American Journeypersons – 22% of all journey hours worked across all trades

Asian Journeypersons – 3% of all journey hours worked across all trades

Hispanic Journeypersons – 15% of all journey hours worked across all trades

Female Journeypersons – 5% of all journey hours worked across all trades

Minority Apprentices – 50% of all hours worked by all apprentices

Female Apprentices – 5% of all hours worked by all apprentices

III. Contractor Responsiveness and Responsibility

A. Contractor shall identify all its M/W/DSBE commitments and evidence its agreement to employ a diverse workforce on the form entitled, “M/W/DSBE Participation and Workforce Commitments.” The Contractor’s identified commitment to use an M/W/DSBE on this form constitutes a representation by Contractor, that the M/W/DSBE is capable of completing the subcontract with its own workforce, and that the Contractor has made a legally binding commitment with the firm. The listing of the M/W/DSBE firm by Contractor in its final Plan represents that Contractor will subcontract with the listed firm(s) for the work or supply effort described and the dollar/percentage amount(s) set forth on the form. In calculating the percentage of M/W/DSBE participation, Contractor shall apply the standard mathematical rules in rounding off numbers. In the event of inconsistency between the dollar and percentage amounts listed on the form, the percentage will govern. Contractor is to maintain the M/W/DSBE percentage commitments throughout the term of the contract which shall apply to the total amount of the contract and any additional increases. In the event the Contractor’s contract is increased by change order and/or modification, or amendment, it shall be the responsibility of the Contractor to apply its Best and Good Faith Efforts to the amended amount in order to maintain any participation ranges committed to on the total dollar amount of the contract at the time of contract completion.

1. Commercially Acceptable Function

A contractor that enters into a subcontract with an M/W/DSBE shall be considered to have made a Best and Good Faith Effort in that regard only if its M/W/DSBE subcontractor performs a commercially acceptable function (“CAF”). An M/W/DSBE is considered to perform a CAF when it engages in meaningful work or supply effort that provides for a distinct element of the subcontract (as required by the work to be performed), where the distinct element is worthy of the dollar amount of the subcontract and where the M/W/DSBE carries out its responsibilities by actually performing, managing and supervising the work involved; M/W/DSBE subcontractors must perform at least twenty percent (20%) of the cost of the subcontract (not including the cost of materials, equipment or supplies incident to the performance of the subcontract) with their own employees.

³ These goals have been informed by the City of Philadelphia Fiscal Year 2015 Annual Disparity Study, Economic Opportunity Plan Employment Composition Analysis.

The City may evaluate the amount of work subcontracted, industry practices and any other relevant factors in determining whether the M/W/DSBE is performing a CAF and in determining the amount of credit the Contractor receives towards the participation ranges. For example, a contractor using an M/W/DSBE non-stocking supplier (i.e., a firm that does not manufacture or warehouse the materials or equipment of the general character required under the contract) to furnish equipment or materials will only receive credit towards the participation ranges for the fees or commissions charged, not the entire value of the equipment or materials furnished.

B. Upon award, letters of intent, quotations, and any other accompanying documents regarding commitments with M/W/DSBEs, including the M/W/DSBE Participation and Workforce Commitments Form, become part of the contract. M/W/DSBE commitments are to be memorialized in a written subcontract agreement and are to be maintained throughout the term of the contract and shall apply to the total contract value (including approved change orders and amendments). **Any change in commitment, including but not limited to termination of the subcontract, reduction in the scope of committed work, substitutions for the listed firms, changes or reductions in the listed dollar/percentage amounts, must be pre-approved in writing by OEO.** Throughout the term of the contract, Contractor is required to continue its Best and Good Faith Efforts.

C. In the event Contractor does not identify on the M/W/DSBE Participation and Workforce Commitments Form that it has made M/W/DSBE commitments within the participation ranges established for this Contract and/or does not agree to employ a diverse workforce as described herein, Contractor must complete and submit a *Documentation of Best and Good Faith Efforts Form* (“BGFE Form”), documenting its solicitations and any commitments with M/W/DSBEs, and detailing any efforts made to include M/W/DSBEs in the contract and to employ a diverse workforce. The submission of the BGFE Form is an element of proposal responsiveness and failure to include this form may result in the rejection of the Proposal. The BGFE Form must include at a minimum, certification and documentary evidence that the following actions were taken:

1. Solicitation directed to both qualified M/W/DSBEs registered with OEO and qualified M/W/DSBEs certified by agencies approved by OEO. Contractor must provide a list of all certification directories used for soliciting participation for this Contract. Contractor must determine with reasonable certainty if the M/W/DSBEs are interested by taking appropriate steps to follow up on initial solicitations; one time contact, without follow up, is not acceptable; and

2. Contractor provided interested M/W/DSBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation; and

3. Contractor negotiated in good faith with interested M/W/DSBEs. An Contractor using good business judgment would consider a number of factors in negotiating with subcontractors, including M/W/DSBE subcontractors, and would take a firm’s price and capabilities as well as the objectives of the Plan into consideration; and

4. Documentation of the following:

i. Any commitments to use M/W/DSBEs in its proposal for subcontracted services and materials supply even when Contractor would otherwise prefer to self-perform/supply these items; and

ii. Correspondence between the Contractor and any M/W/DSBE(s) related to this Proposal; and

iii. Attendance logs and/or records of any scheduled pre-proposal meeting; and

5. Certification and evidence that the following actions were taken or documentation of the following, or an explanation why these actions were not taken or why documentation does not exist:

i. Any arms length business assistance provided to interested M/W/DSBEs; and

ii. Solicitation through job fairs, newspapers, periodicals, advertisements and other organizations or media that are owned by M/W/DSBEs and/or focus on M/W/DSBEs; and

iii. Telephone logs of communications related to this Contract; and

iv. Notification of and access to proposal documents at the Utility Supplier's office or other office locations for open and timely review; and

v. Contractor sought assistance from the Urban Affairs Coalition, PACareerlink, Opportunity Industrial Center and Philadelphia Works, Inc. to perform employment outreach; and

vi. Contractor published its policy of nondiscrimination in the hiring, retention and promotion of employees; and

vii. Any agreement with a training program that targets the employment of minority persons, disabled persons and women.

IV. Evaluation of Responsiveness and Responsibility

A. Evaluation and Determination

1. The City, acting through its OEO, will evaluate the responsiveness of the Plan to these requirements. OEO reserves the right to request further documentation and/or clarifying information at any time prior to the award of the contract which may result in Contractor's amendment of its M/W/DSBE Participation and Workforce Commitments Form or BGFE Form.

B. Administrative Reconsideration

1. If the OEO determines that the Contractor has not made sufficient Best and Good Faith Efforts, the Contractor will be notified that its proposal is nonresponsive and may file a written appeal with OEO within forty-eight (48) hours of the date of notification. The decision of OEO may be appealed in writing within forty-eight (48) hours of the date of the OEO's decision to the Chief Operating Officer of the

Commerce Department or his designee whose decision shall be final. If it is determined that the Contractor did not make sufficient Best and Good Faith Efforts, its Proposal will be rejected.

2. Notwithstanding compliance with the requirements set forth herein, the City reserves the right to reject any or all proposals as deemed in the best interest of the City.

V. Compliance and Monitoring of Best and Good Faith Efforts

A. The Contractor shall file a hard copy of this Plan, as certified below by OEO, with the Chief Clerk of City Council within fifteen (15) days of receiving a Notice of Award. The Plan shall be filed with:

Michael Decker, Chief Clerk of City Council
Room 402 City Hall
Philadelphia, Pennsylvania 19107

The Contractor also agrees to cooperate with OEO in its compliance monitoring efforts, and to submit, within the time limits prescribed by OEO, all documentation which may be requested by OEO relative to the awarded contract, including the items described below. The Contractor must provide as required and maintain the following contract documentation for a period of three (3) years following acceptance of final payment under the contract:

- Copies of signed contracts and purchase orders with M/W/DSBE subcontractors;
- Evidence of payments (cancelled checks, invoices, etc.) to subcontractors and suppliers to verify participation;
- Telephone logs and correspondence relating to M/W/DSBE commitments.

B. Prompt Payment of M/W/DSBEs

The Contractor shall within five (5) business days after receipt of a payment from the City for work performed under the contract, deliver to its M/W/DSBE subcontractors their proportionate share of such payment for work performed (including the supply of materials). In connection with payment of its M/W/DSBE subcontractors, the Contractor agrees to fully comply with the City's payment reporting process which may include the use of electronic payment verification systems.

Each month of the contract term and at the conclusion of the contract, the Contractor shall provide to the OEO documentation reconciling actual dollar amounts paid to M/W/DSBE subcontractors to M/W/DSBE commitments presented in the Plan.

C. Oversight Committee

1. For this project, the City, in its sole discretion, may establish a Project Oversight Committee consisting of representatives from the Utility Supplier's company and the City ("Committee"). The Committee will meet regularly to provide advice for the purpose of facilitating compliance with the Plan.

2. If a Project Oversight Committee is established, the City will convene meetings of the Committee no later than one (1) month after issuance of the Notice To Proceed.

VI. Remedies and Penalties for Non-Compliance

A. The Contractor agrees that its compliance with the requirements of the Plan is material to the contract. Any failure to comply with these requirements may constitute a substantial breach of the contract. It is further agreed and understood that in the event the City determines that the Contractor hereunder has failed to comply with these requirements the City may, in addition to remedies reserved under Section 17-1605 of The Philadelphia Code, any other rights and remedies the City may have under the contract, or any bond filed in connection therewith or at law or in equity, exercise one or more of the remedies below, which shall be deemed cumulative and concurrent:

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

Terminate the contract, in whole or in part.

Suspend/Debar the Contractor from proposing on and/or participating in any future City contracts for a period of up to three (3) years.

Recover as liquidated damages, one percent of the total dollar amount of the contract for each one percent (or fraction thereof) of the commitment shortfall. (NOTE: The “total dollar amount of the contract” shall include approved change orders, amendments and for requirements contracts shall be based on actual quantities ordered by the City.)

The remedies enumerated above are for the sole benefit of the City and City’s failure to enforce any provision or the City’s indulgence of any non-compliance with any provision hereunder, shall not operate as a waiver of any of the City’s rights in connection with the Contract nor shall it give rise to actions by any third parties including identified M/W/DSBE subcontractors. No privity of contract exists between the City and the M/W/DSBE subcontractor identified in the contract. The City does not intend to give or confer upon any such M/W/DSBE subcontractor(s) any legal rights or remedies in connection with subcontracted services under any law or Executive Order or by any reason of the Contract except such rights or remedies that the M/W/DSBE subcontractor may seek as a private cause of action under any

legally binding contract to which it may be a party.

Allison M Dunn - Area General Manager
PRINT NAME OF CONTRACTOR AND TITLE

July 6, 2017
DATE


SIGNATURE OF CONTRACTOR AND TITLE

July 6, 2017
DATE

IOLA HARPER, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY⁴ DATE

[See Forms on following pages; these Forms, must be submitted by Contractor]

⁴ Pursuant to Section 17-1603 (2) of The Philadelphia Code, the representative of the City of Philadelphia's Office of Economic Opportunity, the "certifying agency", certifies that the contents of this Plan are in compliance with Chapter 17-1600.

STATEMENT OF DIVERSITY PRACTICES, POLICIES AND PAST ACHIEVEMENTS

In compliance with Chapter 17-1600 of the Philadelphia Code, Section 17-1603 entitled “Equal Opportunity Plan: Contents,” the Plan shall contain a statement from the contractor, developer and/or recipient of financial assistance summarizing past practices by identifying and describing examples of processes used to develop diversity at any/all levels of its organization including, but not limited to, Board and managerial positions. This statement shall also summarize strategic business plans specific to current or past practices of M/W/DSBE utilization on government and non-government projects and procurement. Where appropriate, such a statement should contain:

1. Describe employment and recruitment policies used to achieve diversity in your workforce.
2. Provide the race, gender, and residential (local) status of your
 - a) Board of Directors
 - b) Management
 - c) General Workforce
3. Identify your organization’s methods of solicitation and utilization of Minority, Woman and Disabled Businesses (M/W/DSBEs). Please be specific in describing outreach and any procurement policies that are focused on creating or sustaining business relationships with M/W/DSBEs.
4. What percentage of your company’s total spend with vendors and suppliers is attributable to M/W/DSBEs? Please include a list of the largest M/W/DSBEs used by your organization in the last 12 months.
 - a) Identify the type of goods or services purchased
 - b) Amount of the contract.
 - c) Indicate if any of these M/W/DSBEs are listed in the City of Philadelphia’s Office of Economic Opportunity Registry.
 - d) Are these companies certified as M/W/DSBEs? Do you rely on any particular certifying agency?
 - e) If there is no previous M/W/DSBE utilization, the Plan shall contain a statement that explains the reason for the lack of M/W/DSBE participation in past contract(s) or project(s).
5. Describe any initiatives made by your organization to increase investment and promote equity ownership by minorities and women.

Please find our answers to the above questions after our Equal Employment Opportunity Policy Statement.



Johnson Controls
EQUAL EMPLOYMENT OPPORTUNITY POLICY STATEMENT

It is the policy of Johnson Controls not to discriminate against any employee or applicant for employment because of his or her race, color, religion, sex, sexual orientation, gender identity or national origin or because he or she is an individual with a disability or disabled veteran, Armed Forces service medal veteran, recently separated veteran, or active duty wartime or campaign badge veteran, or thereafter referred collectively as “protected veterans.” It is also the policy of Johnson Controls to take affirmative action to employ and to advance in employment, all persons regardless of their status as individuals with disabilities or protected veterans, and to base all employment decisions only on valid job requirements. This policy shall apply to all employment actions, including but not limited to recruitment, hiring, upgrading, promotion, transfer, demotion, layoff, recall, termination, rates of pay or other forms of compensation and selection for training, including apprenticeship, at all levels of employment.

Employees and applicants shall not be subjected to harassment, intimidation, threats, coercion or discrimination because they have engaged in or may engage in any of the following activities: (1) Filing a complaint; (2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of Section 503 of the Rehabilitation Act of 1973, as amended (Section 503) or any other Federal, State or local law requiring equal opportunity for individuals with disabilities; (3) Opposing any act or practice made unlawful by Section 503 or its implementing regulations in this part or any other Federal, State or local law requiring equal opportunity for disabled persons; or (4) Exercising any other right protected by section 503 or its implementing regulations in this part.

As Chairman and CEO of Johnson Controls, I am committed to the principles of Affirmative Action and Equal Employment Opportunity. In order to ensure dissemination and implementation of equal employment opportunity and affirmative action throughout all levels of the company, I have selected Oran Dyette as the Director HR Compliance for Johnson Controls. One of the Director HR Compliance’s duties will be to establish and maintain an internal audit and reporting system to allow for effective measurement of Johnson Controls’ programs.

In furtherance of Johnson Controls’ policy regarding Affirmative Action and Equal Employment Opportunity, Johnson Controls has developed a written Affirmative Action Program which sets forth the policies, practices and procedures that Johnson Controls is committed to in order to ensure that its policy of nondiscrimination and Affirmative Action for qualified individuals with disabilities and qualified protected veterans is accomplished. This Affirmative Action Program is available for inspection by any employee or applicant for employment upon request between 8:00AM - 5:00PM at the HR Compliance department. Any questions should be directed to your supervisor, your HR person, or Oran Dyette, Director HR Compliance.

A handwritten signature in black ink, appearing to read 'Alex Molinaroli', written in a cursive style.

Alex Molinaroli
Chairman and CEO
Johnson Controls
1/1/2017

1. Describe employment and recruitment policies used to achieve diversity in your workforce.

Diversity Employment

As part of our commitment to diversity and inclusion we set in place strategies and tactics developed to enable sustainable progress in this area. Johnson Controls recognizes the value of diversity and inclusion and aspires to leverage it as part of accelerating our competitive advantage. We strive to create, develop, and fully leverage the strengths of a diverse workforce in order to meet our growth commitments. Achieving these goals requires an organization committed to integrating processes which will drive and deliver desired results in diversity and inclusion. Johnson Controls mission is to become the competitive leader and industry model for diversity and inclusion to enable operational excellence, growth, and engagement.

Making progress in diversity and inclusion starts from the top of our organization where the commitment is realized through examples which are set, and by expectations which are communicated. As an example, our CEO has identified diversity and inclusion as a key element of Johnson Controls 5-year strategy.

Diversity and inclusion management is the responsibility of each and every employee and we believe no step is too small in terms of impacting our progress. Educating employees on the importance of diversity and inclusion is important to Johnson Controls. We have developed an overarching strategy which addresses the recruitment, retention, inclusion, and engagement of a diverse global workforce.

Diversity Recruiting

Diversity associations and national conferences are a great way to attract diverse talent to Johnson Controls. As we partner with these organizations it enables us in building Johnson Controls brand recognition among diverse university students and professionals in engineering. Engineers comprise a key function across all of Johnson Controls business units and represent a priority area of focus for the organization.

Partnering with diversity associations and conferences provides us with access to thousands of engineering students and professionals. While our primary goal is to advance our diversity recruiting strategy our involvement also creates an opportunity to showcase Johnson Controls leaders & experts, provide learning and skill development, participate in networking, and provide professional development for Johnson Controls employees.

To create a sustainable ROI for each diversity conference each business unit is represented with senior leaders in attendance, arrive with a commitment to achieve pre-determined hiring levels, pre-screen candidates before conferences, conduct interviews and make job offers at each conference, and lastly, increase our brand recognition.

In collaboration with Talent Acquisition, Diversity & Inclusion sets the strategy for attracting diverse talent to Johnson Controls. Diversity and Inclusion manages corporate partnerships with diversity organization and manages our involvement at national conferences. Talent Acquisition sources and identifies early career and experienced candidates' pre-conference and develops specific plans by each business unit on follow up with their top candidates.

Awards & Recognition

As we further align our strategy and plans to become the employer, business partner and supplier of choice, we will to continue to be bold and courageous as ONE Johnson Controls. We are proud of the accomplishments we're achieved thus far and the external recognition for our efforts.

2017:

Award & Recognition	Organization
DiversityInc Noteworthy Company	DiversityInc
Top 50 Employers for Minority Engineers	Minority Engineer Magazine
Top Veteran-Friendly Company	U.S. Veterans Magazine
Top 50 Employers for Workforce Diversity	Workforce Diversity for Engineering & IT Professionals Magazine

2016:

Award & Recognition	Organization
Top 50 Employers for Minority Engineers	Minority Engineer Magazine
TOP Employer in China	Top Employers Institute
Top Veteran-Friendly Company	U.S. Veterans Magazine
Top 50 Employers for Woman Engineers	Women Engineer Magazine
Top 50 Employers for Workforce Diversity	Workforce Diversity for Engineering & IT Professionals Magazine

2015:

Award & Recognition	Organization
Top 25 ERG & Council Honors Award	Association of ERGs and Councils & PRISM
40 Best Companies for Diversity	Black Enterprise Magazine
Hispanic Chamber of Commerce of WI Corporation of the Year Award	Hispanic Chamber of Commerce
Top Veteran-Friendly Company	U.S. Veterans Magazine
Top 50 Employers for Workforce Diversity	Workforce Diversity for Engineering & IT Professionals Magazine

2. Provide the race, gender, and residential (local) status of your

a) Board of Directors:

- Female: Caucasian
- Minority: Mexican American
- Residential local status: Delaware , Georgia, New York, Mexico, Switzerland, Pennsylvania, Virginia, Wisconsin

b) Management:

Executive management:

- Female: Caucasian
- Minority: African American
- Residential local status: We have leaders in our global headquarters:
 - Cork, Ireland
 - Milwaukee, WI
 - Shanghai, China

Company Officers:

- Female: Caucasian
- Minority: African American
- Residential local status: We have leaders in nearly 2,000 locations worldwide.

c) General Workforce:

- Female: The race classification of our general female workforce includes African American, Asian American, Caucasian, Hispanic/Latino and those who self-identify as two or more races.
- Minority: The race classification of our general minority workforce includes African American, Asian American, Hispanic/Latino and those who self-identify as two or more races.
- Residential local status: We have a total of 117K employees in nearly 2,000 locations worldwide.

Questions can be directed to Crystal Andrews Banks, Global Manager, Diversity & Inclusion.

3. Identify your organization's methods of solicitation and utilization of Minority, Woman and Disabled Businesses (M/W/DSBEs). Please be specific in describing outreach and any procurement policies that are focused on creating or sustaining business relationships with M/W/DSBEs.

For more information on our organization's methods, outreach and other policies that is focused on Minority, Woman and Disabled Business, please refer to the Technical Submittal Section 3.3: Approach to Economic Opportunity Plan in the proposal.

4. What percentage of your company's total spend with vendors and suppliers is attributable to M/W/DSBEs? Please include a list of the largest M/W/DSBEs used by your organization in the last 12 months.

Annual spending with MBE and WBE suppliers exceeded \$1.1 billion in 2016.

Top 20 MWBEs in FY2017

Vendor Name	Primary Naics Code	Primary Certifying Council Name
Bridgewater Interiors, LLC	336360	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
Enerflex Solutions, LLC	-	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
CONTINENTAL LIGHTING LLC	-	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
Camaco, LLC	332999	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
DSSI, LLC	541511	NMSDC-TRI-STATE MINORITY SUPPLIER DEVELOPMENT COUNCIL
R-Squared Puckett, Inc.	332410	NMSDC-SOUTHERN REGION MINORITY SUPPLIER DEVELOPMENT COUNCIL
MAGIC Workforce Solutions	561310	NMSDC-SOUTHERN CALIFORNIA MINORITY SUPPLIER DEVELOPMENT COUNCIL
Pacific Rim Capital, Inc.	532490	NMSDC-SOUTHERN CALIFORNIA MINORITY SUPPLIER DEVELOPMENT COUNCIL
Dura Automotive Systems, LLC	336360	WBENC-(MI) WOMENS BUSINESS ENTERPRISE COUNCIL GREAT LAKES
Delaco Steel Corp. (Delaco-Kenwal Steel, LLC)	423510	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
CNI, Inc.	336360	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
Grupo Logico	488510	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
Gill Industries, Inc.	332116	WBENC-WOMENS BUSINESS ENTERPRISE NATIONAL COUNCIL
W.J.G. Enterprises Molding Company	-	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
TEXAS INTERNATIONAL BUSINESS LLC	335911	NMSDC-HOUSTON MINORITY SUPPLIER DEVELOPMENT COUNCIL
Advantage Technologies, Inc.	-	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
Alliance Suppliers, Inc.	315211	NMSDC-GEORGIA MINORITY SUPPLIER DEVELOPMENT COUNCIL
Trans International, LLC	541614	WBENC-(IL) WOMENS BUSINESS DEVELOPMENT CENTER CHICAGO
Saturn Electronics & Engineering, Inc.	334412	NMSDC-MICHIGAN MINORITY SUPPLIER DEVELOPMENT COUNCIL
SBM Management Services, LP	314999	NMSDC-WESTERN REGIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL

a) Identify the type of goods or services purchased

Johnson Controls has more than 300 diverse suppliers representing more than 50 product and service categories.

b) Amount of the contract.

\$13,326,336

c) Indicate if any of these M/W/DSBEs are listed in the City of Philadelphia’s Office of Economic Opportunity Registry.

Company Name	Products/Services Descriptions
Service Select, Inc.	Exterior interior signs, lighting, 24/7 sign & lighting service & maintenance. PV solar ignage & grid systems.
Old Philadelphia Associates, Inc.	Caulking, masonry restoration, concrete, brick and stone replacement and repair, waterproofing, firesafing
Environmental Construction Services, Inc.	Environmental Construction Services, Incorporated is a full service HVAC construction company. Our company's management team, with over 60 years of combined experience, counsel their customers with respect to the most optimal solutions to their needs.
E&M Engineering	HVAC, Electrical, Plumbing and Fire Protection Design Engineering and Construction Period Services including commissioning.
THE BIOENGINEERING GROUP INC	ENGINEERING SERVICES, ENVIRONMENTAL CONSULTING Bioengineering Group helps clients realize the benefits of applying sustainability principles to site planning and development projects. They are award winning experts in the most progressive and creative sustainable design work featuring water and energy conservation, ecological restoration, low impact development, and renewable energy strategies, including putting policy-into-practice; research-into-practice; and SUSTAINABILITY-into-PRACTICE.
Element Mechanical Services, LLC	Mechanical contractor specializing in installation of HVAC equipment, Sheet Metal Ductwork, Plumbing and Controls.
ELECTRICAL SYSTEMS AND CONSTRUCTION SUPPLY, INC.	Alkaline batteries, Fluorescent ballast, Low voltage lighting transformer
Arora Systems Group, LLC	Low Voltage Wiring, Inspections Fire Alarm
LARRY C MCCRAE INC	PUBLIC WORKS ELECTRICAL PUBLIC WORKS GENERAL CONSTRUCTION Telecommunications

d) Are these companies certified as M/W/DSBEs? Do you rely on any particular certifying agency?

Johnson Controls requires diverse suppliers in our Supplier Diversity & Business Development program to hold diverse business certification. The Johnson Controls preferred diverse business certifications are from the National Minority Supplier Development Council (NMSDC), the Women's Business Enterprise National Council (WBENC) and the National Veteran Business Development Council (NVBDC).

e) If there is no previous M/W/DSBE utilization, the Plan shall contain a statement that explains the reason for the lack of M/W/DSBE participation in past contract(s) or project(s).

N/A

5. Describe any initiatives made by your organization to increase investment and promote equity ownership by minorities and women.

Please refer to the Technical Submittal Section 3.3: Approach to Economic Opportunity Plan in the proposal.

M/W/DBSBE Participation and Workforce Commitments
RFP EOP

DEPARTMENT OF COMMERCE OFFICE OF ECONOMIC OPPORTUNITY (OEO)									
Minority (MBE), Woman (WBE), Disabled (DSBE) and Disadvantaged (M-DBE and W-DBE) Business Enterprises ¹					Proposal Due Date - July 6, 2017				
PROJECT TITLE - Philadelphia Museum of Art									
NAME OF Proposer - Johnson Controls, Inc.									
<i>List below all MBE/WBE/DSBE/DBEs² that you have a commitment to use for a Commercially Acceptable Function On this Proposal - Photocopy this form as necessary.</i>									
<input type="checkbox"/> MBE	<input checked="" type="checkbox"/> WBE	<input type="checkbox"/> DSBE	<input type="checkbox"/> M-DBE ²	<input type="checkbox"/> W-DBE ²	<input checked="" type="checkbox"/> Subcontractor	<input type="checkbox"/> Supplier	Quote Received		Amount Committed To
Work or Supply Effort to be Performed							YES ³	NO	Dollar Amount
- Water Conservation							X		\$66,104.00
- Water Conservation									Percent of Total Proposal
- Water Conservation									0.6%
- Water Conservation									Amount Committed To
- Water Conservation									Dollar Amount
- Water Conservation									\$520,789.00
- Water Conservation									Percent of Total Proposal
- Water Conservation									4.8%
- Water Conservation									Amount Committed To
- Water Conservation									Dollar Amount
- Water Conservation									\$33,638.00
- Water Conservation									Percent of Total Proposal
- Water Conservation									0.3%

¹MBE/WBE/DBEs Listed above must be certified prior to bid submission date.

²If Proposer makes commitments with DBEs, Proposer shall indicate which class type M-DBE or W-DBE is submitted for credit.

³Proposer should attach quotation with this form, but the City reserves the right to request this information which shall be submitted by Proposer within 48 hours of the City's Request.

Please make additional copies when necessary.

REV 09/2010

M/W/DSBE Participation and Workforce Commitments
RFP EOP

DEPARTMENT OF COMMERCE
OFFICE OF ECONOMIC OPPORTUNITY (OEO)

Minority (MBE), Woman (WBE), Disabled (DSBE) and Disadvantaged (M-DBE and W-DBE) Business Enterprises¹
PROJECT TITLE - Philadelphia Museum of Art
 NAME OF Proposer - Johnson Controls, Inc. Proposal Due Date - July 6, 2017

List below all MBE/WBE/DSBE/DBEs² that you have a commitment to use for a Commercially Acceptable Function On this Proposal - Photocopy this form as necessary.

<input type="checkbox"/> MBE <input checked="" type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²		Supplier	Quote Received		Dollar Amount
<input type="checkbox"/> MBE <input checked="" type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²		Supplier	YES ³	NO	Dollar Amount
Company Name Cahill Controls Inc Address 600 Woodborne Road Langhorne PA 19047 Contact Person Teresa Cahill Telephone Number 215-702-1085 Fax # 215-702-1086 E-mail Address teresa@cahillcontrols.com OEO Registry # City of Philadelphia		<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed - BAS Electrical Installation for Siemens system	X	NO	\$504,650.00 Percent of Total Proposal 4.6%
Company Name Cahill Controls Inc Address 600 Woodborne Road Langhorne PA 19047 Contact Person Teresa Cahill Telephone Number 215-702-1085 Fax # 215-702-1086 E-mail Address teresa@cahillcontrols.com OEO Registry # City of Philadelphia		<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed - LED Lighting Installation Main Building & Rodin	X	NO	\$365,430.00 Percent of Total Proposal 3.3%
Company Name Cahill Controls Inc Address 600 Woodborne Road Langhorne PA 19047 Contact Person Teresa Cahill Telephone Number 215-702-1085 Fax # 215-702-1086 E-mail Address teresa@cahillcontrols.com OEO Registry # City of Philadelphia		<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed - Transformer Upgrades	X	NO	\$216,205.00 Percent of Total Proposal 2.0%

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Please make additional copies when necessary.

M/W/DBSBE Participation and Workforce Commitments
RFP EOP

DEPARTMENT OF COMMERCE
OFFICE OF ECONOMIC OPPORTUNITY (OEO)

Minority (MBE), Woman (WBE), Disabled (DSBE) and Disadvantaged (M-DBE and W-DBE) Business Enterprises¹
 NAME OF Proposer - Johnson Controls, Inc. Proposal Due Date - July 6, 2017

List below all MBE/WBE/DSBE/DBEs² that you have a commitment to use for a Commercially Acceptable Function On this Proposal - Photocopy this form as necessary.

<input type="checkbox"/> MBE <input checked="" type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²		Supplier	Quote Received	Amount Committed To
Work or Supply Effort to be Performed		YES ³	NO	Dollar Amount \$
Company Name H2O Applied Technologies LLC Address 50 Federal Street Floor 4 Boston MA 02110 Contact Person Hope Sidman Telephone Number 617-428-8666 Fax # 617-422-0442 E-mail Address hsidman@h2oappliedtech.com OEO Registry # City of Philadelphia		<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier - Steam Trap Replacement	X	\$693,324.00 Percent of Total Proposal 6.3%
Company Name H2O Applied Technologies LLC Address 50 Federal Street Floor 4 Boston MA 02110 Contact Person Hope Sidman Telephone Number 617-428-8666 Fax # 617-422-0442 E-mail Address hsidman@h2oappliedtech.com OEO Registry # City of Philadelphia		<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier - Radiator Valve Replacement	X	\$557,000.00 Percent of Total Proposal 5.1%
Company Name Address Contact Person Telephone Number Fax # E-mail Address OEO Registry # City of Philadelphia		<input type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed	YES ³	Amount Committed To
Address Contact Person Telephone Number Fax # E-mail Address OEO Registry # City of Philadelphia		YES ³	NO	Dollar Amount \$ Percent of Total Proposal %

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M/W/DBE Participation and Workforce Commitments
RFP EOP

DEPARTMENT OF COMMERCE
OFFICE OF ECONOMIC OPPORTUNITY (OEO)

Minority (MBE), Woman (WBE), Disabled (DSBE) and Disadvantaged (M-DBE and W-DBE) Business Enterprises¹
 NAME OF Proposer - Johnson Controls, Inc. Proposal Due Date - July 6, 2017

List below all MBE/WBE/DSBE/DBEs² that you have a commitment to use for a Commercially Acceptable Function On this Proposal - Photocopy this form as necessary.

Company Name JD Bravo Company Inc Address 136 Pennsylvania Ave Malvern PA 19355 Contact Person James M Davie Telephone Number 484-320-7400 Fax # 484-320-7500 E-mail Address rdettore@jdblavocompany.com OEO Registry # City of Philadelphia	Work or Supply Effort to be Performed - LED Lighting Material		Quote Received		Dollar Amount \$ \$644,206.00 Percent of Total Proposal % 5.9%
	<input type="checkbox"/> MBE <input type="checkbox"/> WBE <input checked="" type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²	<input type="checkbox"/> Subcontractor <input checked="" type="checkbox"/> Supplier	YES ³	NO	
Company Name C.A.D. Electric Incorporated Address 1021 Saville Ave Eddystone PA 19022 Contact Person Carol Doyle Telephone Number 610-565-8544 Fax # 610-568-8277 E-mail Address dustin@cadelectric.com OEO Registry # City of Philadelphia	<input checked="" type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²	<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier	YES ³	NO	Dollar Amount \$ \$320,196.00 Percent of Total Proposal % 2.9%
Company Name Salveo Management Services Inc Address 4900 Wyalusing Ave Philadelphia PA 19131 Contact Person George Banks Telephone Number 215-473-7033 ext 7282 Fax # 219-933-6929 E-mail Address gbanks@cchss.org OEO Registry # City of Philadelphia	<input checked="" type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²	<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier	YES ³	NO X	Dollar Amount \$ \$127,850.00 Percent of Total Proposal % 1.2%

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M/W/DSBE Participation and Workforce Commitments
RFP EOP

**DEPARTMENT OF COMMERCE
OFFICE OF ECONOMIC OPPORTUNITY (OEO)**

Minority (MBE), Woman (WBE), Disabled (DSBE) and Disadvantaged (M-DBE and W-DBE) Business Enterprises¹
PROJECT TITLE - Philadelphia Museum of Art Proposal Due Date - July 6, 2017

NAME OF Proposer - Johnson Controls, Inc.

List below all MBE/WBE/DSBE/DBEs² that you have a commitment to use for a Commercially Acceptable Function On this Proposal - Photocopy this form as necessary.

	<input type="checkbox"/> MBE <input checked="" type="checkbox"/> WBE <input type="checkbox"/> DSBE <input type="checkbox"/> M-DBE ² <input type="checkbox"/> W-DBE ²	<input type="checkbox"/> Subcontractor <input checked="" type="checkbox"/> Supplier	Quote Received	YES ³	NO	Dollar Amount \$
Company Name Goshen Mechanical Contractors Inc Address 1640 Snyder Ave Unit A West Chester PA 19382 Contact Person James Gaffney Telephone Number 4610-644-4433 Fax # 610-644-4433 E-mail Address jgaffney@goshenmechanical.com OEO Registry # Certifying Agency WEBNC		<input type="checkbox"/> Subcontractor <input checked="" type="checkbox"/> Supplier - Rodin Rooftop Condenser Replacement - WEBNC certified submitted application for OEO certification. Also Being considered for Chiller replacement and Convert CHW to variable flow ECMS	X		NO	\$51,897.00
Company Name Address Contact Person Telephone Number E-mail Address OEO Registry # Certifying Agency		<input type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed	X		NO	.5%
Company Name Address Contact Person Telephone Number E-mail Address OEO Registry # Certifying Agency		<input checked="" type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed	X		NO	\$519,502.00
Company Name Address Contact Person Telephone Number E-mail Address OEO Registry # Certifying Agency		<input type="checkbox"/> Subcontractor <input type="checkbox"/> Supplier Work or Supply Effort to be Performed	X		NO	4.7%

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**DEPARTMENT OF COMMERCE
OFFICE OF ECONOMIC OPPORTUNITY (OEO)**

Proposer, by submission of this MW/DSBE Participation and Workforce Commitments Form, certifies that it will use, for the duration of the project, its Best and Good Faith Efforts, as that term is defined in Chapter 17-1600 of The Philadelphia Code, to employ a diverse workforce for this project and achieve the following goals:

African American Journeypersons – 22% of all journey hours worked across all trades

Asian Journeypersons – 3% of all journey hours worked across all trades

Hispanic Journeypersons – 15% of all journey hours worked across all trades

Female Journeypersons – 5% of all journey hours worked across all trades

Minority Apprentices – 50% of all hours worked by all apprentices

Female Apprentices – 5% of all hours worked by all apprentices

List any and all collective bargaining agreements that Proposer is a signatory to:

Johnson Controls has established collaborative working relationships with numerous union organizations both on a national and local basis, and has been working hand-in-hand with represented employees over half a century. We have a National Agreement with the United Association (UA) of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. The labor agreement has been in place over 40 years, and our relationship with the UA has been very positive. Johnson Controls directly maintains union agreements with more than 40 organizations in the United States:

Detroit Building Trades, UA International, UA International Pipe Fab CBA, UA Local 9, UA Local 120, UA Local 420, UA Local 597, UA Local 170, UA Local 516, UA Local 488, UA Local 179, UA Local 254, UA Local 787, Ontario Pipe Trades, UA Locals, UA Local 56, UA Local 740, UA Local 325, National Organized Workers Union, UAW Local 1872, UAW Local 1296, CWA Local 4009, CWA 4217, CWA Local 4603, HAMTC, IAM Local 2799, IBEW Local 3, IBEW Local 15, IBEW Local 21, IBEW Local 213, IUOE Local 30, IUOE Local 39, IUOE Local 68, IUOE Local 94, IUOE Local 95, IUOE Local 95 IUOE Local 286, IUOE Local 399, IUOE Local 501, IUOE Local 832 S, IUOE Local 835, SEIU Local 32BJ, SMWIA Local 2, SMWIA Local 15, SMWIA Local 18, SMWIA Local 80, SMWIA Local 361, Teamsters Local 102, Teamsters Local 419, Teamsters Local 1999, USW Local 2020-51
SSNA JCI-UA National HVACR, York PA Plant CBA