
State of Wyoming



Wyoming Energy Conservation Improvement Program

For State Agencies, County & Municipal Governments,
Higher Education Facilities, Public School Districts,
Hospitals, and other Public Entities

PROGRAM MANUAL Appendix 1D

WYECIP ENERGY PERFORMANCE CONTRACT



State of Wyoming



Wyoming Energy Conservation Improvement Program

ENERGY PERFORMANCE CONTRACT

Between

(Facility Owner Name)

and

(Energy Services Company Name)



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ENERGY PERFORMANCE CONTRACT

This Energy Performance Contract (the “Contract”) is made and entered into as of (Date), between (Energy Services Company Name), having its principal office at (Energy Services Company Address), hereinafter referred to as “Contractor” and (Facility Owner Name and Address), hereinafter referred to as “Facility Owner” for the purpose of installing certain energy, water or other operating cost saving equipment, described in Attachment J, and providing other services designed to save energy, water or other operating costs for Facility Owner 's property and buildings (the “Facility”).

Therefore, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Facility Owner and Contractor hereto covenant and agree that the following Attachments, Exhibits and Appendices are attached hereto (or will be, as provided in this Contract) and are made a part of this Contract by reference.

1.0 Representations.

1.1 BY FACILITY OWNER.

- 1.1.1** Facility Owner has executed a Facility Owner Contract with the Wyoming Business Council for participation in the Wyoming Energy Conservation Improvement Program (WYECIP).
- 1.1.2** Facility Owner owns and operates the Facility, and is in need of energy saving equipment and service designed to save costs at said Facility.
- 1.1.3** Facility Owner desires to retain Contractor to purchase, install and service certain equipment of the type or class described in Attachment J, attached hereto and made part hereof and to provide other services for the purpose of achieving cost reductions within the Facility, as more fully set forth herein.
- 1.1.4** Facility Owner has been authorized to enter into a contract for all professional services, construction/improvements, project contingencies, reimbursable expenses and miscellaneous expenses for the purchase and installation of energy and water conservation measures and other capital improvements.

- 1.1.5** Subject to the provisions contained herein, Facility Owner has provided or shall provide in a timely fashion to Contractor, all records relating to energy and water usage and energy-related maintenance of Facility requested by Contractor and as available to Facility Owner.
- 1.1.6** Facility Owner has not entered into any prior leases, contracts or agreements with other persons or entities regarding the leasing or acquisition of water or energy efficiency equipment or the provision of energy management services for the Facility or with regard to servicing any of the equipment located in the Facility that would encroach upon the scope of this Contract. Facility Owner shall notify Contractor of any future or additional installations of energy efficiency equipment and contracts for management or servicing of preexisting equipment at the Facility.
- 1.1.7** The terms and conditions of the WYECIP Facility Owner Contract are incorporated by reference into this Contract.

1.2 BY CONTRACTOR.

- 1.2.1** Contractor has been pre-qualified and has executed an ESCo Contract with the Wyoming Business Council for participation in WYECIP for work pertaining to the discovery, engineering, procurement, installation, financing, savings guarantee, maintenance and measurement and verification of energy and water saving measures at facilities similar in size, function and system type to Facility Owner's facilities.
- 1.2.2** Contractor shall, before commencing performance of this Contract, become licensed or otherwise permitted to do business in the State of Wyoming and shall provide proof and documentation of all required insurance and bonds pursuant to this Contract.
- 1.2.3** Contractor is financially solvent, able to pay its debts as they mature and possesses sufficient working capital to complete the Energy Conservation Measure Installation and perform its obligations under this Contract.
- 1.2.4** Contractor shall use qualified subcontractors and delegates, who are qualified, licensed and bonded in Wyoming to perform the work.
- 1.2.5** Contractor has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Contract.

- 1.2.6** Contractor has developed or become knowledgeable about certain procedures for controlling energy and water consumption through services provided and equipment installed and maintained at facilities similar in scope and scale of Facility Owner.
- 1.2.7** Contractor has completed an assessment of the utility consumption and operational characteristics of facilities, which was delivered to Facility Owner as an Investment Grade Audit Report which Facility Owner has approved.
- 1.2.8** Contractor has provided to Facility Owner a Project Proposal containing a package of acceptable Energy Conservation Measures (ECMs).
- 1.2.9** The ECMs installed will be compatible with all other Facility mechanical and electrical systems, subsystems, or components with which the ECMs interact, and that, as installed, neither the ECMs nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of equipment installation or operation.
- 1.2.10** Contractor shall make available, upon reasonable request, documents relating to its execution of the work under this Contract, including contracts and subcontracts it has entered into.
- 1.2.11** The terms and conditions of the WYECIP ESCo Contract are incorporated by reference into this Contract.

2.0 Contract Administration.

2.1 CONTRACT DOCUMENTS.

2.1.1 Contract and Attachments. In addition to this Energy Performance Contract, the documents for this Contract shall consist of the following:

2.1.1.1 Attachments:

- a) **Attachment A:** WYECIP Contract General Conditions.
- b) **Attachment B:** List of Buildings Included in Contract (Final).
- c) **Attachment C:** Cost and Pricing Elements (Final).
- d) **Attachment D:** Financing Agreement Documents.
- e) **Attachment E:** Risk Assessment Matrix (Final).
- f) **Attachment F:** Measurement and Verification Plan (Final).
- g) **Attachment G:** Contract Schedules CS-1 through CS-5 (Final).
- h) **Attachment H:** Notice of Acceptance of Investment Grade Audit Report.
- i) **Attachment I:** Description of Facility and Pre-Existing Equipment Inventory.
- j) **Attachment J:** Schedule of Energy Conservation Measures (ECMs) and Other Capital Improvements to be Installed by Contractor.
- k) **Attachment K:** Energy Savings Guarantee.
- l) **Attachment L:** Baseline Energy Consumption.
- m) **Attachment M:** Savings Measurement & Calculation Formulae and Methodology for Adjusting Baseline.
- n) **Attachment N:** Standards of Comfort.
- o) **Attachment O:** Construction and Installation Schedule.
- p) **Attachment P:** Contractor Construction Period Payment Schedule and Schedule of Values.
- q) **Attachment Q:** System Start-Up and Commissioning; Operating Parameters of Installed Equipment.

- r) **Attachment R:** Contractor's Maintenance Responsibilities.
- s) **Attachment S:** Facility Owner's Maintenance Responsibilities.
- t) **Attachment T:** Facility Maintenance Checklist.
- u) **Attachment U:** Contractor's Training Responsibilities.

2.1.1.2 Exhibits.

- a) **Exhibit 1** Facility Owner Form of Performance Bond.
- b) **Exhibit 2** Facility Owner Form of Labor and Material Payment Bond.
- c) **Exhibit 3** Form of Notice of Acceptance of Installed Energy Conservation Measures (ECMs) by Facility Owner.

2.1.1.3 Appendix Material.

- a) **Appendix A** Contractor's Investment Grade Audit and Project Proposal.
- b) **Appendix B** WYECIP Investment Grade Audit and Project Development Contract executed by the Parties and dated [REDACTED].

2.1.2 Documents Incorporated by Reference. The following documents shall be incorporated by reference into this Energy Performance Contract:

2.1.2.1 WYECIP ESCo Contract with Attachments

2.1.2.2 WYECIP Facility Owner Contract

2.1.2.3 WYECIP Program Manual

2.1.3 Further Documents. The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to fulfill the provisions of this Contract.

2.2 MODIFICATIONS TO THE CONTRACT. Any changes, modifications, revisions or amendments to this Contract which are mutually agreed upon by the parties to this Contract shall be incorporated by written instrument, executed and signed by all parties to this Contract.

- 2.3 ENTIRE AGREEMENT.** This Contract and its incorporated Attachments, Exhibits, and Appendices represents the entire and integrated agreement between Facility Owner and Contractor and supersedes all prior negotiations, representations or agreement, either written or oral.
- 2.4 NOTICES.** All notices required by the contract documents to be given by one party to the other shall be effective only when sent in writing, addressed as follows.

2.4.1 For Facility Owner:

(Facility Owner Name)
ATTN: _____
(Facility Owner Address)
(Facility Owner City, State, Zip)

With Copy To:

Wyoming Business Council, State Energy Office
ATTN: Mr. Tom Fuller
214 West 15th Street
Cheyenne, WY 82002
Telephone: 307-777-2804
Facsimile: 307-777-2837
E-mail: tom.fuller@wybusiness.org

2.4.2 For Contractor:

(Contractor Name)
ATTN: _____
(Contractor Address)
(Contractor City, State, Zip)

- 2.5 ORDER OF PRECEDENCE.** In the event of conflict or inconsistency between this Contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

- 2.5.1** This Energy Performance Contract including all Attachments.
- 2.5.2** Contractor's Investment Grade Audit and Project Proposal.
- 2.5.3** WYECIP Investment Grade Audit and Project Development Contract executed by the Parties and dated .

2.5.4 WYECIP Program Manual.

2.5.5 WYECIP ESCo Contract with Attachments.

2.5.6 WYECIP Facility Owner Contract.

2.6 CONTRACT TERM. This Contract shall become effective upon execution by Facility Owner and shall be effective and binding upon the parties immediately upon its execution. Unless otherwise terminated pursuant to the terms of this Contract, the Term of this Contract shall continue in effect for (number) years. The term of this Contract consist of two (2) distinct periods as defined below.

2.6.1 Construction Period.

2.6.1.1 Upon execution of the Contract the Construction Period shall begin. During this period, Contractor shall complete final project design, perform construction activities to install the Energy Conservation Measures (ECMs) provided for in this Contract, provide commissioning on the installed ECMs, and prepare and submit the Post-Implementation Report.

2.6.1.2 Work shall commence within thirty (30) days of execution of this Contract and shall be completed as set forth in the Construction and Installation Schedule (Attachment O). Time is of the essence of this Contract. By executing this Contract, the parties confirm the time of completion is a reasonable period. Time for completion and the costs related thereto shall only be extended and modified by Change Order, for such reasonable time and amount as the parties hereto may determine. Change Orders in excess of contingency funds and/or completion date shall not be allowed unless mutually re-negotiated by both parties.

2.6.1.3 Any energy savings achieved during the Construction Period shall be fully credited to Facility Owner and shall not be applicable to the Guaranteed Savings after the Performance Period Commencement Date.

2.6.2 Performance Period.

2.6.2.1 During the Performance Period, Contractor shall provide the Savings Guarantee, perform Measurement and

Verification (M&V) activities for installed ECMs, prepare and submit M&V Reports, perform maintenance and service on equipment and provide training for Facility Owner, all in accordance with the requirements in this Contract and its Attachments.

2.6.2.2 The Performance Period of this Contract shall begin with the Performance Period Commencement Date. The Performance Period Commencement Date also establishes when the savings guarantee period begins. The repayment period for the financing arrangement shall coincide begin on the Performance Period Commencement Date.

2.6.2.3 The Performance Period Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by Facility Owner and when Contractor shall have delivered notice to Facility Owner that it has installed and commenced operating all of the equipment specified in the Schedule of Energy Conservation Measures (ECMs) to be installed by Contractor (Attachment J) and in accordance with the provisions of Section 3.6.5 and Attachment Q, and Facility Owner has inspected and accepted said installation and operation as evidenced by the Notice of Acceptance of Installed Energy Conservation Measures (ECMs) (Exhibit 3).

2.6.2.4 Compensation payments due to Contractor for service and maintenance under this Contract, as set forth in Section 2.7.4 and on Contract Schedule CS-3 Performance Period Cash Flow (Attachment G), shall begin no earlier than (number of days) from the Performance Period Commencement Date as defined herein.

2.6.2.5 Notwithstanding anything to the contrary in Section 2.6.2.3 and Section 2.6.2.4 the Performance Period Commencement Date shall not occur and Facility Owner shall not be required to accept the work under this Contract until all equipment installation for the Facility is completed by Contractor in accordance with the terms and conditions of this Contract. Facility Owner shall have fifteen (15) days after notification by Contractor to inspect and accept the equipment.

2.6.2.6 Facility Owner reserves the right to reject the work if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract.

2.7 COMPENSATION.

2.7.1 Financing. Facility Owner agrees to finance equipment as provided for in separate financing agreement documents (Attachment D). Contractor agrees to provide the equipment, together with installation, maintenance and other services as provided herein based upon the terms and conditions set forth in Attachment D.

2.7.2 Capital Contribution from Facility Owner.

2.7.2.1 Construction Period. In addition to the funds provided by the financing agreement described in Attachment D, Facility Owner elects to make an initial capital contribution of \$ Dollar Amount to pay for part of the initial cost as illustrated in Contract Schedule CS-3 Performance Period Cash Flow (Attachment G).

2.7.2.2 Performance Period. In addition to the funds provided by the Energy Savings Guarantee described in Contract Schedule CS-1 (Attachment G), Facility Owner elects to make periodic capital contributions of \$ Dollar Amount to pay for part of the Total Annual Payments as shown on Contract Schedule CS-3 Performance Period Cash Flow (Attachment G).

2.7.3 Contractor Compensation – Construction Period.

2.7.3.1 Contractor's Obligations. Contractor will provide the work and all related services identified on Attachment J and the post-implementation Measurement and Verification services detailed in the Measurement and Verification Plan (Attachment F). Contractor shall supervise and direct the work and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under this Contract. Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and

services necessary for the proper execution and completion of the work.

2.7.3.2 Contract Sum for Construction Period.

- a) The agreed to Contract Sum for the Construction period is a Guaranteed Maximum Price not to exceed Dollar Amount in Words (\$ dollar amount). Facility Owner shall pay Contractor the Contract Sum in accordance with Contract Schedule CS-1 Implementation Cost by Energy Conservation Measure (Attachment G), Contractor Payment Schedule and Schedule of Values (Attachment P), and the Financing Agreement (Attachment D).
- b) Payments will be made on a progress basis in accordance with the Contractor Payment Schedule and Schedule of Values (Attachment P) for work completed and authorized by Facility Owner during the Construction Period. The Progress Payments outlined in Attachment P and Attachment D will be applicable to this Contract.
- c) Payments due during the Construction Period shall be due and payable within thirty (30) days of Facility Owner's approval of the invoice, which shall not be unreasonably withheld.
- d) Retainage will be withheld from each payment until the construction installation is completed as set forth in Section 3.19.3. Professional Services shall not be subject to retainage.
- e) In establishing the Contract Sum, Contractor has used the markups and fees, as negotiated and agreed to by Facility Owner and detailed in the Cost and Pricing Elements (Attachment C), and applied them to the labor and material costs as shown in Attachment P. Contractor has also provided a contingency equal to a percentage of the labor, material and direct cost budget.
- f) The Contract Sum shall be adjusted based on the actual costs of labor and materials to Contractor multiplied by the markups in Attachment C, but in no event shall the Contract Sum be increased.
- g) In the event it is possible to reduce the Contract Sum because the actual labor and material costs are less than budgeted, Facility Owner can, at its sole option, increase the scope of work to include additional equipment such that the original Contract Sum is

reached. If Facility Owner declines to increase the scope of work, at its sole option, the Contract Sum shall be reduced to an amount consistent with the pricing using the stated markups and the balance shall be applied to the financing amount.

2.7.3.3 Construction Period Final Payment. Contractor shall not be paid in full, including retainage, until the Notice of Acceptance of Installed Energy Conservation Measures (Exhibit 3) has been issued after the punch list is completed. The retainage will be released after the punch list is completed and Contractor has satisfied any and all claims for labor and materials.

2.7.4 Contractor Compensation – Performance Period.

2.7.4.1 Contractor's Obligations. Contractor will provide all related services identified in the Measurement and Verification Plan (Attachment F), Energy Savings Guarantee (Attachment K), Contractor's Maintenance Responsibilities (Attachment R), and Contractor's Training Responsibilities (Attachment U).

2.7.4.2 Energy Savings Guarantee

- a) Subsequent to the Performance Period Commencement Date and throughout the term of this Contract, Contractor hereby guarantees the energy and cost savings as detailed in Contract Schedule CS-4 Guaranteed Annual Cost Savings and Annual Payments (Attachment G) and the Energy Savings Guarantee (Attachment K). Contractor shall provide the savings guarantee and measurement and verification of savings as defined in the Measurement and Verification Plan (Attachment F), for every year of the Contract Term.
- b) Contractor has formulated and, subject to the adjustments provided for in Section 5.0 Material Changes, has guaranteed the annual energy and operations savings to be achieved as a result of the installation and operation of the equipment and provision of services provided for in this Contract as specified in Contractor's Maintenance Responsibilities (Attachment R) and in accordance with the Savings Calculation Formulae as set forth in Savings

Calculation Formulae and Methodology to Adjust Baseline (Attachment M).

- c) The Energy Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Contract Schedule CS-4 Guaranteed Annual Cost Savings and Annual Payments (Attachment G) and has been structured by Contractor so as to be sufficient to cover any and all annual payments required to be made by Facility Owner.
- d) The Annual Energy Savings Guarantee per Attachment G shall not be reduced even in the event of a Material Change per Section 5.0, except as the parties may mutually agree to such a reduction and act in good faith in determining such an agreement.
- e) Energy and Cost Savings shall be calculated in the following manner:
 - 1. Each month, by the 10th day after receipt of utility bills, Facility Owner shall provide Contractor with copies of all relevant energy bills received for the preceding month.
 - 2. Reporting to Facility Owner is outlined in Measurement and Verification Plan (Attachment F).
- f) In the event this Contract is terminated due to an uncured Event of Default by Facility Owner, as defined in Section 2.8, the Energy Savings Guarantee shall be cancelled and Contractor shall have no further obligations hereunder, except to guarantee Facility Owner the prorated portion of the annual Energy Savings Guarantee. The prorated portion shall include all Guaranteed Savings incurred prior to the termination date except that such portion should only go up until the Event of Default if the Event is related to the non-payment or other violations impacting the Energy Savings including but not limited to providing utility bills and access to the equipment.

2.7.4.3 Performance Period Payments.

- a) Contractor has structured the Energy Savings Guarantee referred to in Section 2.7.4.2 above, so as to be sufficient to include any and all annual payments required to be made by Facility Owner in connection with financing/purchasing the Energy Conservation Measures to be installed by Contractor and Performance Period Expenses under this Contract as set

forth in Contract Schedules CS-3 Performance Period Cash Flow and CS-4 Guaranteed Annual Cost Savings and Annual Payments (Attachment G).

- b) Actual energy and operations savings achieved by Contractor through the operation of Energy Conservation Measures and performance of services by Contractor shall be sufficient to cover any and all annual fees to be paid by Facility Owner to Contractor for the provision of services in accordance with the provisions of Measurement and Verification Plan (Attachment F), Energy Savings Guarantee (Attachment K), Contractor's Maintenance Responsibilities (Attachment R), and Contractor's Training Responsibilities (Attachment U).
- c) Facility Owner shall pay to Contractor the Performance Period Expenses shown on Contract Schedule CS-3 Performance Period Cash Flow (Attachment G) and the Financing Agreement (Attachment D).
- d) Payments due during the Performance Period shall be due and payable within forty-five (45) days of the invoice date.

2.7.4.4 Effective Date of Payment Obligation.

- a) The payment obligation for the Performance Period costs shall not begin before the Performance Period Commencement Date.
- b) Facility Owner shall not be required to begin any payments to Contractor under this Contract until all Energy Conservation Measure installations are completed by Contractor in accordance with the provisions of Section 3.0 Performance Period Requirements and Scope and Attachment Q, Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment, and accepted by Facility Owner as evidenced by the signed Notice of Acceptance of Installed Energy Conservation Measures as set forth in Exhibit 3 and all Energy Conservation Measures are fully and properly functioning.

2.7.4.5 Allowable Cost Savings Sources. Facility Owner has pre-determined allowable cost and savings sources to be applied to annual payments may include: energy and water cost savings; material/commodity savings including avoided cost from replacement lamps, ballasts, etc. and

scheduled replacement of parts; and other cost savings including maintenance contracts.

2.7.4.6 Annual Review.

- a) At the end of each Contract year there will be a review and reconciliation of the actual achieved savings, subject to any adjustments made in accordance with Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline (Attachment M), versus Contractor's Annual Energy Savings Guarantee per Attachments G and K.
- b) Energy-related cost savings shall be measured and/or calculated as specified in Measurement and Verification Plan (Attachment F) and Baseline Energy Consumption (Attachment L) and a report provided to Facility Owner and Wyoming Business Council State Energy Office within ninety (90) days of receipt of all needed data as defined in Attachment F for the previous year for each anniversary of the Performance Period Commencement Date.
- c) In the event the energy savings achieved during such Contract year is less than the Annual Energy Savings Guarantee in Contract Schedule CS-1 (Attachment G) set forth for that year Contractor shall pay Facility Owner an amount equal to the difference.
- d) If in any year, the achieved savings exceed the guarantee, Facility Owner shall retain excess savings. Excess savings shall not be used to compensate for shortfalls in other years of the Contract.

2.7.5 Compensation for Termination. Compensation for termination of the Contract shall be as set forth in Section 2.8 of this Contract.

2.8 DEFAULT AND TERMINATION.

2.8.1 Default by Facility Owner. Each of the following events or conditions shall constitute an "Event of Default" by Facility Owner:

- 2.8.1.1** Any failure by Facility Owner to pay Contractor any sum due that is not in dispute more than thirty (30) days after written notification by Contractor that Facility Owner is delinquent in making payment.

2.8.1.2 Any other mutually determined material failure by Facility Owner 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 notice to Facility Owner demanding that such mutually determined failures to perform be cured or if such cure cannot be effected in such forty-five (45) days, Facility Owner shall be deemed to have cured default upon the commencement of a cure within such forty-five (45) days and diligent subsequent completion thereof.

2.8.1.3 Any representation or warranty furnished by Facility Owner in this Contract that was knowingly false or misleading in any material respect when made.

2.8.2 Default by Contractor. Each of the following events or conditions shall constitute an "Event of Default" by Contractor:

2.8.2.1 The standards of comfort and service set forth in Attachment N are not provided due to failure of Contractor to properly design, install, maintain, repair or adjust the Installed ECMs except that such failure, if corrected or cured within thirty (30) days after written notice by Facility Owner to Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract.

2.8.2.2 Any representation or warranty furnished by Contractor in this Contract is knowingly false or misleading in any material respect when made.

2.8.2.3 Failure to furnish and install the Energy Conservation Measures and make them ready for use within the time specified by this Contract as set forth in Schedule of Energy Conservation Measures to be Installed by Contractor (Attachment J) and Construction and Installation Schedule (Attachment O).

2.8.2.4 Provided that the operation of the facility is not adversely affected and provided that the Standards of Comfort in Attachment N are maintained, any failure by Contractor to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein; except that such failure, if corrected or cured within thirty (30) days after written notice to Contractor

demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract.

2.8.2.5 Failure by Contractor to pay any amount due that is not in dispute, or performs any material obligation under the terms of this Contract, unless such amount due or failure to perform is excused pursuant to the provisions of this Contract.

2.8.2.6 Failure by Contractor to pay the Energy Savings Guarantee shortfall as set forth in Contract Schedule CS-4 Guaranteed Annual Cost Savings and Annual Payments (Attachment G) and Energy Savings Guarantee (Attachment K).

2.8.2.7 Any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of Contractor which is not released in thirty days after notice of said filing.

2.8.2.8 Any change in ownership or control of Contractor without the prior approval of Facility Owner, which shall not be unreasonably withheld.

2.8.2.9 The filing of a bankruptcy petition whether by Contractor or its creditors against Contractor which proceeding shall not have been dismissed within 90 days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of Contractor.

2.8.3 Remedies upon Default.

2.8.3.1 *Default by Facility Owner.* All disputes shall be submitted to Facility Owner management for resolution. If resolution is not obtained, Contractor shall engage the dispute resolution services provided under the WYECIP by the Wyoming Business Council State Energy Office.

2.8.3.2 *Default by Contractor.* In the Event of Default by Contractor, Facility Owner may terminate this Contract in accordance with Section 2.8.4.1 below. Facility Owner may also 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.

2.8.4 Termination by Facility Owner – Construction Period.

Facility Owner may terminate this Contract at any time during the Construction Period as described below, subject to applicable termination clauses in the Financing Agreement Documents (Attachment D).

2.8.4.1 Termination for Cause or Default.

- a) **Failure to Perform:** Facility Owner may terminate this Contract upon Contractor's failure to fulfill the terms of the Contract. If Contractor fails to timely perform any of the provisions of this Contract, with such diligence as will ensure its completion within the time specified in this Contract, Facility Owner may notify Contractor in writing of the non-performance, and if not promptly corrected within the time specified, Facility Owner may terminate Contractor's right to proceed with the Contract or such part of the Contract as to which there has been delay or a failure to properly perform. Contractor shall continue performance of the Contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services elsewhere. Termination shall be effective 30 days from receipt of written notice if conditions of default are not first corrected.
- b) **Protection of Facility Owner Property:** Notwithstanding termination of the Contract and subject to any directions from Facility Owner, Contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of Contractor in which Facility Owner has an interest.
- c) **Compensation for Termination:** Payment for work completed and materials or supplies delivered and accepted by Facility Owner shall be at the Contract price and in accordance with Section 2.7 of this Contract. Facility Owner may withhold amounts due to Contractor as Facility Owner deems to be necessary to protect Facility Owner against loss because of outstanding liens or claims of former lien holders and to reimburse Facility Owner for the excess costs incurred in procuring similar goods and services.

- d) **Excuse for Nonperformance or Delays in Performance:** Except for obligation to make payments of money, Contractor shall not be in default by reason of any failure in performance of this Contract in accordance with its terms if such failure arises out of acts of God; acts of the public enemy; acts of the State and any governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

Upon request of Contractor, Facility Owner shall ascertain the facts and extent of such failure, and, if Facility Owner determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, Contractor's progress and performance would have met the terms of the Contract, the delivery schedule shall be revised accordingly, subject to the rights of Facility Owner.

- e) **Erroneous Termination for Default:** If after notice of termination of Contractor's right to proceed under the provisions of this clause, it is determined for any reason that Contractor was not in default under the provisions of this clause, or that the delay was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the termination for convenience clause.

2.8.4.2 Termination for Convenience.

- a) **Termination:** Facility Owner may, when the interests of Facility Owner so require, and with 30 days written notice, terminate this Contract in whole or in part, for the convenience of Facility Owner. Facility Owner shall give written notice of the termination to Contractor specifying the part of the Contract terminated and when termination becomes effective. This shall in no way imply that Facility Owner has breached the Contract by exercise of the Termination for Convenience Clause.
- b) **Contractors Obligations:** Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination Contractor will stop work to the extent specified. Contractor shall also terminate outstanding orders and

subcontracts as they relate to the terminated work. Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. Facility Owner may direct Contractor to assign Contractor's right, title, and interest under terminated orders or subcontracts to Facility Owner. Contractor must still complete and deliver to Facility Owner the work not terminated by the Notice of Termination and may incur obligations as are necessary to do so.

c) Compensation for Termination:

1. Upon notice of Termination for Convenience by Facility Owner, Contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data bearing on such claim. If Contractor fails to file a termination claim within 90 days from the effective date of termination, Facility Owner may pay Contractor, if at all, an amount set in accordance with subparagraph 2.8.4.2.c.3. of this Section.
2. Facility Owner and Contractor may agree to a settlement provided Contractor has filed a termination claim supported by cost or pricing data and that the settlement does not exceed the total Contract price plus settlement costs, reduced by payments previously made by Facility Owner, the proceeds of any sales of supplies and manufactured materials made under agreement, and the Contract price of the work not terminated.
3. Absent complete agreement, under subparagraph 2 of this Section, Facility Owner shall pay Contractor the following amounts, provided the payments agreed to under subparagraph 2 shall not duplicate payments under this subparagraph:
 - (i) Contract prices for supplies or services accepted under the Contract.
 - (ii) Costs incurred in preparing to perform the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not exceed the markup and fee schedules in the Cost and Pricing Elements Attachment C, nor include anticipatory profit or consequential damages) less amounts paid

or to be paid for accepted supplies or services; provided, however, that if it appears that Contractor would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss.

- (iii) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Contractor's obligations paragraph of this clause. These costs must not include costs paid in accordance with subparagraph 2 of this Section.
 - (iv) The reasonable settlement costs of Contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the terminated portion of this Contract.
 - (v) The total sum to be paid Contractor under this subparagraph 3 shall not exceed the total Contract price plus settlement costs, reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under subparagraph 2, and the Contract price of work not terminated.
4. Contractor will be entitled to no other payments in case of termination for convenience.

2.8.4.3 Termination for Non-Appropriation of Funding.

Each payment obligation of Facility Owner is conditioned upon the availability of government funds that are appropriated or allocated for the payment of this obligation as described in the WYECIP General Conditions (Attachment A).

2.8.5 Termination by Facility Owner – Performance Period.

Facility Owner may terminate this Contract at any time during the

Performance Period as described in Section 2.8.4 above, subject to applicable termination clauses in the Financing Agreement Documents (Attachment D). Compensation for Termination shall be subject to the following:

2.8.5.1 Annual Termination Ceiling for Financing. The Annual Termination Ceiling for project financing for this Contract shall be as illustrated on Contract Schedule CS-5 Annual Termination Ceiling (Attachment G).

2.8.5.2 Maximum Payment to Contractor for Termination. The maximum payment to Contractor for termination of Contractor's Performance Period services shall not exceed the scheduled annual payment for Performance Period Expenses in the year of termination as illustrated on Contract Schedule CS-3 Performance Period Cash Flow (Attachment G).

2.9 INSURANCE REQUIREMENTS.

2.9.1 Coverage and Amounts. It is agreed and understood Contractor shall maintain in full force and effect adequate commercial general liability insurance and property damage insurance, as well as workmen's compensation and employer's liability insurance pursuant to the State of Wyoming and Facility Owner insurance requirements as defined below. Contractor shall obtain, and maintain such insurance at all times during the term of this Contract.

Insurance requirements and amounts of coverage shall be coordinated with existing Facility Owner policy amounts and coverage's. Before commencing any work under this Contract, Contractor shall file with Facility Owner certificates of insurance evidencing at a minimum the coverage specified below. Contractor shall submit a Certificate of Insurance at the signing of this Contract and also any notices of Renewal of said Policy as they occur.

2.9.1.1 Commercial General Liability.

- a) Combined single limit of \$ _____ written on an "occurrence" basis.
- b) Aggregate limit not less than \$ _____.
- c) Contractor must purchase additional insurance if claims reduce the annual aggregate below \$ _____.

2.9.1.2 Professional Liability or Errors and Omissions Liability Insurance.

- a) Contractor promises and agrees to maintain in full force and effect an Errors and Omissions Professional Liability Insurance Policy in an amount not less than \$ [REDACTED].
- b) The policy, including claims made forms, shall remain in effect for the duration of the Construction Period and for at least three years beyond the completion and acceptance of the equipment.
- c) Contractor shall be responsible for all claims, damages, losses or expenses, including attorney fees, arising out of or resulting from the performance of professional services contemplated in this Contract, provided that any such claim, damage, loss or expense is caused by any negligent act, error or omission of Contractor, any consultant or associate thereof, or anyone directly or indirectly employed by Contractor.
- d) Contractor shall submit a Certificate of Insurance verifying said coverage at the signing of this Contract and also any notices of renewals of Renewals of the said policy as they occur.

2.9.1.3 Automobile Liability (Minimum Coverage Required). Combined single limit of \$ [REDACTED].

2.9.1.4 Additional Insured. All insurance policies required by this Contract shall name Facility Owner as an additional insured, and shall contain a waiver of subrogation against Facility Owner, its agents and employees. Contractor shall provide a copy of an endorsement providing this coverage.

2.9.1.5 Workers' Compensation and Unemployment Insurance. Contractor shall provide to Facility Owner proof of workers' compensation and unemployment coverage for all its employees who are to work on the project described in this Contract. Certificates of good standing in each of the Wyoming Workers' Compensation and Unemployment Insurance programs shall serve as sufficient proof if Contractor is statutorily required to participate in those programs. If Contractor's coverage is under a program different from the coverage provided by the Wyoming Department of Employment, proof of

coverage shall be satisfied in manner to be determined sufficient in the discretion of Facility Owner.

2.9.2 *Payment of Premiums and Notice of Revocation.* All policies required under this Contract shall be in effect for the duration of this Contract and project. All policies shall be primary and not contributory. Contractor shall pay the premiums on all insurance certificates, which must include a clause stating that the insurance may not be revoked, canceled, amended or allowed to lapse until the expiration of at least thirty (30) days advance written notice to Facility Owner. Insurance shall include provisions preventing cancellation without 30 calendar day's prior written notice, by certified mail to Facility Owner.

2.9.3 *Facility Owner may Insure for Contractor.* In case of the breach for any provision of this Section, Facility Owner may, at Facility Owner's option, purchase and maintain, at the expense of Contractor, such insurance in the name of Contractor, as Facility Owner may deem proper and may deduct the cost of taking out and maintaining such insurance from any sums which may be found to be due or become due to Contractor under this Contract.

2.9.4 *Subcontractors.* The insurance requirements set forth above apply to all subcontractors. It is Contractor's responsibility to ensure that its subcontractors meet these insurance requirements.

2.9.5 *Responsibility for Claims.* Contractor shall be responsible for all claims, damages, losses or expenses, including attorney's fees, arising out of or resulting from the performance of the services contemplated in this Contract, provided that any such claim, damage, loss or expense is caused by any neglect act, error or omission of Contractor, any Consultant or associate thereof, or anyone directly or indirectly employed by Contractor.

Contractor shall save and hold harmless Facility Owner and its officers, agents and employees or any of them from any and all claims, demands, actions or liability of any nature based upon or arising out of any services performed by Contractor, its agents or employees under this Contract.

2.9.6 *Responsibility for Damage to Facility Owner Equipment.* Contractor shall be responsible for any damage to the equipment or other Facility Owner property at the facility and any personal injury

where such damage or injury occurs as a result of Contractor's performance under this Contract.

2.10 DISPUTES. Facility Owner and Contractor agree to engage in good faith efforts to resolve any disputes arising from the performance under this Contract and to utilize the third-party dispute resolution assistance provided under the WYECIP by the Wyoming Business Council, State Energy Office.

2.11 OWNERSHIP.

2.11.1 Ownership of Certain Proprietary Property Rights.

2.11.1.1 Facility Owner 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 equipment.

2.11.1.2 Contractor shall grant to Facility Owner a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for Facility Owner to continue to operate, maintain, and repair the equipment in a manner that will yield maximal energy consumption reductions.

2.11.2 Ownership of Existing Equipment.

2.11.2.1 Ownership of the equipment and materials presently existing at the Facility at the time of execution of this Contract shall remain the property of Facility Owner even if it is replaced or its operation made unnecessary by work performed by Contractor pursuant to this Contract.

2.11.2.2 Contractor shall advise Facility Owner in writing of all equipment and materials to be replaced at the Facility and Facility Owner shall within thirty days designate in writing to Contractor which equipment and materials that should not be disposed of off-site by Contractor.

2.11.2.3 It is understood and agreed to by both Parties that Facility Owner shall be responsible for and designate the location

and storage for any equipment and materials that should not be disposed of off-site.

2.11.2.4 Contractor shall be responsible for the disposal of all equipment and materials designated by Facility Owner as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

2.11.3 New Equipment. All new equipment or materials supplied to Facility Owner shall become the property of Facility Owner.

2.11.4 Instruments of Service.

2.11.4.1 Drawings, specifications and other documents, including those in electronic form, prepared by Contractor and Contractor's consultants are Instruments of Service for use solely with respect to this project. Contractor and Contractor's consultants shall be deemed the authors and owners of their respective instruments of service and shall retain all common law, statutory and other reserved rights, including copyrights.

2.11.4.2 Upon execution of this Contract, Contractor hereby grants to Facility Owner a perpetual, non-revocable, and nonexclusive license to reproduce and use, and permit others to reproduce and use for Facility Owner, Contractor's Instruments of Service solely for purposes of constructing, using and maintaining the Project or for future alterations, or additions to the project. Contractor shall obtain similar nonexclusive licenses from Contractor's consultants consistent with this Contract. If, and upon the date Contractor is adjudged to be in default of this Contract, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting Facility Owner to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections or additions to the Instruments of Service solely for purposes of completing, using and maintaining the project, or for future alterations, or additions to the project.

2.11.4.3 Any unilateral use by Facility Owner of the Instruments of Service for completing, using, maintaining, adding to or altering the project or facilities shall be at Facility Owner's sole risk and without liability to Contractor and Contractor's



consultants; provided, however, that if Facility Owner's unilateral use occurs for completing, using or maintaining the project as a result of Contractor's breach of this Contract, nothing in this Section shall be deemed to relieve Contractor of liability for its own acts or omissions or breach of this Contract.

3.0 Construction Period Requirements and Scope.

3.1 GENERAL.

3.1.1 Purpose of Contract. This Contract is to acquire, under an Energy Performance Contract, energy conservation services for Facility Owner to reduce energy, water consumption and associated utility costs, and energy-related operations and maintenance costs as specified in this Contract. Contractor shall be responsible for providing all labor, material, and capital to install energy and water conservation measures and to provide operations and maintenance as specified herein.

3.1.2 Project Costs Paid from Savings.

3.1.2.1 The cost of the project must be covered by the reduced energy and related operation and maintenance cost savings incurred at Facility Owner's Facility, plus any capital contribution by Facility Owner as described in Section 2.7.2.1 of this Contract.

3.1.2.2 The energy cost savings must be guaranteed and verified annually by Contractor. The annual guarantee is required for the entire Contract term. The guarantee shall be based on cost savings attributable to all energy saving measures, and must equal or exceed all project costs each year during the Contract period.

3.1.2.3 Annual project costs include debt service, Contractor fees, maintenance services, monitoring services, and other services as defined in this Contract.

3.1.3 Performance by Contractor.

3.1.3.1 Contractor shall perform all tasks/phases under the Contract, including construction, and install the Energy Conservation Measures (ECMs) in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Standards of Comfort (Attachment N) and the construction schedule specified in the Construction and Installation Schedule (Attachment O).

- 3.1.3.2** Contractor will provide the installation and all related services identified on the Attachments to this Contract. Contractor shall provide supervision and direction and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under this Contract.
- 3.1.3.3** Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the work.
- 3.1.3.4** Contractor shall repair and restore to its original condition any area of damage caused by Contractor's performance under this Contract. Facility Owner reserves the right to review the work performed by Contractor and to direct Contractor to take certain corrective action if, in the opinion of Facility Owner, the structural integrity of the Facility or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by Contractor's performance of the work shall be borne by Contractor.
- 3.1.3.5** Contractor shall remain responsible for the professional and technical accuracy of all services performed, whether by Contractor or its subcontractors or others on its behalf, throughout the term of this Contract.
- 3.1.4 Investment Grade Audit.** Contractor prepared a complete Investment Grade Audit (Appendix A) which has been approved and accepted by Facility Owner as set forth in the Notice of Acceptance of Investment Grade Audit Report (Attachment H).
- 3.1.5 Energy Use Records and Data.** Facility Owner has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract to Contractor or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Facility.
- 3.1.6 Utility Incentive Payments.** If Utility Incentive Payments are a part of this Contract, wherein a portion of the Contract cost will be subsidized by the Utility upon the Utility's inspection and approval of the work performed, the total Incentive Payment is as indicated on

Contract Schedule CS-3 (Attachment G). There shall be no adjustment to the Contract Sum, Guarantee, or Schedule of Values if the Incentive Payment allowed by the Utility is other than the amount specified herein, unless the disallowance or reduction is attributable to delay caused by neglect or an act of Facility Owner constituting a breach of its obligations under this Contract. Facility Owner understands that Contractor is not a representative or an agent of the Utility.

3.2 STANDARDS OF COMFORT. Energy and water conservation measures installed by Contractor shall provide the standards of heating, cooling, ventilation, hot water supply, lighting quality and levels, etc. described in Attachment N to comply with the Standards of Comfort required by Facility Owner. Contractor will be responsible for maintaining the levels of comfort for each building as specified in this Contract.

During the term of this Contract, Contractor and Facility Owner will maintain, according to Attachment F, Attachment R and Attachment S, and operate the measures in a manner that will provide the standards of comfort and levels of operation as described in Attachment N.

3.3 SUBCONTRACTORS.

3.3.1 Facility Owner retains the right to approve any Contractor selected subcontractor prior to its commencement of work on this project. Names and qualifications for proposed subcontractors must be submitted by Contractor at least two weeks in advance.

3.3.2 Prior to the execution of subcontracts, Contractor shall ensure that they incorporate by reference all relevant clauses of this Contract and that any required prior notice and description of the subcontract is given to Facility Owner and any required consent is received.

3.3.3 Except as may be expressly set forth herein, any consent by Facility Owner to the execution of subcontracts shall not be construed to constitute approval of the subcontractor or any subcontract terms and conditions, determination of any price revision of the Contract or any of the respective obligations of the parties thereunder, or creation of any subcontractor privilege of Contract with Facility Owner.

3.4 ENERGY CONSERVATION MEASURES (ECMs).

3.4.1 Compliance with Contract Requirements. Installed ECMs shall comply with the Contract requirements. Contract Requirements also incorporate all Facility Owner-approved Contractor submittals, including equipment design; installation specifications; the Design and Construction Package(s); Commissioning Plan; compliance with codes and standards; design drawings; installation schedules; startup and testing procedures; operation and maintenance procedures; and any other submittals required by the Contract.

3.4.2 Modification or Replacement of ECMs.

3.4.2.1 *Modification or Replacement by Contractor.*

- a) Contractor may elect to modify, replace, change the ECM systems and equipment, revise any procedures for operation or implement other energy saving actions in the Facility during the term of the Contract from those originally approved.
- b) Any proposed ECM modification, replacement, or change shall require notification and coordination with and approval of Facility Owner, which approval shall not be unreasonably withheld.
- c) Such modifications, replacements, changes or revisions shall be subject to the following:
 1. Contractor shall comply with the standards of comfort and services set forth in Attachment N herein.
 2. Such ECM modifications, replacement, revisions, and any operational changes, or new procedures are necessary to enable Contractor to achieve or increase energy and cost savings at the Facility.
 3. Any replacement of ECM equipment shall be new and have equal or better potential to reduce energy consumption at the Facility than the ECM equipment being replaced.
 4. Contractor shall update any and all software to be used in connection with the ECM equipment in accordance with the provisions of Section 2.13.1 (Ownership of Certain Proprietary Rights).
- d) All modifications, additions or replacements of ECMs or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to the Energy Conservation Measures described in Attachment J and

shall be covered by the provisions and terms of this Contract.

- e) Any such ECM modifications, replacement, revisions, and any operational changes, or new procedures shall be performed by Contractor at no cost to Facility Owner and shall not interfere with Facility Owner's operations and mission.

3.4.2.2 Modification by Facility Owner.

- a) Except as set forth in Attachment S (Facility Owner's Maintenance Responsibilities), during the Term of this Contract Facility Owner will not, without the prior written consent of Contractor, move, remove, modify, alter, or change in any way any ECM equipment.
- b) Notwithstanding the foregoing, Facility Owner may take reasonable steps to protect the ECM equipment if, due to an emergency, it is not possible or reasonable to notify Contractor before taking any such actions. In the event of such an emergency, Facility Owner shall take reasonable steps to protect the ECM equipment from damage or injury and shall follow instructions for emergency action provided in advance by Contractor.
- c) Facility Owner agrees to maintain the Facility in good repair and to protect and preserve all portions thereof which may in any way affect the operation or maintenance of the ECM equipment, all in accordance with the same standard of care Facility Owner applies to the Facility generally, that of a reasonably prudent owner.

3.5 INSTALLATION REQUIREMENTS FOR ECMs. Once negotiated and awarded, an Energy Performance Contract is a fixed-price design/build energy performance contract. Changes to meet design or performance requirements of the Contract shall be at no cost to Facility Owner. Changes in Contractor cost due to Facility Owner changes to Contract requirements will be negotiated as changes.

3.5.1 Design and Construction Package.

- 3.5.1.1** Contractor shall prepare and submit a Design and Construction Package to Facility Owner for review and approval prior to starting ECM installation. The Design and Construction Package shall be certified by a licensed Professional Engineer to assure compliance with applicable

building codes and Facility Owner design standards. Contractor is responsible for the technical adequacy of its work. Acceptance of the Design and Construction Package by Facility Owner shall not relieve Contractor from responsibility for adequacy of its design and installation work.

3.5.1.2 The Design and Construction Package due date will be specified in the agreed upon Construction and Installation Schedule (Attachment O). Upon approval of the Design and Construction Package, bonds may be required.

3.5.1.3 The Design and Construction Package shall be prepared and include at least the following:

- a) **Manufacturer's Data:** For all ECM equipment to be installed, Contractor shall provide the manufacturer's descriptive literature of equipment including drawings, diagrams, performance and characteristic curves, and catalog cuts.
- b) **Design Specifications:** Contractor shall identify and reference design specifications applicable to installed ECMs.
- c) **Construction Drawings:** Construction drawings shall be prepared by Contractor, subcontractor, or any lower-tier subcontractor showing in detail:
 1. The installation (e.g. form, fit, and attachment details) of the interface between ECM equipment and existing Facility Owner equipment.
 2. The location of installed equipment on building floor plans.
 3. Certification of ECM Compliance with Building Codes and Standards. Contractor shall provide certification by a licensed Professional Engineer that ECMs comply with all applicable building codes and standards. ECM installation plans submitted to Facility Owner without evidence of the licensed Professional Engineer (PE) certification shall be returned for resubmission.
- d) **Planned Service Interruptions:** If any utility services must be discontinued temporarily to perform work, such interruptions shall be described and indicated on the project installation schedule. The description shall include the length of the interruption, its time (date, day of week, time of day, etc.), and a justification.

- e) **Quality Control Plan:** A Quality Control Inspection Plan for ECM installation shall be prepared and submitted with the design and construction package.
- f) **Site Plan and Compliance with Facility Owner Exterior Site Plan:** If an ECM involves the installation of facilities or exterior structures, Contractor shall provide a site plan showing its location, or show its location on Facility Owner's existing site plan. Contractor shall also provide a plan and elevation drawings of the facility or exterior structure showing its size and exterior appearance.
- g) **Acquisition of Permits:** For any ECM installation requiring permits from regulatory agencies (i.e., hot-work permit for welding), Contractor shall provide its plan and schedule for acquiring such permits.
- h) **Installation Schedules:** The Construction and Installation Schedule (Attachment O) shall be revised to show the most current information relative to the order in which Contractor proposes to perform the work and the dates on which Contractor contemplates starting and completing all major milestones (including acquiring materials, equipment, permits). The schedule shall be in the form of a progress chart of suitable scale to indicate the amount of work scheduled for completion by any given date during the installation period.
- i) **Commissioning Plan:** Contractor's plan for start-up and commissioning of ECMs installed under this Contract.

3.5.1.4 Design documents will require both a preliminary and final review by Facility Owner.

3.5.2 Design and Construction Standards.

3.5.2.1 At a minimum, all work, equipment and materials required for ECM installation shall comply with the following list of standards:

- a) **American National Standards Institute (ANSI)**
- b) **National Electric Code (NEC)**
- c) **National Electrical Safety Code (NESC)**
- d) **National Fire Protection Association (NFPA) Standards including, but not limited to NFPA 101 - Life Safety Code**

- e) **National Electrical Manufacturers Association (NEMA)**
- f) **Underwriters Laboratory (UL)**
- g) **Uniform Building Code (UBC)**
- h) **Uniform Plumbing Code (UPC)**
- i) **American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE)ASHRAE 90.1**
- j) **Illuminating Engineering Society of North America (IES)**
- k) **American Institute of Architects (AIA) Masterspec**
- l) **Air Conditioning and Refrigeration Institute (ARI)**
- m) **Occupational Safety and Health Administration regulations**
- n) **Other design standards required by the Facility Owner**

3.5.2.2 No requirement of this Contract shall supersede applicable regulations, local codes and/or standards. Any violation of such regulations and standards shall be brought to the attention of Facility Owner for clarification prior to proceeding with the work.

3.5.2.3 If conflicts between designated applicable codes and/or standards exist, Facility Owner and applicable authority having jurisdiction shall determine the appropriate code to follow.

3.5.3 ECM Installation Quality Control. Contractor shall be responsible for quality control during installation of ECMs. Contractor shall inspect and test all work performed during ECM installation to ensure compliance with Contract's performance requirements. Contractor shall maintain records of inspections and tests, including inspections and tests conducted by or for utility or other regulatory agencies.

3.5.4 Coordination During Installation. Facility Owner and Contractor shall coordinate the activities of Contractor's equipment installers with those of Facility Owner, its employees, and agents. Contractor shall not commit or permit any act which will interfere with the performance of business activities conducted by Facility Owner or its employees without prior written approval of Facility Owner.

3.5.5 ECM Start-up and Commissioning. Contractor shall assure Facility Owner through the ECM Commissioning that performance of

the ECMs achieves facility performance requirements as set out in the Contract. The ECM Commissioning shall be accomplished through a process of verification and documentation, from the post-award design phase through Acceptance of Installed ECMs. To ensure this Contract properly accounts for as-installed conditions, which conditions may vary from the pre-installation analyses, Contractor shall re-validate or modify Attachment J and Attachment Q prior to System Start-Up.

3.5.5.1 Commissioning Approach.

- a) Contractor has submitted in its Project Proposal an ECM Commissioning Approach document that utilizes data and factors derived from the Investment Grade Audit, needed to achieve facility performance requirements in accordance with the Contract.
- b) Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed ECMs in accordance with the procedures specified in Attachment Q and in the Commissioning Plan prior to acceptance of the project by Facility Owner.
- c) Testing shall be designed to determine if the installed ECMs are functioning in accordance with both published specifications and the Attachments to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment.
- d) Contractor shall provide notice to Facility Owner of the scheduled test(s) and Facility Owner and/or its designees shall have the right to be present at any or all such tests conducted by Contractor and/or manufacturers of equipment. Contractor shall be responsible for correcting and/or adjusting all deficiencies in the operation of the installed ECMs that may be observed during system commissioning procedures of Attachment Q and in the Commissioning Plan.
- e) Contractor shall be responsible for correcting and/or adjusting all deficiencies in ECM operation that may be observed during system testing procedures.

3.5.5.2 Commissioning Plan. Contractor shall provide a Commissioning Plan with the design and construction package that finalizes the Commissioning Approach and

addresses each ECM with specific steps that will be taken during the commissioning process.

3.5.5.3 Commissioning Report.

- a) Prior to Facility Owner acceptance, Contractor shall submit a Commissioning Report documenting the affect of the installed ECMs upon facility performance requirements in accordance with the Commissioning Plan.
- b) The Commissioning Report shall also provide Facility Owner with reasonably satisfactory documentary evidence that the ECMs installed are the measures specified in Attachment J.

3.6 PERMITS AND APPROVALS. Facility Owner shall use its best efforts to assist Contractor in obtaining all necessary permits and approvals for installation of the Energy Conservation Measures. In no event shall Facility Owner, however, be responsible for payment of any permit fees. The Energy Conservation Measures and their operation by Contractor shall at all times conform to all federal, state and local code requirements. Contractor shall furnish copies of each permit or license which is required to perform the work to Facility Owner before Contractor commences the portion of the work requiring such permit or license.

Set forth in Section 3.5.1.3 above, design documentation will be submitted to Facility Owner for review. As deemed necessary by Facility Owner, design documentation will be forwarded by Facility Owner to the appropriate code review Contractor for review. Facility Owner agrees that Facility Owner's review process at each phase will not be longer than 14 calendar days, not including code review. All costs of code review will be borne by Facility Owner.

3.7 PAYMENT AND PERFORMANCE BONDS. Contractor will provide to Facility Owner at Contract signing separate performance and labor and material payment bonds, each in the sum of 100 percent of the cost of the construction work. Form of bonds shall be a shown in Exhibit 1 (Facility Owner Form of Performance Bond) and Exhibit 2 (Facility Owner Form of Labor and Material Payment Bond).

3.8 ACCESS TO THE FACILITY.

3.8.1 Contractor Access.

- 3.8.1.1** Facility Owner shall provide sufficient space on the Facility for the installation and operation of the Energy Conservation Measures and shall take reasonable steps to protect such Energy Conservation Measures from harm, theft and misuse. Facility Owner shall provide access to the Facility for Contractor to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by Contractor and acceptable to Facility Owner.
- 3.8.1.2** It shall be Contractor's responsibility, through Facility Owner, to obtain access to buildings on the project site, and arrange for the buildings to be opened and closed as necessary.
- 3.8.1.3** Keys may be issued to Contractor; however, it shall be Contractor's responsibility to make adequate arrangements for security of the building at the end of each work day. Contractor shall be responsible for the cost of replacing any keys that are furnished to and lost by its employees. If Facility Owner decides that a lock must be replaced because of the loss of a key by Contractor's employee(s), Contractor shall pay the cost of that replacement. Similarly, Contractor shall pay the cost of changing a combination if Facility Owner has reasonable cause to assume that the combination has been compromised.
- 3.8.1.4** Access to any tenant spaces must be scheduled with Facility Owner at least ten (10) days in advance. Notice must include names of employees to be admitted, expected arrival time, and visit duration.
- 3.8.1.5** Certain areas of the Facility may require that Contractor and its employees have an escort, and/or place limits on the days and times that Contractor and its employees may work in these areas.
- 3.8.1.6** Contractor shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. Contractor's access to the Facility to

make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by Facility Owner. Contractor shall immediately notify Facility Owner when emergency action is taken and follow up with written notice within three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Facility, if any.

3.8.2 Utility Access.

3.8.2.1 If a Utility Incentive Payment is made as described in Section 3.1.6 (Utility Incentive Payments), the following shall apply:

- a) Upon request by the Utility (or its agent) and with prior consent of Facility Owner which consent shall not be unreasonably withheld, Facility Owner shall agree to allow Utility to interview Facility Owner and to enter the Facility at reasonable times throughout the life of the installed equipment to install metering equipment, perform energy audits or inspect the facilities and any equipment installed.
- b) Facility Owner also agrees to cooperate with the Utility or its agent upon request and with prior consent of Facility Owner, in conducting such activities and/or in analyzing energy savings. At all times a representative of Facility Owner shall be present during such inspections.

3.9 ENVIRONMENTAL PROTECTION.

3.9.1 Quality of Environment. ECMs shall cause no adverse impacts upon the quality of the human environment. Impacts on air quality (pollutants, noise level, and odors or fumes) and potable water use are examples of potential areas of concern at the project site.

3.9.2 Compliance with Regulations.

3.9.2.1 *Federal, State and Local Laws or Regulations.* Contractor shall comply with applicable Federal, state and local laws and with the applicable regulations and standards regarding environmental protection. All environmental protection matters shall be coordinated with Facility Owner. Authorized Facility Owner personnel may inspect any of Contractor's work areas on a no-notice basis during

normal working hours. In the event that a regulatory agency assesses a monetary fine against Facility Owner for violations caused by Contractor negligence, Contractor shall reimburse Facility Owner for the amount of any fine and other related costs. Contractor shall also clean up any oil spills, hazardous wastes, and hazardous materials resulting from Contractor's operations. Contractor shall comply with the instructions of the cognizant Facility Owner's safety and health personnel to avoid conditions that create a nuisance or which may be hazardous to the health of Facility Owner's or other personnel.

3.9.2.2 *Documentation for Permits.* Contractor shall prepare at its expense all documentation necessary to acquire permits to comply with all applicable Federal, state and local requirements prior to implementing affected ECMs in the performance of this Contract. Contractor shall not receive a notice to proceed with installation until all environmental protection requirements contained in the Contract have been satisfied.

3.9.2.3 *Spill Prevention and Countermeasures.* Contractor shall comply with any Facility Owner spill prevention control and countermeasures requirements.

3.9.2.4 *Hazardous Materials Handling.* All work completed under this Contract must be in compliance with all applicable federal, state and local laws, rules and regulations regarding waste disposal and treatment/disposal of any hazardous materials that could result from this project.

- a) Work must also be in accordance with sound engineering and safety practices, and in compliance with all reasonable Facility Owner rules relative to the Facility.
- b) In the event Contractor encounters any such materials, Contractor shall immediately notify Facility Owner and stop work pending further direction from Facility Owner. Facility Owner may, in its sole discretion, suspend work on the project pending removal of such materials or terminate this Contract. Contractor shall undertake no further work on the Facility except as authorized by Facility Owner in writing.
- c) Facility Owner recognizes that in connection with the installation and/or service or maintenance of the ECMs at the Facility, Contractor may encounter, but is not responsible for, any work relating to asbestos, materials

containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, or pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section 3.8.2.5 below or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof.

- d) Facility Owner agrees that if performance of work involves any such hazardous wastes or hazardous materials, Facility Owner will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. Facility Owner shall be responsible to handle such materials at its expense.
- e) Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by Facility Owner shall not constitute a default by Facility Owner. In the event of such stoppage of work by Contractor, the time for completion of work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by Contractor as a result will be added by Change Order.
- f) Contractor shall be responsible for any hazardous or other materials, including, without limitation, those listed in this Section 3.8.2.4 that it may bring to the Facility.

3.9.2.5 Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps.

- a) Contractor will enter into an agreement with an approved PCB ballast disposal contractor who will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts.
- b) All capacitors and asphalt potting compound materials removed from Facility Owner's PCB ballasts will be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction will be provided by the approved facility to Facility Owner.
- c) Contractor's responsibility shall be for the proper and legal management of any of Facility Owner's PCB ballasts removed as a result of the installation of the ECMs and shall be limited only until said PCB ballasts

are loaded onto an approved PCB ballast disposal Contractor's vehicle for transportation.

- d) Contractor will enter into an agreement with an approved lamp disposal contractor who will provide approved containers, materials required to label, transportation, recycling or incineration in accordance with EPA requirements, and a copy of the manifest.
- e) Facility Owner agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Facility.

3.10 SERVICE INTERRUPTIONS. For any planned utility service interruptions, Contractor shall furnish a request to Facility Owner's designated representative for approval at least fifteen (15) working days in advance or as specified in the Contract. The request shall identify the affected buildings and duration of planned outage.

Facility Owner will coordinate with affected tenants and other occupants as applicable.

If the discontinued service is due to any emergency breakdown, Contractor shall notify Facility Owner's designated representative as soon as possible and Facility Owner will notify those affected tenants and other occupants as applicable.

3.11 AS-BUILT DRAWINGS. After completion of installation of ECMs, Contractor shall provide durable, reproducible record drawings in electronic (CAD) format from the "as-built drawings" of all existing and modified conditions associated with the project, conforming to typical engineering standards. These shall include applicable architectural, mechanical, electrical, structural, and control drawings and operating manuals which shall be delivered prior to acceptance. Contractor shall also provide Facility Owner with any As-built Drawings received from Subcontractors.

3.12 AVAILABILITY OF UTILITIES. Facility Owner will furnish water and electric current at existing outlets as may be required for the installation work to be performed at no cost to Contractor. Contractor, at its expense and in a workmanlike manner satisfactory to Facility Owner, shall install and maintain all necessary temporary connections and distribution lines for each utility. Information concerning the location of existing outlets may be obtained from Facility Owner. Contractor shall remove all the temporary connections, distribution lines, and associated equipment upon completion of the installation work.

3.13 CONTRACTOR FURNISHED LABOR AND MATERIAL.

3.13.1 Contractor Labor and Personnel. Contractor shall furnish sufficient personnel to perform all work specified within the Contract and Contractor employees shall conduct themselves in a proper, efficient, courteous, and businesslike manner. Contractor shall provide to Facility Owner the name(s) of the responsible supervisory person(s) authorized to act for Contractor. No employee or representative of Contractor will be admitted to the work site unless that employee furnishes satisfactory proof that he/she is a citizen of the United States or otherwise legally authorized to work in the United States.

3.13.2 Contractor Materials. Contractor shall provide all materials and supplies necessary to perform the work as specified in the Contract. Materials and supplies provided shall be of acceptable industrial grade and quality and in compliance with any applicable standards. All such materials and supplies must be compatible, and operate safely within design parameters of existing systems equipment.

3.14 FIRE PREVENTION. Contractor shall ensure that its employees shall know how to activate a fire alarm. Contractor employees operating critical equipment shall be trained to properly respond during a fire alarm or fire in accordance with the applicable Facility Owner's fire prevention procedures, rules or regulations as identified in the Contract. Contractor shall obtain all required welding permits prior to any welding. Contractor shall observe all requirements for handling and storing combustible supplies, materials, waste and trash.

3.15 SALVAGE. All material and equipment removed or disconnected during the installation of ECMs under this Contract shall remain the property of Facility Owner. Facility Owner will identify the equipment it wants stored. Any material and equipment not to be stored and all debris resulting from work under this Contract shall be removed from the site by Contractor at his expense.

3.16 SAFETY REQUIREMENTS. All work shall be conducted in a safe manner. Facility Owner will not provide safety equipment to Contractor. A safety program and hazard analysis shall be prepared prior to the start of work on a construction site. Prior to commencing work, Contractor shall meet with Facility Owner to agree upon administration of the safety program.

Contractor's workplace may be inspected periodically for OSHA violations. Abatement of violations shall be the responsibility of Contractor and/or Facility Owner as determined by Facility Owner. Contractor shall provide assistance to Facility Owner and Federal or state OSHA inspector if a complaint is filed. Any fines levied on Contractor by Federal or state OSHA offices due to safety/health violations will be paid promptly by Contractor.

Contractor shall report to Facility Owner all accidents within 24 hours of their occurrence. Additionally, Contractor shall submit to Facility Owner a full report of damage to Facility Owner property and equipment by Contractor's employees or Contractor's subcontractors, at any tier. All damage reports shall be submitted to Facility Owner within 24 hours of their occurrence.

3.17 SECURITY REQUIREMENTS.

3.17.1 Passes and Badges. All Contractor employees shall obtain employee and vehicle passes and badges as required by Facility Owner for the project site. Contractor shall, prior to the start of on-site work, submit to Facility Owner, an estimate of the number of employees expected to be utilized at any one time on the Contract. Facility Owner will issue badges it requires without charge. When an employee leaves Contractor's service, the employee's pass and badge shall be returned within ten (10) days.

3.17.2 Contractor Vehicles. Each Contractor vehicle shall display Contractor's name such that it is clearly visible. Contractor vehicles shall, at all times, display a valid state license plate and safety inspection sticker. Facility Owner may issue vehicle passes as it determines, and these shall also be displayed so as to be clearly visible.

3.18 WORK SCHEDULE REQUIREMENTS. Contractor shall arrange its on-site work so that it will not interfere with normal Facility Owner business. Contractor shall develop a monthly work schedule for all on-site work performed from Contract award through implementation and performance periods for all ECMs. In no event shall Contractor change approved work schedules without the prior consent of Facility Owner.

If Contractor desires to work on Saturdays, Sundays, Holidays, or outside the Facility's normal working hours, it may submit a request for approval to Facility Owner at least seven (7) working days prior to the proposed start of such work.

3.19 INSPECTION AND ACCEPTANCE.

3.19.1 Facility Owner Inspection.

3.19.1.1 Facility Owner shall have the right to inspect, test and approve the work conducted in the facilities during construction and operation. Facility Owner shall have the right and access to the account books, records, and other compilations of data that pertain to the performance of the provisions and requirements of this Contract. Records shall be kept on a generally recognized accounting basis, and calculations will be kept on file in legible form and retained for three years after close-out. Facility Owner retains the right to have its representative visit the site during the audit and implementation phases of the project, and to attend relevant on-site or off-site meetings of Contractor and/or its subcontractors.

3.19.1.2 Facility Owner inspections and tests are for the sole benefit of Facility Owner and do not:

- a) Relieve Contractor of responsibility for providing adequate quality control measures.
- b) Relieve Contractor of responsibility for damage to or loss of the material before acceptance.
- c) Constitute or imply acceptance.
- d) Affect the continuing rights of Facility Owner after acceptance of the completed work under Section 3.18.1.8 below.

3.19.1.3 The presence or absence of a Facility Owner inspector does not relieve Contractor from any Contract requirement, nor is the inspector authorized to change any term or condition of the specification without Facility Owner's written authorization.

3.19.1.4 Contractor shall promptly furnish, at no increase in Contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by Facility Owner. Facility Owner may charge to Contractor any additional cost of inspection or test when work is not ready at the time specified by Contractor for inspection or test, or when prior rejection makes re-inspection or retest necessary. Facility Owner shall perform all inspections and tests in a manner that will

not unnecessarily delay the work. Any special and performance tests shall be performed as described in the Contract.

3.19.1.5 Contractor shall, without charge, replace or correct work found by Facility Owner not to conform to Contract requirements, unless in its interest Facility Owner consents to accept the work with an appropriate adjustment in Contract price. Contractor shall promptly segregate and remove rejected material from the Facility.

3.19.1.6 If Contractor does not promptly replace or correct rejected work, Facility Owner may:

- a) By contract or otherwise, replace or correct the work and charge the cost to Contractor.
- b) Terminate for default Contractor's right to proceed.

3.19.1.7 If, before acceptance of the entire work, Facility Owner decides to examine already completed work by disassembling or removing it, Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or non-conforming in any material respect due to the fault of Contractor or its subcontractors, Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet Contract requirements, Facility Owner shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

3.19.1.8 Unless otherwise specified in the Contract, Facility Owner shall accept, as promptly as practicable after completion and inspection, all work required by the Contract, or that portion of the work Facility Owner determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or Facility Owner's rights under any warranty or guarantee.

3.19.2 Contractor Inspection. Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the Contract conforms to Contract

requirements. Contractor shall maintain complete inspection records and make them available to Facility Owner. All work shall be conducted under the general direction of Facility Owner for the specific project, and is subject to Facility Owner inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the Contract.

3.19.3 Acceptance of Installed ECMs

3.19.3.1 Contractor shall arrange for the inspection of construction work and construction oversight to verify that the energy efficiency equipment and/or system modifications are properly supplied as designed and specified, and installed in accordance with the approved installation plan, all applicable codes and standards, the Contract specifications and in a manner that will provide the intended long-term function, energy savings, and performance of the equipment.

3.19.3.2 Any monitoring and verification of equipment and systems installed shall be consistent with requirements defined in the approved M&V plan. All start-up and testing shall be conducted in the presence of Facility Owner.

3.19.3.3 Facility Owner will accept the project installation in writing, in accordance with Exhibit 3, upon satisfactory completion of the required test period and receipt of all other required deliverables.

3.19.3.4 Facility Owner acceptance shall occur when the following approvals are completed:

- a) Approval by Facility Owner of Contractor's Post-Implementation Report (Section 4.1.2.1).
- b) Approval by Facility Owner of Contractor's ECM Commissioning Report (Sections 3.6.5.3, and the project inspection and acceptance is obtained pursuant to (Sections 3.19.1 and 3.19.2).

3.19.3.5 The approval of the ECM Commissioning Report and the Measurement and Verification Post-Implementation Report by Facility Owner shall also constitute acceptance of Contractor's achievement of facility performance requirements.

4.0 Performance Period Requirements and Scope.

4.1 MEASUREMENT AND VERIFICATION OF ECM PERFORMANCE.

4.1.1 Measurement and Verification Plan.

4.1.1.1 This Contract includes a site-specific Measurement & Verification (M&V) Plan (Attachment F) that specifies the M&V requirements and procedures that shall apply to the Contract based on various factors such as type of ECMs, projected value of energy savings, certainty/uncertainty of savings being achieved, and the intended risk allocation between Facility Owner and Contractor.

4.1.1.2 The M&V plan specifies the M&V options(s) and method(s) that will be used for each ECM included in the Contract. M&V options and methods for each ECM comply with the latest version of the International Protocol for Measurement and Verification of Performance (IPMVP) guidelines for M&V in effect at the time of Contract award.

4.1.1.3 Contractor shall conduct annual M&V activities to verify operation of the installed equipment/systems and/or calculation of current year's energy savings

4.1.2 Measurement and Verification Submittals.

4.1.2.1 *Post Implementation Report.* Contractor shall prepare and submit a Post-Implementation Report to Facility Owner verifying that installed ECMs demonstrate the potential to achieve the guaranteed annual energy, energy-related, and water cost savings specified in the Contract. The approval by Facility Owner of this Post-Implementation Report shall constitute Facility Owner's acceptance of Contractor's energy savings performance guarantee.

4.1.2.2 *Annual Measurement and Verification Report.* Contractor shall prepare and submit an Annual Measurement and Verification Report to Facility Owner pursuant to Attachment F including data and calculations that demonstrate that continued ECM performance achieves

the guaranteed annual energy, energy-related, and water cost savings as required by the Contract.

4.1.3 Independent Review of Measurement and Verification Reports. Facility Owner will utilize the services provided by the Wyoming Business Council, State Energy Office (WBC) under the WYECIP to provide independent third party review of Contractor's measurement and verification reports and to advise Facility Owner of compliance in measuring and verifying savings. The WBC's responsibilities could also include verifying the prorated share of Guaranteed Savings in the event of Contract Termination. Compliance checks will relate to the Measurement and Verification Plan (Attachment F), the established baseline (Attachment L), the baseline adjustments and savings calculations (Attachment M) and the requirements detailed in the WYECIP Program Manual.

4.1.4 Measurement and Verification Fees.

4.1.4.1 Throughout the Term of this Contract Facility Owner shall pay Contractor an annual fee according to Contract Schedule CS-3 Performance Period Cash Flow (Attachment G) for measuring and verifying the energy and cost savings. Annual guaranteed energy and cost savings achieved shall be sufficient to cover all fees to be paid to Contractor pursuant to the provisions of Contract Schedule CS-3.

4.1.4.2 Notwithstanding the above provisions in Section 2.6, Facility Owner shall not be required to begin any Measurement and Verification Fee payments to Contractor under this Contract unless and until all equipment installation is completed by Contractor and accepted by Facility Owner as evidenced by the signed Notice of Acceptance of Installed Energy Conservation Measures as set forth in Exhibit 3, and unless and until said equipment is fully and properly functioning in accordance with Attachment J and related details and specifications.

4.2 WARRANTY.

4.2.1 Warranty on Installed Equipment.

4.2.1.1 Contractor warrants that all equipment sold and installed as part of this Contract is new, unless otherwise agreed, will be materially free from defects in materials or

workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the date of the Substantial Completion for the particular energy conservation measure if operated and maintained in accordance with the procedures established per building.

- 4.2.1.2** Substantial Completion shall be defined as the stage in the progress of ECM installation where the work is sufficiently complete in accordance with the Contract Documents so that Facility Owner can utilize and take beneficial use of the ECM for its intended use or purpose. Substantial Completion does not occur until the ECM installation has been commissioned and accepted as defined in this Contract.
- 4.2.1.3** Contractor further agrees to assign to Facility Owner all available manufacturer's warranties relating to the ECM installation and to deliver such written warranties and which shall be attached and set forth as Exhibit 4; pursue rights and remedies against the manufacturers under the warranties in the event of malfunction or improper or defective function, and defects in parts, workmanship and performance.
- 4.2.1.4** Contractor shall, during the warranty period, notify Facility Owner whenever defects in equipment, parts, or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by Contractor. During this period, the cost of any risk of damage or damage to the equipment and its performance, including damage to property and equipment of Facility Owner or the Facility, due to Contractor's failure to exercise its warranty rights shall be borne solely by Contractor.
- 4.2.1.5** All warranties, to the extent transferable, shall be transferable and extend to Facility Owner. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction.
- 4.2.1.6** After the warranty period, Contractor shall have no responsibility for performing maintenance, repairs, or

making manufacturer warranty claims relating to the ECM installation, except as provided in Contractor's Maintenance Responsibilities (Attachment R).

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

4.2.2 Warranty of Services.

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

4.2.2.2 Facility Owner shall give written notice of any defect or nonconformance to Contractor within 30 days from the date the defect or non-conformance is detected by Facility Owner. This notice shall state either Contractor shall correct or re-perform any defective or nonconforming services, or that Facility Owner does not require correction or re-performance.

4.2.2.3 If Contractor is required to correct or re-perform, it shall be at no cost to Facility Owner, and any services corrected or re-performed by Contractor shall be subject to this clause to the same extent as work initially performed. If Contractor fails or refuses to correct or re-perform, Facility Owner may, by contract or otherwise, correct or replace with similar services and charge to Contractor the cost occasioned to Facility Owner thereby, or make an equitable adjustment in the Contract price.

4.3 OPERATION, MAINTENANCE, REPAIR, AND REPLACEMENT OF ECMs.

4.3.1 OPERATION AND MAINTENANCE MANUALS. Contractor shall furnish at least () copies of operation and maintenance (O&M) manuals and recommended spare parts lists for O&M of the installed ECMs and modified Facility Owner equipment. O&M plans and spare

parts lists shall be submitted prior to Facility Owner acceptance of the project, as specified in the Contract. Manuals are subject to approval of Facility Owner.

4.3.2 OPERATION OF ECMs.

4.3.2.1 Contractor and Facility Owner shall be jointly responsible for operation of all installed ECMs. The operations work effort for installed ECMs shall include operations tasks at specific stations, continuous or periodic equipment monitoring, and minor on-line equipment adjustments required to achieve all facility and energy conservation performance requirements of the Contract.

4.3.2.2 When the implementation of an installed ECM results in a change in an existing operations work procedure, Contractor shall prepare a new written operations work procedure for approval by Facility Owner.

4.3.2.3 The Parties acknowledge and agree that energy and cost savings would not likely be obtained unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by Facility Owner on a regular and continuous basis.

4.3.2.4 Facility Owner agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth in Facility Owner's Maintenance Responsibilities (Attachment S).

4.3.2.5 For Operations of ECMs assumed by Facility Owner Facility Owner will operate the ECM in accordance with Contractor-provided work procedures. If Facility Owner fails to operate an ECM pursuant to Contractor-provided work procedures, Facility Owner will compensate Contractor for losses directly attributable to that action.

4.3.3 PREVENTIVE MAINTENANCE OF ECMs.

4.3.3.1 Preventive maintenance work includes periodic equipment inspections, tests, calibrations, and preventive maintenance tasks and actions required to ensure that systems operate as intended. Contractor shall be responsible for preventive maintenance of all installed ECMs, unless this activity is

- assumed by Facility Owner, set forth in Facility Owner's Maintenance Responsibilities (Attachment S).
- 4.3.3.2** Contractor will provide a written record of all preventive maintenance work performed by Contractor. This record will be a description of maintenance actions performed.
- 4.3.3.3** Contractor shall prepare a written preventive maintenance work procedure for each installed ECM. Contractor shall train Facility Owner personnel in the new approved preventive maintenance work procedures.
- 4.3.3.4** Facility Owner agrees that it shall adhere to, follow and implement the maintenance procedures as set forth in Facility Owner's Maintenance Responsibilities (Attachment S).
- 4.3.3.5** For Maintenance of installed ECMs assumed by Facility Owner, Facility Owner will maintain the ECM in accordance with work procedures and checklists provided by Contractor and approved by Facility Owner. If Facility Owner fails to perform preventive maintenance per Contractor-provided preventive maintenance procedures and checklists, and the performance of the installed ECMs is adversely affected, (including manufacturer equipment warranties) Facility Owner will compensate Contractor for the losses directly attributable to that action.
- 4.3.3.6** Upon completion or termination of the Contract, Contractor shall provide to Facility Owner a single comprehensive schedule of necessary preventive maintenance for all installations for the five (5) years following Contract expiration or termination.
- 4.3.3.7** Facility Owner agrees that Contractor shall have the right once a month, with prior notice, to inspect Facility to determine if Facility Owner is complying, and shall have complied with its obligations as set forth in Section 4.3.2 and 4.3.3. For the purpose of determining Facility Owner's said compliance, the checklist to be set forth in Attachment T, as completed and recorded by Contractor during its monthly inspections, shall be used to measure and record Facility Owner's compliance. Facility Owner shall make the Facility available to Contractor for and during each monthly inspection, and shall have the right to witness each

inspection and Contractor's recordation on the checklist. Facility Owner may complete its own checklist at the same time. Contractor agrees to not interfere with Facility Owner operations during any monthly inspection.

4.3.4 REPAIR AND REPLACEMENT OF ECMs.

- 4.3.4.1** Repair of installed ECMs includes all material and equipment associated with the replacement or rebuilding of out-of-warranty facilities, systems, or equipment that have failed or are found to be in a condition of diminished ECM performance as determined by Contractor, and concurred to by Facility Owner.
- 4.3.4.2** Contractor shall provide all service, repairs, and adjustments to installed ECMs under terms of this Contract pursuant to Contractor's Maintenance Responsibilities (Attachment R). Facility Owner shall incur no cost for ECM service, repairs, and adjustments, except as set forth in Contract Schedule CS-3 (Performance Period Cash Flow), provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of Facility Owner or any employee or other agent of Facility Owner, and Contractor can so demonstrate such causal connection, Contractor may charge Facility Owner for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.
- 4.3.4.3** Contractor will provide a written record of all service work performed. This record will indicate the reason for the service, description of the problem and the corrective action performed.
- 4.3.4.4** If equipment failure or damage is a result of Facility Owner negligence, Facility Owner will provide repair or replacement. If repaired or replaced by Contractor as directed by Facility Owner, Facility Owner will reimburse Contractor for losses attributable to that negligence.
- 4.3.4.5** If equipment failure or damage is a result of Contractor negligence, Contractor will provide repair or replacement at its expense, or if repaired or replaced at Facility Owner

expense, will reimburse Facility Owner for losses attributable to that negligence.

4.3.5 MALFUNCTIONS AND EMERGENCIES.

4.3.5.1 Facility Owner shall use its best efforts to notify Contractor or its designated subcontractor within twenty-four (24) hours after Facility Owner's actual knowledge and occurrence of:

- a) Any malfunction in the operation of the installed ECMs or any pre-existing energy related equipment that might materially impact upon the energy savings or Energy Savings Guarantee.
- b) Any emergency condition affecting the installed ECMs.
- c) Any interruption or alteration to the energy supply to the Facility.
- d) Any alteration or modification in any energy-related equipment or its operation.

4.3.5.2 Where Facility Owner exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify any such conditions as having a material impact upon the savings.

4.3.6 CONTRACTOR RESPONSE TIME.

4.3.6.1 Emergency maintenance and repair work is defined as maintenance or repair necessary to correct an imminent failure of Section 3.3 Standards of Comfort or any action necessary to protect the safety or health of the facility occupants and prevent adverse impacts on property.

4.3.6.2 Contractor shall establish a point of contact (name and phone number) for use by Facility Owner in providing response to Contractor equipment failures. The point of contact shall be available for the length of the Contract's term.

4.3.6.3 Initial telephone response to repair call messages shall be within hour(s).

4.3.6.4 If a site visit is needed to repair equipment, repair personnel shall arrive on site within [] hours of the initial telephone response for emergency repairs or within [] hours for non-emergency repairs.

4.3.6.5 In the event Contractor fails to respond as required in the Contract and in the event of emergencies, Facility Owner may incur expenses to perform emergency repairs to Contractor-installed equipment as well as Facility Owner equipment for which Contractor assumed maintenance and repair responsibilities, and deduct such incurred expenses from future Contractor invoices. Contractor shall hold Facility Owner harmless in such cases where Contractor fails to respond in emergencies. In addition, Contractor shall reimburse Facility Owner for any costs incurred.

4.4 TRAINING. Contractor shall provide the training program described in Contractor's Training Responsibilities (Attachment U) for Facility Owner personnel for each ECM in the project.

4.4.1 The training program shall provide instruction on operation, troubleshooting, maintenance, and repair of ECMs. Training shall include both a classroom phase and a practical application phase. The course material shall include the operation and maintenance plans and manuals. The program shall be conducted at Facility Owner's site in facilities provided by Facility Owner.

4.4.2 Adequate training for Facility Owner to properly operate the installed ECMs must be completed prior to acceptance of the ECM installation.

4.4.3 Facility Owner shall pay Contractor an annual fee, if applicable, according to Contract Schedule CS-3 Performance Period Cash Flow (Attachment G) for ongoing training during the Contract Term as described in Attachment U.

4.4.4 Contractor shall also provide ongoing training whenever needed with respect to updated or altered equipment, including upgraded software, in accordance with Contractor's Training Responsibilities (Attachment U).

5.0 Material Changes.

5.1 DEFINITION. A Material Change shall include any change in or to the Facility, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of Facility Owner, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Attachment L (Baseline Energy Consumption) and Attachment M (Savings Measurement and Calculation Formulae and Methodology to Adjust Baseline) by at least █ % after adjustments for climatic conditions and provided a statistically acceptable correlation exists between climatic conditions and facility energy use.

5.2 ACTIONS BY FACILITY OWNER. Actions by Facility Owner that may result in a Material Change include but are not limited to the following: (i) manner of use of the Facility by Facility Owner; or (ii) hours of operation for the Facility or for any equipment or energy using systems operating at the Facility; or (iii) permanent changes in the comfort and service parameters set forth in Attachment N (Standards of Comfort); or (iv) occupancy of the Facility; or (v) structure of the Facility; or (vi) types and quantities of equipment used at the Facility or (vii) modification, renovation or construction at the Facility; or (viii) Facility Owner's failure to provide maintenance of and repairs to the equipment in accordance with Attachment S (Facility Owner's Maintenance Responsibilities); or (ix) casualty or condemnation of the Facility or equipment, or (x) changes in utility provider or utility rate classification, or (xi) any other conditions other than climate affecting energy or water use at the Facility.

5.3 REPORTED MATERIAL CHANGES - NOTICE BY FACILITY OWNER. Facility Owner shall use its best efforts to deliver to Contractor a written notice describing all actual or proposed Material Changes in the Facility or in the operations of the Facility at least 14 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 Contractor 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 Facility Owner within five (5) business days after having actual knowledge that the event constituting the Material Change occurred or was discovered by Facility Owner to have occurred.

5.4 UNREPORTED MATERIAL CHANGE. In the absence of any Material Changes in the Facility or in their operations, the baseline energy consumption as set forth in Attachment L (Baseline Energy Consumption)

should not change more than % during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions and provided a statistically acceptable correlation exists between climatic conditions and Facility energy use.

Therefore, if energy consumption for any month as set forth in Attachment L (Baseline Energy Consumption) deviates by more than percent (%) from the energy consumption for the same month of the preceding Contract year after adjustments for changes to climactic conditions, then such deviation shall be timely reviewed by Contractor to ascertain the cause of deviation. Contractor shall report its findings to Facility Owner in a timely manner and Contractor and Facility Owner shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Attachment L (Baseline Energy Consumption) and Attachment M (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline).

5.5 OTHER ADJUSTMENTS. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, Contractor will work with Facility Owner to investigate, identify and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, Contractor and Facility Owners shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Attachments L and M.



6.0 Signatures. In witness thereof, the parties to this Contract, either personally or through their duly authorized representatives, have executed this Contract on the days and dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of this Contract.

FACILITY OWNER

Name and Title

Date

CONTRACTOR

Name and Title

Date