

**STATE OF NORTH CAROLINA
ENERGY SERVICES AGREEMENT
GUARANTEED ENERGY PERFORMANCE CONTRACTING PROGRAM**

This Energy Services Agreement, referred to herein as "Agreement" or "ESA", entered into _____, 200__, by and between the _____, referred to herein as the "ISSUER" and _____ with offices located at _____, referred to hereafter as the "ESCO" for the purpose of providing energy conservation measures (ECMs), consisting of services, systems and facilities designed to reduce energy consumption and costs in buildings owned and operated by the ISSUER which are described herein as the "Premises."

RECITALS

WHEREAS, the ESCO was selected by the ISSUER as a qualified provider to provide services, herein after called the "Work" which will result in decreased energy consumption and costs, and which services may include but are not limited to the following: energy use analyses, the design, delivery and installation of ECMs which consist of systems and devices for the Premises, guarantee of energy savings, the training of designated ISSUER's employees, and the maintenance and monitoring of the ECMs as provided herein and measurement, verification and reporting of energy savings, financing of the project if herein provided and;

WHEREAS, under separate agreement with the ISSUER, the ESCO has performed a comprehensive Energy Audit and has prepared an Energy Audit Report which has been approved and accepted by the ISSUER as evidenced by the Energy Audit Report and ISSUER's Acceptance Certification as set forth in Exhibit II (i); and

WHEREAS, the ESCO has agreed to guarantee a level of monetary savings to be achieved as the result of the professional and other services to be provided under this Agreement; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, the ISSUER and the ESCO hereby covenant and agree as follows:

ARTICLE 1: THE ESCO'S RIGHTS AND RESPONSIBILITIES

1.1 Independent Company Status. The ESCO is an independent Contractor and in providing its services under this Agreement, shall not represent otherwise.

1.2 Legal Responsibility. The ESCO shall perform the Work and all other services required by this Agreement. The ESCO shall assure that all of the Work is accomplished in a workmanlike manner and that all services which require the exercise of professional skills or judgment shall be accomplished by professionals qualified and competent in the applicable discipline and licensed as required in the State of North Carolina. All Project Documents as set forth in paragraph 3.3 and which are required to be prepared by the ESCO shall be in accord with all applicable codes, standards and regulations and shall be prepared by qualified personnel. Where required by North Carolina law, Project Documents shall bear the stamp or seal of architects or engineers licensed in the State of North Carolina. The ESCO shall remain responsible for all services performed, whether by the ESCO or its subcontractors or others on its behalf, throughout the term of this Agreement.

The ESCO shall be liable to the issuer for any failure and any expense or any expenses resulting from failure to comply with the terms of this agreement. Any review, approval, acceptance or payment for any and all of the ESCO's performance by the ISSUER shall not relieve the ESCO of its responsibility for the Work. This provision in no way limits the ISSUER'S rights and defenses against the ESCO either under this Agreement or otherwise in law or in equity.

1.3 Insurance. The ESCO shall purchase, maintain and provide evidence of insurance coverage of the types, in the amounts and for the periods specified in Schedule Q. Subsequent to the Commencement Date described in paragraph 5.1 hereof, the ISSUER shall be responsible for providing insurance coverage on the ECMs.

The **ESCO** may not commence performance of the Work or other services under this Agreement until all required insurance is obtained and evidence of it is received and approved by the **ISSUER**, but the failure of the **ISSUER** to obtain such evidence from the **ESCO** before permitting the **ESCO** to commence the Work shall not be deemed to be a waiver by the **ISSUER**, and the **ESCO** shall remain under a continuing obligation to obtain and maintain the required coverage and to supply evidence of coverage in accordance with Schedule Q.

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

The **ESCO** shall timely renew the required insurance as necessary to keep such coverage in effect for the periods specified in Schedule Q and shall supply the **ISSUER**, not less than **sixty (60)** days prior to any expiration or renewal dates for such insurance policies, with evidence of all required insurance including updated replacement Certificates of Insurance and amendatory riders or endorsements that clearly evidence the continuation of all coverage in the same manner, limits of protection, and scope of coverage, as was provided by the Certificates of Insurance, amendatory riders or endorsements originally supplied. The **ISSUER shall be a named additional insured in any policy of insurance required by this agreement**.

The **ESCO** expressly understands and agrees that any insurance protection furnished by the **ESCO** hereunder shall in no way limit its responsibility to indemnify and save harmless the **ISSUER** under the provisions of this Agreement.

1.4 Performance and Labor and Material Payment Bonds. The **ESCO** shall, prior to commencing the Work, deliver to the **ISSUER** a Performance Bond and a Labor and Material Payment Bond **in conformity with N.C. General Statute Chapter 44-A, Article 3**.

1.5 Cooperation with the **ISSUER's** Consultants. The **ISSUER** reserves the right to designate authorized representatives or to retain consultants at its expense, including an Architect/Engineer, to act on its behalf with respect to administering the performance required under this Agreement throughout its term. The **ISSUER** and its representatives and consultants shall at all times have access to the Work. The **ESCO** agrees to cooperate with any representative of, or consultant retained by, the **ISSUER**.

1.6 Joint and Several Liability. Each and every obligation or undertaking herein to be fulfilled or performed by the **ESCO** shall be the joint and several obligation of the **ESCO** and **any authorized** successors or assigns.

1.7 Miscellaneous. Other rights and responsibilities of the **ESCO** are set forth throughout this Agreement and in the Project Documents described in paragraph 3.3 hereof and are included under other titles, articles, sections and headings for convenience. It is the responsibility of the **ESCO** to familiarize itself with all provisions of this Agreement and the Project Documents in order to understand fully the entirety of its rights and responsibilities hereunder.

ARTICLE 2: THE **ISSUER'S** RIGHTS AND RESPONSIBILITIES

2.1 Project Administration.

2.1.1 Issuer's Responsibility. The **ESCO** shall be primarily responsible for the administration and monitoring of the performance of the Work. The **ISSUER's** personnel designated in paragraph 10.9 shall be the principal point of contact between the **ISSUER** and the **ESCO** relative to the performance required under this Agreement.

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

- (i) Review and approve required insurance coverage and bonds to ensure compliance with the terms of this Agreement;
- (ii) Review and approve the ECM Submittals required under 2.3 hereof within ____ () business days after receipt by the **ISSUER** of such ECM submittals to ensure:
 - (a) That the design and installation of the ECMs **appears to be consistent** with the ECMs contemplated in the **ESCO's investment grade audit.**
- (iii) Attend project meetings.

2.3. ECMs Submittals. ECMs submittals are in sufficient detail to allow the **ISSUER** to complete the reviews described in paragraph 2.2, and shall include:

- i) Date and revision dates.
- ii) Project Number and Title.
- iii) Stamp or seal of the preparer of the ECM submittal, and the Company's certification that it has reviewed and approved the submittal as to its accuracy and compliance with the provisions of this Agreement.
- iv) Drawings, plans, specifications, shop drawings, product data, and where appropriate or reasonably required, product samples.

At the request of the **ISSUER**, and where appropriate or required, the **ESCO** shall provide on-site "mock-ups" and demonstrations of the ECMs at the Premises which shall also be construed as ECM submittals under the provisions of this paragraph. The **ISSUER** may also request additional materials, documents, or information.

After receipt of the submittals, the **ISSUER** shall, **within a reasonable time**, complete its review of the submittals and provide written approval of the submittal or if the submittal has been **disapproved**, written explanation as to the reason therefore. **Upon disapproval** the **ESCO** shall submit a revised submittal within ten (10) business days to the **ISSUER** for review and approval. The **ESCO** shall be responsible for any delays caused by rejection of incomplete or inadequate submittals. The **ESCO** may not commence any of the Work which requires the submittals without written approval by the **ISSUER**.

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

2.4 Drawings, Specifications and Surveys Provided by the Issuer

(a) The **ISSUER** shall provide the **ESCO** with such surveys as it may have describing the physical characteristics, legal limitations and utility locations for the site of the Work. **All such information furnished by the ISSUER is furnished without any representation as to the accuracy of such information.**

(b) The **ISSUER** will make available for review by the **ESCO** such working drawings, specifications, surveys and "As-Built" drawings concerning the Premises which are available and which relate to work being performed by other Companies at the Premises. **All such information furnished by the ISSUER is furnished without any representation as to the accuracy of such information;**

(c) All drawings, specifications, surveys and copies thereof furnished by the **ISSUER** are and shall remain **ISSUER's** property.

2.5 Ownership, Dissemination and Publication of Documents. The drawings, specifications, reports, renderings, models, electronic media and all such other documents to be prepared and furnished by the **ESCO** pursuant to this Agreement, shall be and remain the property of the **ISSUER** .

2.6 Interpretation of Agreement. The **ISSUER** shall have the authority to **make a binding determination** of questions of fact that arise in relation to the interpretation of this Agreement and the **ESCO's** performance hereunder. The **ESCO** shall proceed diligently with the performance of this Agreement and in accordance with the **ISSUER'S** decision. Continuation of the Work shall not be construed as a waiver of any **other** rights accruing to the **ESCO**.

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

3.1 Project Defined. The **ESCO** shall design, procure, fabricate and install the energy conservation measures specified in Schedule A and provide training, commissioning, maintenance and monitoring and all other services specified in this Agreement and the Project Documents set forth in paragraph 3.3 at the Premises described in Schedule B.

3.2 Energy Audit Report. The Energy Audit Report prepared by the **ESCO** and accepted by the **ISSUER** contains specific recommendations and documentation concerning the energy conservation measures, systems and services to be provided at the Premises and is incorporated herein by reference. The Schedules and Project Documents referenced in paragraph 3.3 shall govern in the event of any inconsistencies between the Energy Audit Report and the provisions of this Agreement.

3.3 Project Documents. The Project Documents include:

- The executed ESA
- The Energy Audit Report
- **Accepted** Submittals specified in paragraph 2.3.
- Certificates of Insurance
- Executed Performance Bond and Labor and Material Payment Bond

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

Schedule A	Equipment to be installed by the ESCO
Schedule B	Description of Premises; Pre-Existing Equipment Inventory
Schedule C	Energy Saving Guarantee
Schedule D	Compensation to the ESCO
Schedule E	Baseline Energy Consumption
Schedule F	Savings Measurement & Verification Calculation Formulae; Methodology to Adjust Baseline
Schedule G	Construction and Installation Schedule
Schedule H	Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
Schedule I	Standards of Comfort
Schedule J	The ESCO's Maintenance Responsibilities
Schedule K	Issuer's Maintenance Responsibilities
Schedule L	Facility Maintenance Checklist
Schedule M	The ESCO's Training Responsibilities
Schedule N	Installment Payment Schedule

Schedule O	Proposed Final Project Cost & Proposed Final Project Cash Flow Analysis (See Attachment B at the end of this Energy Audit Agreement)
Schedule P	Current and Known Future Capital Projects at the Premises; Methodology to Adjust Baseline for Changes in Building Use or Operating Hours
Schedule Q	Insurance and Bonds
Schedule R	Warranties (including Equipment)
Schedule S	[FINANCING AGREEMENT] (Optional)

Attachment A Sample Construction Process language

3.3.1 Review of Project Documents; Notification to the Issuer. The **ESCO** shall carefully review all Project Documents, including all addenda, whether prepared by the **ESCO**, its subcontractors or furnished by the **ISSUER** for errors, inconsistencies or omissions relative to the performance of the Work. Upon completion of its review of the Project Documents, and prior to commencing the Work, the **ESCO** shall provide written notice to the **ISSUER** that (i) there are no inconsistencies in the Project Documents pertaining to the performance of the Work at the Premises **or conflicts with existing conditions on the Project.**; or, (ii) specifying the nature of any conflicts or inconsistencies noted from the **ESCO's** review of the Project Documents. All Work to be performed under this Agreement by the **ESCO** or its subcontractors which the Project Documents indicate is in conflict with the Project Documents or **the existing conditions** shall be brought to the attention of the **ISSUER** before the Work is commenced.

3.3.2 Correction of Conflicting Work. In the event that the **ESCO** fails to properly prepare or review Project Documents or commences the Work without providing notice to the **ISSUER** of any **inconsistency** or conflict it discovers in the Project Documents, the **ESCO** shall, upon written direction from the **ISSUER**, remove all such Work or portion thereof so conflicting, and rebuild it as directed at no additional cost to the **ISSUER**.

ARTICLE 4: IMPLEMENTATION OF THE ENERGY CONSERVATION PROJECT ("THE WORK")

4.1 Description of the Work. The design, procurement, fabrication, installation and commissioning of the ECMs specified in Schedule A and any training services described in Schedule M, which are integral to the operation of the ECMs, are referred to in this Agreement as the "Work." The maintenance, monitoring, and savings measurement and verification services detailed in Schedules F and L and the any Post-Acceptance Training services detailed in Schedule M, performance of which does not commence until after the Commencement Date **of this agreement but** not part of the Work.

4.2 Performance of the Work. Construction and equipment installation shall proceed in accordance with the provisions **contained in this agreement** and the project installation schedule approved by **ISSUER** and attached hereto as Schedule G.

4.3 Systems Startup/Commissioning. The **ESCO** shall conduct a thorough and systematic performance test of each element and total system of the installed ECMs in accordance with Schedule H. The **ESCO** shall provide advance written notice of at least ten (10) business days to the **ISSUER** of the scheduled test(s). The **ISSUER** shall have the right to designate representatives to be present at any or all such tests including representatives of the manufacturers of the ECMs. The **ESCO** shall demonstrate that all ECMs installed comply with the requirements of the Project Documents. The **ESCO** shall test all components and systems of the installed ECMs. The **ESCO**, or its subcontractor(s), shall correct or adjust all deficiencies in operation of the ECMs.

ARTICLE 5: EXECUTION AND COMMENCEMENT DATES AND TERM; INTERIM PERIOD; FISCAL FUNDING

5.1 Execution and Commencement Dates. Contract execution is contingent upon receipt of the required State of North Carolina approvals and financing. The Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by the **ISSUER** and **ESCO** shall have delivered a written Notice to the **ISSUER** that (i) it has completed the installation and commissioning and commenced operating all of the energy conservation measures specified in Schedule A; (ii) no Event of Default under Article 11 exists; and, (iii) the Energy Savings Guaranty set forth in Schedule C is in full force and effect; and the **ISSUER** has inspected and accepted said installation and operation as evidenced by the Certification of Acceptance as set forth in Exhibit II (ii). Compensation payments due to ESCO for project monitoring, savings measurement and verification, reporting and maintenance services under this Contract as set forth in Schedule F shall begin no earlier than _____ days from the Commencement Date as defined herein.

5.2. Term of Contract; Interim Period. Subject to the following sentence, the term of this Agreement shall be 12 years measured beginning with the Commencement Date. Nonetheless, the Agreement shall be effective and binding upon the parties immediately upon its execution. The period from contract execution until the Commencement Date shall be known as the "Interim Period". Energy savings achieved during the interim period will be fully credited to the **ISSUER**. (OPTIONAL)

5.3. Nonappropriation of Funds. In the event insufficient **ISSUER** or other funds are appropriated and budgeted in any fiscal period for which payments are due **ESCO** under this Agreement, then the **ISSUER** will, not less than ___ days prior to end of such applicable fiscal period, in writing, notify the **ESCO** of such occurrence and this Agreement shall terminate on the last day of the fiscal period for which appropriations were made without penalty or expense to the **ISSUER** of any kind whatsoever, except as to the portions of payments herein agreed upon for which the **ISSUER** and/or other funds shall have been appropriated and budgeted or are otherwise available.

ARTICLE 6: ANNUAL SAVINGS GUARANTY; ANNUAL RECONCILIATION; COMPENSATION TO ESCO

6.1 Annual Energy Savings Guaranty. The **ESCO** has formulated and guaranteed the level of **cost** savings as provided for in Schedule C, which will be achieved each year as a result of the performance by **ESCO** of the services specified in this Agreement utilizing the Methods of Savings Measurement and Verification set forth in Schedule F.

6.2 Annual Review, Reconciliation and Reimbursement. **Cost** savings achieved at the Premises shall be reported, reconciled and verified pursuant to the provisions of Schedule F. If said annual review, reconciliation and verification of energy savings discloses that the **ESCO** has failed to achieve the annual guaranteed energy savings and operating cost savings set forth in Schedule C, the **ESCO** will pay the **ISSUER** or the **ISSUER'S** designee, as may be directed by the **ISSUER**, the difference between the annual amount guaranteed and the amount of actual annual cost savings achieved at the Premises. The **ESCO** shall remit such payments to the **ISSUER** not later than thirty (30) days of written demand therefore by the **ISSUER**.

6.3 ESCO Compensation for the Work. **ISSUER** will pay **ESCO** for the performance of the work the grand total Contract Sum of \$_____. Payments to the **ESCO** for the Work shall be made by the **ISSUER** in the amounts and in accordance with Schedule ~~N-D~~ hereto. The amount specified as Compensation for the Work is inclusive of all costs and fees to be paid for the Work pursuant to this Agreement including any training services provided prior to acceptance of the project by **ISSUER** and as provided for in Schedule ~~DM~~.

6.4. Payments to Company. Thirty (30) calendar days shall be allowed for the **ISSUERS** inspection and approval of the goods, equipment and services for which any Application For Payment is made.

6.5 Progress Payments Against Contract Sum. Based upon Application For Payment submitted to the **ISSUER** by **ESCO**, upon approval by **ISSUER**, **ISSUER** shall make progress payments to the **ESCO** against the account of the Contract Sum, as provided for in Schedule N and in accordance with the following:

- (a) Within _____ () Calendar Days from the **ISSUER'S** inspection and approval of the goods and services for which any application for payment is submitted by **ESCO**, **ISSUER** shall pay, or cause to be paid to **ESCO**, 90% of that portion of the Contract Sum. The full 10% retainage shall be retained until completion of the work.

(b) The **ISSUER** may, upon request or at its discretion, furnish to a Subcontractor, if practicable, information regarding the percentages of completion of the amount applied for by **ESCO** and the action taken thereon by the **ESCO** on account of Work done by such Subcontractor.

(c) No Certificate for a progress payment, nor any progress payment, nor any partial or entire use of occupancy or the project by the **ISSUER** shall constitute an acceptance of any work not in accordance with the provisions of this agreement, schedules and Project Documents.

6.6 Final Installation Payment Against Contract Sum. Within _____ () days from the Commencement Date set forth in Article 5, the **ISSUER** shall pay or cause to be paid to **ESCO** the entire unpaid balance of then Contract Sum, less the amount of any sums which continue to be retained to satisfy the cost of performing any change in the work which is the subject of any claim or dispute and which has not yet been satisfactorily performed by **ESCO**.

6.2 Maintenance, Monitoring, Savings Measurement and Verification and any Post-Acceptance Training Fees. Payment to the **ESCO** for maintenance, monitoring, savings measurement, verification and reporting, and Post-Acceptance Training services performed after the Commencement Date shall be made by the **ISSUER** pursuant to and in accordance with Schedule N.

ARTICLE 7: ACCEPTANCE

7.1 Acceptance of the Work. Acceptance of the Work shall occur **when the requirements of this article are met and** the **ESCO's** performance of the entire scope of the Work is complete, in accordance with the Project Documents so that the **ISSUER** can utilize **all** the installed ECMs for their intended use and the Energy Savings Guaranty provided by **ESCO** under paragraph 6.1 and Schedule C becomes effective and the **ISSUER** has inspected and accepted said installation and operation as evidenced by the Certification of Acceptance as set forth in Exhibit II (ii).

7.2 Required Acceptance Submittals by the Company. The **ESCO** shall submit the following documents to the **ISSUER** with its notice of Final Completion:

- (a) All Project Record Documents as described in paragraph 3.5;
- (b) The **ESCO** shall submit lien waivers, sworn statements, guarantees, full releases or other evidence reasonably satisfactory to the **ISSUER** that there are no liens, claims or stop notices pending, filed or threatened against the **ISSUER**, the **ESCO**, the Work or the ECMs whatsoever.
- (c) Certificates of compliance for all ECMs which require local government inspection;
- (d) Asbestos abatement compliance records, if applicable;
- (e) **Any other documentation reasonably required by the issuer.**

7.3 Any retainage amounts will be paid **upon acceptance by ISSUER of the work.** .

ARTICLE 8: THE ENERGY CONSERVATION MEASURES

8.1 ECM Warranties. The **ESCO** warrants that all ECMs designed, procured, fabricated and installed pursuant to this Agreement are new, in good and proper working condition and are of merchantable quality and fit for the particular purposes of enabling the **ISSUER** to reduce energy consumption and operating cost. The **ESCO** further warrants that the ECMs are protected by appropriate written warranties covering all parts and equipment performance for the periods specified in Schedule R and Exhibit III. The **ESCO** shall deliver to the **ISSUER** for inspection and approval all such written warranties and shall pursue rights and remedies against the

manufacturer and each prior seller of the ECMs under the warranties in the event of equipment malfunction, improper or defective function, or defects in parts, workmanship or performance. The **ESCO** shall be responsible for managing all warranty activity during the warranty periods set forth in Schedule R and Exhibit III and shall notify the **ISSUER** whenever defects in equipment, parts or performance occur which give rise to such rights and remedies and **that** those rights and remedies are exercised by the **ESCO**. The cost of any damage, loss or claims by any person arising out of the use or operation of the ECMs or damage to the ECMs and their performance, including damage to other property and equipment of the **ISSUER** or the Premises, due to the **ESCO's** failure to exercise its warranty rights shall be borne solely by the **ESCO**.

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

8.2 Correction of Warranted Work.

(a) Commencing with the date of beneficial use of each ECM to the **ISSUER** and continuing for the warranty periods set forth in Schedule R and Exhibit III for each ECM, or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Project Documents, the **ESCO** shall correct or replace all faulty, defective or nonconforming Work, **or malfunctioning portions thereof**, in accordance with the timeframes set forth in 8.2(c). **The ISSUER shall give the ESCO written notice as soon as practical if the issuer has reason to believe that any portion of the work is nonfunctional, or otherwise nonconforming.** After receipt of written notice from the **ISSUER** to correct such fault or defect, whether it was observed before or after acceptance of the Work, the **ESCO** will correct the Work unless the **ISSUER** has given the **ESCO** a written waiver of the specific fault or defect. Notice may be given by telephone in the event of an emergency situation. The **ESCO** shall bear all costs of replacing or correcting such faulty, defective or nonconforming Work.

(b) **Prior to acceptance**, The **ESCO** shall, at its own expense, remove from the Premises all portions of defective and nonconforming Work which **ESCO** is obligated to replace or correct under this paragraph 8.2 unless removal has been waived in writing by the **ISSUER**. If the **ESCO** fails to correct faulty, defective or nonconforming Work as provided in this Section within twenty-four (24) hours after notice, in the case of emergency conditions, or within five (5) business days in other cases after the **ESCO's** receipt of written notice from the **ISSUER** of such faulty, defective or nonconforming Work, the **ISSUER** may correct such work at the **ESCO's** expense including costs incurred due to the removal of faulty, defective or non-conforming and removal and storage of equipment or materials left at the Premises by the **ESCO**.

(c) Nothing contained in this Section shall be construed to establish a period of limitation with respect to any other obligation which the **ESCO** might have under the Project Documents. The establishment of the time period set forth in paragraph 8.2(a) above, relates only to the specific obligation of the **ESCO** to correct the Work and has no relationship to the time within which its obligation to comply with the Project Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the **ESCO's** liability with respect to its obligations other than to specifically correct the Work. Notwithstanding the provisions of this paragraph 8.2, the **ESCO** shall, on demand made by the **ISSUER**, at any time within the ten (10) year period following Acceptance, promptly repair or replace all defective or non-conforming work resulting from fraudulent misrepresentation, fraudulent concealment or gross negligence by the **ESCO** or its subcontractors in the performance of the Work.

8.3 Location and Access. The **ISSUER** shall provide sufficient space at the Premises for the installation and operation of the ECMs for the term of this Agreement, including access to office space with a telephone line, if necessary to allow the **ESCO** to perform required maintenance, monitoring and training services. The **ISSUER** shall provide access to the Premises for the **ESCO** and its employees or subcontractors to install, adjust, inspect, maintain and repair the ECMs in accordance with the terms of this Agreement during regular business hours, or

such other reasonable hours as may be requested by the **ESCO** and acceptable to the **ISSUER**. The **ESCO's** access to correct any emergency condition shall not be unreasonably restricted by the **ISSUER**.

8.4 ESCO Maintenance and Monitoring Responsibilities for ECMs. The **ESCO** shall be responsible for providing the maintenance, monitoring, repairs, and adjustments to the ECMs as set forth in Schedule J. All replacements of and alterations or additions to the ECMs by the **ESCO** shall become part of the ECMs and shall become the property of the **ISSUER**. Any replacements of and alterations or additions made by the **ESCO** to the **ISSUER's** pre-existing equipment, or equipment acquired by the **ISSUER** during the term of this Agreement, shall become part of said equipment and be owned by the **ISSUER**. The **ESCO** shall be compensated for such maintenance and monitoring services pursuant to Schedule D hereof. In the event of the **ESCO's** failure to provide **required** maintenance, service, repairs and adjustments to the ECMs, as provided in Schedule J or if an Event of Default exists pursuant to Article 11, the **ISSUER** may withhold fees due to the **ESCO** for such services until such repairs or adjustments are completed or such Event of Default is cured. The **ISSUER** shall notify the **ESCO** in writing when any payments are so withheld. The withholding of fees by the **ISSUER** under this paragraph 8.4 shall not release the **ESCO** from its obligation to provide the Energy Savings Guaranty pursuant to paragraph 6.1 and Schedule C hereof.

8.5 ISSUER Operating and ECMs Maintenance Responsibilities. The **ISSUER** shall be responsible for providing the maintenance, monitoring, service, repairs and adjustments to the ECMs as set forth in Schedule K. Except as set forth in Schedule K, the **ISSUER** shall not move, modify, remove, adjust, alter or change in any material way the ECMs, or any part thereof, during the term of this Agreement, without prior written approval of the **ESCO**, except in the event of an occurrence reasonably deemed by the **ISSUER** or the **ESCO** to constitute a bona fide emergency. The **ISSUER** acknowledges that substantial **and long term deviations**, from the operating conditions set forth in the Schedules to this Agreement may constitute a material change in accordance with paragraph 9.3 hereof. In addition to the responsibilities set forth in Schedule K, the **ISSUER** shall use its best efforts to maintain the Premises in good repair and to protect and preserve the ECMs in good repair and condition in accordance with applicable manufacturers' recommendations which shall be provided to the **ISSUER** by the **ESCO** and to maintain the operating conditions of **all non ECM** mechanical systems and energy related systems located at the Premises. The **ESCO** shall notify the **ISSUER** of any improper maintenance or repair as soon as **ESCO** has notice thereof. The **ISSUER** acknowledges that improper repairs or maintenance of the ECMs not **seasonably corrected after notice** may constitute a Material Change in accordance with paragraph 9.3, and that the provisions of paragraph 9.5 may be applicable.

8.6 Training by the ESCO. The **ESCO** shall conduct the training program described in Schedule M hereto.

8.7 ECMs Upgrades: Alterations. The **ESCO** shall have the right, at all times during the term of this Agreement, subject to the **ISSUER's** written approval, to modify or replace any of the ECMs or install additional ECMs and to revise any procedures for the operation of the ECMs or implement other procedures at the Premises provided that: (i) such actions by the **ESCO** do not result in modifying the standards of comfort and service set forth in Schedule I without the express written approval of the **ISSUER**; (ii) such modifications or additions to, or replacements of the ECMs, and any operational changes, or new procedures are necessary to enable the **ESCO** to achieve the energy savings guaranteed by the **ESCO** at the Premises and (iii) any costs incurred relative to such modifications, additions or replacements of the ECMs, or operational changes or new procedures shall be the responsibility of the **ESCO**. All modifications, additions or replacements of the ECMs or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the **ISSUER** for approval, which shall not be unreasonably withheld, and incorporated into this Agreement provided that any replacement ECM shall be new and have equal or better potential to reduce energy consumption at the Premises than the ECM being replaced. The **ESCO** shall **continuously update all ECM software unless the ESCO certifies to the ISSUER that a specific update would lower the savings that are realized from that ECM**. All replacements of and alterations or additions to the ECMs shall become part of the ECMs described in Schedule A and shall become the property of the **ISSUER**.

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

8.8.1 Any material malfunction in the operation of the ECMs or any **related nonECM** energy-related equipment **or systems**;

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

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

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

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

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

ARTICLE 9: THE PREMISES

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

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

9.3 Material Change Defined. A Material Change shall include any change in or to the Premises, not covered by Schedule B, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the **ISSUER** to increase or decrease annual costs of energy usage. Actions by the **ISSUER** which may result in a Material Change which is subject to this paragraph 9.3, include, but are not limited to the following:

9.3.1 Changes in the manner of use of the Premises by the **ISSUER**; or

9.3.2 Changes in the hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or

9.3.3 Permanent changes in the comfort and service **conditions** set forth in Schedule I; or

9.3.4 Changes in the occupancy of the Premises; or

9.3.5 Changes in the structure of the Premises; or

9.3.6 Changes in the types and quantities of equipment used at the Premises; or

9.3.7 Modification, renovation or construction at the Premises; or

9.3.8 The **ISSUER's** failure to provide maintenance of the ECMs pursuant to paragraph 8.5 hereof; or

9.3.9 Any significant damage to the Premises or the ECMs caused by fire, flood, or other casualty or any condemnation affecting a significant portion of the Premises; or

9.3.10 The permanent or temporary closing of a building at the Premises; or

9.4 Reporting of Material Changes: Notice by Customer. The **ISSUER** shall use its best efforts to deliver to the **ESCO** a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises no less than thirty (30) days before any actual or proposed Material Change is implemented. Where Material Changes result because of a bona fide emergency or other situation which precludes advance notification, the **ISSUER shall give notice as soon as reasonably possible** after the event constituting the Material Change occurred or was discovered by the **ISSUER** to have occurred.

9.5 Reported Material Changes: Adjustments to Baseline/Benchmarks. Any changes in energy usage which occur as the result of a Reported Material Change shall be timely reviewed by the **ESCO** and the **ISSUER** to determine what, if any, adjustments to the Baseline/Benchmarks set forth in Schedule E are necessitated by such Material Change(s). The **ESCO** and the **ISSUER** agree that any adjustments made to the Baseline/Benchmarks shall be in accordance with generally accepted engineering principles.

9.6 Unreported Material Changes. Upon and after the Commencement Date and in the absence of any reported Material Change(s) in the Premises or in their operations, if energy savings deviates more than ____ (___%) percent during any month from projected energy savings for that month, **after adjustment for normal deviations from climatic conditions**, then the **ESCO** shall timely review such changes to ascertain the cause of such deviation. The **ESCO** shall report its findings to the **ISSUER** in a timely manner. The **ESCO** and the **ISSUER may** determine what, if any, adjustments to the Baseline/Benchmarks set forth in Schedule E are necessary.

ARTICLE 10: GENERAL TERMS AND CONDITIONS

10.1 Assignment. The **ESCO** acknowledges that the **ISSUER** is induced to enter into this Agreement by, among other things, the professional qualifications of the **ESCO**. The **ESCO** agrees that neither this Agreement nor any right or obligation hereunder may be assigned in whole or in part, without the prior written approval of the **ISSUER**

10.2 Duty to Indemnify. The **ESCO** shall defend, indemnify, keep and save harmless the **ISSUER** and its agents and employees against all suits, claims, damages, losses and expenses, including attorney's fees, caused by, growing out of, or incidental to, the wrongful or negligent performance of the Work under this Agreement by the **ESCO** or its subcontractors to the full extent as allowed by the laws of the State of North Carolina. The **ISSUER** shall promptly notify the **ESCO** of any suits or claims. The **ESCO**, at its sole expense, to settle or defend and control the defense of any suit based upon such claim or claims. In the event of any such injury (including death) or loss or damage, or claims therefore, the **ESCO** shall give prompt notice to the **ISSUER**. The **ESCO's** subcontractors shall **include a substantially identical indemnity and shall include the ISSUER** as a named indemnitee parties as to whom indemnification is due under their subcontracts.

10.2.1 Effect of Statutory Limitations. In the event of any claim against the **ISSUER** or against any of its officials or employees, in either their personal or official capacities, made by any direct or indirect employee or agent of the **ESCO** or of any subcontractor, the **ESCO's** indemnification obligation shall not be affected by any limitation on the amount or type of damages, compensation or benefits payable to said employee or agent contained in any other type of employee benefit act.

10.2.2 Intellectual Property Claims Indemnification. The **ESCO** shall protect, defend, indemnify and hold the **ISSUER** harmless against and from any and all claims, judgments, amounts paid in settlement, costs and expenses, including attorneys' fees relating to alleged patent, trademark or copyright infringement, misappropriation of proprietary rights, or trade secrets or similar claims, resulting from actions taken by the **ESCO** in connection with this Agreement.

10.3 No Waiver. The failure of **ISSUER** or the **ESCO** to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either Party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of the **ISSUER** or the **ESCO**.

10.4 Severability. It is agreed that the illegality or invalidity of any term or clause of this Agreement, shall not affect the validity of the remainder of this Agreement and this Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein, **provided that the remaining portions of the agreement shall be construed to effectuate as nearly as possible apparent intent of the term or clause**

10.5 Complete Agreement: Amendments. This Agreement, when executed, together with all Project Documents and Schedules referred to in paragraph 3.3 and any other exhibits or attachments referred to in this Agreement, shall constitute the entire agreement between the Parties and this Agreement may not be amended or modified except by a written agreement signed by the Parties hereto.

10.6 Further Documents. The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

10.7 Applicable Law. This Agreement and the construction and enforceability thereof shall be interpreted under the laws **and solely in the courts of the** State of North Carolina.

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

10.10 Termination for Convenience by the Issuer. Subsequent to the Acceptance Date, this Agreement may be terminated at the sole discretion of the **ISSUER** in accordance with the provisions of this paragraph 10.10.

The **ISSUER** shall provide written notice 30 days in advance **ESCO**. The termination shall become effective on the last day of said guaranty period. The **ESCO's** obligation to report, reconcile and verify the energy savings achieved during the guaranty period proceeding termination remains in full force and effect, as does its obligation, pursuant to paragraph 6.2 of this Agreement, to remit payment to the **ISSUER** in the event that the energy savings have not been achieved at the level guaranteed by the **ESCO**. **If the end of the notice period does not coincide with the end of the annual guaranty period all calculations of payments shall be prorated.**

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

ARTICLE 11: EVENTS OF DEFAULT OR BREACH; TERMINATION; RIGHT TO OFFSET

11.1 If the **ISSUER** considers it to be in its best interests, it may elect not to declare default or to terminate this Agreement in the event of **breach or default** by the **ESCO**. The parties acknowledge that this provision is solely for the benefit of the **ISSUER** and that if the **ISSUER** permits the **ESCO** to continue to perform the Work and other services despite a **breach or default**, the **ESCO** shall in no way be relieved of any of its responsibilities, duties or obligations under this Agreement nor shall the **ISSUER** waive or relinquish any of its rights.

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

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

ARTICLE 12: REPRESENTATIONS AND WARRANTIES

12.1 Each party warrants and represents to the other that:

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

(b) Its execution, delivery, and performance of this Agreement have been duly authorized, executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

(c) It has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

12.2 Representations and Warranties by the Issuer. The **ISSUER** hereby warrants and represents to the **ESCO** that:

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

(b) The **ISSUER** has not entered into any leases, contracts or agreements with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Premises or with regard to maintaining any of the energy related equipment located in the Premises.

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

(a) That it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Agreement;

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

- (c) That it is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Work and perform its obligations hereunder and has sufficient experience and competence to do so;
- (d) That it is authorized to do business in the State of North Carolina and is properly licensed by all necessary governmental and public and quasi-public authorities having jurisdiction over it and over the Work and the Premises;
- (e) That its execution of this Agreement and its performance thereof is within its duly authorized powers; and
- (f) That its duly authorized representative has visited the Premises, familiarized itself with the local conditions under which the Work is to be performed and correlated its observations with the requirements of the Project Documents.

ARTICLE 13: APPLICABLE LAWS

13.1 **ESCO's Failure to Comply with Statutory and Regulatory Requirements.** The **ESCO**, and its subcontractors shall comply with all laws, rules regulations and codes applicable to performance of the Work and the maintenance, monitoring and training services to be performed pursuant to Article 6. Except where expressly required by applicable laws and regulation, the **ISSUER** shall not be responsible for monitoring the **ESCO's** compliance with any laws or regulations. When the **ESCO** observes conflicting regulatory requirements, it shall notify the **ISSUER** in writing immediately. If the **ESCO** performs any of the Work or other services required by this Agreement knowing or having reason to know that the Work or such services are contrary to such laws, rules and regulations, the **ESCO** shall pay all costs arising there from.

ARTICLE 14: RIGHT TO AUDIT.

The **ISSUER** shall have the right to have access to and audit all of the **ESCO's** records, books, correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Agreement. In addition, the **ISSUER** or its authorized representative shall have access to the **ESCO's** facilities and shall be provided adequate and appropriate work space, in order to conduct audits in compliance with this article.

IN WITNESS WHEREOF, the Parties have executed this Energy Services Agreement by their authorized signatures as of this ___ day of _____, 200__.

THE ISSUER : THE ESCO:

BY:_____

BY:_____

Title:_____

Title:_____

ATTACHMENT A

SAMPLE CONSTRUCTION PROCESS PROVISIONS (OPTIONAL)

A.1.1 Description of the Work. The design, procurement, fabrication, installation and commissioning of the ECMs specified in Schedule A and the Training services described in Schedule M, which are integral to the operation of the ECMs, are referred to in this Agreement as the "Work." The maintenance, monitoring, and savings measurement and verification services detailed in Schedules L and F and the any Post-Acceptance Training services detailed in Schedule M, performance of which does not commence until after the Commencement Date, are not part of the Work.

A.1.2 Supervision of the Work. The **ESCO** shall supervise and direct the performance of the Work using its best skill, attention and judgment. The **ESCO** shall be solely responsible for site safety and for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Agreement.

A.1.3 Rejection of the Work by the ISSUER. The **ISSUER** may reject any sequences or procedures proposed by the **ESCO** in connection with the Work which might constitute or create a hazard to the Premises, or to persons or property, or which deviate from the Project Documents or will result in schedule delays or additional costs to the **ISSUER**. This provision shall not be construed to mean that Work which is not rejected is therefore approved.

A.1.4 Responsibility for the Work. The **ESCO** shall not be relieved of its obligations to perform the Work in accordance with the Project Documents by reason of observations or inspections, tests or approvals by any person or entity except as expressly agreed to in writing by an authorized representative of the **ISSUER**.

A.1.5 Coordination of the Work. The **ESCO** shall consult with the personnel designated by the **ISSUER** in order to coordinate the Work, including installation of any ECM, and to provide appropriate training in the operation of any ECM. The **ESCO** shall not permit any act which will interfere with the performance of the **ISSUER's** business activities at the Premises without the prior written approval of the **ISSUER**. The **ESCO** shall consult with the **ISSUER** regarding the coordination of the Work with any other work being performed by other Companies at the Premises.

A.1.6 Sufficient Workforce. The **ESCO** shall furnish a competent and adequate staff as necessary for the proper administration, coordination and supervision of the Work; organize the procurement of all materials and equipment so that they will be available at the time they are needed for the Work; and ensure that an adequate force of skilled workmen are available to complete the Work in accordance with all requirements of this Agreement.

A.1.7 Project Manager. The **ESCO** shall employ a competent project manager who shall be responsible for the coordination of the Work, and who shall be authorized to commit the **ESCO** with regard to manpower, schedule, coordination and cooperation. The project manager shall not have less than two years of documented experience in responsible field supervision for projects of comparable size and complexity. The **ESCO** shall give the **ISSUER** advance written notice if it intends to remove or replace the project manager. In the event the project manager fails to perform its duties under this Agreement the **ESCO** shall provide a competent replacement.

A.1.8 Harm to Structure of the Premises. The **ESCO** shall perform the Work under this Agreement and install the ECMs in such a manner so as not to harm the structural integrity of the Premises or their operating systems, except as specifically described in the Project Documents which have been approved by the **ISSUER**. The **ESCO** shall repair and restore to its condition immediately preceding the performance of the Work, any area of damage caused by its performance under this Agreement which has not been so described in the Project Documents and approved by the **ISSUER**.

A.1.9 Responsibility for Damages. The **ESCO** shall be responsible for all loss or damage to the Work, the Premises, or to improvements or personal property thereon and the work of other Companies caused by the **ESCO's** performance of the Work.

A.1.11 Verification of Dimensions and Existing Conditions. The **ESCO** is responsible for becoming knowledgeable of the conditions of the Premises relating to the performance of the Work and the conditions under which the Work is to be performed, All dimensions and existing conditions have been verified by the **ESCO** during the energy audit conducted at the Premises by actual measurement and observation. All discrepancies between the requirements of the Project Documents and the existing conditions or dimensions shall be reported to the **ISSUER** as soon as they are discovered. Failure to verify and report prior to the commencement of work shall constitute the **ESCO's** acceptance of existing conditions as fit for the proper execution of the Work under this Agreement,

A.1.12 Changed Conditions. Should the **ESCO** encounter subsurface or latent physical conditions at the site which differ materially from those indicated in the Project Documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, the **ESCO** shall give written notice to the **ISSUER** before any such condition is disturbed or further disturbed. No claim of the **ESCO** under this provision will be allowed unless the **ESCO** has given the required notice. The **ISSUER** will promptly investigate and, if it is determined that the conditions materially differ from those which **ESCO** should reasonably have been expected to discover or anticipate, the **ISSUER** may approve such changes in the Project Documents as **are** necessary. If such changed conditions cause an increase or decrease in the **ESCO's** cost or time of performance, the parties may negotiate a mutually acceptable solution.

A.2 The Issuer's Right to Carry Out the Work.

A.2.1 In the event that the **ESCO** neglects or fails to carry out the Work in accordance with this Agreement and the Project Documents, the **ISSUER** may correct such deficiencies after giving twenty (20) business days written notice to the **ESCO** and its surety. This shall be without prejudice to any other remedy the **ISSUER** may have. **ISSUER** may deduct from the payments to be made to the **ESCO** for the Work, pursuant to paragraph 6.1 hereof and of Schedule C, the amount of all costs incurred in correcting deficiencies made necessary by such neglect or failure. If such payments to be made to the **ESCO** are not sufficient to cover such amount, the **ESCO** shall be liable in such amount to the **ISSUER**.

A.2.2 Emergencies. In case of bona fide emergencies as determined by the **ISSUER** involving public health or public safety or to protect against further loss or damage to the **ISSUER's** property or to prevent or minimize serious disruption of **ISSUER** services or to insure the integrity of **ISSUER's** records, the **ISSUER** may cause such Work as is necessary to be performed without prior notice to the **ESCO** or its surety.

A.2.3 Right to Reject or Stop the Work. The **ISSUER** may reject any of the Work which does not conform to the Project Documents. If the **ESCO** fails to correct defective Work or fails to supply labor, materials or equipment in accordance with the Project Documents or to execute the Work in a workmanlike manner, the **ISSUER** may order the **ESCO** to stop the Work, or any portion thereof, until the cause for such order has been eliminated.

A.2.4 Right to Terminate the ESCO's Performance of the Work. If the **ESCO** fails or refuses to prosecute the Work with such diligence as to allow completion of the Work substantially in accordance with the Project Installation Schedule, or commits a material breach of any other provision of this Agreement or the Project Documents, and provided that such breach continues for thirty (30) days after written notice to the **ESCO** demanding that such breach be cured or if cure cannot be effected in such thirty (30) days, **ESCO's** failure to propose and commence a cure acceptable to the **ISSUER** within such thirty (30) days, the **ISSUER** may terminate the **ESCO's** right to proceed with the Work as specified herein. In no event shall the **ISSUER** have any obligation to compensate the **ESCO** for delays arising pursuant to the **ESCO's** failure or refusal to complete the Work and damages arising in connection therewith.

In such case, the **ISSUER** will give the **ESCO** and its surety written notice of intention to terminate the **ESCO's** right to complete the Work and the reason therefore and, unless within seven (7) business

days the delay or violation shall cease or a cure acceptable to the **ISSUER** for correcting the situation is proposed, the **ISSUER** may issue a termination notice to such effect for the **ESCO** and its surety. Thereupon, the surety will be given the opportunity to complete the Work in accordance with the Project Documents. Such completion may include, but not be limited to, the use of a completing **ESCO**, satisfactory to the **ISSUER**, pursuant to a written takeover agreement, the payment of a sum of money required to allow the **ISSUER** to complete the Work, or other arrangements agreed to by the **ISSUER** and the surety.

If within seven (7) business days following the issuance of the termination notice, the surety fails to notify the **ISSUER** that it intends to exercise its right to undertake the Work, the **ISSUER** may take over the Work, exclude the **ESCO** from the Premises and take possession of all of the **ESCO's** tools, appliances, equipment and machinery at the Premises and use the same to the full extent they could have been used by the **ESCO** (without liability for trespass or conversion), incorporate into the Work all materials and equipment stored at the Premises and finish the Work as the **ISSUER** may deem expedient.

In the event the **ISSUER** terminates the **ESCO's** right to complete the Work under this paragraph A.2(d), the **ESCO** shall not be entitled to receive further payments until a Certificate of Acceptance has been delivered pursuant to paragraph 5.3 hereof specifying the amount, if any, payable to the **ESCO** pursuant. If the **ISSUER's** expenses in completing the Work exceed the **ESCO's** Compensation for the Work, the **ESCO** shall pay the difference to the **ISSUER** upon demand therefore.

Provided further, that a Certificate of Acceptance directing payment to the **ESCO** for any portion of the Work be issued only if the notification required pursuant to Article 7 has been delivered by the **ESCO**. If the **ESCO** is not able to deliver such notification, the **ISSUER** shall not execute and deliver a Certificate of Acceptance and may terminate this Agreement in accordance with the provisions of Article 11 and may pursue any and all remedies provided therein.

A.3 Permits and Approvals. The **ESCO** shall obtain and pay for all necessary permits and approvals for the design, installation and operation of the ECMs. The **ISSUER** shall exercise its best efforts to assist the **ESCO**. The ECMs and the operation of the ECMs by the **ESCO** shall at all times conform to all applicable codes.

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

If the **ESCO** observes that any of the Project Documents are at variance with permits or licenses granted, or laws, ordinances, codes, rules or regulations of governmental authorities, the **ESCO** shall promptly notify the **ISSUER** in writing and shall make any necessary changes, subject to the approval thereof by the **ISSUER** in accordance with the terms of this Agreement. If the **ESCO** performs any Work which is contrary to any permit or license granted, or any applicable laws, ordinances, codes, rules or regulations, the **ESCO** shall make changes as required to comply therewith and shall bear all costs arising therefrom.

A.4 Royalties and Patents. The **ESCO** shall pay all royalties and license fees due to third parties in connection with the Work.

A.5 Project Schedule. The **ESCO** shall consult with the **ISSUER** concerning the development of a detailed Project Installation Schedule and, recognizing that time is of the essence of this Agreement, shall perform the Work in such manner and with such sufficient equipment and forces to complete the Work in accordance with Schedule G.

A.6 Subcontracts and Subcontractors. The **ESCO** shall have the right to have any of the services to be provided by the **ESCO** under this Agreement accomplished by subcontractors pursuant to written subcontracts between the **ESCO** and such subcontractors.

The **ESCO** shall, upon entering into any agreement with a subcontractor, furnish the **ISSUER** with an executed copy thereof. All subcontracts shall be subject to, consistent with, and in conformance with all applicable State and federal laws, rules, regulations and codes, and shall contain provisions that require all services to be performed in strict accordance with the requirements of this Agreement and shall provide that the

subcontractors are subject to all the terms of this Agreement. Provided that such agreements do not prejudice any of the **ISSUER**'s rights under this Agreement, such agreements may contain different provisions than are provided herein with respect to extensions of schedule, time of completion, payments, guarantees and matters not affecting the quality of the Work.

The **ESCO** shall not grant or allow to exist any lien or security interest for labor or material or otherwise on the ECMs, the Premises or any other property owned by the **ISSUER**.

A.7 Interim Savings; and Utility Rebates.

- (a) Interim Savings. Interim Savings as defined in Article 4 belong to the **ISSUER**.
- (c) Utility Rebates. Utility rebates secured or obtained due to the installation of the ECMs at the Premises belong to the **ISSUER**.

A.8 Hazardous Materials.

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

(b) In the event that the **ESCO** or any of its subcontractors encounters any hazardous substance or material covered by the Act in the performance of the Work, the existence of which has not previously been disclosed to the **ESCO** by the **ISSUER**. The **ESCO** shall, before disturbing such materials, immediately notify the **ISSUER** of the location thereof. The **ESCO** shall advise the **ISSUER** as to whether it is feasible to re-route the Work as to avoid such materials. If such re-routing is reasonably feasible, the **ESCO** shall do so without additional compensation hereunder.

If such re-routing or avoidance is not reasonably feasible in the judgment of the **ISSUER** and such material must be disturbed or relocated to complete the Work, and if (i) removal or containment of the hazardous substance or material cannot be effectuated without a cessation of the Work; or (ii) applicable law, rule or regulation requires cessation of the Work, or (iii) continuation of the Work exposes any person to a substantial risk, the **ESCO** may suspend its performance of the Work without penalty until the substance or material is removed or contained by the **ISSUER**.

(c) The following options are available to the **ISSUER** in the event that undisclosed hazardous materials are encountered in the performance of the Work by the **ESCO** or its subcontractors:

- (i) If feasible, the **ISSUER** may direct the **ESCO** to modify the scope of the Work to eliminate portions of the Work affected by the undisclosed hazardous substance or material.
- (ii) The **ISSUER** may terminate this Agreement upon payment to the **ESCO** of the amount due for services or materials and equipment supplied by the **ESCO** prior to suspension of the Work, including damages caused by the delay as prescribed by the Act. Provided, however, that the **ISSUER** shall not be liable for damages or other costs or expenses incurred by the **ESCO** if the existence of the hazardous substance or material was disclosed to the **ESCO** by the **ISSUER** or, if as a result of the **ESCO**'s review of the Project Documents, including any Asbestos Management Plan developed for the Premises and its investigation of the Premises, the **ESCO** should reasonably have been expected to discover or anticipate the existence of the hazardous substance or material and the **ESCO** could have developed the scope of the Work in such a manner as to avoid said hazardous substance or material.

(d) The **ESCO** and the **ISSUER** agree that any work relating to (i) asbestos, material containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, or (ii) pollutants, hazardous wastes, hazardous materials, contaminants (collectively "Hazardous Materials") or the storage, handling, use, transportation, treatment or the disposal, discharge, leakage, detection removal or containment thereof which is not specifically provided for in this Agreement, is the responsibility of the **ISSUER**. Notwithstanding the foregoing, the **ESCO** will utilize due diligence in order to determine whether the Work will require the removal of PCB ballasts and whether asbestos is likely to be encountered in the performance of the Work. **ESCO** shall provide the **ISSUER** with an estimate for the cost of removal and disposition of PCB ballasts and asbestos it expects may be encountered in the performance of the Work and shall allow for an amount equal to the estimated cost of removal and disposal in the Guaranteed Savings detailed in Schedule C.

If an Asbestos Management Plan has been developed for the Premises, the **ISSUER** shall make said plan available for the **ESCO's** review and inspection throughout the Interim Period.

A.9 Material and Workmanship.

(a) The **ESCO** shall ensure that all materials used by the **ESCO** and its subcontractors and workmanship performed or caused to be performed by the **ESCO** in connection with the Work meets or exceeds all applicable codes and is performed in a workmanlike manner. Where conflicts exist between applicable codes, the more stringent provision shall apply;

(b) The **ESCO** shall ensure that all equipment and materials to be used in the Work for which Underwriters Laboratory labeling services is provided shall be UL labeled;

(c) The **ESCO** shall obey the following list of codes where applicable:

- 1) Applicable construction and electrical code;
- 2) Underwriters Laboratories (UL);
- 3) Insulated Power Cable Engineers Association (IPCEA);
- 4) National Electrical Code (NEC);
- 5) National Electrical Manufacturers Association (NEMA);
- 6) American National Standards Institute (ANSI); and
- 7) Institute of Electrical and Electronic Engineers (IEEE).

d.) The **ESCO** shall be responsible, **at its sole cost**, for the disposal of all equipment and materials removed or replaced through its performance of the Work in accordance with all applicable laws and regulations regarding such disposal, except those items designated by the **ISSUER** as nondisposable. The cost of disposal to be performed by the **ESCO** is included in the **ESCO** compensation for the Work set forth in Schedule D.

A.10 Warranty of Materials. The **ESCO** warrants that all materials and equipment installed as part of the Work will be new unless otherwise specified, and that all work will be of good quality, free from faults and defects and in conformance with the Project Documents. All work not so conforming to these requirements may be considered defective. If required by the **ISSUER** the **ESCO** shall furnish satisfactory evidence as to the kind and quality of materials and equipment. This warranty is not limited by the provisions of paragraph 8.1 below. This warranty of materials, equipment and workmanship is separate from, independent of, and in addition to any other guarantees in this Agreement or any other warranties in this Agreement or required by the Project Documents.

A.11 Responsibility for Materials. The **ISSUER** does not assume any responsibility for the availability of any controlled materials or other materials and equipment required for the Work. However, **ISSUER** reserves the right to review and approve the quality and standards for all materials. The **ESCO** shall be responsible for the contracted quality and standards of all materials, components or completed Work furnished by the **ESCO** pursuant to the terms hereof. Materials, components or completed Work which fails to comply with this Agreement and the Project Documents may be rejected by the **ISSUER** and shall be replaced by the **ESCO** at no

cost to the **ISSUER**. The **ESCO** shall remove from the Premises within a reasonable time any materials or components so rejected at the entire expense of the **ESCO**, after written notice has been delivered by the **ISSUER** to the **ESCO** that such materials or components have been rejected. \

A.12 Inspections.

(a) All materials and equipment and each part of the detail of the Work shall be subject at all times to inspection by the **ISSUER** or its designated representatives or consultants, and the **ESCO** will be held strictly to the true intent of this Agreement and the Project Documents with regard to quality of materials, workmanship, and the diligent execution of the Work.

(b) The **ESCO** shall allow the **ISSUER** access to all parts of the Work, and shall furnish such information and assistance as is required to make a complete and detailed inspection or inspections.

(c) All material and equipment installed as part of the Work must be inspected, tested and approved in accordance with the Project Documents and this Agreement prior to its use.

(d) The **ESCO** shall, if the **ISSUER** requests, remove or uncover such portions of the finished Work as the **ISSUER** may direct. After the examination, the **ESCO** shall restore said portion of the Work to the standard required by this Agreement and the Project Documents. If the Work thus exposed or examined proves acceptable, the expenses of uncovering or removing and the replacing of the parts removed shall be the responsibility of the **ISSUER** and such uncovering, removing and replacing shall be deemed to be an excusable event of delay, if a delay in completion is caused thereby. If the Work so exposed or examined has not been performed in accordance with the Project Documents, the expense of uncovering, removing and replacing any portion of the Work necessary to comply with this Agreement and the Project Documents shall be borne by the **ESCO** and requests for a time extension or claims for delay will not be granted.

(e) Upon written request by the **ESCO**, the **ISSUER** shall schedule preliminary inspections of the Work as soon as practicable after notification by the **ESCO** that major ECMs or systems are substantially installed. If such Work is not acceptable to the **ISSUER** at the time of such preliminary inspections, the **ESCO** will be provided written notice as to the particular defects to be remedied before the Work will be accepted. The date such Work is approved by the **ISSUER**, shall be the date of beneficial use to the **ISSUER** for the applicable ECM, relative to the commencement of the warranty period set forth in Schedule R for such ECM.

Notwithstanding the foregoing, the Certificate of Acceptance shall not be executed until a final inspection has been performed.

A.13 Project Meetings. The **ESCO** shall provide for regularly scheduled project meetings in the Project Installation Schedule, and shall give timely advance written notice and agenda of such meetings to the **ISSUER**. The **ESCO** shall record minutes and distribute copies of minutes of meetings to the **ISSUER** within five (5) business days after each meeting. The **ESCO** shall schedule additional project meetings if requested by the **ISSUER**.