STATE OF COLORADO

OFFICE OF THE STATE ARCHITECT

COLORADO ENERGY OFFICE

**ENERGY PERFORMANCE CONTRACT**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| State Agency  Insert Department's or IHE's Full Legal Name | | | Contract Number  Insert CMS number or Other Contract Number | |
| Contractor / Energy Service Company  Insert Contractor's Full Legal Name, including "Inc.", "LLC", etc... | | | Contract Performance Beginning Date  The later of the Effective Date or Month Day, Year | |
| Contract Maximum Amount  Initial Term | | | Initial Contract Expiration Date  Month Day, Year | |
| State Fiscal Year 20xx | | $0.00 | |  |
| Extension Terms | | | Contract Authority  Insert Brief Description of the Authority to enter into the Contract | |
| State Fiscal Year 20xx | $0.00 | |  | |
| State Fiscal Year 20xx | $0.00 | |
| State Fiscal Year 20xx | $0.00 | |
| State Fiscal Year 20xx | $0.00 | |
| Total for All State Fiscal Years | $0.00 | |  | |
| Contract Purpose  Briefly describe the Contract's purpose | | | | |
| Exhibits and Order of Precedence  The following Exhibits and attachments are included with this Contract:  Refer to Article 25, list of Schedules  In the event of a conflict or inconsistency between this Contract and any Exhibit or attachment, such conflict or inconsistency shall be resolved by reference to the documents in the following order of priority:   1. Colorado Special Provisions in §52 of Schedule A, EPC General Conditions. 2. The provisions of the other sections of the main body of this Contract. 3. Schedule A, Energy Performance Contract General Conditions and any Supplement General Conditions. 4. Schedule B, Statement of Work. 5. Article 25 Schedules not listed above | | | | |
| Principal Representatives | | | | |
| For the State: | | | For Contractor: | |
| Name | | | Name | |
| Department Name | | | Company Name | |
| Address | | | Address | |
| Address | | | Address | |
| City, State Zip | | | City, State Zip | |
| Email | | | Email | |

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SIGNATURE PAGE

THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

Each person signing this Contract represents and warrants that he or she is duly authorized to execute this Contract and to bind the Party **authorizing** his or her signature.

|  |  |
| --- | --- |
| **CONTRACTOR**  INSERT-Legal Name of Grantee  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  By: Name & Title of Person Signing for Contractor  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | **STATE OF COLORADO**  Jared S. Polis, Governor  INSERT-Name of Agency or IHE  INSERT-Name & Title of Head of Agency or IHE  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  By: Name & Title of Person Signing for Agency or IHE  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| **DEPARTMENT OF PERSONNEL & ADMINISTRATION**  STATE BUILDINGS PROGRAM State Architect  (or authorized delegate)  \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  By: Name & Title of SBP Delegate  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | **LEGAL REVIEW**  Philip J. Weiser, Attorney General  By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Assistant Attorney General  Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| In accordance with §24-30-202, C.R.S., this Agreement is not valid until signed and dated below by the State Controller (or an authorized delegate) or the Title of IHE CFO per the Fiscal Rules of the individual Institution of Higher Education  **STATE CONTROLLER**  **Robert Jaros, CPA, MBA, JD**  By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Name of Agency or IHE Delegate-Please delete if contract will be routed to OSC for approval  Effective Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | |

# PARTIES

This Energy Performance Contract (hereinafter called “Contract” or “EPC”) is entered into by and between Energy Service Company, (Insert Vendor Name) (hereinafter called “Contractor”), and the STATE OF COLORADO acting by and through the (Insert Dept or IHE name) (hereinafter called the “Principal Representative” or the “State”).

# RECITALS

### **WHEREAS**, the State Personnel Director or the State Personnel Director’s designee has authorized the Principal Representative to enter into a contract for the design and implementation of energy analysis and recommendations pertaining to measures that would significantly increase Utility Cost Savings, Operations and Maintenance Cost Savings, and Vehicle Fleet Operational and Fuel Cost Savings, pursuant to **§24-30-2002 C.R.S.**; and

### **WHEREAS**, Contractor or other entity and the Principal Representative entered into a certain Investment Grade Audit (IGA) Contract effective \_\_\_\_\_\_\_\_\_ pursuant to **§24-30-2002 C.R.S.**, whereby Contractor or other entity provided an analysis and recommendations in the form of an IGA Report and an Energy Performance Contract Project Proposal. Such report and project proposal provided; estimates of the amounts by which Utility Cost Savings and Operation and Maintenance Cost Savings would increase and estimates of all costs of such Utility Cost-Savings Measures or Energy-Savings Measures, including, but not limited to, itemized costs of design, engineering, equipment, materials, installation, maintenance, repairs, and debt service; or estimates of the amounts by which Vehicle Fleet Operational and Fuel Cost Savings would increase and estimates of all costs of such Vehicle Fleet Operational and Fuel Cost-Savings Measures, set forth in **§24-30-2002(3) C.R.S.**; and

### **WHEREAS**, Contractor or other entity was selected by the Principal Representative as the party to analyze and recommend measures to significantly increase utility cost, operation and maintenance cost, and vehicle fleet operational and fuel cost savings, through an IGA, pursuant to competitive negotiations under **§24-30-1401 C.R.S.** and as authorized by **§24-30-2002(2) C.R.S.**; and

### **WHEREAS**, The Colorado Department of Personnel and Administration State Personnel Director or designee has approved Contractor’s or other entity’s energy analyses and recommendations in the IGA, pursuant to criteria contained in procedures approved by its Executive Director set forth in **§24-30-2003 C.R.S.** on (*enter date*); and

### **WHEREAS**, The Utility analysis and recommendations provided by Contractor or other entity pursuant to the IGA indicate that the expected annual payments by the Principal Representative required under this Contract, or as required in a contract with the Principal Representative and any Third-Party Lessor, which payments shall include any annual maintenance costs, for the implementation of one or more Utility Cost- Savings Measures is required to be equal to or less than the sum of the Utility Cost Savings and Operation and Maintenance Cost Savings achieved by the implementation of such Utility Cost-Savings Measures on an annual basis; and

### **WHEREAS**, Contractor or other entity and the Principal Representative have reviewed the Energy Performance Contract Project Proposal, which was derived from the IGA Report, and created a finalized EPC Description of Work (**Schedule B**) and that all the necessary information has been incorporated into the appropriate EPC schedules to complete the Work; and

### **WHEREAS**, Contractor is either (i) the same entity that performed the IGA and is therefore exempt from any State competitive bidding or procurement provisions, pursuant to **§24-30-2003(2) (b) C.R.S.**, or (ii) not the same entity that performed the IGA and was selected for performance of this Contract pursuant to the negotiation requirements described **§24-30-1401, et seq., C.R.S.** and any other applicable State competitive bidding or procurement provisions; and

### **WHEREAS**, authority exists in the law, funds have been budgeted, appropriated and otherwise made available for the purposes set forth in this Contract and a sufficient unencumbered balance thereof remains available for payment, and required approval, clearance, and coordination has been accomplished from and with appropriate agencies.

### **NOW, THEREFORE**: in consideration of the premises and mutual agreements and covenants hereinafter set forth, and intending to be legally bound, the Principal Representative and Contractor hereby agree to the terms and conditions in this Contract.

# EFFECTIVE DATE AND NOTICE OF NON-LIABILITY

This Contract shall not be effective or enforceable until it is approved and signed by the Colorado State Controller or designee (hereinafter called the “Effective Date”). The Principal Representative shall not be liable to pay or reimburse Contractor for any performance hereunder including, but not limited to, costs or expenses incurred, or be bound by any provision hereof prior to the Effective Date, except that the Principle Representative may make any payments for work that was completed under a properly executed contract for an investment grade audit that are to be paid under this contract in accordance with the terms of the investment grade audit contract.

All references in this Contract to “article”, “section” whether spelled out or using the **§** symbol, exhibits or other attachments, are references to Articles, sections, subsections, exhibits or other attachments contained herein or incorporated as a part hereof, unless otherwise noted.

# DEFINITIONS

The following terms as used herein shall be construed and interpreted as follows:

## Adjusted-Baseline Energy

“Adjusted-Baseline Energy” means the energy use of the baseline period, adjusted to a different set of operating conditions.

## American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE)

“American Society of Heating, Refrigeration, and Air Conditioning Engineers” or “ASHRAE” means the recognized professional organization with standards and guidelines that may be referenced for additional definitions, procedures, and technical information as necessary in this Contract’s Scope of Work and the IGA Contract and Exhibits.

## Baseline Energy

“Baseline Energy” means the energy use (units) occurring during the Baseline Period without adjustments.

## Baseline Period

“Baseline Period” means the period of time chosen to represent operation of the facility or system before implementation of an ECM or any applicable FIM. This Baseline Period may be as short as the time required for an instantaneous measurement of a constant quantity, or long enough to reflect one full operating cycle of a system or facility with variable operations.

## Baseline

“Baseline” means and pertains to the Baseline Period.

## Business Day

“Business Day” means any day in which the State is open and conducting business, but shall not include Saturday, Sunday or any day on which the State observes one of the holidays listed in **§24-11-101(1) C.R.S.**

## Colorado Open Records Act (CORA)

“CORA” means the Colorado Open Records Act, **§§24-72-200.1** **et seq, C.R.S.**

## Commissioning

“Commissioning” means a process for achieving, verifying and documenting the performance of equipment to meet the operational needs of the facility within the capabilities of the design, and to meet the design documentation and the principal representative's functional criteria, including preparation of operating personnel. Retro-commissioning is the application of the Commissioning process to existing buildings.

## Compensation

“Compensation” means the funds payable to Contractor by the Principal Representative related to the performance of Contractor’s obligations hereunder, including, but not limited to, the Project and the M&V Services.

## Contingency Funds

“Contingency Funds”, if applicable, shall mean Principal Representative funds not included in the Fixed Limit of Design and Construction Cost and set aside for the Principal Representative to release to Contractor, any Principal Representation contractor through a Separate Contract (**Schedule A, Article 18**), or any Third-Party Lessor. Contingency Funds could be used in the event of construction cost budget overage, if the Principal Representative desires to add to, or change the Contractor’s Scope of Work, hire a contractor for special services (example-environmental remediation), or reduce the Principal Representative’s obligation to any Third-Party Lessor, pursuant to **§6(C)** and **§6(J)**.

## Construction Commencement Date

“Construction Commencement Date” means the date the Principal Representative issues a written Notice to Proceed to Commence Construction Phase form.

## Construction Documents

“Construction Documents” means the documents set forth in **§6(A)**.

## Construction Term

“Construction Term” means the period of time in which Contractor shall complete the Project, pursuant to **§6(F)**.

## Contract Documents

“Contract Documents” means this Contract; the Exhibits; the Schedules; and the Construction Documents. **§25** and **§26**, respectively, list the Exhibits and Schedules attached hereto and incorporated by reference herein.

## Contractor’s Intellectual Property

“Contractor’s Intellectual Property” means any formulas, patterns, devices, secret inventions or processes, copyrights, patents, or other intellectual property purchased, licensed or developed by Contractor prior to or outside of this Contract or purchased, licensed or developed by Contractor or its Subcontractors as a tool for their use in performing the Services, plus any modifications or enhancements thereto and derivative works based thereon.

## Contract Term

“Contract Term” means the definition set forth in **§2(B)**.

## Cost-Weighted Average Service Life

“Cost-Weighted Average Service Life” is the calculation based upon each ECM cost (excluding the audit cost and owner’s contingency) and associated service life (ASHRAE Handbook - HVAC Applications or other approved source), relative to the total cost of all ECMs. The formula is the sum of each individual ECM cost multiplied by the service life of each ECM divided by the total cost. Cost-Weighted Average Service Life = ∑ ECM cost x ECM service life ÷ total cost of all ECMs.

## C.R.S.

“C.R.S.” means the Colorado Revised Statutes, as amended.

## Deliverable

“Deliverable” means any document, material, data, information, specification, software, Work Product, or other deliverable that results from or is provided through the Services or that Contractor is required to deliver to the Principal Representative under this Contract, the Exhibits, Schedules or other document or report which is required to be delivered by Contractor to the Principal Representative pursuant to this Contract and is created after the Effective Date.

## Design Documents

“Design Documents” or “DDs” means documents supplied by Contractor consisting of drawings, specifications, and other documents that fix and describe the size and character of the entire Project as to architectural, structural, mechanical, and electrical systems, materials, and such other elements as may be appropriate, and include design plans and documentation for each ECM that may become part of the Project, and as further described in **§5(C)**.

## Energy

“Energy” means electricity (both usage and demand), natural gas, steam, water (potable or non-potable), or any other Utility charged service.

## Energy Conservation Measure

“Energy Conservation Measure” or “ECM” means an Energy Cost-Savings Measure as defined in **24-30-2001(1.3) C.R.S**. An ECM is an activity or set of activities designed to increase the efficiency (energy, water, or other utility) of a facility, system or piece of equipment. ECMs may also conserve energy without changing efficiency. An ECM may involve one or more of: physical changes to facility equipment, revisions to operating and maintenance procedures, software changes, or new means of training or managing users of the space or operations and maintenance staff. An ECM may be applied as a retrofit to an existing system or facility, or as a modification to a design before construction of a new system or facility. An ECM is a Utility Cost-Savings Measure as defined below.

## Energy Cost-Savings Contract

“Energy Cost-Savings Contract” means a Utility Cost-Savings Contract or a Vehicle Fleet Operational and Fuel Cost-Savings Contract **24-30-2001(1) C.R.S.**

## Energy Cost-Savings Measure

"Energy Cost-Savings Measure" means a Utility Cost-Savings Measure or a Vehicle Fleet Operational and Fuel Cost-Savings Measure **24-30-2001(1.3) C.R.S.**

## Energy Management Program

“Energy Management Program” or “EMP” means a program within the Office of the State Architect (OSA). It shall refer to the division of the executive department of State government responsible for the “High Performance Certification Program” and the “Energy Performance Contract Program.” The abbreviation EMP is used to indicate OSA forms that have been modified for and are only applicable in an Energy Performance Contract.

## Energy Performance Contract

“Energy Performance Contract” or (EPC) as defined in **24-30-2001(1.5) C.R.S.,** is a contract for evaluations, recommendations, or implementation of one or more Utility Cost-Savings Measures designed to produce Utility Cost Savings, Operation and Maintenance Cost Savings, or Vehicle Fleet Operation and Fuel Cost- Savings, which:

1. Sets forth savings attributable to calculated Utility Cost-Savings or Operation and Maintenance Cost Savings for each year during the Contract Term:
2. Provides that the amount of actual savings for each year during the Contract Term shall exceed annual contract payments, including maintenance costs, to be made during such year by the State agency contracting for the Energy Cost-Savings Measures. Except that, "annual contract payments" does not include moneys received by the State from rebates, gifts, grants, or donations specifically designated by the gifting, granting, or donating party for the design or implementation of an Energy Cost-Savings Measure or State moneys that have been specifically appropriated in a distinct line item, or, in the case of the department of transportation, otherwise set aside in the department's budget, for the design or implementation of an energy cost-savings measure that is wholly addressed within the scope of the Energy Cost-Savings Contract;
3. Requires the party entering into the Energy Performance Contract with the State to provide a written guarantee that the sum of Utility Cost-Savings and Operation and Maintenance Cost Savings for each year during the first three years of the Contract period shall not be less than the calculated savings for that year.
4. Requires payments by a state agency to be made within twelve years after the date of the execution of the contract; except that the maximum term of the payments shall be less than the Cost-Weighted Average Useful (*Service*) Life of energy cost-savings equipment for which the contract is made, not to exceed twenty-five years.

## Energy Service Company

“Energy Service Company” or “ESCO” means the energy service company entity entering into a contract to design and construct the Project with the State of Colorado acting by and through the Principal Representative. The Energy Service Company may also be referred to as “Contractor” in this Contract or in related schedules, exhibits, attachments, contract modification or procedural documents. The Energy Service Company may be the Architect/Engineer for the Energy Conservation Measures or may contract out these professional services with approval by the Principal Representative. If the Energy Conservation Measure does not require the professional services of an Architect/Engineer as approved by the Principal Representative following their requirements to the State Buildings Program, then the Energy Service Company shall have the authority of the Architect/Engineer on such Energy Conservation Measures. The Energy Service Company is responsible for the Measurement and Verification of the Guarantee through the M&V Term.

## Equipment

“Equipment” means the equipment, systems and associated services set forth on **Schedule B**, together and with any and all includes all replacements, repairs, restorations, Modifications and improvements of or to such Equipment.

## Escrow Agreement

“Escrow Agreement” means the escrow agreement executed by the State, Lessor, and the Escrow Fund Custodian, pursuant to which the Escrow Fund will be established and administered.

## Escrow Fund

“Escrow Fund” means the fund established under the Escrow Agreement.

## Escrow Fund Custodian

“Escrow Fund Custodian” is indicated in **§3D.**

## Evaluation

“Evaluation” means the process of examining Contractor’s Work and rating such Contractor’s Work based on criteria established in this Contract.

## Excluded Materials and Activities

“Excluded Materials and Activities” means asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, pollutants, hazardous wastes, hazardous materials, or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof.

## Facility

"Facility" means a state-owned building or utility. "Facility" does not include highways or publicly assisted housing projects, **§24-30-1301(8), C.R.S.**

## Facility Improvement Measure

“Facility Improvement Measure” or “FIMS” is an activity or set of activities designed to improve the functional or operational conditions of a facility, system or piece of equipment. A FIM may be an activity associated with an Energy Cost-Savings Measure and funded as part of an EPC. A FIM may be an activity request by the Principal Representative, but is not an Energy Cost-Savings Measure, but funds have been budgeted, appropriated and otherwise made available to be included in an EPC. Within this Contract, FIMs and ECMs shall be interchangeable as necessary.

## Federal Energy Management Program (FEMP) Measurement & Verification Guidelines

“Federal Energy Management Program (“FEMP”) M&V Guidelines” means the current M&V Guidelines prepared by the U.S. Department of Energy. The FEMP M&V Guidelines contains specific procedures for applying concepts originating in the IPMVP. The FEMP M&V Guideline represents a specific application of the IPMVP to EPC projects. It outlines procedures for determining M&V approaches, evaluating M&V plans and reports, and establishing the basis of payment for energy savings during the contract. These procedures are intended to be fully compatible and consistent with the IPMVP.

## Finance Agreement Term

“Finance Agreement Term” means the original term and all renewal terms of any Lease-Purchase Agreement or any other Principal Representative financing agreement.

## Fixed Limit of Design and Construction Cost

“Fixed Limit of Design and Construction Cost” or “FLDCC” means the total amount to be paid by the Principal Representative or any Third-Party Lessor to Contractor for Contractor’s satisfactory performance, construction, and installation of all elements of the Work, which shall include, but not be limited to, costs and expenses, permits, performance bonds, materials, labor, auditing, IGA, design, engineering, project construction management costs, commissioning, training, profit, travel expenses, communications, code work, including review, inspection, and compliance unless otherwise noted, acquisition and installation of Equipment. The Fixed Limit of Design and Construction Cost is included as a part of the MCP and all costs comprising the Fixed Limit of Design and Construction Cost shall be identified in **Schedule F**, which shall be executed after this Contract is effective. The Fixed Limit of Design and Construction Cost does not include any Contingency Funds or the M&V Fee.

## Guarantee

“Guarantee” means Contractor hereby warrants and guarantees that for each year of the Guarantee Period, the Project shall result in annual cost savings equal to or greater than the Guaranteed Annual Cost Savings presented in **Schedule C** which shall be equal to or greater than the Principal Representative’s annual payments used to repay the project funding. Failure to meet the Guaranteed Annual Cost Savings in any year during the Guarantee Period shall result in Contractor directly remunerating the Principal Representative the dollar amount equal to the cost value of that year’s Guaranteed Annual Cost Savings shortfall. Alternatively, subject to the Principal Representative’s consent, which shall not be unreasonably withheld, Contractor may implement additional ECMs, at no cost to the Principal Representative, which may generate additional annual cost savings in future years of the Performance Period to offset future Guaranteed Annual Cost Savings shortfall.

## Guarantee Period

“Guarantee Period” means a period of time commencing upon M&V Commencement Date and terminating on the termination of the M&V Term. The Guarantee Period is a mutually agreed to time period after the M&V Commencement Date, during which Guaranteed Annual Cost Savings resulting from the Project are measured and verified by the Contractor set forth in **Schedule D**.

## Guaranteed Annual Cost Savings

“Guaranteed Annual Cost Savings” means measurable and verifiable aggregate of Guaranteed Annual Utility Cost Savings, Guaranteed Annual Operations and Maintenance Cost Savings, and Annual Vehicle Fleet Operational and Fuel Cost Savings guaranteed by Contractor resulting from the Project that shall occur for each year of the Guarantee Period pursuant to **Schedule C**. Guaranteed Annual Utility Cost Savings shall be determined by Contractor’s Measurement and Verification of annual utility unit use reductions and the application of mutually agreed to baseline and escalated utility unit costs for each year of the Guarantee Period as defined in **Schedule C**.

## Guaranteed Annual Operations and Maintenance Cost Savings

“Guaranteed Annual Operations and Maintenance Cost Savings” means annual cost savings resulting from a verifiable reduction in the Agency’s operation and maintenance budget.

## Guaranteed Annual Utility Cost Savings

“Guaranteed Annual Utility Cost Savings” means annual Utility Cost Savings resulting from a reduction of usage and the application of the mutually agreed to baseline and escalated utility unit rates as presented in **Schedule C**.

## Guaranteed Annual Vehicle Fleet Operational and Fuel Cost Savings

“Guaranteed Annual Vehicle Fleet Operational and Fuel Cost Savings” means measureable and verifiable annual cost savings resulting from the reduction of vehicle operations and maintenance costs.

## Incident

“Incident” means any accidental or deliberate event that results in or constitutes an imminent threat of the unauthorized access, loss, disclosure, modification, disruption, or destruction of any communications or information resources of the State, which are included as part of the Work, as described in §§24-37.5-401, et. seq., C.R.S. Incidents include, without limitation, (i) successful attempts to gain unauthorized access to a State system or State information regardless of where such information is located; (ii) unwanted disruption or denial of service; (iii) the unauthorized use of a State system for the processing or storage of data; or (iv) changes to State system hardware, firmware, or software characteristics without the State’s knowledge, instruction, or consent.

## International Performance Measurement and Verification Protocol

“International Performance Measurement and Verification Protocol” or “IPMVP” means the current document prepared by the Efficiency Valuation Organization on the Effective Date of the IGA contract, as the industry standard for current best practice techniques available for verifying results of energy efficiency, water efficiency, and renewable energy projects associated with the Investment Grade Audit Report and Energy Performance Contract Project Proposal.

## Investment Grade Audit

“Investment Grade Audit” or “IGA” means a detailed audit of Principal Representative facilities, including the Premises, conducted by Contractor or another party pursuant to the IGA Contract, pursuant to **§24-30-2002 C.R.S.**, which serves as the basis for this Energy Performance Contract.

## Investment Grade Audit Contract

“Investment Grade Audit Contract” means that certain contract between Contractor or another party and the Principal Representative and entered into pursuant to **§24-20-2002 C.R.S.**, and pursuant to which Contractor or another party conducted the IGA.

## kW

“kW” means “Kilowatt” (abbreviation)

## kWh

“kWh” means “Kilowatt-hour” (abbreviation)

## Lease-Purchase Agreement

“Lease-Purchase Agreement” means any lease-purchase financing agreement entered into by the Principal Representative and a Third-Party Lessor for the financing of the ECMs as a result of Contractor’s work pursuant to this Contract, and is authorized pursuant to **§24-30-2003 C.R.S.**.

## Material Change

“Material Change” means any change or cumulative changes in or to the Premises, whether structural, operational or otherwise in nature as determined by the Principal Representative and Contractor, to increase or decrease annual energy or water consumption in accordance with the provisions and procedures set forth in **Schedule B** and is correlated with such change in energy or water usage, and as described in **§17**.

## Maximum Contract Price

“Maximum Contract Price” or “MCP” means the maximum amount of total allowable costs under this Contract, as set forth in **§4(A),** which shall be the total amount paid by the Principal Representative, or Third-Party Lessor on behalf of the Principal Representative, to Contractor, and which shall include, but not be limited to, the Fixed Limit of Design and Construction Cost, the Measurement and Verification Fee, and any Contingency Funds. It is the maximum amount payable to Contractor pursuant to this Contract.

## Measurement and Verification

“Measurement and Verification” or “M&V” means the process of using measurements to reliably determine and verify the actual savings created within buildings, infrastructure, or systems resulting from an energy management program. Savings cannot be directly measured, since they represent the absence of energy use. Instead savings are determined by comparing measured use before and after implementation of a project, making appropriate adjustments for changes in conditions. M&V follows the standards and definitions in the current International Performance Measurement and Verification Protocol (“IPMVP”), as may be amended prepared by the Efficiency Valuation Organization on the Effective Date of this Contract. The CEO Measurement and Verification Policy may allow alternative verification standards as appropriate for select ECMs.

## M&V Commencement Date

“M&V Commencement Date” means the first day of the month following the completion by Contractor and the Principal Representative’s submittal of Notice of Final Acceptance.

## M&V Fee

“M&V Fee” means an annual fee paid to Contractor by the Principal Representative for Contractor’s satisfactory performance of the M&V Services, as set forth in **§13**. The M&V Fee is included as a part of the Maximum Contract Price.

## M&V Plan

“M&V Plan” defines how savings will be calculated and specifies any ongoing activities that will occur during the Contract Term. The details of the M&V Plan are in **Schedule D**.

## M&V Services

“M&V Services” means annual Services or activities relating to the Measurement and Verification by Contractor of the efficiency and effectiveness of the Project, pursuant to this Contract and the CEO Measurement and Verification Policy as applied.

## M&V Term

“M&V Term” has the meaning ascribed to it in **§13**.

## MMBtu

“MMBtu” means 1 Million British thermal unit (abbreviation).

## Modification (of equipment)

## “Modification of Equipment” means a field installable upgrade, feature, addition, accessory or modification to Equipment, which is made by or for the original manufacturer of such Equipment.

## Modification (to the contract)

“Modification to the Contract” means a written (i) amendment to this Contract signed by both parties or (ii) Change Order executed in accordance with **Schedule A**.

## OSA

“OSA” means the State of Colorado’s Department of Personnel & Administration’s Office of the State Architect.

## Open Book Pricing

“Open Book Pricing” means as set forth in **§6(H)**.

## Operation and Maintenance Cost Savings

“Operation and Maintenance Cost Savings” as defined in **§24-30-2001(2) C.R.S.** means the measureable decrease in operation and maintenance (O&M) costs that is a direct result of the implementation of one or more Utility Cost-Savings Measures. Such savings shall be calculated in comparison with an established baseline of operation and maintenance costs.

## Personally Identifiable Information (PII)

“PII” means personally identifiable information including, without limitation, any information maintained by the State about an individual that can be used to distinguish or trace an individual‘s identity, such as name, social security number, date and place of birth, mother‘s maiden name, or biometric records; and any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information. PII includes, but is not limited to, all information defined as personally identifiable information in §24-72-501, C.R.S.

## Premises

“Premises” is as set forth in **§5(A)**.

## Project

“Project” means Contractor’s design, acquisition, construction, and installation of the ECMs, and all Equipment and Services related thereto, as set forth in **Schedule B** and the Contract Documents, but does not include M&V Services.

## Rebate

“Rebate” means funds used for Contractor’s compensation which are not Principal Representative funds and which are not funds from a Third-Party Lessor, and shall include solar REC’s and utility rebates, and as described in **Schedule B** and on **Schedule G**.

## Review

“Review” means the Principal Representative examining the Contractor’s Work to ensure that it is adequate, accurate, correct and in accordance with this Contract.

## Schedule(s)

“Schedule(s)” means the Schedules as identified in **Article 25** which are hereby incorporated into the Contract.

## Schedule A

“**Schedule A**” means **Schedule A** to this Contract, attached hereto as General Conditions of the Energy Performance Contract.

## Schedule B

“**Schedule B**” means **Schedule B** to this Contract, attached hereto as EPC Description of Work. The **Schedule B** is developed from information in the EPC Project Proposal. **Schedule B** includes, but is not limited to: the final list of facilities that define the Premise, final list of improvements, installed equipment and upgrades, training, start-up, commissioning, and design/construction schedule. **Schedule B** shall provide the initial design and construction schedules as indicated in the **Article 12** of **Schedule A**. **Schedule B** details the cost for the Work from initial design to the start of the Guarantee Period. **Schedule B** includes the financial performance including any rebates, grants, Principal Representative provided funds, and the potential third-party financial amount that totals up to the Maximum Contract Price.

## Services

“Services” means all services performed by Contractor hereunder, including, but not limited to, engineering, design, project management, construction management, design, training, and M&V Services, and tangible material produced either separately or in conjunction with the Work performed.

## Simple Payback

“Simple Payback” means the length of time, typically presented in years, required to recover the cost of a measure or project.

## State Confidential Information

“State Confidential Information” means any and all State Records not subject to disclosure under CORA. State Confidential Information shall include, but is not limited to, PII, Tax Information, and State personnel records not subject to disclosure under CORA.

## State Fiscal Year

“State Fiscal Year” means a 12-month period beginning on July 1 of each calendar year and ending on June 30 of the following calendar year. If a single calendar year follows the term, then it means the State Fiscal Year ending in that calendar year.

## State Records

“State Records” means any and all State data, information, and records, regardless of physical form, including, but not limited to, information subject to disclosure under CORA.

## Tax Information

“Tax Information” means federal and State of Colorado tax information including, without limitation, federal and State tax returns, return information, and such other tax-related information as may be protected by federal and State law and regulation. Tax Information includes, but is not limited to all information defined as federal tax information in Internal Revenue Service Publication 1075.

## Third-Party Lessor

“Third-Party Lessor” means a third-party lender to the Principal Representative for the purchase of Equipment and Services pursuant to this Contract.

## Utility or Utilities

“Utility” or “Utilities” means the water, sewer services, electricity, payments to energy service companies, purchase of energy conservation equipment, and all heating fuels set forth in **§24-75-112(q) C.R.S.**, as amended. Utility may include compressed air, chilled water, or other systems or services as agreed to with the Principal Representative.

## Utility Cost Savings

“Utility Cost Savings” means the definition set forth in **§24-30-2001(5)** **C.R.S.**is the combination of either or both of the following:

1. A cost savings caused by a reduction in metered or measured physical quantities of a bulk fuel or utility resulting from the implementation of one or more energy conservation measures when compared with an established baseline of usage; or
2. A decrease in utility costs as a result of changes in applicable utility rates or utility service suppliers. The savings shall be calculated in comparison with an established baseline of utility costs.

## Utility Cost-Savings Contract

“Utility Cost-Savings Contract” means an Energy Performance Contract or any other agreement in which Utility Cost Savings are used to pay for Services or Equipment.

## Utility Cost-Savings Measure

“Utility Cost-Savings Measure” means the definition set forth in **§24-30-2001(7) C.R.S.,** is the installation, modification or service that is designed to reduce energy and water consumption and related operating costs in buildings and other facilities and includes, but is not limited to, the following:

1. Insulation in walls, roof, floors and foundations, and in heating and cooling distribution systems;
2. Heating, ventilating or air conditioning and distribution system modifications or replacements in buildings or central plants;
3. Automatic energy control systems;
4. Replacement or modification of lighting fixtures;
5. Energy recovery systems;
6. Renewable energy and alternate energy systems;
7. Cogeneration systems that produce steam or forms of energy, such as heat or electricity, for use primarily within a building or complex of buildings;
8. Devices that reduce water consumption or sewer charges;
9. Changes in operation and maintenance practices;
10. Procurement of low-cost energy supplies of all types, including electricity, natural gas and other fuel sources, and water;
11. Indoor air quality improvements that conform to applicable building code requirements;
12. Daylighting systems;
13. Building operation programs that reduce utility and operating costs including, but not limited to, computerized energy management and consumption tracking programs, staff and occupant training, and other similar activities;
14. Services to reduce utility costs by identifying utility errors and optimizing existing rate schedules under which service is provided; and
15. Any other location, orientation, or design choice related to, or installation, modification of installation or remodeling of, building infrastructure improvements that produce utility or operational cost savings for their appointed functions in compliance with applicable state and local building codes.

## Vehicle Fleet Operational and Fuel Cost Savings

“Vehicle Fleet Operational and Fuel Cost Savings” means a measurable decrease in the operation and maintenance costs of State vehicles that is associated with fuel or maintenance based on higher efficiency ratings or alternative fueling methods, including but not limited to savings from the reduction in maintenance requirements and a reduction in or the elimination of projected fuel purchase expenses as a direct result of investment in higher efficiency or alternative fuel vehicles or vehicle or charging infrastructure.

## Vehicle Fleet Operational and Fuel Cost-Savings Contract

“Vehicle Fleet Operational and Fuel Cost-Savings Contract” means the definition set forth in **§24-30-2001(9) C.R.S.,** means an Energy Performance Contract or any other agreement in which Vehicle Fleet Operational and Fuel Cost Savings are used to pay for the cost of the vehicle or associated capital investments.

## Vehicle Fleet Operational and Fuel Cost-Savings Measure

“Vehicle Fleet Operational and Fuel Cost-Savings Measure” means the definition set forth in **§24-30-2001(10) C.R.S.,** means any installation, modification, or service that is designed to reduce energy consumption and related operating costs in vehicles and includes, but is not limited to, the following:

1. Vehicle purchase or lease costs either in full or in part;
2. Charging or fueling infrastructure to appropriately charge or fuel alternative fuel vehicles included in an energy cost-savings contract.

## Work

“Work” means all of the labor, materials, equipment, and other services required by the Contract Documents or otherwise required to be provided by Contractor to meet Contractor’s obligations under this Contract.

## Work Product

“Work Product” means the tangible or intangible results of Contractor’s Work, including, but not limited to, equipment, software not identified as Contractor’s Intellectual Property, research, reports, studies, data, photographs, negatives or other finished or unfinished documents, drawings, models, surveys, maps, materials, or work product of any type including drafts. Work Product does not include Contractor’s Intellectual Property or Intellectual Property owned by third parties.

Any other term used in this Contract that is defined in a Schedule shall be construed and interpreted as defined in that Schedule.

# ORGANIZATION AND TERM

## Contract Phases

This Contract shall be performed in accordance with its provisions and contains the following phases:

1. Funding (Articles 3 and 4)
2. Pre-Construction (Article 5)
3. Construction (Article 6, 7, and 9)
4. Start-up, Commissioning, and Acceptance (Article 8)
5. Training (Article 10)
6. Measurement and Verification (Article 13)

## Contract Term

Contractor shall complete the Work and its other obligations as described herein on or before

Month, Day, Year.

The Principal Representative shall not be liable to compensate Contractor for any Work performed prior to the Effective Date or after the termination of this Contract. The term of this Contract (“Contract Term”) shall be divided into three (3) separate components:

1. The “Planning Term”, which shall commence on the Effective Date and upon delivery by the Principal Representative to Contractor of a Notice to Proceed to Commence Design Phase (EMP-8.26) under §4(G) and terminate upon delivery by the Principal Representative to Contractor of a Notice to Proceed to Commence Construction Phase (EMP-8.261) for the last improvement per the Construction and Installation **§6(B)**;
2. The “Construction Term”, which shall commence upon delivery by the Principal Representative to Contractor of a Notice to Proceed to Commence Construction Phase under **§6(E)**, and terminate no more than

INSERT # OF DAYS

after the Construction Commencement Date, unless sooner terminated as provided in this Contract; and

1. The M&V Term shall begin on the M&V Commencement Date and continue for a minimum term of three years per statute (**20-30-2001 C.R.S.**) and no greater than the Finance Agreement Term. The M&V Term shall terminate pursuant to **Schedule D** unless sooner terminated as provided in this Contract.

# FUNDING

## Source of Funds

The Principal Representative intends to obtain funds for the MCP as indicted in Schedule G

INSERT $ AMOUNT

required under this Contract by entering into a personal property lease-purchase financing arrangement with a Third-Party Lessor, or in such other manner as the Principal Representative, in its sole discretion, shall deem appropriate per **§24-30-2001(1.5(b)) C.R.S.** The Total Amount Financed that the State will attempt to acquire from a Third-Party Lessor as indicated in Schedule G will be

$ INSERT $ AMOUNT (the “Financed Amount”)

As provided in Schedule F, the Financed Amount is the MCP minus the M&V Fees for the first three State Fiscal Years ($0), less rebates ($0), plus the Bond Counsel fee of ($0) budget contracted directly to Owner (as provided in Schedule G)

If Principal Representative is unable to obtain funds in any manner for the entire amount of the MCP, the Principal Representative and Contractor may negotiate a reasonable reduction in the Project scope, price, and Guarantee in a manner consistent with any available funds or the Principal Representative may unilaterally terminate this Contract, in the Principal Representative’s sole discretion. If the Principal Representative is unable to obtain the entire amount of the MCP and the Parties are unable to revise the Project scope to reflect available funds within sixty (60) days of the Effective Date, either Party may terminate this Contract upon 10 days written notice to the other Party and such termination shall not be a default under this Contract. Upon termination, neither Party shall have any obligation to the other Party under this Contract, except for those provisions which by their terms survive any such termination, as provided herein.

## State Funds

The Principal Representative will provide all or a portion of the funds for the MCP required under this Contract in the amount of

$ (Total cost of the annual M&V for the first three State Fiscal Years from the M&V plan, Schedule D

from existing appropriations *(your agency may contribute funds if appropriated and encumbered, but put in $0.00 if no contribution)* as full or partial compensation for the cost of the Project as described in **Schedule B** and indicated on **Schedule G** to be paid to Contractor as reimbursement pursuant to **§4** and **Schedule A,** and **Schedule D**.

## Escrow Account

Any funds obtained by the Principal Representative from a Third-Party Lessor shall be deposited into an escrow account established on the Principal Representative’s behalf. The Principal Representative shall direct the Escrow Fund Custodian, as described in **§3(D)**, to compensate Contractor for the Work performed by Contractor and accepted in writing by the Principal Representative in accordance with **§4**, and **Schedule A**, and the Escrow Fund Custodian will make payment from the escrow account in accordance with procedures set forth in the Lease-Purchase Agreement, this Contract, and any escrow agreement. Final payment shall be made to Contractor upon the Principal Representative’s submittal of the Notice of Final Acceptance of the Project and in accordance with **Schedule A**. Any proceeds from the escrow account shall accrue to the Principal Representative.

## Escrow Fund Custodian

The Escrow Fund Custodian is hereby identified as:

|  |
| --- |
| INSERT NAME |
| INSERT TITLE |
| INSERT ADDRESS |
| INSERT PHONE NUMBER |
| INSERT EMAIL |

## Escrow Fund Custodian is subject to change at any time, without notice, and at the Principal Representative’s discretion. The Principal Representative shall notify Contractor and the Third‐ Party Lessor within 15 days of any change in the Escrow Fund Custodian.

## Energy Policy Act

Principal Representative agrees that for the work to be performed herein, Contractor may in consultation with the Principal Representative, determine which, if any, entity shall be the “designer(s)” as that term is identified in the Energy Policy Act of 2005, and which entity(s) shall have the exclusive right to report to any federal, state, or local agency, authority or other party, including without limitation under Section 179(d) of the Energy Policy Act of 2005, any tax benefit associated with the work. Upon Notice of Final Acceptance, Principal Representative, at its sole discretion, agrees to execute a Written Allocation including a Declaration related to Section 179D of the Internal Revenue Code. Contractor may prepare the Declaration and all accompanying documentation.

# COMPENSATION

The Principal Representative will, or will direct any Escrow Fund Custodian to, in accordance with the provisions of this **§4**, pay Contractor in the amounts and using the methods set forth below:

## Maximum Contract Price

|  |  |
| --- | --- |
| The MCP from Schedule G is: | $ |

The MCP reflects the maximum amount of compensation payable to Contractor pursuant to this Contract. The MCP may include, without limitation,

|  |  |
| --- | --- |
| IGA fee paid in separate contract: | $0 |
| The Fixed Limit of Design and Construction Cost of: | $0 |
| The M&V Fees in an amount not to exceed: | $0 |
| And all Contingency Funds in the amount of: | $0 |
| Total MCP | $0 |

If any State funds are used pursuant to **§3(B)** of this Contract the maximum amount of the MCP available for payment by the Principal Representative during any state fiscal year of the Contract term shall be as follows:

(*Match this schedule with* ***Schedule G*** *and* ***Schedule B****, but do not use if amount in Principal Representative provided capital contribution is zero)*

|  |
| --- |
| $0 in fiscal year 20\_\_, ending June 30, 20\_\_ (M&V year 1) |
| $0 in fiscal year 20\_\_, ending June 30, 20\_\_ (M&V year 2) |
| $0 in fiscal year 20\_\_, ending June 30, 20\_\_ (M&V year 3) |

## Changes to MCP

The Principal Representative may decrease the amount available for the MCP with the mutual consent of the Contractor and assuring that the decrease in the MCP does not adversely affect the Contractor’s requirement to meet the Guaranteed Annual Cost Savings. A change in the Guaranteed Annual Cost Savings may be considered a Material Change to this Contract, pursuant to **Article 17**. The decrease in MCP may be based on the actual costs of labor and materials to Contractor. The MCP shall not be increased or decreased without an amendment to this Contract, in accordance with State Fiscal Rules.

## Invoicing

Contractor shall invoice the Principal Representative in the format and manner required by the Principal Representative, per **Articles 31, 32, 33, and 34** of **Schedule A**. Contractor shall use the categories in **Schedule F** to demonstrate all costs categories, shall demonstrate all subcontractor costs, and shall allow the Principal Representative to review any records relating to the Project. Contractor shall provide ECM-specific information and Project-level information in **Schedule F**. For each ECM and for the Project the profit shall be clearly explained and referenced in each invoice. The M&V Services shall be invoiced separately in a format and manner as required by the Principal Representative.

## Payments and Retainage

The Principal Representative will, or will direct any Escrow Fund Custodian to, compensate Contractor for Work done by Contractor pursuant to **Articles 31** through **35** in **Schedule A**. The Principal Representative shall withhold and release retainage amounts pursuant to **Article 31.C** and **D** of **Schedule A** and as allowed by applicable law.

## Availability of State Funds

The Principal Representative is prohibited by law from making commitments beyond the term of the State’s current fiscal year. Therefore, Contractor’s compensation beyond the State’s current Fiscal Year is contingent upon the continuing availability of Principal Representative appropriations as provided in the Colorado Special Provisions. If federal funds are used to fund this Contract, in whole or in part, the Principal Representative’s performance hereunder is contingent upon the continuing availability of such funds. Payments pursuant to this Contract shall be made only from available funds encumbered for this Contract and the Principal Representative’s liability for such payments shall be limited to the amount remaining of such encumbered funds. If State or federal funds are not appropriated, or otherwise become unavailable to fund this Contract, the Principal Representative may terminate this Contract, in whole or in part, without further liability in accordance with the provisions hereof.

## Erroneous Payments and Excess Funds

At the Principal Representative’s sole discretion, payments made to Contractor in error for any reason, including, but not limited to overpayments or improper payments, and unexpended or excess funds received by Contractor, may be recovered from Contractor by deduction from subsequent payments under this Contract or other contracts, grants or agreements between the Principal Representative and Contractor or by other appropriate methods and collected as a debt due to the Principal Representative. Such funds shall not be paid to any party other than the Principal Representative.

## Notice to Proceed to Commence Design Phase (EMP-8.62)

If the Principal Representative obtains funding from any and all sources in the amount of the MCP for the purposes set forth herein, upon terms and conditions satisfactory to the Principal Representative in its sole discretion, or obtains funds sufficient for a revised Project scope, price, and Guarantee, the Principal Representative shall deliver to Contractor a Notice to Proceed to Commence Design Phase instructing Contractor to commence with the Pre-Construction Services, as described in **§5**.

# PRE-CONSTRUCTION SERVICES

## Premises

The Premises is the Facilities owned or controlled by the Principal Representative, as initially detailed on the IGA Contract Exhibit C and finalized in EPC **Schedule B**.

## Professional Design Services

### **Qualifications**

Design services shall be performed by properly licensed and qualified architects, engineers and other professionals employed by and or selected and paid by Contractor, subject to review by the Principal Representative. The professional obligations of such persons shall be undertaken and performed on behalf of Contractor. Nothing contained herein shall create any contractual relationship between the Principal Representative and the Contractor’s Subcontractors, architects, engineers or suppliers. Prior to designating a professional to perform any of these services, Contractor shall submit the name, together with a resume of training and experience in the work of like character and magnitude to the Project being contemplated to the Principal Representative. All Drawings, Specifications, calculations, certifications and Submittals prepared by such design professionals shall bear the signature and seal of such design professionals and the Principal Representative shall be entitled to rely upon the adequacy, accuracy and completeness of such design services.

### **Designation of Professionals**

All Work performed by Contractor that constitutes the “practice of architecture” as defined in **§12-25-302(6)(a) C.R.S.**, and as may be amended, or the “practice of engineering”, as defined in **§12-25-102(10)(a) C.R.S.**, and as may be amended, shall be performed by properly qualified and licensed professionals employed by Contractor and shall be performed in accordance with applicable Colorado law.

### **Conflict of Interest**

Consultant or subcontractor, not already approved by the Principal Representative, shall not be engaged to perform Work wherein a conflict of interest exists, as described in **§24(J)**, provided, however, that with full disclosure to the Principal Representative of such interest, the Principal Representative may provide a waiver, in writing, in respect to the particular consultant or subcontractor.

### **Pre-construction Meeting**

Contractor and its architect and/or engineer may attend pre-construction meetings, as deemed necessary by the Contractor and the Principal Representative and such additional meetings as the Principal Representative may request. All pre-construction meetings shall be scheduled by Contractor with the approval of the Principal Representative.

### **Minutes**

Contractor shall record minutes of all meetings and distribute them to all participants of the meetings within 30 days after each meeting.

## Design Documents

1. Based on the Scope of Work in **Schedule B** the Contractor shall prepare, for the Principal Representative’s acceptance, the DDs defined in **§1(T)**. The DDs may be waived or modified per ECMs/FIMs as mutually agreed in writing between the Parties. The Contractor shall provide no fewer than Insert number of sets (     ) complete sets of Drawings, Specifications, and such other documents necessary to fully illustrate the complete Design Development Phase to the Principal Representative for the Principal Representative’s approval and provide electronic files in an electric media format that conforms to the latest requirements of the Principal Representative’s drawing standards. Such DDs may include the following, where applicable:
   1. Analysis of the proposed Work and the structure as such relates to any laws, codes, ordinances, and regulations;
   2. As necessary, provide site development Drawings for each proposed ECM, defining the proposed scope of the Project. Include earthwork, surface development, and utility infrastructure as applicable;
   3. Plans in one-line format of the proposed structural, mechanical, and electrical systems as necessary to define size, location and quality of Equipment, equipment, materials, and constructions, for each proposed ECM;
   4. Floor plans including proposed equipment;
   5. Cut-sheets and/or samples of proposed materials, equipment and system components;
   6. Proposed architectural schedule, HVAC, plumbing and electrical fixture schedules;
   7. Specifications, which, identifying conditions of the Contract, materials, and standards for each proposed ECM;
   8. Design plans and documentation for each ECM that requires a design as agreed to with the Principal Representative;
   9. Submittal of final Equipment List, Construction and Installation Schedules, Systems Start-up and Commissioning, Contractor’s Maintenance Responsibilities, Principal Representative’s Maintenance Responsibilities, Contractors Training Responsibilities, and the Manifest of Ownership; and
   10. Submittal of an updated construction cost estimate as applicable, in substantially the same form as **Schedule F**.
2. A written review of code requirements for each ECM. The DDs shall show that either a) the ECM has a code compliance notice with recommended inspections or b) that for listed ECMs, a written declaration that code review is not required.
3. During development of the DDs, Contractor shall follow the State Buildings Code Compliance policy and process as stated in **Article 9B** of **Schedule A**.
4. At the completion by Contractor and acceptance by the Principal Representative of the DDs, Contractor shall provide electronic or printed drawings and such other documents as necessary to fully illustrate the Design Development Phase to the Principal Representative. Electronic drawing files should be in a form acceptable to the Principal Representative.
5. Contractor shall be responsible for ensuring that the DDs, prepared by Contractor are in full compliance with applicable codes, regulations, laws and ordinances, including both technical and administrative provisions thereof. If Contractor deviates from such codes, regulations, law or ordinance, without written authorization from the State Buildings Program, Contractor shall make such corrections in the Construction Documents as may be necessary for compliance.
6. The Principal Representative shall notify Contractor of acceptance or denial of the DDs in writing within 10 days of receipt.

# CONSTRUCTION

## Construction Documents

## The Construction Documents, if required, shall consist of the following:

1. Final Construction Documents reviewed and approved by the Principal Representative in writing for constructability and code compliance;
2. All Design Documents applicable to the Project;
3. Any appendices, addenda, clarifications and allowances;
4. All modifications issued pursuant to this Contract;
5. Construction and Installation Schedule; and
6. Finalized Schedule of Values.

## Construction and Installation Schedule

Contractor shall prepare a Construction and Installation Schedule, which shall provide the timetable for the execution and completion of the Project. Such Construction and Installation Schedule shall be subject to the approval of the Principal Representative, pursuant to **Article 12.B (1, 2, & 4)** of **Schedule A**, and shall be consistent with previously issued schedules, not exceed time limits under the Contract Documents and shall provide a schedule for the entire Project, to the extent required by the Contract Documents.

## Schedule of Values

Contractor shall prepare a schedule of the cost of construction, pursuant to **Article 12.B (3)** of **Schedule A**, which shall be delivered to the Principal Representative for approval and which shall be in substantially similar format as the attached **Schedule F**, and which such Contractor-submitted **Schedule F** shall be subject to review and approval by the Principal Representative. The Schedule of Values shall include, without duplication:

1. All labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Project, whether temporary or permanent, and whether or not incorporated or to be incorporated in the Project;
2. The compensation for services and the cost of work provided by Contractor;
3. All bond premiums and costs of insurance;
4. All Design and drafting Services;
5. All other allowable compensable services pursuant to this Contract as approved by the Principal Representative; and
6. Contingency Funds if any.

## Approval and Completion of Construction Documents

Except as otherwise provided in this Section, the Construction Documents shall be subject to the final approval by the Principal Representative, the Office of the State Architect-State Buildings Program and other reviewing authorities. State Buildings Program representatives or their delegate shall review documents submitted by Contractor and shall render decisions pertaining thereto without unreasonable delay. The Principal Representative’s approval shall be issued in the form of the Notice to Proceed to Commence Construction Phase.

## Notice to Proceed to Commence Construction Phase

Upon receipt of Notice to Proceed to Commence Construction Phase, Contractor shall commence the Project, as described in **§1**, and **Schedule B**. Notice to Proceed to Commence Construction may be issued per ECM/FIM.

## Construction Term

The Construction Term shall commence on the Construction Commencement Date and shall terminate upon the date according to **§2** or the date on which:

1. Contractor has completed the Project Work; and
2. Contractor has finalized and delivered to the Principal Representative all necessary, updated, and final documents, including schedules, exhibits, and completed Punch Lists, at the Principal Representative’s determination; and
3. Contractor has delivered to the Principal Representative a Notice of Substantial Completion, which indicates that Contractor has constructed, installed, and commenced operating the ECMs specified in **Schedule B;** and
4. The Principal Representative has inspected and accepted the Project, according to **§8** and **Schedule A**, including the design, construction, installation, and operation of the Project and accepted Contractor’s submittal of a Notice of Substantial Completion as demonstrated by signing and executing such Notice of Substantial Completion; and
5. The Principal Representative has issued a Notice of Final Acceptance.

## Fixed Limit of Design and Construction Cost

Contractor shall complete the Project and be reimbursed an amount not to exceed the Fixed Limit of Design and Construction Cost per **§4(A)**. Contractor shall design and construct the Project within the price specified in this **§6(G)** and shall furnish all of the labor and materials to perform the Work for the complete and prompt execution of the Project in accordance with the Contract Documents. The Fixed Limit of Design and Construction Cost includes all of Contractor’s Project Work responsibilities, including acquisition of plumbing and electrical building permits and conducting code review. The Principal Representative may unilaterally decrease the amount available for the Fixed Limit of Design and Construction Cost based on the actual costs of labor and materials to Contractor with the mutual consent of the Contractor and assuring that the decrease in the FLDCC does not adversely affect the Contractor’s requirement to meet the Guaranteed Annual Cost Savings. A change in the Guaranteed Annual Cost Savings may be considered a Material Change to this Contract, pursuant to **Article 17**. However, the Fixed Limit of Design and Construction Cost shall not be changed without an amendment or change order to this Contract, in accordance with EPC General Conditions and State Fiscal Rules.

## Cost Reporting

Contractor shall fully disclose all costs as per the Open Book Pricing requirements to the Principal Representative through Applications for Contractors Payments and in such detail as the Principal Representative may request. Contractor shall maintain cost accounting records on authorized work performed as per **§24(K)**. Such accounting records shall identify all costs for materials, labor, including all costs of subcontractor’s, vendors, and services received during the Contract Term provided in **§2B.** Upon request by the Principal Representative, Contractor shall provide a list of hourly rates and position descriptions for labor or services provided by the Contractor and for all subcontractors and vendors and supply information on any other basis as specified by the Principal Representative. The Principal Representative may evaluate all cost through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices to ensure the Contractor’s prices are reasonable and acceptable. Upon request by the Principal Representative, Contractor shall provide the Principal Representative complete access to such records at reasonable times and locations. The records shall be consistent with the Schedule of Values, **Schedule F.** Any disputes shall be subject to the terms of this Contract, and Articles **2**, **36**, and **39** of **Schedule A.**

## Progress Meetings

Contractor shall schedule and conduct regular progress meetings at which meetings the Principal Representative and Contractor shall discuss such matters as procedures, progress, schedule, costs, quality control and problems relating to the Project. Contractor shall record and distribute minutes of all such progress construction meetings within

\_ days

of the meeting.

## Contingency Funds

## The Principal Representative may authorize the disbursement of Contingency Funds to Contractor through an EPC Contract Change Order, as described in Schedule A.

# CONTRACTOR PERFORMANCE

## Performance of Project

Contractor shall perform the Project in accordance with the Contract Documents. Contractor shall construct and install the Project in accordance with the Construction and Installation Schedule. Contractor shall supervise and direct the Project and be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Project under this Contract, subject to the review and approval of the Principal Representative and the Construction and Installation Schedule. Contractor shall design, construct and install the ECMs/FIMs. Before purchasing any major Equipment not specified within the Construction Documents, Contractor shall consult with, and if necessary, receive the written or electronic approval of the Principal Representative regarding the price, specifications, warranty, and manufacturer of the Equipment.

## Contractor’s Duty of Proper Performance

Contractor shall perform the Project so as to maintain and not degrade the structural integrity of the Premises or its operating systems. Contractor shall provide the Equipment and all Services, and complete all Work contemplated under this Contract with skill and diligence to the satisfaction of the Principal Representative and in strict accordance with the provisions of the Contract Documents.

## Standards of Comfort

Contractor’s performance of the Project shall maintain and provide the standards of heating, cooling, ventilation, hot water supply, and lighting quality as described in this **Schedule N** (Standards of Comfort).

## Security

Contractor shall meet Principal Representative requirements for security and access to the Premises.

# START-UP, COMMISSIONING, INSPECTION, and ACCEPTANCE

## Contractor, in conjunction with the Principal Representative's selected personnel, shall direct the testing of installed utilities, operations, systems and Equipment for readiness.

## Systems Startup and Equipment Commissioning

Contractor shall conduct systematic commissioning of all Equipment in accordance with the procedures specified in **Schedule A**, any operating parameters of Equipment from Equipment manufacturers, and this Contract**.** Contractor agrees that **Schedule** **Q** shall follow and use as a standard the procedures and protocol for Commissioning located in the document *Commissioning Guidelines for Energy Saving Performance Contracts for the Colorado Energy Office*.Contractor shall test the Project and the Equipment to ensure it is functioning in accordance and compliance with any published Specifications and this Contract and to determine if modified building systems, subsystems or components are functioning properly within the Project Work. Contractor shall provide notice to the Principal Representative of the scheduled test(s) and the Principal Representative and/or its designees may be present at any or all such tests.

## Acceptance by Principal Representative

Contractor’s Work shall be subject to acceptance by the Principal Representative pursuant to this Contract and **Schedule A**.

## Correction of Deficiencies

Contractor shall correct all deficiencies in the operation of the Project and the Equipment. Prior to Principal Representative acceptance, Contractor shall also provide Principal Representative with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in **Schedule** B and any subsequently necessary and accepted design or construction documents.

## Inspection and Disputes

1. The Principal Representative may inspect the Work provided under this Contract at all reasonable times and places. If any Work does not conform to this Contract, the Principal Representative may require Contractor to perform the Work again in conformity with this Contract's requirements, with no additional compensation. When defects in the quality or quantity of Work cannot be corrected by re-performance, the Principal Representative may:
   1. Require Contractor to take necessary action to ensure that the future performance conforms to Contract requirements; and/or
   2. Equitably reduce the payment due Contractor to reflect the reduced value of the Work performed.
2. Such remedies in no way limit the remedies available to the Principal Representative in the termination provisions of this Contract, or remedies otherwise available at law. Disputes under this Contract shall be subject to the terms of this Contract and **Articles 2.D, 36, 39** of **Schedule A**.

# ENVIRONMENTAL REQUIREMENTS

## Excluded Material and Activities

Pursuant to its performance of the Project, Contractor may encounter, but is not responsible for, any work relating to Excluded Materials and Activities, as defined in **§1**. If performance of Work involves any Excluded Materials and Activities, the Principal Representative may terminate this Contract without penalty, liability, or responsibility, and no further performance may be required, per **Schedule A**, Article 50. If, in the Principal Representative’s sole discretion, the Principal Representative requires continued performance of this Contract, and the performance of any Project involves any Excluded Materials and Activities, the Principal Representative shall perform or arrange for the performance of such work and shall bear the sole cost, risk, and responsibility therefore.

## Discovery of Excluded Materials and Activities

### **Notice - Work Stoppage**

If Contractor discovers Excluded Materials and Activities, Contractor shall immediately cease work and remove all Contractor personnel or Subcontractors from the site, and notify the Principal Representative. Contractor shall undertake no further work on the Premises except as authorized by the Principal Representative in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Principal Representative or Contractor shall not constitute a default. In the event of such stoppage of Work by Contractor, the time for the completion of the Work shall be automatically extended by the amount of time of the work stoppage and any additional costs incurred by Contractor as a result shall be added by Change Order.

### **Other Hazardous Materials**

Contractor shall be responsible for safely handling, installing, and/or disposing of any other hazardous or other materials that it may bring to the Premises, pursuant to **Article 35.C** in **Schedule A**.

### **Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps**

### Contractor is specifically responsible for the proper handling and disposal of Polychlorinated Biphenyl (PCB) Ballasts and Mercury Lamps. Upon discovery of PCB Ballasts and Mercury Lamps, Contractor shall enter into an agreement with an approved PCB ballast disposal contractor who shall provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services such materials. All capacitors and asphalt potting compound materials removed from the PCB Ballasts shall be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction shall be provided by the approved facility to the Principal Representative. Contractor’s responsibility shall be for the proper and legal management of any of the PCB Ballasts removed as a result of the Work. Contractor shall enter into an agreement with an approved Mercury Lamp disposal contractor who shall provide approved containers, materials required to label, transportation, recycling or incineration in accordance with EPA requirements, and a copy of the Manifest of Ownership.

### **Manifests of Ownership**

The Principal Representative will sign a Manifest of Ownership for any PCB Ballasts and Mercury Lamps encountered and prior to removal from the Premises.

# TRAINING AND FOLLOW-UP ACTIVITIES BY CONTRACTOR

## Training

Contractor shall provide training to the Principal Representative and to Principal Representative personnel regarding operation of all new and upgraded Equipment. Training shall be conducted simultaneously with Project Work and commissioning Work and shall include, but not be limited to, any HVAC equipment installed, controls, utilities, lighting, safety, manufacturer's warranties, and operation and maintenance manuals per Contractor Training Responsibilities. All training performed by Contractor shall (i) meet the standards established by the Equipment manufacturers, (ii) be included in the Fixed Limit of Design and Construction Cost and (iii) be completed per Contractor Training Responsibilities, in order for the Principal Representative to issue a Notice of Final Acceptance of the Project.

## Emissions Reductions Documentation and Reporting

## Contractor shall include information about environmental savings (not any Guaranteed Annual Cost Savings as described in §14(B)) in each annual report and advise the State about opportunities to achieve monetary benefit from such credits.

## Application for Certifications

Pursuant to appropriate executive orders from the Governor and the OSA Energy Management Policy, the Contractor shall provide information related to **Schedule** **B** necessary for the Principal Representative to submit any required Federal, State, Local performance or other applicable Certifications.

# MALFUNCTIONS AND EMERGENCIES

## The Principal Representative will use its best efforts to notify Contractor within 24 hours of the Principal Representative's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any pre-existing energy related equipment that might materially impact the Guaranteed Annual Cost Savings, (ii) any interruption or alteration to the energy supply to the Premises, or (iii) any alteration or modification in any energy-related equipment or its operation. When the Principal Representative exercises reasonable 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 Guaranteed Annual Cost Savings.

## If such malfunction, interruption, or alteration occurs during the Contractor’s One-Year Warranty period, Contractor shall use commercially reasonable efforts to respond to any such notice within 24 hours of receipt of notice, and shall promptly thereafter proceed with corrective measures. The Principal Representative will provide Contractor with written memorialization of any telephone notice within three business days after the notice was given.

## Contractor shall provide a written record of all service work performed for each malfunction or emergency. This record shall indicate the reason for the service, description of the problem and the corrective action performed.

## The Principal Representative may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify Contractor before taking any such actions. The Principal Representative agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment, all in accordance with the same standard of care the Principal Representative applies to the Premises generally.

# OWNERSHIP

## Ownership of Documents (Instruments of Service)

1. Drawings, specifications and other documents, including those in electronic form, prepared by the Contractor‘s Architect/Engineer and the Contractor‘s Architect/Engineer’s consultants are Instruments of Service for use solely with respect to this Project. The Contractor‘s Architect/Engineer and the Contractor‘s Architect/Engineer’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. Upon execution of this Agreement and the contract between the Contractor‘s and the Contractor‘s Architect/Engineer, the Contractor‘s Architect/Engineer shall grant to the Principal Representative a perpetual nonexclusive license to reproduce and use, and permit others to reproduce and use for the Principal Representative, the Contractor‘s Architect/Engineer’s Instruments of Service solely for the purposes of constructing, using and maintaining the Project for future alterations or additions to the Project. The Contractor‘s Architect/Engineer shall obtain similar nonexclusive licenses from the Contractor‘s Architect/Engineer’s consultants consistent with this Agreement. If and upon the date the Contractor‘s Architect/Engineer is adjudged in default, the foregoing license shall be deemed terminated and replaced by a second, nonexclusive license permitting the Principal Representative to authorize other similarly credentialed design professionals to reproduce and, where permitted by law, to make changes, corrections and additions to the Instruments of Service solely for the purposes of completing, using and maintaining the Project for future alterations or additions to the Project.
3. Any unilateral use by the Principal Representative of the Instruments of Service for completing, using, maintaining, adding to or altering the Project or facilities shall be at the Principal Representative’s sole risk and without liability to the Contractor‘s Architect/Engineer and the Contractor‘s Architect/Engineers consultants; provided, however, that if the Principal Representative’s unilateral use occurs for completing, using or maintaining the Project as a result of the Contractor‘s Architect/Engineer’s default, nothing in this Article shall be deemed to relieve the Contractor‘s Architect/Engineer of liability for its own acts or omissions or default.

## As-Built Drawings/Record Drawings

The Contractor‘s Architect/Engineer and its consultants shall, upon completion of the Construction Term, receive redline as-built Drawings from any Subcontractors or vendors. These redline changes shall describe the built condition of the Project. This information and all of the incorporated changes directed shall be incorporated by the Contractor‘s Architect/Engineer and its consultants into a Record Drawings document provided to the Principal Representative in the form of an electro-media format and a reproducible format as agreed between the parties. The Contractor‘s Architect/Engineer shall also provide the Principal Representative with the as-built Drawings as received from the Contractor.

## Ownership of Existing Equipment

1. Property owned by the State located at the Premises on the Effective Date shall remain the property of State even if it is replaced or its operation made unnecessary by Work Contractor performs pursuant to this Contract. Contractor shall advise the State in writing of any equipment and materials to be replaced at the Premises and the State shall within 30 days designate in writing to Contractor which equipment and materials should not be disposed of off-site by Contractor.
2. The State shall designate the location and storage for any equipment and materials that it designates to be disposed of by Contractor. Contractor shall dispose of all equipment and materials designated by the State as disposable off-site and in accordance with all applicable disposal laws and regulations.
3. Except as otherwise indicated, Contractor shall not be obligated to dispose of or be responsible for any materials identified in **§1(GG)**.

# MEASUREMENT AND VERIFICATION PLAN

## M&V Plan

Contractor shall provide the M&V Plan as required per the CEO Measurement and Verification Policy. The M&V Plan shall outline the M&V Option for each ECM/FIM. The Contractor M&V Plan is presented in **Schedule D** per the requirements of **Schedule D**.

## M&V Services

Contractor shall provide M&V Services and all other services required to be performed by it pursuant to **Schedule D** during the M&V Term. Contractor agrees that **Schedule D** shall follow and use as a standard the procedures and protocol as stated in the CEO Measurement and Verification Policy.

## Energy Usage Records and Data

The State shall furnish, or authorize its utility suppliers to furnish, to Contractor or its designee upon Contractor’s written request, all records and data regarding energy, water, or other utilities usage and related maintenance at the Premises no later than 45 days from date of request.

## M&V Term

The M&V Term shall begin on the M&V Commencement Date and continue for a minimum term of three years per statute (**20-30-2001 C.R.S.**) and no greater than the Finance Agreement Term. Upon termination of the M&V Term, the Principal Representative shall have no further liability or responsibility for any further payment to Contractor for M&V Services. Upon termination of the M&V Term the Contractor shall have no further liability or responsibility for any M&V Services or Guarantee.

## M&V Fee

The Principal Representative shall pay to Contractor for performance of the M&V Services a maximum not-to-exceed amount as indicated in **§4** and as specified in **Schedule D** and shall be included in the MCP. At the request of the Principal Representative, additional years of M&V may be added at a negotiated additional cost, and shall not be included in the MCP.

## Payment

The Principal Representative shall pay Contractor pursuant to **§§6** and **7**.

## M&V Information Procedure

Measurement and Verification of Savings shall be verified as outlined in **Schedule D.**

## Monitoring Equipment

Contractor shall provide all additional necessary equipment required to perform the M&V Services. The Contractor may utilize existing equipment, systems, utility meters if applicable or provide the necessary equipment as described in **Schedule D**.

## Independent Monitor

**T**he Principal Representative, at its sole expense, may hire an independent third party monitor to review Contractor’s measurement and verification reports, including verifying the prorated share of the Guarantee in any event of contract termination. The Principal Representative shall pay the cost of any independent monitoring through a separate contract.

# GUARANTEE

## Guarantee

The Guarantee for the first year of the Guarantee Period is

$0

as indicated on **Schedule C**. Contractor hereby warrants and guarantees that during the Guarantee Period, the Project shall result in annual cost savings equal to or greater than the Annual Guaranteed Cost Savings presented in **Schedule C** which shall be equal to or greater than the Principal Representative’s annual and aggregate payments used to repay the project funding, as provided in **Schedule C**. Failure to meet Guaranteed Annual Cost Savings in any year during the Guarantee Period shall be as defined in **§1.** Cost savings in excess of the Guaranteed Annual Cost Savings shall be solely retained by the Principal Representative.

## Sufficiency of Savings

Contractor hereby warrants, guarantees, and represents that the Guaranteed Annual Cost Savings is accurately represented in **Schedule C.**

## Termination

If this Contract is terminated by the State for any reason, the Guarantee shall be cancelled and Contractor shall have no further obligations hereunder, except to guarantee the State the prorated portion of the annual amount of Guarantee up to the date of termination. The prorated portion shall include any Savings incurred prior to the termination date. The Contractor shall have all of the remedies listed in **§20** in addition to all other remedies set forth in other sections of this Contract and **Schedule** A.

# MODIFICATION, UPGRADE OR ALTERATIONS OF EQUIPMENT

## Modification of Equipment

Without Contractor’s prior written approval, which shall not be unreasonably withheld, during the term of this Contract, the State shall not affix or install any accessory equipment or device on any of the Equipment if such addition changes or impairs the originally intended Savings, functions, value or use of the Equipment.

## Upgrade or Alteration of Equipment

1. During the performance of this Contract, Contractor may, subject to Principal Representative's prior written approval, change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions in the Premises, provided that: (a) Contractor complies with the Standards of Comfort, as set forth in this Contract, and services set forth in **Schedule M**; (b) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures enable Contractor to achieve a greater amount of energy and cost savings than the Savings, at the Premises; (c) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures are solely borne by Contractor and paid for with any Contingency Funds; and (d) any such action complies with State and federal law and is in the public interest of the State, in the Principal Representative’s sole discretion. Any such upgrade or alteration shall not result in any additional cost to the Principal Representative.
2. All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described at that time in supplemental Schedules provided to the Principal Representative for approval; provided that any replacement of the Equipment shall, unless otherwise agreed, be new and shall reduce energy consumption at the Premises more than the Equipment being replaced. Contractor shall update any and all software it owns which is necessary for the operation of the Equipment. Upon the Principal Representative’s approval thereof, all replacements of and alterations or additions to the Equipment shall become part this Contract and the Equipment described in **Schedule B**.

# LOCATION AND ACCESS

## Contractor Access

The Principal Representative shall provide access to the Premises for Contractor and all necessary escorts to perform any function related to this Contract during regular business hours, or such other reasonable hours requested by Contractor that are acceptable to the Principal Representative. Contractor shall be granted immediate access to make emergency repairs or corrections as Contractor determines are needed. Contractor shall provide a written memorialization within three business days of the access specifying the emergency action taken, the reasons therefore, and the impact on the Premises.

# MATERIAL CHANGES

A Material Change as defined could be the result of the Principal Representative not fulfilling its responsibilities as listed in **Article 22** or from actions including to but not limited to one or more of the following:

1. manner of use of the Premises by the Principal Representative; or
2. occupancy of the Premises; or
3. modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules; or
4. facility modifications, renovations, new construction, including the replacement, addition or removal in types and quantities of energy and water consuming equipment, including plug load items, used at the Premises; or
5. changes in utility provider or utility rate classification; or
6. any other conditions other than climate affecting energy or water use at the Premises.

## Reported Material Changes; Notice by State

The Principal Representative shall use commercially reasonable efforts to deliver to Contractor a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises 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 precluding advance notice shall be deemed sufficient if given by the Principal Representative within five business days after the Principal Representative discovers the event constituting the Material Change or receives actual knowledge thereof.

## Other Adjustments

Contractor shall work with the Principal Representative to investigate, identify and correct any Material Changes that prevent the Savings from being realized. As a result of any such investigation, Contractor and the Principal Representative shall determine what, if any, adjustments to the baseline shall be made in accordance with the provisions set forth in **Schedule B** and **Schedule C**. Any disputes between the Principal Representative and the ESCO concerning any such adjustment shall be resolved in accordance with the provisions of **Article 36 of Schedule A**.

## Force Majeure

Neither party will be responsible to the other for damages, loss, injury, or delay caused by conditions that are beyond the reasonable control, and without the intentional misconduct or negligence of that party. Such conditions (each, a “Force Majeure”) include, but are not limited to: acts of God; strikes; labor disputes; fires; explosions or other casualties; thefts; vandalism; riots or war; acts of terrorism; electrical power outages; interruptions or degradations in telecommunications, computer, or electronic communications systems; or unavailability of parts, materials or supplies.

# INSURANCE

## Contractor shall obtain and maintain at all times during this Contract, insurance in the kinds and amounts as specified in Article 25 of Schedule A.

# BREACH

## Defined

In addition to any Breaches specified in other sections of this Contract, the failure of either Party to perform any of its material obligations hereunder in whole or in part or in a timely or satisfactory manner constitutes a Breach. The institution of proceedings under any bankruptcy, insolvency, reorganization or similar law, by or against Contractor, or the appointment of a receiver or similar officer for Contractor or any of its property, which is not vacated or fully stayed within 20 days after the institution or occurrence thereof, may also constitute a Breach.

Each of the following events or conditions may constitute a Breach by Contractor:

1. Contractor does not provide the Standards of Comfort and service set forth in **Schedule M** due to failure of Contractor to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within 30 days after written notice by the Principal Representative to Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract; or
2. Any representation or warranty furnished by Contractor in this Contract is false or misleading in any material respect when made; or
3. The existence of any lien or encumbrance upon the Equipment by any subcontractor, laborer or materialman which is not released or otherwise cured within 30 days after notice of said filing; or
4. Any failure by the 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 30 days after written notice by the Principal Representative to the Contractor demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract; or
5. The creation or submittal by Contractor of any data related to this Contract that is intentionally inconsistent or incorrect, or the inability to verify Contractor’s reports regarding the Guarantee as determined by any independent third-party monitor retained by the State if such third-party monitor determines that such inability is due to intentional acts of Contractor. Except as provided herein, any creation or submittal by Contractor of any data related to this Contract that is inconsistent, incorrect, or unable to be verified shall be considered a breach and is subject to the cure period discussed herein; or
6. The Savings is less than the Guaranteed Annual Cost Savings and the Contractor fails to reconcile the difference as provided herein.

## Notice and Cure Period

In the event of a Breach, notice of such shall be given in writing by the aggrieved Party to the other Party in the manner provided in **§27**. If such Breach is not cured within 30 days of receipt of written notice, or if a cure cannot be completed within 30 days, or if cure of the Breach has not begun within 30 days and pursued with due diligence, the State may exercise any of the remedies set forth in **§20.** The Contractor may also exercise its’ rights as specified in **Schedule A, Article 36**. Notwithstanding anything to the contrary herein, the State, in its sole discretion, need not provide advance notice or a cure period and may immediately terminate this Contract in whole or in part if reasonably necessary to preserve public safety or to prevent immediate public crisis.

# REMEDIES

## Remedies Not Involving Termination

If Contractor is in Breach under any provision of this Contract, the Principal Representative, in its sole discretion, may exercise one or more of the following remedies in addition to other remedies available to it:

### **Suspend Performance**

Suspend Contractor’s performance with respect to all or any portion of this Contract pending necessary corrective action as specified by the Principal Representative without entitling Contractor to an adjustment in price/cost or performance schedule. Contractor shall promptly cease performance and incurring costs in accordance with the Principal Representative’s directive and the Principal Representative shall not be liable for costs incurred by Contractor after the suspension of performance under this provision.

### **Withhold Payment**

Withhold payment to Contractor until corrections in Contractor’s performance are satisfactorily made and completed pursuant to **Schedule A, Article 33.**

### **Deny Payment**

Deny payment for those obligations not performed that because to Contractor’s actions or inactions, cannot be performed or, if performed, would be of no value to the Principal Representative; provided, that any denial of payment shall be reasonably related to the value to the Principal Representative of the obligations not performed pursuant to **Schedule A, Article 34.**

### **Removal**

Notwithstanding any other provision herein, the Principal Representative may demand immediate removal of any of Contractor’s employees, agents, or Subcontractors whom the Principal Representative deems incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued relation to this Contract is deemed to be contrary to the public interest or the Principal Representative’s best interest.

### **Intellectual Property**

If Contractor infringes on a patent, copyright, trademark, trade secret or other intellectual property right while performing its obligations under this Contract, Contractor shall, at the Principal Representative’s option **(a)** obtain for the Principal Representative or Contractor the right to use such products and services; **(b)** replace any Goods, Services, or other product involved with non-infringing products or modify them so that they become non-infringing; or, **(c)** if neither of the foregoing alternatives are reasonably available, remove any infringing Goods, Services, or products and refund the price paid therefore to the Principal Representative.

## Termination Prior to M&V Commencement Date

If Contractor is in Breach under any provision of this Contract, in addition to all other remedies set forth in other sections of this Contract and **Schedule** **A, t**he Principal Representative may terminate this entire Contract or any part of this Contract as provided herein or pursuant to **Schedule A**. The Principal Representative may exercise any or all of the remedies available to it, in its sole discretion, concurrently or consecutively. Exercise by the Principal Representative of this right shall not be a breach of its obligations hereunder. Contractor shall continue performance of this Contract to the extent not terminated, if any.

To the extent specified in any termination notice, Contractor shall complete and deliver to the Principal Representative all Work not cancelled by the termination notice and may incur obligations as are necessary to do so within this Contract’s terms. At the sole discretion of the Principal Representative, Contractor shall assign to the Principal Representative all of Contractor's right, title, and interest under such terminated orders or subcontracts; provided that Contractor’s obligations with respect to Contractor’s Intellectual Property are set forth in **§12** above. Upon termination, Contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of Contractor in which the Principal Representative has an interest. All materials owned by the Principal Representative in the possession of Contractor shall be immediately returned to the Principal Representative. All Work Product, at the option of the Principal Representative, shall be delivered by Contractor to the Principal Representative and shall become the Principal Representative’s personal property.

## Termination of M&V Term

Notwithstanding anything to the contrary herein, the Principal Representative may terminate this Contract after the first three years of the M&V Term, and if so terminated, Contractor shall have no further obligations thereafter.

# REPRESENTATIONS AND WARRANTIES

## Representations

Contractor makes the following specific representations and warranties, each of which was relied on by State in entering into this Contract.

### **Standard and Manner of Performance**

Contractor shall perform its obligations under this Contract in accordance with the highest standards of care, skill and diligence in Contractor’s industry, trade, or profession.

### **Legal Authority – Contractor Signatory**

Contractor warrants that it possesses the legal authority to enter into this Contract and that it has taken all actions required by its procedures, and by-laws, and/or applicable laws to exercise that authority, and to lawfully authorize its undersigned signatory to execute this Contract, or any part thereof, and to bind Contractor to its terms. If requested by the State, Contractor shall provide the State with proof of Contractor’s authority to enter into this Contract within 15 days of receiving such request.

### **Licenses, Permits, Etc.**

Contractor represents and warrants that as of the Effective Date it has, and that at all times during the term hereof it shall have and maintain, at its sole expense, all licenses, certifications, approvals, insurance, permits, and other authorizations required by law to perform its obligations hereunder. Contractor warrants that it shall maintain all necessary licenses, certifications, approvals, insurance, permits, and other authorizations required to properly perform this Contract, without reimbursement by the Principal Representative or other adjustment in MCP. Additionally, the Contractor shall ensure that all employees, agents and Subcontractors secure and maintain at all times during the term of their employment, agency or subcontract, all license, certifications, permits and other authorizations required to perform their obligations in relation to this Contract. Contractor, if a foreign corporation or other foreign entity transacting business in the State of Colorado, further warrants that it currently has obtained and shall maintain any applicable certificate of authority to transact business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewal of licenses, certifications, approvals, insurance, permits or any such similar requirements necessary for Contractor to properly perform the terms of this Contract is an event of default or breach by Contractor and constitutes grounds for termination of this Contract.

Contractor shall use Subcontractors who are qualified and licensed in this State to perform the work so subcontracted pursuant to the terms hereof.

### **Equipment**

The Equipment is or shall be compatible with, or functional with, and or an upgrade to all other Premises mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components shall materially adversely affect each other as a direct or indirect result of Equipment installation or operation except in cases where that Principal Representative has directed, or approved, Contractor to install such equipment.

That Contractor is financially solvent, able to pay its debts as they mature and possesses sufficient working capital to complete the installation and perform its obligations under this Contract.

## Warranties

The warranties set forth in this section and such other warranties as may be set forth in this Contract are a part of the minimum work requirements of this Contract and all remediation or other actions required by such warranties shall be performed or delivered without additional cost to the Principal Representative.

### **Warranties Generally Applicable**

In addition to the Warranties provided in Article 44 of **Schedule A**, during the Construction phase, **§2A,** this Contract and for a period of one year following the Principal Representative’s submission of either the Notice of Substantial Completion or Notice of Partial Substantial Completion for each ECM, whichever is longer, Contractor warrants that:

* 1. The Work shall meet the Specifications set forth in the Contract Documents and be acceptable to the Principal Representative;
  2. There are not any pending suits, claims, or actions of any type with respect to the Equipment or Work;
  3. All Equipment and Work provided are free and clear of any liens, encumbrances or claims arising by or through Contractor or any party related to Contractor;
  4. Contractor will perform all of its obligations in accordance with **§7**, Contractor Performance;
  5. the Equipment is new, unless otherwise agreed in writing;
  6. shall be materially free from defects in materials; and,
  7. shall function properly.

### **Equipment**

Specific and any material warranties that exceed the equipment One-Year Warranty period shall be provided directly by the Equipment or material manufacturers and Contractor shall assign such warranties to the Principal Representative, after the One-Year Warranty period.

### **Obligations**

During the One-Year Warranty period, Contractor shall remedy any defects due to faulty materials and shall pay for, repair and replace any resulting damage to other work or any other resulting damage directly associated with the Work. Only new and not reconditioned parts may be used as a remedy. The Personal Representative shall give written notice to Contractor of observed defects or other Work requiring correction with reasonable promptness.

Contractor shall pursue rights and remedies against any Equipment manufacturers under the warranties in the event of Equipment malfunction or improper or defective function, defects in parts, workmanship and performance during the One-Year Warranty period. Contractor shall, during the One-Year Warranty period, notify the Principal Representative whenever defects in Equipment parts or performance arise that may provide a warranty claim. During the One-Year Warranty period, the cost of any risk of damage or damage to the Equipment and its performance, including damage to property, equipment of the Principal Representative or the Premises, or Equipment, due to Contractor’s failure to exercise its warranty rights shall be borne solely by Contractor.

Notwithstanding the above, nothing in this section shall be construed to abrogate Contractor’s duty to perform its other obligations under this Contract.

# PRINCIPAL REPRESENTATIVE M&V TERM RESPONSIBILITIES

The Principal Representative is responsible during the M&V Term for:

* 1. Hours of operation of the Premises or for any equipment or systems operating at the Premises; or
  2. Notifying the Contractor about equipment performance issues as they are noticed; or
  3. Permanent changes in the comfort and service parameters set forth in **Schedule M** (Standards of Comfort); or
  4. Failure to provide maintenance of and repairs to the Equipment in accordance with Owner’s Maintenance Responsibilities; or
  5. Providing Contractor, the right once a month, with prior notice, to inspect the Premises to determine if the Principal Representative is complying with appropriate schedules. For the purpose of determining the Principal Representative's said compliance, the checklist to be set forth in Owner’s Maintenance Responsibilities, as completed and recorded by Contractor during its monthly inspections, shall be used to measure and record the Principal Representative's compliance. The Principal Representative shall make the Premises 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. The Principal Representative may complete its own checklist at the same time. Contractor shall not interfere with Principal Representative operations during any monthly inspection.

# RIGHTS IN DATA, DOCUMENTS, AND COMPUTER SOFTWARE

Except for Contractor’s Intellectual Property, and the intellectual property of third parties, any software, research, reports, studies, data, photographs, negatives or other documents, drawings, models, materials, or Work Product of any type, including drafts, prepared by Contractor in the performance of its obligations under this Contract shall be the nonexclusive property of the Principal Representative and, all Work Product shall be delivered to the Principal Representative by Contractor upon completion or termination hereof. The Principal Representative ‘s nonexclusive rights in such Work Product shall include, but not be limited to, the right to copy, publish, display, transfer, and prepare derivative works. Contractor shall not use, willingly allow, cause or permit such Work Product to be used for any purpose other than the performance of Contractor’s obligations hereunder without the prior written consent of the State.

# GENERAL PROVISIONS

## Assignments

Contractor’s rights and obligations under this Contract are personal and may not be transferred or assigned without the prior, written consent of the State. Any attempt at assignment or transfer without such consent shall be void. Any assignment or transfer of Contractor’s rights and obligations approved by the State shall be subject to the provisions of this Contract, except in the event that any third party acquires substantially all of the assets and obligations of Contractor, at which point the State may choose, in its sole discretion, to either provide consent to the assignment or terminate this contract without further obligation to the contractor.

## Subcontracts

Contractor shall not enter into any subcontract in connection with its obligations under this Contract without the prior, written approval of the State. Contractor shall submit to the State a copy of each such subcontract upon request by the State. All subcontracts entered into by Contractor in connection with this Contract shall comply with all applicable federal and state laws and regulations, shall provide that they are governed by the laws of the State of Colorado, and shall be subject to all provisions of this Contract.

## Binding Effect

Except as otherwise provided in §24(A), all provisions of this Contract, including the benefits and burdens, shall extend to and be binding upon the Parties’ respective successors, and assigns.

## Counterparts

This Contract may be executed in multiple, identical, original counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

## Entire Understanding

This Contract represents the complete integration of all understandings between the Parties related to the Work, and all prior representations and understandings related to the Work, oral or written, are merged into this Contract. Prior or contemporaneous additions, deletions, or other changes to this Contract shall not have any force or affect whatsoever, unless embodied herein.

## Modification

### **By the Parties**

Except as specifically provided in this Contract, any modifications to this Contract shall only be effective if agreed to in a formal amendment to this Contract, properly executed and approved in accordance with applicable Colorado State law and State Fiscal Rules. Modifications permitted under this Contract, other than contract amendments, shall conform to the Policies of the Office of the State Controller, including, but not limited to, the policy entitled MODIFICATIONS OF CONTRACTS - TOOLS AND FORMS and the policies of the Office of the State Architect (OSA), including, but not limited to, the OSA policy CONTRACT MODIFICATIONS GUIDELINES.

## Statutes, Regulations, Fiscal Rules, and Other Authority

Any reference in this Contract to a statute, regulation, State Fiscal Rule, fiscal policy or other authority shall be interpreted to refer to such authority then current, as may have been changed or amended since the Effective Date of this Contract.

## Survival of Certain Contract Terms

Any provision of this Contract that imposes an obligation on a Party after termination or expiration of the Contract shall survive the termination or expiration of the Contract and shall be enforceable by the other Party.

## Taxes

The State is exempt from all federal excise taxes under I.R.C. Chapter 32 (26 U.S.C., Subtitle D, Ch. 32) (Federal Excise Tax Exemption Certificate of Registry No. 84-730123K) and from Colorado state and local government sales and use taxes under **§§39-26-704(1)**, **et seq**. C.R.S. (Colorado Sales Tax Exemption Identification Number 98-02565), and as indicted in **Article 9.C** in **Schedule A**. The State shall not be liable for the payment of any excise, sales, or use taxes, regardless of whether any political subdivision of the state imposes such taxes on Contractor. Contractor shall be solely responsible for any exemptions from the collection of excise, sales, or use taxes that Contractor may wish to have in place in connection with this Contract.

## Conflict of Interest

Contractor shall not engage in any business or personal activities or practices or maintain any relationships which conflict in any way with the full performance of Contractor’s obligations hereunder. Contractor acknowledges that with respect to this Contract, even the appearance of a conflict of interest is harmful to the Principal Representative’s interests. Absent the Principal Representative’s prior written approval, Contractor shall refrain from any practices, activities or relationships that reasonably appear to be in conflict with the full performance of Contractor’s obligations to the Principal Representative hereunder. If a conflict or appearance exists, or if Contractor is uncertain whether a conflict or the appearance of a conflict of interest exists, Contractor shall submit to the Principal Representative a disclosure statement setting forth the relevant details for the Principal Representative’s consideration. Failure to promptly submit a disclosure statement or to follow the Principal Representative’s direction in regard to the apparent conflict constitutes a breach of this Contract.

## Reporting – Notification

Reports, Evaluations, and reviews required under this §24(K) shall be in accordance with the procedures of and in such form as prescribed by the State and in accordance with **Schedule A**, §53(J), if applicable.

### **Performance, Progress, Personnel, and Funds**

Principal Representative shall submit a report to the Contractor upon expiration or sooner termination of this Contract, containing an Evaluation and Review of Contractor’s performance and the final status of Contractor's obligations hereunder. In addition, Contractor shall comply with all reporting requirements, if any, set forth in **Schedule A.**

### **Litigation Reporting**

Within 10 days after being served with any pleading in a legal action filed with a court or administrative agency, related to this Contract or which may affect Contractor’s ability to perform its obligations hereunder, Contractor shall notify the Principal Representative of such action and deliver copies of such pleadings to the Principal Representative.

### **Noncompliance**

Contractor’s failure to provide reports and notify the Principal Representative in a timely manner in accordance with this §24(K) may result in the delay of payment of funds and/or termination as provided under this Contract.

### **Subcontracts**

Copies of any and all subcontracts entered into by Contractor to perform its obligations hereunder shall be submitted to the Principal Representative in accordance with **Schedule** A. Any and all subcontracts entered into by Contractor related to its performance hereunder shall comply with all applicable federal and state laws and shall provide that such subcontracts be governed by the laws of the State of Colorado.

## Contractor Records

### **Maintenance**

Contractor shall make, keep, maintain, and allow inspection and monitoring by the Principal Representative of a complete file of all records, documents, communications, notes, and other written materials, electronic media files, and communications, pertaining in any manner to the Work or the delivery of Services or Goods hereunder. Contractor shall maintain such records until the last to occur of: **(i)** a period of three years after the date this Contract expires or is sooner terminated, or **(ii)** final payment is made hereunder, or **(iii)** the resolution of any pending Contract matters, or **(iv)** if an audit is occurring, or Contractor has received notice that an audit is pending, until such audit has been completed and its findings have been resolved (collectively, the “Record Retention Period”).

### **Inspection**

Contractor shall permit the Principal Representative, the federal government and any other duly authorized agent of a governmental agency to audit, inspect, examine, excerpt, copy and/or transcribe Contractor's records related to this Contract during the Record Retention Period to assure compliance with the terms hereof or to evaluate performance hereunder. The Principal Representative reserves the right to inspect the Work at all reasonable times and places during the term of this Contract, including any extensions or renewals, pursuant to **Article 6.C** in **Schedule A**. If the Work fails to conform with the requirements of this Contract, the Principal Representative may require Contractor promptly to bring the Work into conformity with Contract requirements, at Contractor’s sole expense. If the Work cannot be brought into conformance by re-performance or other corrective measures, the Principal Representative may require Contractor to take necessary action to ensure that future performance conforms to Contract requirements and exercise the remedies available under this Contract, at law or in equity, in lieu of or in conjunction with such corrective measures.

### **Monitoring**

Contractor shall permit the Principal Representative, the federal government, and governmental agencies having jurisdiction, in their sole discretion, to monitor all activities conducted by Contractor pursuant to the terms of this Contract using any reasonable procedure, including, but not limited to: internal evaluation procedures, examination of program data, special analyses, on-site checking, formal audit examinations, or any other procedures. All monitoring controlled by the Principal Representative shall be performed in a manner that shall not unduly interfere with Contractor’s performance hereunder.

### **Final Audit Report**

If an audit is performed on Contractor’s records for any State Fiscal Year covering a portion of the term of this Contract, Contractor shall submit a copy of the final audit report to the Principal Representative or its principal representative at the address specified herein.

## State Records – State Confidential Information

Contractor shall comply with the provisions on this **§24(M)** if it becomes privy to State Records or State Confidential Information in connection with its performance hereunder.

### **Confidentiality**

Contractor shall keep confidential, and cause all Subcontractors to keep confidential, all State Records, unless those State Records are publicly available. Contractor shall not, without prior written approval of the Principal Representative, use, publish, copy, disclose to any third party, or permit the use by any third party of any State Records, except as otherwise stated in this Contract, permitted by law, or approved in writing by the Principal Representative. Contractor shall provide for the security of all State Confidential Information in accordance with all applicable laws, rules, policies, publications, and guidelines. If Contractor or any of its Subcontractors will or may receive the following types of data, Contractor or its Subcontractors shall provide for the security of such data according to the following: the most recently promulgated IRS Publication 1075 for all Tax Information. Contractor shall immediately forward any request or demand for State Records to the State’s Principal Representative.

### **Other Entity Access and Nondisclosure Agreements**

Contractor may provide State Records to its agents, employees, assigns and Subcontractors as necessary to perform the Work, but shall restrict access to State Confidential Information to those agents, employees, assigns and Subcontractors who require access to perform their obligations under this Contract. Contractor shall ensure all such agents, employees, assigns, and Subcontractors sign agreements containing nondisclosure provisions at least as protective as those in this Contract, and that the nondisclosure provisions are in force at all times the agent, employee, assign or Subcontractor has access to any State Confidential Information. Contractor shall provide copies of those signed nondisclosure provisions to the State upon execution of the nondisclosure provisions if requested by the State.

### **Use, Security, and Retention**

Contractor shall use, hold and maintain State Confidential Information in compliance with any and all applicable laws and regulations only in facilities located within the United States, and shall maintain a secure environment that ensures confidentiality of all State Confidential Information. Contractor shall provide the State with access, subject to Contractor’s reasonable security requirements, for purposes of inspecting and monitoring access and use of State Confidential Information and evaluating security control effectiveness. Upon the expiration or termination of this Contract, Contractor shall return State Records provided to Contractor or destroy such State Records and certify to the State that it has done so, as directed by the Principal Representative. If Contractor is prevented by law or regulation from returning or destroying State Confidential Information, Contractor warrants it will guarantee the confidentiality of, and cease to use, such State Confidential Information.

### **Incident Notice and Remediation**

If Contractor becomes aware of any Incident, it shall notify the Principal Representative immediately and cooperate with the Principal Representative regarding recovery, remediation, and the necessity to involve law enforcement, as determined by the Principal Representative. Unless Contractor can establish that Contractor and its Subcontractors are not the cause or source of the Incident, Contractor shall be responsible for the cost of notifying each person who may have been impacted by the Incident. After an Incident, Contractor shall take steps to reduce the risk of incurring a similar type of Incident in the future as directed by the Principal Representative, which may include, but is not limited to, developing and implementing a remediation plan that is approved by the Principal Representative at no additional cost to the Principal Representative. The Principal Representative may adjust or direct modifications to this plan in its sole discretion, and Contractor shall make all modifications as directed by the Principal Representative. If Contractor cannot produce its analysis and plan within the allotted time, the Principal Representative, in its sole discretion, may perform such analysis and produce a remediation plan, and Contractor shall reimburse the Principal Representative for the actual costs thereof.

### **Data Protection and Handling**

Contractor shall ensure that all State Records and Work Product in the possession of Contractor or any Subcontractors are protected and handled in accordance with the requirements of this Contract at all times.

### **Compliance**

Contractor shall review, on a semi-annual basis, all Colorado Office of Information Security (OIS) policies and procedures which OIS has promulgated pursuant to §§24-37.5-401 C.R.S. through 406 and 8 CCR § 1501-5 and posted at http://oit.state.co.us/ois, to ensure compliance with the standards and guidelines published therein. Contractor shall cooperate, and shall cause its Subcontractors to cooperate, with the performance of security audit and penetration tests by OIS or its designee. Contractor shall perform an annual SSAE16 SOC2 Type II audit including the following Trust Principles: Security, Confidentiality, and Availability, and shall provide the resulting audit report to the Principal Representative.

### **Safeguarding PII**

If Contractor or any of its Subcontractors will or may receive PII under this Contract, Contractor shall provide for the security of such PII, in a manner and form acceptable to the Principal Representative, including, without limitation, State non-disclosure requirements, use of appropriate technology, security practices, computer access security, data access security, data storage encryption, data transmission encryption, security inspections, and audits.

## Order of Precedence

In the event of conflict or inconsistency between this Contract and its Schedules, Exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

1. Colorado Special Provisions (General Conditions of the EPC, **Schedule A**, Article 52),
2. The provisions of the main body of this Contract,
3. The remainder of Schedule A,
4. Construction Documents **§6(A),**
5. The remaining Schedules,
6. Any other attachment.

# SCHEDULES-LIST OF

The following Schedules are attached hereto and incorporated by reference herein:

|  |  |
| --- | --- |
| Schedule A | General Conditions of Energy Performance Contract |
| Schedule B | Energy Performance Contract Description of Work |
| Schedule C | Guarantee |
| Schedule D | Measurement and Verification Services Plan |
| Schedule E | Code Compliance Requirement |
| Schedule F | Schedule of Values (Initial) |
| Schedule G | Projected Financial Cost and Cash Flow Analysis |
| Schedule H | Certification that Cost-weighted Average Service Life of Equipment Exceeds Financing Term |
| Schedule I | Record of Reviews (as required) |
| Schedule K | Certificate of Insurance (Including Professional Errors And Omissions Liability Insurance) |
| Schedule L | Performance Bond (SC-6.22) |
| Schedule M | Labor and Material Payment Bond (SC-6.221) |
| Schedule N | Standards of Comfort |
| Schedule O | Client Construction Specifications |

# OPTIONAL PROVISIONS AND ELECTIONS

The provisions of this Article alter the preceding Articles or enlarge upon them as indicated (The Energy Performance Contract General Conditions EMP-GC (Schedule A)).

The Principal Representative and or the State Buildings Program shall mark boxes and initial where applicable.

*[To select any of these provisions: The boxes below are “fields”. Place cursor in front of the square, right-click, select “Properties”, change Default Value to “Checked”]*

## MODIFICATION OF ARTICLE 2. EXECUTION, CORRELATION, INTENT OF DOCUMENTS, COMMUNICATION AND COOPERATION

If the box below is marked, certification of apprenticeship utilization is required for all mechanical, sheet metal, fire suppression, sprinkler fitting, electrical and plumbing work on the project.

\_\_\_\_\_\_ Principal Representative initial

## MODIFICATION OF ARTICLE 45. WARRANTY INSPECTIONS AFTER COMPLETION

If the box below is marked the six-month warranty inspection is not required.

\_\_\_\_\_\_ Principal Representative initial

## MODIFICATION 1 OF ARTICLE 27. LABOR AND WAGES

If the box is marked the Federal Davis-Bacon Act shall be applicable to the Project. The minimum wage rates to be paid on the Project shall be furnished by the Principal Representative and included in the Contract Documents.

\_\_\_\_\_\_ Principal Representative initial

## MODIFICATION 2 OF ARTICLE 27. LABOR AND WAGES

If the box is marked, the State prevailing wage statute shall be applicable to the Project. The minimum wage rates to be paid on the Project shall be furnished by the Principal Representative and included in the Contract Documents.

\_\_\_\_\_\_ Principal Representative initial

## MODIFICATION OF ARTICLE 39. NON-BINDING DISPUTE RESOLUTION – FACILITATED NEGOTIATIONS

If the box is marked, and initialed by the State as noted, the requirement to participate in facilitated negotiations shall be deleted from this Contract. Article 39, Non-Binding Dispute Resolution – Facilitated Negotiations, shall be deleted in its entirety and all references to the right to the same where ever they appear in the contract shall be similarly deleted. The box may be marked only for projects with an estimated value of less than $500,000.

\_\_\_\_\_\_ Principal Representative initial

## MODIFICATION OF ARTICLE 46. TIME OF COMPLETION AND LIQUIDATED DAMAGES

If an amount is indicated immediately below, liquidated damages shall be applicable to this Project as, and to, the extent shown below. Where an amount is indicated below, liquidated damages shall be assessed in accordance with and pursuant to the terms of Article 46, Time of Completion and Liquidated Damages, in the amounts and as here indicated. The election of liquidated damages shall limit and control the parties right to damages only to the extent noted.

1. For the inability to use the Project, for each day after the number of calendar days specified in the Contractor’s bid for the Project and the Contract for achievement of Substantial Completion, until the day that the Project has achieved Substantial Completion and the Notice of Substantial Completion is issued, the Contractor agrees that an amount equal to N/A ($N/A) shall be assessed against Contractor from amounts due and payable to the Contractor under the Contract, or the Contractor and the Contractor’s Surety shall pay to the Principal Representative such sum for any deficiency, if amounts on account thereof are deducted from remaining amounts due, but amounts remaining are insufficient to cover the entire assessment.

2. For damages related to or arising from additional administrative, technical, supervisory and professional expenses related to and arising from the extended closeout period, for each day in excess of the number of calendar days specified in the Contractor’s bid for the Project and the Agreement to finally complete the Project as defined by the issuance of the Notice of Final Acceptance) after the issuance of the final Notice of Substantial Completion, the Contractor agrees that an amount equal to N/A ($N/A) shall be assessed against Contractor from amounts due and payable to the Contractor under the Contract, or the Contractor and the Contractor’s Surety shall pay to the Principal Representative such sum for any deficiency, if amounts on account thereof are deducted from remaining amounts due but amounts remaining are insufficient to cover the entire assessment.

# NOTICES and REPRESENTATIVES

Each individual identified below is the principal representative of the designating Party. All notices required to be given hereunder shall be hand delivered with receipt required or sent by certified or registered mail to such Party’s principal representative at the address set forth below. In addition to, but not in lieu of a hard-copy notice, notice also may be sent by e-mail to the e-mail addresses, if any, set forth below. Either Party may from time to time designate by written notice substitute addresses or persons to whom such notices shall be sent. Unless otherwise provided herein, all notices shall be effective upon receipt.

## Owner:

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## Contractor:

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