

**SUPPLEMENTAL GENERAL CONDITIONS  
FOR CONTRACTS BETWEEN OWNER AND ENERGY PERFORMANCE  
CONTRACTOR**

The Commonwealth of Virginia General Conditions of the Design-Build Contract (CO-7DB) are supplemented with the following additional terms and conditions:

**1. DEFINITIONS**

**Energy Conservation Measures:** All or a portion of the A/E Services and Work which reduce energy consumption or operating costs at the Site for the Owner.

**Energy Cost Savings:** A realized reduction in fuel, energy, operating, maintenance or other costs of the Owner which result from one or more of the Energy Conservation Methods.

**Energy Savings Guarantee:** The annual level of energy and operations cost savings to be recognized by Owner as a result of the installation and operation of the Work and provision of services provided for in this Contract as established by Contractor and set forth in Exhibit A using the savings calculation formula set for in Exhibit C (the "Energy Savings Guarantee").

**Facilities Maintenance Checklist:** The operational and maintenance activities which the Owner agrees to perform during the Guarantee Period.

**Guarantee Period.** That period of time, not to exceed fifteen (15) years, following Substantial Completion of the Design and Construction Work, during which the Energy Savings Guarantee is effective and the Guarantee Period Work is performed by the Contractor.

**14. PATENTS**

**Ownership of Certain Proprietary Property Rights.** Owner shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property related to the equipment and controls software. Nothing in this section shall negate the rights of the Owner to the ownership of the Project documents described in Section 23 of the General Conditions. The Contractor shall grant to the Owner a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Owner to continue to operate, maintain, and repair the equipment in a manner that will yield maximal energy consumption reductions.

**31. USE OF SITE AND REMOVAL OF DEBRIS**

f. Ownership of the equipment and materials presently existing at the Site at the time of execution of this Contract shall remain the property of the Owner even if it is replaced or its operation made unnecessary by work performed by Contractor pursuant to this Contract. If applicable, Contractor shall advise the Owner in writing of all equipment and materials to be replaced at the Site and the Owner shall within fifteen (15) days designate in writing to the Contractor which equipment and materials that should not be disposed of off-Site by the Contractor. It is

understood and agreed that the Owner shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-Site. The Contractor shall be responsible for the disposal of all equipment and materials designated by the Owner as disposable off-Site in accordance with all applicable laws and regulations regarding such disposal. Owner shall be responsible for the removal and disposal of all hazardous waste, such as asbestos and lead containing materials for which Contractor provides timely and compliant Notice to Owner. Contractor will stop work and notify Owner immediately if it discovers or suspects the presence of hazardous materials at the Site. Adjustment to the Project schedule and/or the Contract Price resulting from the remediation of hazardous material shall be addressed by Change Order in accordance with the requirements of Section 38 of the General Conditions.

- g. No existing equipment, pipes, wires, duct, or other materials shall be abandoned in place or on Site without the written consent of the Owner. Such materials, after consultation with the Owner in accordance with Section 31(f) of the General Conditions., shall be removed from the site and properly disposed of.

#### **41. OWNER'S RIGHT TO TERMINATE THE CONTRACT FOR CAUSE**

- g. Owner may terminate this Contract at any time if Contractor does not achieve the required Energy Savings Guarantee in any Guarantee Period term, fails to remit any monies due to the Owner following the Measurement and Verification of savings during any Guarantee Period Term, or otherwise fails or refuses to perform Contractor's obligations during the Guarantee Period. Owner shall give notice to Contractor prior to termination as set forth in Section 41(b) above. Upon a termination under this Section 41(g) becoming effective, Owner shall provide Notice to the Surety for the Guarantee Period Bond of any sums due to Owner from Contractor. Contractor and/or the Surety for the Guarantee Period Bond promptly shall remit all sums due to Owner.

#### **49. TRAINING, OPERATION AND MAINTENANCE OF EQUIPMENT**

- c. As long as this Contract is in effect, the Contractor shall provide ongoing training whenever needed with respect to updated or altered Work, including upgraded software. Such training shall be provided at no additional charge to the Owner.
- d. Unless otherwise provided by the Contract Documents, Owner shall provide all service, repairs, and adjustments to all other equipment installed under terms of this Contract in accordance with the Facilities Maintenance Checklist. Owner shall incur all costs for such equipment service, repairs, and adjustments, except when the need for maintenance or repairs principally arises due to a Contractor warranty obligation.
- e. Owner shall use its best efforts to notify the Contractor within twenty-four (24) hours after the Owner's actual knowledge and occurrence of: (i) any malfunction in the operation of the equipment or any preexisting energy-related equipment that might materially impact upon the Energy Savings Guarantee; (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.

Where Owner exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration, it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the Energy Savings Guarantee. Owner shall notify Contractor within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Work. Contractor shall respond or cause its designee(s) to respond

within two to four (2-4) hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Owner shall be followed within three business days by written notice to Contractor from Owner. If Owner unreasonably delays in so notifying Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, such conditions will be treated as an Energy Performance Change and the applicable provisions of Section 55 shall be applied.

f. Owner shall not move, remove, modify, alter, or change in any way the Work or any part thereof without written notification to the Contractor. Notwithstanding the foregoing, Owner may take reasonable steps to protect the Work if, due to an emergency, it is not possible or reasonable to notify Contractor before taking any such actions. In the event of such an emergency, Owner shall take reasonable steps to protect the Work from damage or injury and shall follow instructions for emergency action provided in advance by Contractor. Owner 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 Work.

g. **Owner's Compliance with Facilities Maintenance Checklist:**

1. The parties acknowledge and agree that Contractor has entered into this Contract in reliance upon the prospect of earning compensation based on the Energy Savings Guarantee.
2. The parties further acknowledge and agree that the said Energy Savings Guarantee would not likely be obtained unless the procedures and methods of operation designed for energy conservation set forth in the Facilities Maintenance Checklist shall be implemented and followed by Owner on a regular and continuous basis. Contractor agrees that the requirements of the Facilities Maintenance Checklist must not exceed prevailing industry practices, must be reasonable, and must be approved by the Owner prior to being implemented.
3. Owner agrees that it shall adhere to, follow and implement the guidelines set forth on the Facilities Maintenance Checklist agreed to by Owner.
4. Owner agrees that Contractor shall have the right once a month, with prior notice, to inspect premises to determine if Owner is following the Facilities Maintenance Checklist. Owner shall make the premises reasonably available to Contractor for and during each monthly inspection. Owner shall have the right to witness each inspection and receive a copy of any notes or reports following Contractor's inspection.

The Commonwealth of Virginia General Conditions of the Design-Build Contract (CO-7DB) is hereby appended with following additional sections:

**52. ENERGY SAVINGS GUARANTEE**

- a. **Energy Savings Guarantee.** Contractor guarantees that the Owner shall annually attain the Energy Savings Guarantee and that the annual Energy Savings Guarantee has been structured by the Contractor to be sufficient to cover any and all annual payments required to be made by the Owner to Contractor as set forth in Exhibit B.

- b. **Annual Review and Reimbursement/Reconciliation.** Within a reasonable period of time following the conclusion of each Guarantee Period term, Contractor shall complete Measurement and Verification for the concluding period and provide a report to Owner setting forth the actual energy savings for the term. If at the conclusion of a term the Contractor has failed to achieve the annual Energy Savings Guarantee specified in Exhibit C, upon written request by the Owner, which shall be given no earlier than the end of such term and no later than forty-five (45) days thereafter, the Contractor shall pay the Owner the difference between the annual Energy Savings Guarantee and the amount of energy and operations savings actually realized during that term. The Contractor shall remit such payments to the Owner within thirty (30) days of written notice by the Owner of such monies due. In no event shall credit for excess savings be used to satisfy the Energy Savings Guarantee in future years of the Guarantee Period.
- c. **Contractor Compensation and Fees.** Contractor has structured the Energy Savings Guarantee to be sufficient to cover and include any and all annual payments required to be made to the Contractor by the Owner for any reason, including for the financing/purchasing of the Work and any annual fees to be paid by Owner to Contractor during the Guarantee Period.

### 53. UPGRADING OR ALTERING THE WORK

Contractor shall at all times have the right, subject to Owner's prior written approval, which approval shall not be unreasonably withheld, to change the Work, revise any procedures for the operation of the Work or implement other energy saving actions for the Site, provided that:

1. the Contractor complies with the Standards of Comfort and Services set forth in Exhibit D herein;
2. such modifications or additions to, or replacement of the Work, and any operational changes or new procedures are necessary to enable the Contractor to achieve the Energy Savings Guarantee; and
3. any cost incurred relative to such modifications, additions or replacement of the Work, or operational changes or new procedures, shall be the sole responsibility of the Contractor.

All modifications, additions or replacements of the Work or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Owner for approval. Any replacement of the Work shall be new and have equal or better potential to reduce energy consumption at the Site than the Work being replaced. The Contractor shall update any and all software to be used in connection with the Work. All replacements of and alterations or additions to the Work shall become part of the Work described in Exhibit A and shall be covered by the provisions and terms of the Contract.

### 54. STANDARDS OF COMFORT AND SERVICES

Contractor will install the Work in a manner which will provide the standards of heating, cooling, hot water, and lighting as described in Exhibit D. These Standards of Comfort and

Services shall comply with nationally recognized standards unless further clarified by the Owner.

## 55. ENERGY PERFORMANCE CHANGES

- a. **Energy Performance Change Defined:** An Energy Performance Change shall include any change in or to the Site, whether structural, operational or otherwise in nature, which reasonably could be expected, in the judgment of the Owner or as identified by the Contractor, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Exhibit C by at least 5% after adjustments for climatic variations. Actions by the Owner which may result in an Energy Performance Change include but are not limited to the following:
1. manner of use of the Site by the Owner;
  2. hours of operation for the premises or for any equipment or energy using systems operating at the Site;
  3. permanent changes in the Standards of Comfort and Services parameters set forth in Exhibit D;
  4. occupancy of the Site;
  5. structure of the buildings on the Site;
  6. types and quantities of equipment used at the Site;
  7. modification, renovation or construction at the Site;
  8. the Owner's failure to provide maintenance of and repairs to the Work in accordance with the Facilities Maintenance Checklist; or
  9. any other conditions other than climate affecting energy use at the Site.
- b. **Reported Energy Performance Changes; Notice by Owner:** The Owner shall use its best efforts to deliver to the Contractor a written notice describing all actual or proposed Energy Performance Changes in the Site or in the operations of the Site at least 10 days before any actual or proposed Energy Performance Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the Contractor of Energy Performance Changes which result from an emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Owner within 4 hours after the Owner's Project Manager having actual knowledge the event constituting the Energy Performance Change occurred or was discovered to have occurred.
- c. **Unreported Energy Performance Change.** In the absence of any Energy Performance Changes in the premises or in their operations, the baseline energy consumption as set forth in Exhibit C should not change more than 5% during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions. Therefore, if energy consumption for any month as set forth in Exhibit C deviates by more than 5 percent (5%) from the energy consumption for the same month of the preceding Guarantee Period term after adjustments for changes to climatic conditions, then such deviation shall be timely reviewed by

the Contractor to ascertain the cause of deviation. The Contractor shall report its findings to the Owner in a timely manner.

- d. Upon notice in accordance with Section 55(b) or 55(c) above, the Contractor shall determine and request adjustments, if any, to the baseline set forth in Exhibit C. Such adjustments shall be calculated utilizing the same methodology and assumptions utilized in the original calculations unless the action or actions of the Owner identified in Section 55(a) have materially changed those assumptions or the methodology required to complete such calculations. The proposed adjustment shall be submitted with supporting documentation including all assumptions and calculations that the Owner deems necessary to allow evaluation of the request. Adjustment to the Contract as the result of an Energy Performance Changes shall be addressed by Change Order in accordance with the requirements of Section 38 of the General Conditions.

## **56. ADDITIONAL REPRESENTATIONS OF THE PARTIES**

Owner hereby warrants, represents and promises that it has provided or shall provide timely to Contractor, all records relating to energy usage and energy-related maintenance of premises requested by Contractor and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract will be true and accurate in all material respects.

## **59. MEASUREMENT AND VERIFICATION**

**Measurement and Verification.** Measurement and Verification is the systematic measurement of actual consumption and comparison to the anticipated results outlined in the Energy Savings Guarantee for the purpose of quantifying the energy and cost savings resulting from the energy conservation measures required by the Contract.

Unless otherwise provided by the Contract Documents, Measurement and Verification will be performed by an independent third-party and shall be paid for by the Owner.

Measurement and Verification shall be performed in accordance with the most current version of the Federal Energy Management Program (FEMP) International Performance Measurement and Verification Protocol (IPMVP) guidelines as of the date of this Contract. Measurement and Verification shall be done using the Measurement and Verification Plan for the Project using the baseline physical conditions, approaches and other requirements set forth therein.