**ENERGY SPECIAL TERMS AND CONDITIONS FOR ESCO CONTRACTS UNDER THE CO9DB(ESCO)**

**SECTION 1. ENERGY MANAGEMENT PLAN**

Section 1.1 Plan Details. ESCO has prepared the complete Technical Energy Audit (ie, Detailed Technical Proposal) dated \_\_\_\_\_\_\_\_\_\_ which has been approved and accepted by Agency. The audit includes all energy conservation measures agreed upon by the parties, but the specific measures to be implemented through this Contract are identified in Exhibit A, Scope of Work.

Section 1.2 Exhibits. ESCO has prepared and Agency has approved and accepted the exhibits as set forth below, copies of which are attached hereto and made a part of this contract by reference: Exhibit A (including sub-exhibits 1 and 2): Description of Premises and Scope of Work; Exhibit B: Payments by Owner; Exhibit C (including sub-exhibits C.1, C.2, C.3 and C.4): Guaranteed Energy and Operational Savings; Exhibit D: Notice to Proceed; Exhibit E: Performance Period Services.

Agency reserves the right to include the provision of any future goods/services by ESCO on new or existing facilities as an amendment to this contract.

**SECTION 2. ENERGY USAGE RECORDS AND DATA**

Prior to executing the CO9DB(ESCO), utility data will be updated if the most recently provided utility data is more than one year old. Agency shall furnish (or cause its energy suppliers to furnish) to ESCO, upon its request, all of its records and complete data concerning energy usage and energy-related maintenance for the Premises described in Exhibit A, including the following data for the most current thirty-six (36) month period; utility records; occupancy information; descriptions of any changes in the building structure or its heating, cooling, lighting or other systems or energy requirements; descriptions of all energy consuming or saving equipment used in the Premises; bills and records relating to maintenance of energy-related equipment, and a description of energy management procedures presently utilized, if not provided under the Technical Energy Audit. If requested, Agency shall also provide any prior energy audits of the Premises, and copies of Agency's financial statements and records related to energy usage and operations for said thirty-six (36) month period at said Premises, and shall make agents and employees familiar with such records available for consultations and discussions with ESCO.

**SECTION 3. COMMENCEMENT DATE FOR ENERGY SAVINGS AND TERMS; INTERIM PERIOD**

Section 3.1 Commencement Date for Energy Savings. The Commencement Date shall be the first day of the month after the month in which all Exhibits are in final form and accepted by the Agency, ESCO has delivered a Notice to the Agency that it has installed and commenced operating all of the Equipment specified in Exhibit A and in accordance with all the provisions of Section 6; and Agency has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance. Compensation payments due to ESCO for service and maintenance under this Contract as set forth in the attached Exhibit B shall be made in accordance with prompt pay requirements.

Section 3.2 Term of Contract; Interim Period. Subject to the following sentence, the term of this Contract shall be no more than fifteen (15) years for state agencies/institutions or twenty (20) years for localities and measured beginning with the Commencement Date. Nonetheless, the Contract shall be effective and binding upon the parties immediately upon the "Effective Date." The Effective Date is the date this Contract is sent to the ESCO after it has been fully executed by Agency and ESCO and all approvals required by Commonwealth contracting procedures have been obtained. The period from Contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period will be fully credited to Agency.

**SECTION 4. PAYMENTS TO ESCO**

Section 4.1 Energy Savings Guarantee. ESCO has formulated and, subject to the adjustments provided for, has guaranteed the annual level of energy and operations savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in Exhibit A and in accordance with the Savings Calculation Formula as set for in Exhibit C. The Energy Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Exhibit C and has been structured by the ESCO so as to be sufficient to cover any and all annual payments required to be made by the Agency as set forth in Exhibit B.

Section 4.2 Annual Review and Reimbursement/Reconciliation. If at the end of any year during the guarantee period as specified in Exhibit C, the ESCO has failed to achieve the annual Energy Savings Guarantee specified in Exhibit C, upon written request by the Agency, which shall be given no earlier than the end of such year and no later than forty-five (45) days thereafter, the ESCO will pay the Agency the difference between the annual amount guaranteed and the amount of actual energy and operations savings achieved at the Premises in accordance with the provisions of Exhibit C. The ESCO shall remit such payments to the Agency within thirty (30) days of written notice by the Agency of such monies due. When the total energy savings in any one year during the guarantee period exceeds the Energy Savings Guarantee as set forth in Exhibit C and are in addition to those monies due the ESCO for compensation for services as set forth in Exhibit C, such excess savings shall first be applied to reimburse ESCO for any payment ESCO made to Agency to meet ESCO's guarantee for previous years in which the energy savings fell short of ESCO's Energy Savings Guarantee under the terms as set forth in Exhibit C. In no event shall credit for excess savings be used to satisfy performance guarantees in future years of the contract. The Agency may terminate on the anniversary if the savings are not generated.

Section 4.3 ESCO Compensation and Fees. ESCO has structured the Energy Savings Guarantee referred to in Section 4.1 above, so as to be sufficient to include any and all annual payments required to be made by the Agency in connection with financing/purchasing the Equipment to be installed by ESCO under this Contract as set forth in Exhibit A. Actual energy and operations savings achieved by ESCO through the operation of Equipment and performance of services by ESCO shall be sufficient to cover any and all annual fees to be paid by Agency to ESCO for the provision of services as set forth and in accordance with the provisions of Exhibit B.

Section 4.4 Billing Information Procedure. Payments during the Interim Period shall be made using the CO12 Schedule of Values defined in the CO7DB General Conditions of the Construction Contract. Payments made after the “Commencement Date” (for recurring maintenance/service of installed equipment) shall be made in accordance with prompt pay requirements.

**SECTION 5. NONAPPROPRIATION OF FUNDS**

In the event no Agency funds or insufficient Agency funds are appropriated and budgeted in any Commonwealth of Virginia Fiscal Year for payments due under this Contract, then Agency will immediately notify ESCO or its assignee of such occurrence and this Contract shall terminate on the last day of Commonwealth's Fiscal Year for which appropriations were received without penalty or expense to Agency of any kind whatsoever. In the event of such termination, Agency agrees to peaceably surrender possession of all of the Equipment in good operating condition, subject to normal wear and tear to ESCO or its assignee on the date of such termination. ESCO or its assignee will have all legal and equitable rights and remedies to take possession of the Equipment. Upon such termination, title to the Equipment will revert to ESCO or its assignee.

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

Notwithstanding the foregoing, Agency agrees that (i) it will not cancel this Contract under the provisions of this paragraph if any funds are appropriated to it, or by it, for the acquisition, retention or operation of the Equipment or other equipment performing functions similar to the Equipment for the Fiscal Year in which such termination occurs and (ii) it will not, during the term of the Contract, give priority in the application of funds to any other functionally similar equipment or purchase of services such as outsourcing.

**SECTION 6. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; APPROVAL**

Section 6.1 ESCO shall be responsible for the professional and technical accuracy, of all construction and services performed in accordance with the Construction and Professional Services Manual, whether by ESCO or its subcontractors or others on its behalf, throughout the term of this Contract.

Section 6.2 ESCO shall provide overall coordination, management, and responsibility, and shall assure that all work is completed in a good and workmanlike manner. ESCO's services shall include the following:

a. Engineering Design: A survey of the Premises for purposes of designing the Program.

b. Procurement, Installation, Start-Up: Subject to other provisions of this Contract, ESCO will act as a turn-key general contractor assuming total responsibility for the procurement of labor and material for installation and start-up of the Equipment, including: selecting subcontractors and suppliers in concert with Agency; awarding subcontracts; receiving and evaluating submitted drawings on the equipment; progress inspections during installation; developing and presenting subcontractor punch lists after each inspection; receiving and evaluating record drawings; and operation and maintenance manuals from subcontractors; providing for training of Agency personnel on proper operation of the newly installed Equipment; and final inspection and recommendation for approval to the Agency for acceptance of the equipment. The Agency reserves the right to review the bids solicited by the ESCO for equipment and labor.

Section 6.3 Construction and Equipment installation shall proceed in accordance with the construction schedule approved by Agency.

Section 6.4 Systems Startup and Equipment Commissioning: The ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in Exhibit A and prior to acceptance of the project by Agency. The ESCO shall provide notice to the Agency of the scheduled test(s) and the Agency and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Equipment. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures.

Section 6.5 In order for ESCO to receive payments during the design/build stages of the Contract, the Agency shall authorize disbursements from any escrow account established between the owner and the third party financing company. Agency shall request disbursements from the escrow account pursuant to invoicing guidelines of Section 4.4 above.

Section 6.6 Statutory Requirements. In the installation of the Equipment, ESCO shall be required, and shall require its contractors and subcontractors to comply with all Terms and Conditions under contract DEB20110611, unless noted and agreed to as an exception.

**SECTION 7. WARRANTIES**

Section 7.1 General. Should any item of Equipment be found to be defective within one (1) year from the date of installation, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim. All shipping and transportation costs involved in the repair or replacement of the defective Equipment shall be paid by ESCO.

On all systems installed pursuant to this Contract, ESCO shall provide, at no charge during the warranty period, any labor required to repair or replace defective Equipment or parts. Such labor shall include adjustment of controls, air balancing, and correction of mechanical difficulties if such adjustments are due to defective equipment or improper installation.

If the Equipment fails to fulfill the performance guarantees, ESCO shall have the opportunity to make such changes as it deems necessary to fulfill such guarantees. If a demonstration is required, ESCO shall be given the opportunity to test the equipment under requisite conditions.

The warranty provisions under this Section 7.1 are in addition to and not in lieu of any warranties made by equipment or component manufacturers. After installation of all ECMs, Contractor shall deliver to the Agency all manufacturer warranty certificates, documents, operation and maintenance instructions and manuals, and similar documents.

Section 7.2 Equipment Warranties. ESCO covenants and agrees that all Equipment installed as part of this Contract is new, in good and proper working condition and protected by appropriate written warranties covering all parts and equipment performance. ESCO further agrees to deliver to the Agency for inspection and approval, all such written warranties and which shall be attached, to pursue rights and remedies against manufacturer of the Equipment under the warranties in the event of Equipment malfunction or improper or defective function, and defects in parts, workmanship and performance, to notify the Agency whenever defects in Equipment parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO. The cost of any risk of damage or damage to the Equipment and its performance, including damage to property and Equipment of the Agency or the Premises, due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

All warranties shall be transferable and extend to the Agency. The warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessitated by malfunction.

All warranties required hereunder shall be in force for a minimum of one year from the Commencement Date as defined in Section 3.1 hereof. All auxiliary equipment not manufactured by ESCO carries only such warranty as given by the manufacturer thereof and which is hereby assigned to Agency without recourse to ESCO. ESCO’s obligation under this warranty is, at ESCO's sole option, to repair or replace any work which is shown to ESCO's satisfaction to have been defective as to material, workmanship or design, provided that: (i) written notice of such defect is given to ESCO within thirty (30) calendar days of discovery thereof; (ii) the equipment/work has been used or operated in accordance with the operating and maintenance instructions provided by ESCO; and (iii) no alterations or substitutions have been made in the work without the express written authorization of ESCO. NO FURTHER WARRANTIES OR GUARANTIES, EXPRESS OR IMPLIED, ARE MADE WITH RESPECT TO ANY GOODS OR SERVICES PROVIDED UNDER THIS CONTRACT, AND ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARE EXPRESSLY DISCLAIMED.

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

**SECTION 8. TRAINING BY ESCO**

As long as this Contract is in effect, the ESCO shall provide ongoing training whenever needed with respect to updated or altered Equipment as defined in Exhibit A including upgraded software. Such training shall be provided at no additional charge to the Agency.

**SECTION 9. PERFORMANCE BY ESCO**

ESCO shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Building Codes of Virginia and the construction schedule. The Agency reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of the Agency, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the work shall be borne by ESCO.

**SECTION 10. OWNERSHIP**

Section 10.1 Ownership of Certain Proprietary Property Rights. Agency shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. The ESCO shall grant to the Agency a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Agency to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions.

Section 10.2 Ownership of Existing Equipment. Ownership of the equipment and materials presently existing at the Premises at the time of execution of this Contract shall remain the property of the Agency even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the Agency in writing of all equipment and materials to be replaced at the Premises and the Agency shall within fifteen (15) days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that the Agency shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The ESCO shall be responsible for the disposal of all equipment and materials designated by the Agency as disposable off-site in accordance with all applicable laws and regulations regarding such disposal. Agency shall be responsible for the removal and disposal of all hazardous waste, such as asbestos and lead containing materials. ESCO will stop work and notify Agency immediately if it discovers or suspects the presence of hazardous materials at the work-site. The discovery and subsequent third-party remediation of hazardous materials may justify an equitable adjustment to the Project Schedule and/or the Project Cost which, if applicable, the parties will document in a Change Order.

Section 10.3 Ownership of New Equipment. Title to the Equipment shall pass from the ESCO to the Agency after the Equipment has been delivered to the Premises and Agency has had a reasonable opportunity to inspect and accept the Equipment.

**SECTION 11. EQUIPMENT SERVICE**

Section 11.1 Non-Warranty Maintenance. Agency shall provide all service, repairs, and adjustments to all other Equipment installed under terms of this Contract. Agency shall incur all costs for such Equipment service, repairs, and adjustments, except when the need for maintenance or repairs principally arises due to an ESCO warranty obligation.

Section 11.2 Malfunctions and Emergencies. Agency shall use its best efforts to notify the ESCO or its designee(s) within 24 hours after the Agency'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 guaranteed energy 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.

Where Agency 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 guaranteed energy savings. Agency shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. ESCO shall respond or cause its designee(s) to respond within 2-4 hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Agency shall be followed within three business days by written notice to ESCO from Agency. If Agency unreasonably delays in so notifying ESCO 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 16 shall be applied.

Section 11.3 Actions by Agency. Agency shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without written notification to the ESCO. Notwithstanding the foregoing, Agency may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, Agency shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by ESCO. Agency 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.

**SECTION 12 UPGRADING OR ALTERING THE EQUIPMENT**

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

(i) the ESCO complies with the standards of comfort and services set forth in Exhibit C herein;

(ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings at the Premises and;

(iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the ESCO.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Agency for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall be new and have equal or better potential to reduce energy consumption at the Premises than the Equipment being replaced. The ESCO shall update any and all software to be used in connection with the Equipment in accordance with the provisions of the terms and conditions of DEB20110611. All replacements of and alterations or additions to the Equipment shall become part of the Equipment described in Exhibit A and shall be covered by the provisions and terms of Section 6.

**SECTION 13. STANDARDS OF COMFORT**

ESCO will install the Equipment in a manner which will provide the standards of heating, cooling, hot water, and lighting as described in Exhibit C.

**SECTION 14. ENERGY PERFORMANCE CHANGES**

Section 14.1 Energy Performance Change Defined: A Energy Performance Change shall include any change in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Agency or as identified by the ESCO, to increase or decrease energy consumption in accordance with the provisions and procedures set forth in Exhibit C by at least 5%, in the aggregate, after adjustments for climatic variations. Actions by the Agency which may result in an Energy Performance Change include but are not limited to the following:

(i) manner of use of the Premises by the Agency; or

(ii) hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or

(iii) permanent changes in the comfort and service parameters set forth in Exhibit C; or

(iv) occupancy of the Premises; or

(v) structure of the Premises; or

(vi) types and quantities of equipment used at the Premises or

(vii) modification, renovation or construction at the Premises; or

(viii) the Agency's failure to provide maintenance of and repairs to the Equipment; or

(ix) any other conditions other than climate affecting energy use at the Premises.

Section 14.2 Reported Energy Performance Changes; Notice by Agency: The Agency shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Energy Performance Changes in the Premises or in the operations of the Premises 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 ESCO of Energy Performance Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Agency within 4 hours after having actual knowledge that the event constituting the Energy Performance Change occurred or was discovered by the Agency to have occurred.

Section 14.3 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 contract year after adjustments for changes to climactic conditions, then such deviation shall be timely reviewed by the ESCO to ascertain the cause of deviation. The ESCO shall report its findings to the Agency in a timely manner and the ESCO and Agency shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Exhibit C.

**SECTION 15. RISK OF LOSS**

Title and risk of loss of materials and Equipment furnished by ESCO shall pass to the Agency upon their delivery to the Site, and the Agency shall be responsible for protecting and insuring them against theft and damage.

ESCO’s sole obligation with respect to insurance shall be to provide Commercial General Liability on an occurrence basis with a limit of $1,000,000 ($10,000,000 general aggregate), Automobile Liability $2,000,000 combined single limit, and Workers Compensation/Employer Liability $1,000,000. Agency (and other specific entities, if any, designated by Agency) shall be included as an additional insured to the General Liability/Automobile Liability policies. A certificate of insurance shall be issued to the Agency that evidences the above insurance and which provides for thirty (30) days written notice to the certificate holder by U.S. mail should any of the policies be cancelled before the policy expiration date.

The Agency will maintain, at its own expense, property insurance written on a builder’s “all-risk” or equivalent policy form in the amount of the initial Contract Sum, plus the value of subsequent modifications and cost of materials supplied or installed by others, on a replacement cost basis without optional deductibles. Such property insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by ESCO, until final payment has been made to ESCO or no person or entity other then the Agency has an insurable interest in the property, whichever is later. The policy form shall include without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, false work, testing and start-up, rebuilding and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for ESCO’ services and expenses required as result of such insured loss. If the insurance requires deductibles or retentions, the Agency shall pay costs not covered because of such deductibles or retentions. This insurance shall cover portions of the Work off the Site, and also portions of the Work in transit. Partial occupancy or use shall not commence unless the insurance company providing this insurance has consented to such partial occupancy or use by endorsement for otherwise. The Agency shall purchase and maintain boiler and machinery insurance which shall specifically cover such insured objects during installation and until Acceptance by the Agency. The insurance required by this section shall include the interests of the Agency, ESCO, subcontractor and sub-subcontractor in the Work. ESCO shall be included as an additional insured on each such insurance coverage. The Agency and ESCO waive all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other causes of loss to the extent covered by the insurance required by this section and for any other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Agency as fiduciary. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged. Insurance certificates shall be furnished upon request.

ESCO shall not be responsible for loss, delay, injury, damage or failure of performance that may be caused by circumstances beyond its control, including but not restricted to acts or omissions by the Agency or its employees, agents or contractors, Acts of God, war, civil commotion, acts or omissions of government authorities, fire, theft, corrosion, flood, water damage, lightning, freeze-ups, strikes, lockouts, differences with workmen, riots, explosions, quarantine restrictions, delays in transportation, or shortage of vehicles, fuel, labor or materials. In the event of such delay or failure, the time for performance shall be extended by a period equal to the time lost plus a reasonable recovery period and the compensation shall be equitably adjusted to compensate for additional costs ESCO incurs due to such delay. If any such delay exceeds sixty (60) days, ESCO may terminate this Agreement upon three (3) days notice to the Agency and the Agency shall promptly pay ESCO for the allocable portion of the Work completed, for any costs and expenses of termination, and for any loss or damage incurred with respect to materials, equipment, tools and machinery, including reasonable overhead and profit.

**SECTION 16. CASUALTY OR CONDEMNATION OF PREMISES**

Any construction or restoration of the Premises following or necessitated by fire, flood, or other casualty, or any condemnation affecting any portion of the Premises, shall be deemed an Energy Performance Change, and the provisions of Section 14 shall be applicable. If the casualty or condemnation renders fifty percent (50%) or more of the Premises uninhabitable or unusable and, in the case of a casualty, the affected portion is not reconstructed or restored within one hundred and twenty (120) days from the date of such casualty, Agency shall have the option to terminate this Contract by a notice to ESCO. In the event of condemnation, Agency agrees that ESCO shall be entitled to that portion of the condemnation award equal to the purchase option value applicable at that time with appropriate adjustments for applicable portions of the Premises which are condemned versus portions of the Premises which are unaffected.

**SECTION 17. EVENTS OF DEFAULT**

Section 17.1. Events of Default by Agency. Each of the following events or conditions shall constitute an "Event of Default" by Agency:

(i) Any failure by Agency to pay ESCO any sum due for a service and maintenance period of more than sixty (60) days after written notification by ESCO that Agency is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract; or

(ii) Any other material failure by Agency to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to Agency demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, Agency shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; or

(iii) Any representation or warranty furnished by Agency in this Contract which was false or misleading in any material respect when made.

Section 17.2 Events of Default by ESCO. Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

(i) The standards of comfort and service set forth in Exhibit C are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within thirty (30) days after written notice by Agency to ESCO demanding that such failure be cured, shall be deemed cured for purposed of this Contract;

(ii) Any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;

(iii) Failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract;

(iv) Any other material failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, if corrected or cured within thirty (30) days after ESCO's receipt of such written notice shall be deemed cured for the purpose of this Contract.

(v) Any lien or encumbrance upon the equipment by any subcontractor, laborer or material man of ESCO which the ESCO fails to discharge or bond within thirty (30) days from the filing thereof;

(vi) The filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within thirty (30) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;

(vii) Any change in ownership or control of the ESCO by its ultimate parent company without the prior approval of the Agency, which shall not be unreasonably withheld;

(viii) Failure by the ESCO to pay any amount due the Agency; or

(ix) Repossession or removal of the Equipment by ESCO or a third party without good cause.

**SECTION 18. REMEDIES UPON DEFAULT**

Section 18.1 Remedies upon Default by Agency. If an Event of Default by Agency occurs, ESCO may, without a waiver of other remedies which exist in law or equity, elect one or both of the following remedies:

(i) Exercise any and all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Agency, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy;

(ii) Without recourse to legal process, terminate this Contract by delivery of a notice declaring termination, enter the Premises, and dismantle and/or remove its Equipment from the Premises, without liability to Agency.

Section 18.2 Remedies Upon Default by ESCO. In the Event of Default by ESCO, Agency shall have the choice of one or more of the following remedies without waiving any other rights or remedies in law or equity:

(i) Exercise and any all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred;

(ii) Reserved.

(iii) If the payments under this Contract have not been assigned, Agency may set off or counterclaim against its obligation to make any of the payments provided in default; or

(iv) ESCO (but not the assignee) will be liable to Agency for damages incurred by Agency as a result of any default by ESCO. Such damages may include, but are not limited to: (a) payments made to ESCO or its assignee which represents payment towards a unit of Equipment for which acceptance was revoked because of a latent defect (b) the difference in price between the market price of the Equipment which was not delivered or which was rejected (or the actual purchase price if Agency purchases replacements (like Equipment) for any undelivered or rejected unit of Equipment) and the purchase price indicated in the Contract for such units of Equipment) (c) damages as a result of breach of warranty, failure to meet specifications, or damages incurred by Agency resulting from the delivery of Equipment which is defective or fails to meet specifications, or resulting from ESCO's failure to comply with any other requirements of this Contract, and (d) any other damages recoverable by law.

**SECTION 19. REPRESENTATIONS AND WARRANTIES**

Each party warrants and represents to the other that:

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

(ii) Its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

(iii) Its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or

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

**SECTION 20. ADDITIONAL REPRESENTATIONS OF THE PARTIES**

Section 20.1 Agency hereby warrants, represents and promises that:

(i) It has provided or shall provide timely to ESCO, all records relating to energy usage and energy-related maintenance of Premises requested by ESCO 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; and

(ii) It has not entered into any leases, contracts or contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Premises or with regard to servicing any of the energy related equipment located in the Premises. Agency shall provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Premises which may be executed from time to time hereafter within thirty (30) days after execution thereof.

Section 20.2 ESCO hereby warrants, represents and promises that:

(i) Before commencing performance of this Contract:

(a) It is or shall become licensed or otherwise permitted to do business in the Commonwealth of Virginia and shall have a Class A Contractor's License

1. It shall have provided proof and documentation of required insurance pursuant to terms and conditions of the ESCO contract it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
2. It shall have provided all performance and payment bonds and labor and material bonds for the work to be performed; these bonds do not cover the energy savings. These bonds will apply solely to the Work performed during the Construction Period and to the required statutory lien filing period thereafter. These bonds do not apply to the requirement for an energy performance guarantee.

(ii) Prior to substantial completion of the construction and acceptance by the owner, the ESCO shall provide a separate surety bond in accordance with the Code of Virginia for the duration of the guaranteed energy savings in the amount of actual energy savings, not inclusive of Owner operational savings.

(iii) It shall use qualified subcontractors and delegees, licensed and bonded in this state to perform the work so subcontracted or delegated pursuant to the terms hereof;

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

**SECTION 21. INDEPENDENT CAPACITY OF THE CONTRACTOR**

The parties hereto agree that ESCO, and any agents and employees of ESCO, in the performance of this Contract, shall act in an independent capacity and not as officers, employees, or agents of the Agency.

**SECTION 22. NO WAIVER**

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

**SECTION 23. CONTRACTOR RESPONSIBILITY PROVISIONS**

Section 23.1 ESCO certifies that it is not currently under suspension or debarment by the Commonwealth of Virginia, any other state, or the federal government.

Section 23.2 If ESCO enters into any subcontracts under this Contract with subcontractors who are currently suspended or debarred by Commonwealth or federal government or who become suspended or debarred by Commonwealth or federal government during the term of this Contract or any extensions or renewals thereof, Agency shall have the right to require ESCO to terminate such subcontracts.

Section 23.3 ESCO agrees that it shall be responsible for reimbursing Agency for all necessary and reasonable costs and expenses incurred by the Office of the Attorney General relating to an investigation of ESCO's compliance with the terms of this or any other Contract between ESCO and Agency which results in the suspension or debarment of the ESCO.

**SECTION 24. AGENCY'S COMPLIANCE WITH FACILITIES MAINTENANCE CHECKLIST**

Section 24.1 The parties acknowledge and agree that ESCO has entered into this Contract in reliance upon the prospect of earning compensation based on guaranteed energy savings in energy used at Premises, as set forth Exhibits B & C, attached hereto and made a part hereof.

Section 24.2 The parties further acknowledge and agree that the said guaranteed energy savings would not likely be obtained unless certain procedures and methods of operation designed for energy conservation shall be implemented, and followed by Agency on a regular and continuous basis.

Section 24.3 Agency agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Exhibit C, to be attached hereto and made a part hereof after Agency's approval.

Section 24.4 Agency agrees that ESCO shall have the right once a month, with prior notice, to inspect Premises to determine if Agency is complying. Agency shall make the Premises available to ESCO for and during each monthly inspection, and shall have the right to witness each inspection and the recordations on the checklist.

**SECTION 25. INDEMNIFICATION AND LIMITATION OF LIABILITY**

Section 25.1 ESCO agrees to indemnify, hold harmless and defend Agency from and against any and all liabilities, demands, claims, fines, penalties, damages, forfeitures and suits, together with reasonable attorneys' and witnesses' fees and other costs and expenses of defense and settlement, which Agency may incur, become responsible for or pay out as a result of death or bodily injury or threat thereof to any person, destruction of or damage to any property, contamination of or adverse effect on natural resources or the environment, any violation of local, state or federal laws, regulations or orders, or any other damages claimed by third parties (collectively, "Damages"), to the extent such Damages are caused directly by the negligence or willful misconduct of ESCO. This indemnification represents and shall be the sole indemnification obligation of ESCO under the Contract.

Section 25.2 Notwithstanding any other provision herein, in no event shall either Agency or ESCO be liable to the other party for special, indirect, incidental or consequential damages, including commercial loss, loss of use, or lost profits, even if either party has been advised of the possibility of such damages and, in any event, ESCO’s aggregate liability for any and all claims, losses or expenses arising out of this agreement, or out of any goods or services furnished under this agreement, whether based in contract, negligence, strict liability, agency, warranty, trespass, indemnity or any other theory of liability, shall be limited to the total compensation received by ESCO from Agency under this agreement.