

General Notes to ISSUER:

- This document constitutes a draft template Energy Services Agreement (ESA) as a starting point for use by local governments who wish to enter into a Guaranteed Energy Savings Performance Contract. The Department of Environmental Quality makes no representations as to the sufficiency of this document to achieve the purposes sought by a particular local government. For example, this document does not take into account any local procurement requirements that may be applicable to a particular local government. Local governments using this draft template should consult with their own legal counsel or contracting officer prior to signing the ESA for such a contract and make their own independent determination as to its sufficiency.
- If during negotiations the ESCO requests edits to this document that attempt to limit or remove their responsibilities for the performance of or guaranteed, actual, measured savings for the ECMs to be implemented by this agreement such edits should be rejected.
- Per N.C.G.S. § 143-64.17B(b), before entering into a Guaranteed Energy Savings Contract, the governmental unit shall provide published notice of the time and place or of the meeting at which it proposes to award the contract, the names of the parties to the proposed contract, and the contract's purpose. The notice must be published at least 15 days before the date of the proposed award or meeting.
- Per N.C.G.S. § 143-64.17B(a)(3), the energy conservation measures to be installed under the contract must be for an existing building or utility system.
- Please delete this page from your ESA. Page numbers should auto-correct.

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

ENERGY SERVICES AGREEMENT

This energy services agreement (the "Energy Services Agreement" or "Agreement") is entered into on _____, 20____, the Commencement Date, by and between the _____ (the "ISSUER") and _____ with offices located at _____ (the "ESCO") (collectively, the "Parties") for the purpose of implementing certain energy conservation measures designed to reduce energy consumption and costs ("ECMs") in buildings and utility-consuming equipment owned and operated by the ISSUER (the "Premises").

RECITALS

WHEREAS, the **ESCO** is a qualified provider selected by the **ISSUER** to implement certain ECMs that will reduce energy consumption and costs on the Premises owned and managed by the **ISSUER**; and

WHEREAS, pursuant to the Investment Grade Energy Audit Agreement between the Parties dated _____ (the "Energy Audit Agreement"), the **ESCO** conducted an investment grade energy audit and prepared an energy audit report (the "Energy Audit Report") containing specific recommendations and documentation about the ECMs to be furnished, installed and/or carried out at the Premises; and

WHEREAS, the **ISSUER** subsequently approved and accepted the ESCO's Energy Audit Report, as evidenced by the Certificate of Acceptance – Energy Audit Report attached hereto as Exhibit 1; and

WHEREAS, the **ISSUER** has found that the actual energy and operational savings resulting from the performance of this Agreement will equal or exceed the total cost of the Agreement; and

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

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

1) ARTICLE 1: GENERAL TERMS AND CONDITIONS

- a) **Agreement Term.** -This Agreement shall become effective on the Commencement Date and shall remain in effect until the expiration of [INSERT NUMBER OF YEARS] from the Final Project Acceptance Date (defined below).
- b) **Definitions.**
 - i) **Annual Services.** The training, maintenance, monitoring, measurement and verification review and other services specified in the Project Documents for which the ESCO is responsible during the Guarantee Period.

- ii) Final Project Acceptance Date. The date on which the ISSUER formally approves and accepts the Work performed by the ESCO under this Agreement (see subsection (ix) below). Such approval and acceptance of the ESCO's Work as evidenced by the ISSUER's execution of the Certificate of Final Project Acceptance attached hereto as Exhibit 4.
 - iii) Guarantee Period. The period between (and including) the Final Project Acceptance Date and the date exactly *[INSERT NUMBER OF YEARS]* therefrom, during which time the Energy Savings Guarantee is in effect. During the Guarantee Period, the ESCO is responsible for Annual Services as specified in the Project Documents.
 - iv) Guarantee Year. The Guarantee Year shall consist of a 12-month term commencing from the Final Project Acceptance Date and annually thereafter for the Guarantee Period.
 - v) Interim Period. The period between (and including) the Commencement Date and the Final Project Acceptance Date during which the ESCO is responsible for completing the design (to the extent not completed during the IGA), procuring, fabricating, installing, commissioning and implementing the ECMs specified in the Project Documents.
 - vi) Project. The design, procurement, fabrication, installation, commissioning and implementation of ECMs by the ESCO during the Interim Period, as well as the Guarantee Period.
 - vii) Project Documents. The Energy Audit Report, including all Schedules, Exhibits and Submittals associated therewith.
 - viii) Projected Acceptance Date. The anticipated date for completion of the Work (and for final project acceptance by the ISSUER) as of the date of this Agreement. The Projected Acceptance Date is specified in Schedule I ("Construction and Installation Schedule") of this Agreement.
 - ix) Submittal. A written or graphic document or other material prepared by or for the ESCO which the ESCO submits to the ISSUER in furtherance of its performance under this Agreement. Submittals may include, but are not limited to, drawings, specifications, progress schedules, samples, cash flow projections, and schedules of values.
 - x) Work. The design, procurement, fabrication, installation, commissioning and implementation of ECMs as specified in the Project Documents and for which the ESCO is responsible during the Interim Period.
- c) **Complete Agreement**. This Energy Services Agreement consists of the following documents:
- i) This document;
 - ii) The Schedules to the Agreement;
 - iii) Approved Submittals;
 - iv) The Exhibits to the Agreement;
 - v) The ESCO's response to the ISSUER's Request for Proposals; and
 - vi) The ISSUER's Request for Proposals.
- Together, these documents (the "Contract Documents") constitute the entire agreement between the Parties and supersede all prior oral or written statements or agreements.

- d) **Amendment.** This Agreement may not be amended orally or by performance. Any amendment must be made in written form and executed by duly authorized representatives of the Parties. Any proposed amendment or change order that alters the total cost or the guaranteed savings shall be presented to the Utility Savings Initiative and Department of State Treasurer to assess the necessary approval requirements.
- e) **Precedence Among Contract Documents.** In the event of a conflict between or among the terms of the Contract Documents, the term in the Contract Document with the highest level of relative precedence prevails. The order of precedence is established by the order of documents in paragraph (c), above, with the first-listed document having the highest precedence and the last-listed document having the lowest precedence. In the event multiple amendments are made to the Agreement, the most recent amendment shall have the highest precedence and the oldest amendment shall have the lowest precedence.
- f) **Independent Contractor Status.** Under this Agreement, the ESCO, its employees, agents, or assigns shall be designated as an Independent Contractor and shall not represent otherwise to any person when providing its services.
- g) **Compliance with Laws.** The ESCO and its subcontractors shall comply with all laws, rules regulations and codes applicable to the performance of this Agreement. Except where expressly required by applicable laws and regulation, the ISSUER shall not be responsible for monitoring the ESCO's compliance with any laws or regulations. When the ESCO observes conflicting regulatory requirements, it shall notify the ISSUER in writing immediately. If the ESCO performs any of the Project knowing or having reason to know that the Work or services required to implement the Project are contrary to such laws, rules and regulations, the ESCO shall endure all costs arising there from.
- h) **Assignment.** The ESCO acknowledges that the ISSUER is induced to enter into this Agreement by, among other things, the professional qualifications of the ESCO. The ESCO agrees that neither this Agreement nor any of its right or obligation hereunder shall be assigned in whole or in part, without the prior written approval of the ISSUER.
- i) **Duty to Indemnify.** *[Specific terms to be negotiated by the Parties.]*
- j) **Liabilities.** *[Specific terms to be negotiated by the Parties.]*
- k) **Effect of Statutory Limitations.** *[Specific terms to be negotiated by the Parties.]*
- l) **Intellectual Property Claims Indemnification.** *[Specific terms to be negotiated by the Parties.]*
- m) **Interpretation of Agreement.** The ISSUER shall have the authority to make a reasonable determination of questions of fact that arise in relation to the interpretation of this Agreement and the ESCO's performance hereunder. The ESCO shall proceed diligently with the performance of this Agreement and in accordance with the ISSUER'S reasonable decision. Continuation of the Project shall not be construed as a waiver of any other rights accruing to the ESCO, including its claims and disputes rights.
- n) **Cooperation with the ISSUER's Consultants.** The ISSUER reserves the right to designate authorized representatives or to retain consultants at its expense, including but not limited to a licensed architect or engineer, to act on its behalf with respect to administering the performance required under this Agreement throughout its term. The ISSUER and its representatives and consultants shall at all times have access to the

Premises during the ESCO's implementation of the Project. The ESCO agrees to cooperate with any representative of, or consultant retained by, the ISSUER.

- o) **Force Majeure.** Neither Party shall be deemed to be in default of its obligations hereunder if and so long as it is prevented from performing such obligations by an event or circumstance beyond its reasonable control including without limitation any act of war, hostile foreign action, nuclear explosion, riot, strikes, civil insurrection, quarantine restrictions, delays of common carriers, earthquake, hurricane, tornado, or other catastrophic natural event or act of God.
- p) **No Waiver.** The failure of ISSUER or the ESCO to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either Party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of the ISSUER or the ESCO. Every such right and power in the event of a default may be exercised from time to time and as often as may be deemed expedient.
- q) **Severability.** It is agreed that the illegality or invalidity of any term or clause of this Agreement, shall not affect the validity of the remainder of this Agreement and this Agreement shall remain in full force and effect as if such illegal or invalid term or clause were not contained herein, provided that the remaining portions of the Agreement shall be construed to effectuate as nearly as possible the apparent intent of the term or clause.
- r) **Further Documents.** Other rights and responsibilities of the ESCO are set forth throughout this Agreement and in the Project Documents and are included under other titles, articles, sections and headings for convenience. It is the responsibility of the ESCO to familiarize itself with all provisions of this Agreement and the Project Documents in order to understand fully the entirety of its rights and responsibilities hereunder. The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.
- s) **Notices.** The personnel listed below for the Parties shall be designated the principal points of contact. All notices required under this Agreement shall be in writing and shall be deemed properly served if delivered in person to the individual to whom it is addressed or, three (3) days after deposit in the United States mail, if sent postage prepaid by United States registered or certified mail, return receipt requested to the persons listed as follows:

For the **ISSUER**:

For the **ESCO**:

- t) **E-Verify.** The ESCO represents that, to the extent applicable, it and each of its subcontractors performing Work under this Agreement are in compliance with Article 2 of Chapter 64 of the NC General Statutes, including, in particular, the requirement that certain employers verify the work authorization of newly hired employees using the federal E-Verify system.

- u) **Suspension and Debarment.** The ESCO certifies that to the best of its knowledge and belief that it and its principals:
 - i) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal, State, or local government agency;
 - ii) have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - iii) are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (d) (ii) of this certification; and have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.
- v) **Drug Free Workplace.** ESCO certifies that it will comply by:
 - i) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the ESCO's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
 - ii) Establishing a drug-free awareness program to inform employees about -
 - (1) The dangers of drug abuse in the workplace;
 - (2) The ESCO's policy of maintaining a drug-free workplace;
 - (3) Any available drug counseling, rehabilitation, and employee assistance programs; and
 - (4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
 - iii) Making it a requirement that each employee to be engaged in the performance of the Agreement be given a copy of the statement required by paragraph (i) above;
 - iv) Notifying the employee in the statement required by paragraph (i), above, that, as a condition of employment under the Agreement, the employee will -
 - (1) Abide by the terms of the statement; and
 - (2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;
 - v) Notifying the ISSUER within ten days after receiving notice under subparagraph (iv)(2), above, from an employee or otherwise receiving actual notice of such conviction;
 - vi) Taking one of the following actions, within 30 days of receiving notice under subparagraph (iv)(2), above with respect to any employee who is so convicted -
 - vii) Taking appropriate personnel action against such an employee, up to and including termination; or

- viii) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
- ix) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (i), (ii), (iii), (iv), (v), and (vi), above.
- w) **Governing Law.** This Agreement is made under and shall be governed and construed in accordance with the laws of the State of North Carolina.
- x) **Iran Divestment.** The ESCO certifies that it is not identified on a list created by the North Carolina State Treasurer pursuant to N.C. Gen. Stat. §147-86.58 as a company engaging in investment activities in Iran. Contractor further certifies that in the performance of this Agreement it shall not use any contractor or subcontractor that is identified on such a list.
- y) **Conflict of Interest.** The ESCO represents and warrants that no member of the *(insert ISSUER's title)* or any of its employees or officers has a personal or financial interest or will benefit from the performance of the Agreement or has any interest in any contract, subcontract or other agreement related to this Agreement. ESCO shall not permit any member of the *(insert ISSUER's title)* or any of its employees or officers to obtain a personal or financial interest or benefit from the performance of the Agreement or to have any interest in any contract, subcontract or other agreement related to this Agreement, during the term of the Agreement. ESCO shall cause this paragraph to be included in all contracts, subcontracts and other agreements related to this Agreement.
- z) **Jessica Lunsford Act.** The requirements of N.C.G.S. 115C-332.1 are incorporated into this Agreement and the statute's requirements are applicable to the ESCO and all contractors, subcontractors, consultants, sub-consultants and vendors in any way involved with this Agreement. As required by N.C.G.S. 115C-332.1, the ESCO and all contractors, subcontractors, consultants, sub-consultants, and vendors shall conduct prior to the start of service and annually thereafter a review of the State Sex Offender and Public Protection Registration Program, the State Sexually Violent Predator Registration Program, and the National Sex Offender Registry for all employees who will provide services under this contract that involve direct interaction with ISSUER'S students. For ESCO's convenience only, all of the required registry checks may be completed at no cost by accessing the United States Department of Justice Sex Offender Public Website at <http://www.nsopw.gov/>. Any employee of the ESCO, a contractor, subcontractor, consultant, sub-consultant, or vendor found to be registered on any of the lists identified herein shall not perform any work under this contract and shall not be permitted to enter property owned by ISSUER. Failure to comply may result in legal action and termination of the contract for default.
- aa) **Public Records.** This Agreement shall be governed in accordance with G.S. §132 regarding Public Records.
- bb) **Records Retention.** All records pertaining to this Agreement shall be maintained in accordance with the North Carolina Department of Cultural Resources, Division of Archives and Records, Government Records Section, General Schedule for State Agency Records or other applicable State law. The State Auditor and the using agency's internal auditors shall have access to persons and records as a result of all Agreements entered into by State agencies or political subdivisions in accordance with G.S. §147-64.7 and

Session Law 2010-194, Section 21 (i.e., the State Auditors and internal auditors may audit the records of the contractor during the term of the contract to verify accounts and data affecting fees or performance). The ESCO shall retain all records for a period of six (6) years following completion of the contract or until any audits begun during this period are completed and findings resolved, whichever is later.

cc) Representations and Warranties.

- i) Representations of the Parties. Each party warrants and represents to the other that:
 - (1) It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
 - (2) Its execution, delivery, and performance of this Agreement has been duly authorized, executed and delivered by the signatories so authorized, and it constitutes its legal, valid, and binding obligation; and
 - (3) 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.
- ii) Representations and Warranties by the ISSUER. The ISSUER hereby warrants and represents to the ESCO that:
 - (1) It will provide throughout the term of this Agreement (or cause its energy suppliers to furnish) to the ESCO, upon its request, copies of all available records and data concerning energy usage for the Premises including but not limited to the following data: utility records and rate schedules; occupancy information; descriptions of any major changes in the structure or use of the buildings or heating, cooling, lighting or other systems or energy requirements; descriptions of all energy consuming or saving equipment used in the Premises; descriptions of energy management procedures presently utilized; and any prior energy analyses of the Premises. The ISSUER shall make knowledgeable employees and agents available for consultations and discussions with the ESCO concerning energy usage of the Premises.
 - (2) The ISSUER has not entered into any leases, contracts or agreements with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Premises or with regard to maintaining any of the energy related equipment located in the Premises.
- iii) Representations and Warranties by the ESCO. In addition to the other representations and warranties contained in the Project Documents, the ESCO represents and warrants the following to the ISSUER as an inducement to the ISSUER to execute this Agreement, which shall survive the execution and delivery of this Agreement and the Final Completion of the Work.
 - (1) That it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Agreement;
 - (2) That it and each of its employees, agents and subcontractors of any tier are competent to perform its obligations under this Agreement;

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

dd) **Events of Default.**

- i) **By the ISSUER.** Each of the following events or conditions shall constitute an "Event of Default" by the ISSUER:
 - (1) any willful action by the ISSUER that prevents the ESCO from meeting their obligations as set forth in Schedule I "Construction and Installation Schedule;
 - (2) any failure by the ISSUER to pay the ESCO any sum due for the Annual Services for more than thirty (30) days after written notification by ESCO that ISSUER is delinquent in making payment and provided that no ESCO Event of Default, as provided in Section (dd)(ii) hereof, has occurred and is continuing at such time;
 - (3) any other material failure by the ISSUER to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after notice to the ISSUER demanding that such failures to perform be cured or if such cure cannot be effected in thirty (30) days, the ISSUER shall be deemed to have cured default upon the commencement of a cure within thirty (30) days and diligent subsequent completion thereof; or
 - (4) any representation or warranty furnished by the ISSUER in this Agreement, which was false, or misleading in any material respect when made.
- ii) **By the ESCO.** Each of the following events or conditions shall constitute an "Event of Default" by ESCO:
 - (1) any representation or warranty furnished by **ESCO** in this Agreement was false or misleading in any material respect when made;
 - (2) any material failure by **ESCO** to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein except that such failure, if corrected or correction begun within thirty (30) days after written notice by the **ISSUER** to **ESCO** demanding that such failure to perform be cured, shall be deemed cured for purposes of this Agreement if completed within a reasonable period of time; provided that the operation of the Premises shall not be materially adversely affected (other than temporary conditions arising from ESCO's efforts to cure any such breach or failure) and provided further that, unless approved in writing by ISSUER, ESCO shall not have the right to change the standards of comfort (except as may otherwise be permitted in this Agreement) to avoid or cure an Event of Default by ESCO;

- (3) any lien or encumbrance is placed upon the Equipment by any subcontractor, laborer, supplier or lender of **ESCO** and not paid or bonded over within thirty (30) business days after the ESCO receives written notice thereof;
- (4) the filing of a bankruptcy petition whether by **ESCO** or its creditors against **ESCO** which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of **ESCO**;
- (5) Any change in ownership or control of **ESCO** that results in **ESCO** not being qualified to do business in North Carolina; or
- (6) failure by **ESCO** to pay any amount due ISSUER, including any amount owed by ESCO to ISSUER under the terms hereof, for more than thirty (30) days after written notice by ISSUER that the ESCO is delinquent in making payment and provided that no ISSUER Event of Default, as provided in Section (dd)(i) hereof, has occurred and is continuing at such time.

ee) **Remedies upon Default.**

- i) **Remedies upon Default by the ISSUER.** If an Event of Default by the ISSUER occurs, the ESCO may terminate this Agreement and exercise any and all remedies available at law or in equity or statute or institute other appropriate proceedings including, without limitation, bringing an action or actions from time to time for recovery of amounts due and unpaid by ISSUER, and/or for damages which shall include all costs and expenses reasonably incurred, including attorney's fees, in exercise of its remedy. Election of one (1) remedy is not a waiver of other available remedies.
- ii) **Remedies upon Default by ESCO.** If an Event of Default by the ESCO occurs, the ISSUER may exercise any and all remedies at law or equity or statute, 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 by the ESCO, and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees, in exercise of its remedy. Election of one (1) remedy is not a waiver of other available remedies.

2) ARTICLE 2: INSTALLATION AND CONSTRUCTION

- a) **Project, building and ECM specific requirements and conditions shall be documented in the Schedules and Energy Audit Report.**
- b) **Performance and Labor and Material Payment Bonds.** The ESCO shall, prior to commencing the Project, deliver to the ISSUER a Performance Bond and a Labor and Material Payment Bond that conforms to the requirements of N.C. General Statute Chapter 44-A, Article 3. Notwithstanding any provision to the contrary herein, any payment and performance bonds associated with this agreement shall secure only the ESCO's faithful performance of the installation portion of this Agreement, and shall not be construed to secure
 - i) the energy savings guaranteed by the ESCO under this Agreement;

- ii) the performance of any support or maintenance service agreement, or
 - iii) any other guarantees or warranties with terms beyond one (1) year in duration from the completion of the installation portion of this Agreement.
- c) **Right to Terminate the ESCO's Performance of the Work.** If the ESCO fails or refuses to perform the Work with such diligence as to allow completion of the Work substantially in accordance with Schedule I, or commits a material breach of any other provision of this Agreement, and provided that such breach continues for sixty(60) days after written notice to the ESCO demanding that such breach be cured or if cure cannot be effected within sixty (60) days, or the ESCO fails to propose and commence a cure acceptable to the ISSUER within such sixty (60) days, then the ISSUER may issue a notice of intent to terminate the ESCO's right to proceed with the Work as specified herein. In no event shall the ISSUER have any obligation to compensate the ESCO for delays arising pursuant to the ESCO's failure or refusal to diligently perform the Work and damages arising in connection therewith.

In such case, the ISSUER shall give the ESCO and its surety written notice of intention to terminate the ESCO's right to complete the Work and the reason therefore and, unless within seven (7) business days after the notice of intent to terminate the delay or violation shall cease or a cure acceptable to the ISSUER for correcting the situation is proposed, the ISSUER may issue a termination notice to such effect for the ESCO and its surety. Thereupon, the surety will be given the opportunity to complete the Work in accordance with the Project Documents. Such completion may include, but not be limited to, the use of a competing ESCO, satisfactory to the ISSUER, pursuant to a written takeover agreement, the payment of a sum of money required to allow the ISSUER to complete the Work, or other arrangements agreed to by the ISSUER and the surety.

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

In the event the ISSUER terminates the ESCO's right to complete the Work under this Paragraph c), the ESCO shall not be entitled to receive further payments until a Certificate of Final Project Acceptance Exhibit 4 has been delivered pursuant to Article 2(I) hereof specifying the amount, if any, payable to the ESCO. If the ISSUER's expenses in completing the Work exceed the ESCO's Compensation for the Work, the ESCO shall pay the difference to the ISSUER upon demand therefore. In the event an entity other than ESCO is required to complete the Work pursuant to this Paragraph c), then upon issuance of the Certificate of Final Project Acceptance accepting the Work completed by an entity other than ESCO, ISSUER shall reconcile the payment of money due, to or from, ESCO. All

payments shall be made within 30 calendar days of the delivery of such reconciliation to ESCO. The ISSUER shall cause the Work to be completed in accordance with the technical specifications set forth in the Energy Audit Report and in accordance with Schedule E. The security instrument shall remain in place. In no event shall the amount of the Guaranteed Energy Savings, or ESCO's obligations under the Energy Savings Guarantee, be increased in connection with the completion of the Work by anyone other than ESCO.

- d) **Insurance.** The ESCO shall purchase, maintain and provide evidence of insurance coverage of the types, in the amounts and for the periods specified in Schedule P. Subsequent to the date of the Certificate of Final Project Acceptance, the ISSUER shall be responsible for providing insurance coverage on the ECMs.
 - i) The ESCO shall not commence performance of the Project until the ESCO obtains insurance that conforms to the standards in Schedule P and which is approved in writing by the ISSUER. Notwithstanding the foregoing, the failure of the ISSUER to obtain such evidence from the ESCO before permitting the ESCO to commence the Project shall not be deemed to be a waiver by the ISSUER, and the ESCO shall remain under a continuing obligation to obtain and maintain the required insurance coverage and to supply evidence of coverage in accordance with Schedule P.
 - (1) The ESCO shall be prevented from performing any Work at the Premises if it fails to obtain or keep such insurance in force. The ISSUER reserves the right to stop the Project until evidence of the requisite coverage is provided. The ESCO shall require all subcontractors performing any portion of the Project to carry the insurance required in Schedule P, or the ESCO may provide the required coverage for any or all subcontractors. If the ESCO elects to provide the required insurance coverage for any of its subcontractors, the ESCO shall cause the subcontractor to be expressly named in any Certificate of Insurance required to demonstrate compliance with this Agreement. The ESCO agrees that all Commercial General Liability and Automobile Liability insurance policies required by this Agreement, whether previously obtained or obtained in specific contemplation of the Agreement shall waive any rights of subrogation under its primary policy against the ISSUER to the extent of ESCO's negligence.
 - (2) The ESCO shall timely renew the required insurance as necessary to keep such coverage in effect for the periods specified in Schedule P and shall supply the ISSUER, not less than sixty (60) days prior to any expiration or renewal dates for such insurance policies, with evidence of all required insurance including updated replacement Certificates of Insurance and amendatory riders or endorsements that clearly evidence the continuation of all coverage in the same manner, limits of protection, and scope of coverage, as was provided by the Certificates of Insurance, amendatory riders or endorsements originally supplied. The ISSUER shall be listed as an additional insured on the Certificate of Insurance with respect to all Commercial General Liability and Automobile Liability insurance policies required by this Agreement.

- (3) The ESCO expressly understands and agrees that any insurance protection furnished by the ESCO hereunder shall in no way limit the ESCO's responsibility to indemnify and save harmless the ISSUER under the provisions of this Agreement.
- e) **Implementation of the Work.** The ESCO shall supervise and perform or cause its subcontractors to perform the Work pursuant to this Agreement. Construction and equipment installation shall proceed in accordance with the provisions contained in this Agreement and the Project Installation schedule approved by ISSUER and attached hereto as Schedule I. The ESCO shall monitor the performance of the Work for compliance with this Agreement and shall ensure that the Work is accomplished in a workmanlike manner. All services requiring the exercise of professional skills or judgment shall be accomplished by professionals qualified, competent, and licensed in the applicable discipline and as may be required by State Law. All Project Documents which are required to be prepared by the ESCO shall be in accord with all applicable codes, standards and regulations and shall be prepared by qualified personnel. Where required by North Carolina law, Project Documents shall bear the stamp or seal of architects or engineers licensed in the State of North Carolina. The ESCO shall remain responsible for all services performed, whether by the ESCO or its subcontractors or others on its behalf, throughout the term of this Agreement. The ESCO shall be solely responsible for site safety and for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under this Agreement.
- f) **ECM Submittal.** In accordance with Schedule I, the ESCO shall prepare documents for submission to the ISSUER that contain sufficient detail to allow the ISSUER to ensure that the design and installation of the ECMs are consistent with the ECMs documented in the ESCO's Energy Audit Report. The ISSUER may also request additional materials, documents, or information as required to complete the review and includes:
- i) Date (and for revisions of the Submittal, revision dates);
 - ii) Project Number and Title;
 - iii) Stamp or seal of the preparer of the Submittal, and the ESCO's certification that it has reviewed and approved the Submittal for accuracy and compliance with the provisions of this Agreement; and
 - iv) With respect to each ECM, drawings, plans, specifications, shop drawings, product data, and where appropriate or reasonably required, product samples.
- The ISSUER may reject any sequences or procedures proposed by the ESCO in connection with the Project which might constitute or create a hazard to the Premises, or to persons or property, or which deviate from the Project Documents or will result in schedule delays or additional costs to the ISSUER.
- g) **INSPECTIONS.** All materials and equipment and each part of the detail of the Project shall be subject at all times to inspection by the ISSUER or its designated representatives or consultants, and the ESCO will be held strictly to the terms of this Agreement and the Project Documents with regard to quality of materials, workmanship, and the diligent execution of the Project.
- i) Upon written request by the ESCO, the ISSUER shall schedule preliminary inspections of the Work as soon as reasonably practicable after notification by the ESCO that major ECMs or systems are substantially complete. If such Work is not acceptable to

the ISSUER at the time of such preliminary inspections, the ESCO will be provided written notice as to the particular defects to be remedied before the Work will be accepted. The ISSUER will indicate its approval of an ECM by issuing a Certificate of Individual ECM Acceptance (Exhibit 2) for the applicable ECM, the date of which will commence the warranty period for such ECM as set forth in Schedule K.

- h) **Emergencies.** In case of bona fide emergencies as determined by the ISSUER involving public health or public safety or to protect against further loss or damage to the ISSUER's property or to prevent or minimize serious disruption of ISSUER services or to insure the integrity of ISSUER's records, the ISSUER may take appropriate action to prevent or minimize loss or damage to the Premises without prior notice to the ESCO or its surety.
- i) **Subcontracting.** The ESCO shall have the right to have any of the Work to be provided by the ESCO under this Agreement accomplished by subcontractors pursuant to written subcontracts between the ESCO and such subcontractors. Upon ISSUER'S request the ESCO shall, upon entering into any agreement with a subcontractor, furnish the ISSUER with an executed copy thereof. Any such documentation received by the ISSUER shall be maintained in a manner consistent with the public records laws of North Carolina, including, in particular, those laws concerning the non-disclosure of confidential information. All subcontracts shall be subject to, consistent with, and in conformance with all applicable State and federal laws, rules, regulations and codes, and shall contain provisions that require all services to be performed in strict accordance with the requirements of this Agreement and shall provide that the subcontractors are subject to all the terms of this Agreement. Provided that such agreements do not prejudice any of the ISSUER's rights under this Agreement, such agreements may contain different provisions than are provided herein with respect to extensions of schedule, time of completion, payments, guarantees and matters not affecting the quality of the Work.
- j) **Compensation.** ISSUER will pay ESCO no more than \$_____ for the Work in the amounts and in accordance with Schedule O hereto (the "Work Compensation"). The ISSUER will pay ESCO no more than \$_____ for the Annual Services in the amounts and in accordance with Schedule O hereto.
- k) **Payments for Work in Progress.** The ESCO shall submit invoices for the Work, including back-up documentation, to the ISSUER for the ISSUER's review and approval on the schedule provided for the Work in Schedule O. No later than _____ () calendar days following the receipt of any invoice, the ISSUER shall inspect the Work for which the ESCO requests payment and notify the ESCO in writing of the ISSUER's approval or disapproval. Any disapproval of the Work shall be corrected in accordance with Schedule K, Correction of Work. No later than _____ () calendar days from the ISSUER's approval of the Work addressed in any invoice, the ISSUER shall pay, or cause to be paid to ESCO, the total costs of approved Work. The ISSUER may, upon request or at its discretion, furnish to a Subcontractor, if practicable, information regarding the percentages of completion of the Work that is the subject of any invoice and the action taken thereon by the ESCO on account of Work completed by such Subcontractor. No payment to the ESCO, nor any partial or entire use of occupancy of the Premises by the ISSUER shall constitute an acceptance of any Work that is not completed in accordance with the provisions of this Agreement.

- l) **Final Installation Payment.** No later than (_____) days from the date of the Certificate of Final Acceptance, the ISSUER shall pay or cause to be paid to ESCO the entire unpaid balance of the Work Compensation invoiced by the ESCO, less the amount of any sums that continue to be retained to satisfy the cost of performing any change in the Work that is the subject of any claim or dispute and that has not yet been satisfactorily performed by ESCO. The ISSUER shall not be responsible for any payment due to a subcontractor hired by the ESCO for any Work performed by the ESCO's subcontractor under this Agreement.
- m) **Interim Period Energy Savings.** Energy savings achieved on or after the Commencement Date but before the Final Project Acceptance Date ("Interim Period Energy Savings") shall accrue to the benefit of the the ISSUER.
- n) **Actual Interim Savings.** Actual Interim Savings are Energy Savings that are fully measured, verified, and tracked by ESCO from the date of the ISSUER's execution of each "Certificate of Individual ECM Acceptance" Form (Exhibit 2), and continuing to the date of the ISSUER's execution of the Final Project Acceptance Form (Exhibit 4). In accordance with Schedule E of this Agreement, the ESCO shall document the completed installation of each ECM. The ESCO shall notify the ISSUER in writing upon successful completion of each ECM. The ISSUER shall have access to inspect all construction related activities, equipment, documentation, and witness measurement and verification activities subject to this Agreement. Energy savings for completed facilities shall be quantified in accordance with Schedule F (Savings Measurement & Verification Calculation Formulae). Upon inspection and approval by the ISSUER for each completed ECM, the ISSUER shall provide the ESCO a Certificate of Individual ECM Acceptance.
 - i) The ISSUER shall keep and hold all Actual Interim Savings to be used in accordance with this Paragraph. If the Final Project Acceptance Date occurs after the Projected Acceptance Date, the ISSUER may use Actual Interim Savings to pay any project financing debt then due and payable. If the Final Project Acceptance Date occurs after the Projected Acceptance Date (the period between such dates hereinafter "Delay Period") due to one or more delays that is/are the fault of the ISSUER or any act described in Article 1o) (Force Majeure) of this Agreement, the uncompleted ECMs shall be treated as generating the prorated monetary savings projected in Schedule E during the Delay Period ("Deemed Savings") and the Deemed Savings shall be included in Actual Interim Savings. If the Actual Interim Savings (together with any Deemed Savings) are insufficient to pay any portion of the project financing debt service for this project due and payable during the Delay Period, the ESCO shall pay to the ISSUER the amount of any shortfall within Thirty (30) business days following written notification of the shortfall, which payment shall be used to cover any such unpaid financing debt. If completion is after the Projected Acceptance Date, the Final Project Acceptance Date shall become the Guarantee Period start date. All remaining Actual Interim Savings shall be credited to the ISSUER.

3) ARTICLE 3: GUARANTEE PERIOD

- a) **Security.** In accordance with G.S. §143-64.17B, the ESCO shall provide security to the ISSUER in a form acceptable to the Office of the State Treasurer and in an amount equal to one hundred percent (100%) of the guaranteed savings to be maintained for the entire term of this Agreement.

If the agreed form of security is a corporate or parent company guaranty, the guaranty shall not be terminable by the guarantor during the term of this Agreement without the consent of ISSUER, including, but not limited to, in the case of divestment of the ESCO by the guarantor. The guaranty may be terminated with consent of the ISSUER so long as a new security instrument acceptable to the Office of the State Treasurer is in place.

If the agreed form of security is an irrevocable letter of credit or surety bond and during the term of this Agreement, the ISSUER receives information that the ESCO's security will not be renewed and the ESCO is unable to provide an alternative security instrument acceptable to the Office of the State Treasurer the ISSUER may call due the security to assure the ESCO's faithful performance of the Agreement. The security shall then be deposited into an escrow account to be issued in accordance with this Agreement. If the ESCO fails to pay any shortfall due under this agreement, the ISSUER shall draw this amount from the security. Any security remaining following the term of this Agreement shall be returned to the ESCO. Should the ESCO produce, at any time, a security instrument acceptable to the Office of the State Treasurer any security remaining in the escrow account shall be returned to the ESCO.

- b) **Annual Energy Savings Guaranty.** The ESCO shall guarantee energy and operational savings from the date the Certificate of Final Project Acceptance is issued for the Guarantee Period (the "Energy Savings Guaranty"). The ESCO has formulated and guaranteed the annual level of energy savings as provided for in Schedules N and F. The ESCO will achieve these savings each Guarantee Year as a result of the performance by ESCO of the services specified in this Agreement utilizing the Methods of Savings Measurement and Verification set forth in Schedules F and G.
- c) **Annual Review, Reconciliation and Reimbursement.** Energy Savings achieved at the Premises shall be reported, reconciled and verified pursuant to the provisions of Schedules F and G. The Annual Reconciliation Report shall be prepared by a North Carolina Licensed Professional Engineer and shall bear their seal. If any annual review, reconciliation and verification of Energy Savings reveals that the ESCO has failed to achieve the annual guaranteed energy and operating cost savings set forth in Schedule N, the ESCO shall pay the ISSUER or the ISSUER'S designee, as may be directed by the ISSUER, the difference between the annual amount guaranteed and the amount of annual Actual Savings (as calculated pursuant to Schedule F) achieved at the Premises. The ESCO shall remit such payments to the ISSUER not later than thirty (30) calendar days of written demand therefore by the ISSUER. The first-year report shall include the completed Commissioning Report required by Schedule H if not already submitted and approved.
- d) **Annual Service Fees.** Payment to the ESCO for Annual Services performed after the Certificate of Project Acceptance shall be made by the ISSUER pursuant to and in accordance with Schedule O.
- e) **Billing Procedures for Annual Services.** The ESCO shall submit invoices for the Annual Services, including back up documentation, to the ISSUER for the ISSUER's review and

approval on the schedule provided for the Annual Services in Schedule O. No later than _____ () calendar days following the receipt of any invoice, the ISSUER shall inspect the Annual Services for which the ESCO requests payment and notify the ESCO in writing of the ISSUER's approval or disapproval. Any disapproval of the Annual Services shall be addressed in accordance with Schedule K, Correction of Work. No later than _____ () calendar days from the ISSUER's approval of the Annual Services addressed in any invoice, the ISSUER shall pay, or cause to be paid to ESCO the costs of approved Annual Services.

- f) **Termination for Convenience by the ISSUER.** Subsequent to the date the Certificate of Final Project Acceptance is issued and having satisfied all financial obligations entered into including repayment of all loans, this Agreement may be terminated at the sole discretion of the ISSUER in accordance with the provisions of this Paragraph Article 3 f. The ISSUER shall deliver written notice to the ESCO no less than 30 days in advance of the date of termination. Until the specified date of termination of this Agreement, the ESCO's obligation to report, reconcile and verify the energy savings achieved during the guaranty period preceding termination remains in full force and effect, as does its obligation, pursuant to Article 3.c of this Agreement, to remit payment to the ISSUER in the event that the energy savings have not been achieved at the level guaranteed by the ESCO. If the end of the notice period does not coincide with the end of the annual guarantee period, all calculations of payments shall be prorated.

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

[Signature page follows]

4) **ARTICLE 4: EXECUTION**

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

THE ISSUER:

THE ESCO:

BY: _____ BY: _____

Title: _____ Title: _____