

BOE APPROVED

7-11-23

ENERGY PERFORMANCE CONTRACT

DATE: [July 11, 2023]

CUSTOMER:
The Board of Education of the
Greenburgh Central School District
457 W. Hartsdale Avenue
Hartsdale, New York 10530

ESCO: RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595

INTRODUCTION

The Board of Education of the Greenburgh Central School District ("Customer") desires installation of certain equipment and services designed to reduce energy or water consumption, wastewater production, or other energy related operating costs at its Premises.

Customer solicited proposals from qualified firms through the issuance of a request for qualifications/proposals for Energy Efficient Facilities Upgrades dated July 16, 2021 ("RFP"); and

RWE Clean Energy Solutions, Inc. ("ESCO") submitted a proposal dated September 15, 2021 (the "Proposal") in response to the RFP; and

ESCO has made an assessment of the energy consumption characteristics of the Premises and existing equipment and made certain proposals as to proposed Energy Conservation Measures ("ECMs"), all as set forth in the Comprehensive Energy Audit Report dated [June 27, 2023] (the "CEA Report"), which Customer has approved.

Customer desires to retain ESCO to purchase and install certain energy efficiency equipment of the type or class described in Schedule B (Scope of Work), attached hereto and made part hereof, and to provide other services for the purpose of achieving energy cost reductions within the Premises, as more fully set forth herein.

In consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Customer and ESCO (collectively, the "Parties" and each of them individually a "Party") covenant and agree as follows:

SECTION 1. ENERGY MANAGEMENT PLAN

Section 1.1 Plan Details. ESCO has prepared the complete CEA Report of the Premises set forth in Appendix A, which has been approved and accepted by Customer as set forth in Exhibit II (i). The CEA Report includes all ECMs agreed to by the Parties.

Section 1.2 Schedules, Exhibits and Appendices. ESCO has prepared and Customer has approved and accepted the Schedules, Exhibits and Appendices as set forth below, copies of which are attached hereto (or will be as provided for in the Agreement), set forth in their entirety and/or made a part of this Agreement by reference.

Schedules

Schedule A	CEA Report
Schedule B	Scope of Work
Schedule C	Energy and Cost Savings
Schedule D	Schedule of Values
Schedule E	Baseline Energy Consumption
Schedule F	<i>Savings Measurement & Calculation Formulae</i>
Schedule G	Construction and Installation Schedule
Schedule H	Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
Schedule I	Customer's Maintenance Responsibilities and Facility Maintenance Checklist

Schedule J	ESCO's Training Responsibilities
Schedule K	General Conditions
Schedule L	M&V and O&M Oversight Services
Schedule M	Termination Payment Schedule

Exhibits

Exhibit I	Form of Performance Bond and Payment Bond
Exhibit II (i)	Certificate of Acceptance—CEA Report
Exhibit II (ii)	Notice to Proceed with Work
Exhibit II (iii)	Certificate of Substantial Completion
Exhibit II (iv)	Certificate of Acceptance—Installed Equipment and ECMs
Exhibit III	Equipment Warranties
Exhibit IV	Form of Change Order

Appendices

Appendix A	Glossary of Terms
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Section 1.3 Other Documents. This Agreement incorporates herein and makes a part hereof the General Conditions set forth in Schedule K. Acceptance by Customer of the CEA Report is reflected in the Certificate of Acceptance attached hereto as Exhibit II(i). Notwithstanding anything contained in this Agreement to the contrary, in the event of any discrepancy or inconsistency between the terms of this Agreement (including its Schedules), the CEA Report and the RFP, the terms of the final, approved CEA Report and its Appendices (including the obligations and allocations of risk and liability in Appendix D thereto) shall prevail.

SECTION 2. PURCHASE AND SALE

Section 2.1 Purchase and Sale Obligation. Customer agrees to purchase and receive and ESCO agrees to procure, provide install and commission the Equipment and the ECMs specified in Schedule B (*Scope of Work*) (the "Work") and to perform the M&V and O&M Oversight Services specified in Schedule L (*M&V and O&M Oversight Services*), all subject to the terms and conditions of this Agreement. ESCO's obligation to commence the Work is contingent upon written approval by the New York State Education Department ("NYSED") of substantially all of the ECMs specified in the CEA Report and Customer's obtaining financing from a third party source, if applicable, for at least the amount specified in Table 1-1 of the CEA Report specified as Total Financed Amount [**\$20,511,778**], subject to adjustment to reflect the amount of Incentives actually received or committed to and/or the amount of net interest during construction accrued by third parties funding the Work (the "Financing"), and entering into a binding written agreement with respect to the Financing pursuant to which funds may be disbursed to ESCO to cover Customer's obligation to make payments to ESCO in accordance with the Schedule of Values, as specified in Section 5.1 hereof.

Section 2.2 Contract Sum. The agreed to Contract Sum for the Work is [**\$19,623,381**]. The contract sum includes an applied discount that is equal in value to the estimated NYSERDA rebate amounts that would be received at the end of the construction. The Contract Sum will be equal to the sum of all Equipment, materials, services, labor, auditing, design, engineering, project management fees, outside services and applicable discounts, but shall not include ESCO's fee for providing M&V and O&M Oversight Services in accordance with Section 5.2 hereof (*M&V and O&M Oversight Fees*) and as specified in Schedule L (*M&V and O&M Oversight Services*). Customer shall make payment to ESCO for such M&V and O&M Oversight Services annually in the amounts specified in Schedule L. The Contract Sum is predicated upon the conditions set forth in Appendix D to the CEA Report (*ESPC Contract Risk and Responsibility Matrix*). The non-fulfillment of any such condition having an impact on ESCO's costs shall be considered a change in the work requiring the issuance of a Change Order in accordance with Section 13.7 hereof (*Changes in the Work*).

Section 2.3 ESCO Direction of Work. ESCO shall supervise and direct the Work and shall be solely responsible for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Agreement. ESCO shall be responsible to pay for all labor, materials, Equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

SECTION 3. ENERGY USAGE RECORDS AND DATA

Customer has furnished or 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 the CEA Report, including the following data for the most recent 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 requested, Customer shall also provide any prior energy audits of the Premises, and copies of Customer'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 4. TIME FOR COMPLETION; COMMENCEMENT DATE AND TERM

SECTION 4.1 Construction Commencement Date and Time for Completion of Work. The Work shall commence within thirty (30) days after ESCO's receipt of a Notice to Proceed with Work ("Notice to Proceed") from Customer in the form set forth in Exhibit II(ii) hereto and shall be completed as set forth in Schedule G (*Construction and Installation Schedule*). Customer shall issue such Notice to Proceed promptly after closing of the Financing, which Customer shall use its best efforts to secure promptly following issuance of NYSED's written approval of the ECMs specified in the CEA Report in accordance with Section 2.1. Customer shall make payments to ESCO in accordance with the Schedule of Values, as specified in Section 5.1.

4.1.1 In the event Customer fails to issue a Notice to Proceed within thirty (30) days after NYSED approval (or such other time as Customer and ESCO may mutually agree in writing), ESCO may, at its option, terminate the Agreement upon written notice to Customer, in which event Customer shall pay ESCO for all costs incurred up to the effective date of any such termination and such other costs as may be reasonably incurred as a result of such termination.

4.1.2 If ESCO is delayed at any time in progress of the Work by an act or neglect of Customer or by an event of Force Majeure, the Time for Completion of the Work and/or the Contract Sum shall be modified by Change Order as appropriate. In the event that the Work is delayed by an act or neglect of ESCO, and such delay causes Customer expense or otherwise has a material adverse impact on the energy savings projected in the CEA Report, Customer shall be entitled to damages for the reasonable value of the expense or reasonable negative financial impact thereof.

4.1.3 ESCO shall notify Customer when it believes a particular ECM, is substantially complete. Within five (5) days after Customer's receipt of ESCO's notice, Customer and ESCO will jointly inspect the relevant installed Equipment and ECMs to verify that the installation of the Equipment or ECM is substantially complete in accordance with the requirements of this Agreement. If the installation of such Equipment and ECMs is substantially complete, ESCO shall prepare and Customer shall issue a Certificate of Substantial Completion in the form attached hereto as Exhibit II(iii) that will set forth (i) the date of Substantial Completion of the Work of a particular ECM, (ii) the remaining items of Work for each ECM that have to be completed before final acceptance of the Work, (iii) provisions (to the extent not already provided in this Agreement) establishing Customer's and ESCO's responsibility for the security, maintenance, utilities and insurance of the substantially complete Equipment and ECMs pending final completion and (iv) an acknowledgment that warranties for each ECM commence to run in accordance with the provisions of Section 11 (*Equipment Warranties*) hereof, on the date of each ECM's Substantial Completion date, except as may otherwise be modified by vendors and noted in the Certificate of Substantial Completion. Once ESCO has completed all items on the deficiency list, ESCO will provide a written request for a final inspection by Customer to verify that the Work is complete. Such final inspection shall occur within ten (10) business days after Customer's receipt of ESCO's notice for final inspection. If Customer reasonably determines that the Work is not complete, Customer will provide ESCO with a specific material performance deficiency list of all non-warranty items that must be corrected or completed before Customer accepts the Work as complete. This material performance deficiency list shall be provided by Customer to ESCO within fifteen (15) days of such final inspection, or the Work shall be deemed complete under this Agreement. Once such final inspection has occurred and all additional non-warranty items have been addressed by ESCO, all applicable permits have been closed, a conditional release of lien has been provided by ESCO, and all Equipment warranties and commissioning reports have been received by Customer for the Work, the Work shall be deemed to have achieved final acceptance.

4.1.4 Customer, at its option, may use a portion of the Equipment or ECMs which has been determined to be substantially complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of

Equipment and ECMs addressing the items set forth in Section 4.1.1 above and (ii) Customer and ESCO agree that Customer's use or occupancy will not interfere with ESCO's completion of the installation of the remaining Equipment and ECMs.

SECTION 4.2 Performance Commencement Date. The Performance Commencement Date shall be the first day of the month after the month ESCO has delivered a Notice to Customer that it has installed all of the Equipment and ECMs specified in Schedule B (*Scope of Work*), that all of such Equipment and ECMs are substantially complete and commissioned in accordance with the commissioning guidelines in Section [IV] of the CEA Report and Customer has inspected and accepted said installation, as evidenced by the Certificate of Acceptance as set forth in Exhibit II (iii). In the event that not all Equipment and ECMs are installed and accepted at the same time, ESCO and Customer shall negotiate in good faith as to when the Performance Commencement Date should occur and make any adjustments to the level of Customer's Energy and Cost Savings and timing of M&V and O&M Oversight Fees as may be appropriate in light of such staggered ECM acceptance dates.

SECTION 4.3 Performance Term of Agreement. Unless otherwise terminated pursuant to the terms of this Agreement, the performance term of this Agreement (the "Performance Term") shall begin with the Performance Commencement Date and continue for a period of [one (1)] year(s) measured beginning with the Performance Commencement Date.

SECTION 5. PAYMENTS

SECTION 5.1 ESCO Compensation and Fees. Within fifteen (15) days after execution of this Agreement, ESCO shall submit for Customer's review and approval a Schedule of Values (Schedule D) for all of the Work. Such Schedule D (*Schedule of Values*) will (i) subdivide the Work into its respective parts, (ii) include values for all items comprising the Work and (iii) serve as the basis for monthly progress payments made to ESCO throughout the Work. Customer shall make payment to ESCO against monthly invoices for Work completed in accordance with the agreed upon Schedule of Values. Customer's obligation to make payment to ESCO in accordance with the agreed upon Schedule of Values shall be absolute and unconditional in all events except as expressly set forth in Schedule K (*General Conditions*) with respect to non-appropriation of funds. Customer shall have ten (10) business days in which to review and approve the Schedule of Values after delivery. In the event that Customer does not approve the Schedule of Values, Customer and ESCO shall negotiate in good faith to arrive at a mutually acceptable Schedule of Values. If the Parties are unable to reach agreement on a Schedule of Values within thirty (30) business days of receipt by Customer of ESCO's proposed Schedule of Values, then either Party shall have the right, but not the obligation, to terminate this Agreement. In such event, ESCO shall be entitled to recover from Customer payment for all Work executed and for all proven loss, cost or expense in connection with the Work, including payment for the cost of preparing the CEA Report, plus all reasonable demobilization costs, reasonable damages and reasonable allocation of overhead up until the effective date of termination.

SECTION 5.2 M&V and O&M Oversight Fees. Throughout the Performance Term of this Agreement, Customer shall pay ESCO the annual fees set forth in Schedule L (*M&V and O&M Oversight Services*) for ESCO's measurement and verification ("M&V") services and its operations and maintenance ("O&M") oversight. These payments are referred to as the M&V Fees and the O&M Oversight Fees, respectively.

Customer acknowledges and agrees that if it (i) fails to pay for M&V and O&M Oversight Services in accordance with Schedule L (M&V and O&M Oversight Services), (ii) materially fails to fulfill any of Customer's responsibilities necessary to enable ESCO to complete the Work and provide the M&V Services, including, but not limited to, Customer's material failure to operate and maintain the equipment and/or systems as stipulated by ESCO, or (iii) otherwise materially breaches this Agreement, ESCO shall issue a written notice to the Customer stating the nature of the alleged breach and shall provide Customer with a ten (10) business day period to cure such breach.

SECTION 5.3 Energy and Cost Savings Guarantee. Subsequent to the Performance Commencement Date, ESCO hereby guarantees that Customer shall achieve the savings in units of energy and costs specified in the CEA Report. The foregoing is referred to as the "Energy and Cost Savings Guarantee".

5.3.1 This Energy and Cost Savings Guarantee is achieved as a result of the installation and operation of all of the Equipment and ECMs and the provision of services provided for in this Agreement as specified in Schedule L (*M&V and O&M Oversight Services*).

5.3.2 This Energy and Cost Savings Guarantee is expressly subject to (i) the satisfactory performance by Customer of all its obligations under this Agreement including, without limitation, those obligations set forth in Schedule I (*Customer's Maintenance Responsibilities and Facility Maintenance Checklist*), (ii) Customer's payment of M&V and O&M Oversight Fees when due; (iii) the conditions set forth in Appendix D to the CEA Report (*ESPC Contract Risk and Responsibility Matrix*); (iv) the installation of all of the Equipment and ECMs specified in the Scope of Work, and (v) the limitations of liability set forth in Section 28 hereof (*Indemnification/Liability*). However, subclause (iv), above, shall not apply to prevent recovery under the Energy and Cost Savings Guarantee where the ESCO and Customer agree that certain Equipment and ECMs cannot or should not be installed and an equitable adjustment to the Energy and Cost Savings Guarantee has been agreed upon by the Parties.

5.3.3 In the event this Agreement is terminated for any reason other than an uncured Event of Default by ESCO hereunder, this Energy and Cost Savings Guarantee shall be cancelled.

SECTION 5.4 Annual Review and Reimbursement/Reconciliation. Subject to 5.3.2 above, Energy and Cost Savings shall be measured in accordance with the M&V Plan set forth in Schedule L (*M&V and O&M Oversight Services*) and a report provided by the ESCO within forty-five (45) days after each anniversary of the Performance Commencement Date (the "Annual M&V Report"). The Customer shall have 30 days to review and accept the report. If during any such twelve-month period the Energy and Cost Savings achieved are greater than the Guaranteed Energy and Cost Savings, and such excess Guaranteed Energy and Cost Savings can be demonstrably and verifiably attributed to the Equipment and ECMs installed by ESCO, the Energy and Cost Savings in excess of Guaranteed Energy and Cost Savings for such twelve-month period shall be applied and carried over to the Energy and Cost Savings achieved during the next succeeding and, as the case may be, subsequent twelve-month periods during the Performance Term hereof. In the event the Energy and Cost Savings achieved during such twelve-month period are less than the Guaranteed Energy and Cost Savings during such same twelve-month period (and any excess Energy and Cost Savings carried over from a prior twelve-month period), ESCO shall pay the Customer an amount equal to the deficiency within thirty (30) days after the end of such twelve-month period.

SECTION 5.5 Late Payment. Payment due either Party hereunder shall be due and payable within thirty (30) days after the relevant due or invoice date. Interest shall accrue on any past due balance owed to either Party hereunder at the rate of one and one-half percent (1.5%) per month (or the highest rate permitted by law, whichever is lower). This remedy shall be in addition to, and not exclusive of, any other remedy available under this Agreement or Applicable Law.

SECTION 5.6 Effective Date of Payment Obligations. Customer shall commence making payments to ESCO under Schedule D (Schedule of Values) on the date specified therein. Customer shall also make any debt service payments due under the Financing on the due date thereof irrespective of the date of Substantial Completion or acceptance of the Work and irrespective of the level of Energy and Cost Savings generated by the Equipment and the ECMs.

SECTION 6. MODIFICATION OF EQUIPMENT

During the Term of this Agreement, Customer will not, without the prior written consent of ESCO, affix or install any accessory equipment or device on any of the Equipment comprising the ECMs without ESCO's prior written approval, which shall not be unreasonably withheld or delayed provided that any such accessory equipment or device is not reasonably likely to impair the originally intended functions, value or use of such Equipment.

SECTION 7. UPGRADING OR ALTERING THE EQUIPMENT

SECTION 7.1 Changes to the Equipment/Revisions to Procedures. ESCO shall at all times have the right, upon reasonable prior written notice to Customer, to change the Equipment or ECMs, revise any procedures for the operation of the Equipment or ECMs or implement other energy saving actions in the Premises, provided that:

- (i) such modifications or additions to, or replacement of the Equipment or ECMs, and any operational changes, or new procedures are necessary to enable the ESCO to achieve and/or enhance the Energy and Cost Savings at the Premises; and
- (ii) any cost incurred relative to such modifications, additions or replacement of the Equipment or ECMs, or operational changes or new procedures shall be the responsibility of the ESCO, unless such modifications, additions or replacement of the Equipment or ECMs, or operational changes or

new procedures are due to the actions or omissions of Customer or third parties under Customer's control.

SECTION 7.2 Supplemental Schedule. All modifications, additions or replacements of any Equipment or ECMs or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to Customer for approval, which shall not be unreasonably withheld or delayed, provided that any replacement of any such 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 Section 15.1 (*Ownership of Certain Proprietary Rights*) of Schedule L (*M&V and O&M Oversight Services*). All replacements of and alterations or additions to the Equipment shall become part of the Equipment and ECMs described in Schedule B (*Scope of Work*) and shall be covered by the provisions and terms of Section 10 (*Acceptance Testing*) and Section 13 (*Construction and Installation by ESCO*).

SECTION 8. INCENTIVES

SECTION 8.1 Availability of Incentives. The ESCO has discounted the price of the work by \$979,200 as reflected in the Contract Price herein. In consideration for the discounted price by ESCO, the Customer agrees that in the event the implementation or installation of one or more ECMs result in Customer's eligibility for a rebate, incentive, subsidy, low-cost financing, award or other payment or consideration from any serving public utility company or Local or State Governmental Authority (an "Incentive"), that the ESCO shall be entitled to timely prepare and submit to the appropriate utility company and/or Local or State Governmental Authority any and all documentation required to apply for such Incentive, for the sole benefit of the ESCO. Customer shall exercise all reasonable commercial efforts and due diligence in supporting assignment of the Incentives for the benefit of ESCO.

SECTION 8.2 Non-Utility Representative. Customer understands that ESCO is not a representative or an agent of the Local Serving Utility.

SECTION 9. ENVIRONMENTAL REQUIREMENTS

SECTION 9.1 Excluded Material and Activities. Customer recognizes that in connection with the installation and/or service or maintenance of Equipment or ECMs at Customer's Premises, ESCO may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, (ii) lead paint or (iii) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities". ESCO's Scope of Work does not include ESCO encountering or disturbing any Hazardous Materials or being required to perform any abatement or taking any other action with respect to Excluded Materials and Activities, with the exception of previously known or discovered asbestos or materials containing asbestos in the area where ESCO will be performing the Scope of Work, as identified in the CEA.

9.1.1 In the event ESCO discovers Hazardous or Excluded Materials, with the exception of previously known or discovered asbestos or materials containing asbestos in the area where ESCO will be performing the Scope of Work, ESCO shall immediately cease Work, remove all ESCO personnel or subcontractors from the site, and notify Customer. Customer shall be responsible to handle such other Hazardous or Excluded Materials at its expense. ESCO shall undertake no further work on the Premises except as authorized by the Customer in writing. Any such stoppage of Work by ESCO shall be considered as a delay in the Work requiring adjustment to the Time for Completion of Work and/or the Contract Sum in accordance with the provisions of Section 13.6 hereof (*Delays in the Work*), provided that the Time for Completion will be automatically extended by no less than the amount of time of the work stoppage.

9.1.2 ESCO shall be responsible for any hazardous or other materials, including, without limitation, those listed in this Section 9.1 (*Excluded Material and Activities*) that it may bring to the Premises.

SECTION 9.2 Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps. If the Work includes removal of PCB ballasts or mercury lamps, ESCO will arrange for disposal, recycling or destruction of such materials in accordance with applicable local, state or federal law. Customer will be identified as the generator of any such PCB ballasts or mercury lamps so disposed.

9.2.1 ESCO's responsibility shall be for the proper and legal management of any PCB ballasts generated as a result of the installation of the Equipment only until they are loaded onto a Customer approved PCB ballast disposal contractor's vehicle for transportation.

9.2.2 ESCO will retain an approved lamp disposal contractor, subject to Customer's approval, who will provide approved containers, materials required to label, transportation, recycling in accordance with EPA requirements, and a copy of the manifest.

9.2.3 Customer agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Premises.

SECTION 10. ACCEPTANCE TESTING

SECTION 10.1 Modification of Schedules. To ensure this Agreement and its Schedules properly account for as-installed conditions, which conditions may vary from the pre-installation analyses, the ESCO shall re-validate or modify the Schedules to reflect as-installed conditions.

SECTION 10.2 Systems Startup and Equipment Commissioning. The ESCO shall conduct a performance test of the installed Equipment and ECMs in accordance with the procedures specified in Schedule H (*Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment*) prior to the Performance Commencement Date. Testing shall be designed to determine if the Equipment and ECMs are functioning in accordance with both their published specifications and the Schedules to this Agreement, and to determine if all building systems, subsystems or components are functioning properly within the new integrated environment.

10.2.1 ESCO shall provide notice to Customer of the scheduled test(s) and the Customer 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.

10.2.2 ESCO shall be responsible for correcting and/or adjusting all deficiencies in Equipment and ECM operations that may be observed during system testing and commissioning procedures.

10.2.3 Prior to Customer acceptance of the Work, ESCO shall also provide Customer with satisfactory documentary evidence that the Equipment installed is the Equipment specified in Schedule B (Scope of Work).

10.2.4 If (i) not all Equipment and ECMs are scheduled to be installed and commissioned at the same time, (ii) several facilities comprise the Premises and the Equipment and ECMs for one or more of the facilities within the Premises are installed and tested according to the requirements of paragraphs 10.2.1 to 10.2.3 above prior to the Equipment and ECMs for all facilities within the Premises or (iii) if substantially all, but not all of the ECMs are installed and tested according to the requirements of paragraphs 10.2.1 to 10.2.3 above within a facility, Customer shall issue a Certificate of Acceptance for installed Equipment and ECMs in the form of Exhibit II(iii) for all Equipment and ECMs that are installed and tested in the scenarios contemplated by in this paragraph 10.2.4.

10.2.5 All Equipment installed that is comparable to similar equipment at the facility(ies), shall offer compatibility with existing systems, and/or be of the same manufacturer for standardization of equipment District-wide, unless excepted by Customer.

SECTION 11. EQUIPMENT WARRANTIES

SECTION 11.1 Basic Warranty. ESCO warrants that all Equipment sold and installed as part of this Agreement is new, will be free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the date of Substantial Completion for the particular ECM of which the Equipment is a part (the "Warranty Period"). Except as stated in this Section 11.1, ESCO shall have no responsibility for performing maintenance or repairs relating to the Equipment or ECMs, other than as provided in Schedule L (*M&V and O&M Oversight Services*).

SECTION 11.2 Assignment of Manufacturers' Warranties. ESCO agrees to assign to Customer all manufacturer's warranties relating to the Equipment, once obtained, and to deliver such written warranties, which shall be attached and set

forth as Exhibit III(i) (*Equipment Warranties*). All warranties shall be transferable and extend to the Customer to the extent allowable under the terms of such warranties.

SECTION 11.3 Customer's Performance. ESCO's warranty obligations under Section 11.1 (*Basic Warranty*) are conditioned upon the performance by Customer of its obligation to obtain ESCO's prior written approval for modification of Equipment under Section 6 (*Modification of Equipment*) of this Agreement and its maintenance obligations under Schedule I (*Customer's Maintenance Responsibilities and Facility Maintenance Checklist*). Notwithstanding the foregoing, ESCO's prior written approval shall not be required for modification of Equipment necessitated by emergency circumstances, provided that Customer shall inform ESCO in writing of the nature of such modification immediately after making same. In addition, the cost of any warranty repairs under Section 11.1 shall be for the account of Customer in the event that any Equipment comprising an ECM does not function properly due to (i) Customer use of the Equipment in a manner inconsistent with manufacturer's instructions and any manuals provided by manufacturer, or Customer's use of such Equipment in a manner inconsistent with its intended purpose, (ii) any damage to any Equipment caused by the act or omission, negligence, or willful misconduct of Customer or any of its representatives, employees or agents or any users of or invitees upon Customer's premises, (iii) any modification of the Equipment by Customer, including under the circumstances contemplated in Section 6 or (iv) a Casualty or an event of Force Majeure.

SECTION 12. PERMITS AND APPROVALS; COORDINATION

SECTION 12.1 Permits and Approvals. All required permits and licenses for the installation of the Equipment, including without limitation, applicable plumbing and electrical permits shall, to the extent allowable by Applicable Laws, be secured by the ESCO. Customer shall use its best efforts to assist ESCO in obtaining all necessary permits and approvals for installation of the Equipment. If, due to the nature of the Equipment being installed or the nature of the ECM contemplated, only Customer may apply for a permit, ESCO shall prepare the necessary application and file such application on Customer's behalf and Customer shall take all steps and promptly execute all documents required for such applications. Customer shall be responsible for paying all permitting and license fees when any permit or license must, by law or other applicable regulation, be filed by Customer. ESCO shall bear the cost of all permit preparation and pay all permitting and license fees when any permit or license must be obtained in ESCO's name. ESCO shall furnish copies of each permit or license which is required to perform the work to the Customer before the ESCO commences the portion of the work requiring such permit or license.

SECTION 12.2 Compliance with Law and Code. The Equipment and ECMs, as well as the installation and (if applicable) operation of the Equipment and ECMs by ESCO shall upon acceptance conform to Applicable Laws.

SECTION 12.3 Customer Review of Design Documentation. As directed by Customer, design documentation will be submitted to Customer for review. Customer agrees that the total review process will not be longer than ten (10) days. All costs of code review will be borne by Customer.

SECTION 12.4 Coordination During Installation. Customer and ESCO shall coordinate the activities of ESCO's Equipment and ECM installers with those of the Customer, its employees, and agents. ESCO shall not commit or permit any act, which will interfere with the performance of business activities conducted by the Customer or its employees without prior written approval of the Customer. Customer shall promptly review any such ESCO coordination of activities request and provide reasonable times during which ESCO may accomplish its work hereunder. ESCO shall in addition coordinate the activities of all of its subcontractors. If Customer performs other work on the Premises with separate contractors under Customer's control, ESCO agrees to reasonably cooperate and coordinate its activities with those of such separate contractors so that the Work can be completed in an orderly and coordinated manner without unreasonable disruption. If, due to the nature of the use of the Premises, ESCO and its subcontractors are not permitted unrestricted access to the Premises, Customer undertakes to make available sufficient personnel to ensure that the employees of ESCO and its subcontractors are accompanied at all times on the Premises. Customer's failure to do so shall be considered an event giving rise to a delay in the Work pursuant to Section 13.6 hereof (*Delays in the Work*). No alcohol, tobacco or drugs are to be permitted on Customer property at any time for any reason.

SECTION 13. CONSTRUCTION AND INSTALLATION BY ESCO

SECTION 13.1 Construction Schedule. Construction and equipment installation shall proceed in accordance with the construction schedule approved by Customer and attached hereto as Schedule G (*Construction and Installation Schedule*).

SECTION 13.2 ESCO's Duty of Proper Installation. All services called for by this Agreement which constitute the "practice of architecture" or the "practice of engineering," shall be performed by properly qualified and licensed professionals employed by ESCO and shall be performed in accordance with Applicable Laws, including all applicable federal, state and local code requirements. ESCO shall perform all tasks/phases under this Agreement, including construction, and shall install the Equipment and ECMs in such a manner so as not to harm the structural integrity of the buildings or their operating systems. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Agreement. Customer reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the reasonable opinion of Customer, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action caused by ESCO's breach of its obligations under this Agreement shall be borne by ESCO. All construction and installation by ESCO shall be in compliance with applicable building, fire and other codes in existence as of the date of this Agreement.

SECTION 13.3 Subcontracts. As used in this Agreement, the term "subcontractor" means a person or entity supplying both labor and materials, or labor only, for installation or maintenance related to the Equipment. Each and every subcontractor shall be properly qualified to perform the work that is the subject of such subcontract. Within thirty (30) days following execution of this Agreement, ESCO shall provide the Customer a complete list of all subcontractors. The ESCO shall not use any subcontractor the Customer objects to in writing as being unacceptable within five (5) days after receiving ESCO's list, provided that any equipment supplier or subcontractor mentioned in the CEA Report shall be deemed to be approved by Customer. The ESCO shall be fully responsible to Customer for the acts and omissions of its subcontractors and of persons either directly or indirectly employed by the subcontractors, as ESCO is for the acts and omissions of persons directly employed by it. Nothing in this Agreement or otherwise shall create any contractual relationship whatsoever between any subcontractor and the Customer. The ESCO shall not grant or allow any lien or security interest for labor or material or otherwise on the Equipment, the Premises or other property owned by the Customer. In the event that such a lien or security interest for labor is placed on the Equipment, the Premises or other property owned by Customer, ESCO shall bear all costs associated with obtaining a release of any such lien or security interest, unless the circumstances giving rise to such lien or security interest are due to the act or neglect of Customer. Notwithstanding the foregoing, Customer reserves the right to require the removal or dismissal from the project of any individual for any reason.

SECTION 13.4 ESCO's Supervision. ESCO shall provide, during the progress of the installation and testing, competent supervision for the Work being performed. This person shall represent the ESCO and all directions or notices given to him or her shall be binding on the ESCO. This person shall see that the work is carried out in accordance with the terms and conditions of this Agreement. The person assigned to this project by the ESCO shall not be removed from this project without the prior written approval of Customer. Such approval may not be unreasonably withheld.

SECTION 13.5 ESCO Responsibility. ESCO shall remain responsible for the professional and technical accuracy of all services performed, whether performed by the ESCO or its subcontractors or others on its behalf, throughout the term of this Agreement.

SECTION 13.6 Delays in the Work. If causes beyond ESCO's control delay the commencement or progress of the Work, then the Contract Sum and/or the date of Substantial Completion shall be modified by Change Order as appropriate. Such causes shall include but not be limited to: changes ordered in the Work, acts or omissions of Customer or separate contractors employed by Customer, the Customer preventing ESCO from performing the Work pending dispute resolution, the Customer not providing sufficient personnel to accompany or supervise the employees and representatives of ESCO and/or its subcontractors or others acting on its behalf, Hazardous Materials, Differing Site Conditions and events of Force Majeure. In the event delays in the Work are encountered for any reason, the Parties agree to undertake reasonable steps to mitigate the effect of such delays.

SECTION 13.7 Changes in the Work. A Change Order is a written instrument issued after execution of the Agreement in the form set forth in Exhibit IV signed by Customer and ESCO, stating their agreement upon all of the following: (a) the scope of the change in the Work; (b) the amount of the adjustment to the Contract Sum; and (c) the extent of the adjustment to the Time for Completion.

13.7.1 All changes in the Work authorized by a Change Order shall be performed under the applicable conditions of this Agreement. Customer and ESCO shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

13.7.2 If Customer requests a proposal for a change in the Work from ESCO and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse ESCO for reasonable costs incurred for estimating services, design services and services involved in the preparation of proposed revisions to the Agreement and the Scope of Work.

13.7.3 The increase or decrease in Contract Sum resulting from a change in the Work shall be determined by one or more of the following methods: (a) unit prices set forth in the Agreement or as subsequently agreed to between the Parties; (b) a mutually accepted, lump sum, and supported by sufficient substantiating data to permit evaluation by Customer or (c) costs, fees and any other markups set forth in the Agreement.

13.7.4 If Customer and ESCO disagree upon whether ESCO is entitled to be paid for any services required by Customer, or if there are any other disagreements over the scope of Work or proposed changes to the Work, Customer and ESCO shall resolve the disagreement pursuant to Section 30 hereof (*Resolution of Disputes*). As part of the negotiation process, ESCO shall furnish Customer with a good faith estimate of the costs to perform the disputed services in accordance with Customer's interpretations.

13.7.5 In any emergency affecting the safety of persons and/or property, ESCO shall act, at its discretion, to prevent threatened damage, injury or loss. Any change in the Contract Sum and/or Time for Completion on account of emergency work shall be determined as a change in the Work as provided in this Section 13.7.

13.7.6 In the event any changes in Applicable Laws affecting the performance of the Work are enacted after the date of this Agreement, or the act, order, decision or failure to act by any Governmental Authority delays the Work or requires a change in the Scope of Work, the Contract Sum and the Time for Completion shall be equitably adjusted by Change Order.

13.7.7 Any Change Order must be approved by the Customer's Board of Education and signed by an authorized representative of each party.

SECTION 14. TRAINING

The ESCO shall conduct the training program described in Schedule J (*ESCO's Training Responsibilities*).

SECTION 15. OWNERSHIP

SECTION 15.1 Ownership of Certain Proprietary Property Rights. Customer shall not, by virtue of this Agreement, acquire any ownership 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. Customer shall, however, have a nonexclusive license to utilize all such intellectual or proprietary rights in connection with its use of the Equipment under this Agreement. The ESCO hereby grants to Customer a perpetual, irrevocable, royalty-free license to any and all software or other intellectual property or proprietary rights necessary for Customer to continue to operate, maintain, and repair the Equipment and ECMs in a manner that will yield maximum energy consumption reductions. This license shall continue subsequent to any termination or expiration of this Agreement other than termination due to breach by Customer.

SECTION 15.2 Ownership of Documents. All drawings, reports and materials prepared by the ESCO specifically in performance of this Agreement shall become the property of Customer. Unless waived by Customer in writing, within sixty (60) days following the Performance Commencement Date, ESCO shall provide the Customer as-built record drawings of the Equipment installation and all specifications therefor. "Drawings" shall include three sets of corrected prints, and electronic files in compliance with Customer's CAD standards. Additional documents will be provided as a change order.

SECTION 15.3 Ownership of Existing Equipment. Ownership of the equipment and materials existing at the Premises at the time of execution of this Agreement shall remain the property of Customer even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Agreement. If applicable, ESCO shall advise Customer in writing of all equipment and materials to be replaced at the Premises and Customer shall within fifteen (15) days designate in writing to the ESCO which equipment and materials should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that Customer shall be responsible for and designate the location and storage for any equipment and materials that

should not be disposed of off-site. Except as may be otherwise provided in this Agreement, the ESCO shall be responsible for the disposal of all equipment and materials designated by Customer as disposable off-site in accordance with all Applicable Laws and regulations regarding such disposal. Notwithstanding the foregoing, under no circumstance shall ESCO be obligated to dispose of or take responsibility for any materials identified in Section 9 (*Environmental Requirements*) of this Agreement including, without limitation, Hazardous or Excluded Materials and PCB ballasts.

SECTION 15.4 Ownership of Equipment Installed by ESCO. Title to all Equipment installed by ESCO hereunder except Measurement and Verification Equipment (as defined below) shall vest in Customer or in the party providing financing if required by the terms of the Financing as it is installed in accordance with the terms hereof. Neither Customer nor any party providing Financing shall have any ownership rights in the Measurement and Verification Equipment or any other related ESCO property.

SECTION 15.5 Ownership of Measurement and Verification Equipment. Customer agrees to provide rent-free space for the location of equipment required to provide the ongoing measurement of energy and water savings (the "Measurement and Verification Equipment"). If required, Customer shall provide and maintain a dedicated telephone line and/or internet access to facilitate remote monitoring of the Equipment. Customer shall not by virtue of this Agreement, 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 verification of savings by ESCO.

SECTION 16. ESCO ACCESS

SECTION 16.1 ESCO Access. ESCO acknowledges that there exists sufficient space on the Premises for the installation and operation of the Equipment and ECMs. Customer shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Agreement. Customer shall provide access to the Premises for ESCO to perform any function related to this Agreement during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to the Customer, and shall make available sufficient personnel to ensure that the employees of ESCO and its subcontractors are accompanied and supervised by Customer personnel at all times. ESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed and shall not be unreasonably restricted by Customer. ESCO shall immediately notify the Customer when emergency action is taken and follow up with written notice within three (3) business days thereafter specifying the action taken, the reasons therefor, and the impact upon the Premises, if any.

SECTION 16.2 Utility Access. If an Incentive is made or paid as described in Section 8 (*Incentives*), the following applies. Upon request by the Local Serving Utility (or its authorized agent) and with prior consent of Customer which consent shall not be unreasonably withheld, Customer shall agree to allow the Local Serving Utility to interview Customer and to enter the Premises at reasonable times throughout installed life of the Equipment to install metering equipment, perform energy audits or inspect the facilities and any equipment installed. Customer also agrees to cooperate with the Local Serving Utility or its authorized agent upon request and with prior consent of the Customer, in conducting such activities and/or in analyzing energy savings. At all times a representative of Customer (or its authorized agent) shall be present during such inspections.

SECTION 17. EQUIPMENT SERVICE

SECTION 17.1 Customer Maintenance Responsibility. Customer shall be responsible for and shall bear all costs associated with service, repairs, and adjustments to the Equipment and ECMs except as may be set forth in Schedule L (*M&V and O&M Oversight Services*) and as set forth in Section 11 (*Equipment Warranties*).

SECTION 17.2 Malfunctions and Emergencies. Customer shall use its best efforts to notify the ESCO or its designated subcontractor within twenty-four (24) hours after the Customer's actual knowledge and occurrence of:

- (i) any malfunction in the operation of the Equipment, any ECM or any preexisting energy related equipment that might materially impact upon the Energy and Cost Savings or Energy and Cost Savings Guarantee,
- (ii) any interruption or alteration to the energy supply to the Premises, or
- (iii) any alteration or modification in any energy-related equipment or its operation.

17.2.1 Customer shall notify ESCO within twenty-four (24) hours of Customer having actual knowledge of any emergency condition affecting the Equipment. If such malfunction, interruption, or alteration occurs during the Warranty Period, ESCO shall respond to any such notice within twenty-four (24) hours in accordance with its obligations under Section 11.1 (*Basic Warranty*). Any telephonic notice of such conditions by Customer shall be followed within three (3) business days by written notice to ESCO from Customer unless ESCO has responded to the Premises or contacted Customer telephonically or in writing concerning Customer's trouble report.

17.2.2 If Customer unreasonably delays in so notifying ESCO of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, ESCO may charge Customer for its loss, due to the delay, associated with the Guaranteed Energy and Cost Savings under this Agreement for the particular time period.

SECTION 17.3 Actions by Customer. During the term of this Agreement, Customer shall not move, remove, modify, alter, or change in any way the Equipment or any ECM or any part thereof without the prior written approval of ESCO except as set forth in Schedule I (*Customer's Maintenance Responsibilities and Facility Maintenance Agreement*). Notwithstanding the foregoing, Customer 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, Customer shall take reasonable steps to protect the Equipment from damage or injury and shall inform ESCO in writing of the nature of such steps immediately after making same. Customer agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment, all in accordance with the same standard of care the Customer applies to the Premises generally, that of a similarly situated owner.

SECTION 18. INSURANCE REQUIREMENTS

SECTION 18.1 ESCO Insurance. ESCO shall obtain, maintain and keep in force during the Term, including any extension thereof, at least the following types and amounts of insurance:

(a) Workers' compensation insurance complying with applicable State law and employers' liability insurance with limits of at least \$1,000,000. Furthermore, ESCO shall require all contractors and their subcontractors to maintain workers' compensation insurance that complies with applicable State law and employers' liability insurance with limits of at least \$1,000,000. If a subcontractor fails to maintain workers compensation insurance, then the contractor that hired the subcontractor (rather than the ESCO) will be the "ultimate employer" for any potential claims by the subcontractor's injured employees.

(b) Commercial general liability insurance for bodily injury claims with limits of \$1,000,000 per occurrence, \$2,000,000 policy aggregate, and property damage claims with limits of \$500,000 per occurrence, \$500,000 policy aggregate. Such insurance will include, but not necessarily be limited to, contractual liability coverage, personal injury liability, explosion and collapse hazard coverage and products and completed operations liability.

(c) Commercial auto liability insurance with combined single limits of \$1,000,000 each accident, covering all owned, hired and non-owned vehicles. ESCO will require all contractors and their subcontractors to maintain commercial auto liability insurance with combined single limits of at \$1,000,000 each accident to cover all owned, hired, and non-owned motor vehicles. If a subcontractor fails to maintain commercial auto liability insurance, the contractor that hired the subcontractor (rather than the ESCO) will be responsible for any non-owned auto liability claims.

(d) Excess liability insurance with limits of \$1,000,000 each accident and annual aggregate.

Insurance coverage shall be evidenced by a CERTIFICATE OF INSURANCE in a form acceptable to the Customer. A copy of the CERTIFICATE OF INSURANCE shall be provided to the Customer upon execution of this Agreement. Insurance coverage shall be written as primary coverage, not contributing with and not in excess of insurance coverage which the Customer may carry.

SECTION 18.2 Customer Insurance. Customer shall obtain, maintain and keep in force during the Term, including any extension thereof (unless some other period of coverage is specified herein), at least the following types and amounts of insurance¹:

(a) commercial general liability insurance, on an occurrence basis against claims for bodily injury, death, and property damage, providing coverage for property damage and personal injury occurring at or in the vicinity of the Premises and in connection with this Contract with a \$5,000,000 limit per occurrence.

(b) insurance covering “all risks” of physical loss or damage to the Premises and against such other risks and perils as are customarily insured against by others in State using facilities similar to the Premises, and shall be in an amount equal to at least the replacement value of the Premises.

SECTION 18.3 Occurrence Policies/Additional Insureds. Each of the policies of insurance maintained by ESCO and Customer in accordance with the foregoing provisions shall be occurrence rather than claims-made policies and, with the exception of the workers compensation insurance, shall name the other Party as an additional insured. The insurance shall not contain any endorsements or any other form designed to limit and restrict any action by an additional insured against the insurance coverage in regard to the obligations of the insured Party hereunder and otherwise consistent with this Agreement.

SECTION 18.4 Certificates of Insurance. ESCO shall deliver to Customer and Customer shall deliver to ESCO certificates of insurance evidencing the existence of insurance required hereunder.

SECTION 18.5 Waiver of Subrogation. All insurance policies maintained by ESCO and Customer pursuant to this Section 18 shall expressly waive any right on the part of any insurer to assert any claims against the Customer, in the case of ESCO policies, and against the ESCO, in the case of Customer policies. The Parties agree that all policies will include such waiver clause or endorsement.

SECTION 18.6 Title to Equipment/Risk of Loss. Upon installation of any item of Equipment or an ECM, Customer assumes all risk of loss of or damage to such item of Equipment or ECM from any cause whatsoever except if due to the breach by ESCO of one of its obligations hereunder or as provided in Section 11 (*Equipment Warranties*) and Section 17 (*Equipment Service*), and no such loss of or damage to any item of Equipment or ECM shall relieve Customer of the obligation to make payments or to perform any other obligation under this Agreement.

18.6.1 In the event of damage to any item of Equipment or ECM, Customer will immediately notify ESCO or its assignee and place the same in good repair, except as may otherwise be required by the provisions of Sections 11, 17 and 18.

18.6.2 If any of the Equipment or ECMs is lost, stolen, destroyed or damaged beyond repair (any of these occurrences being deemed “Irreparable Damage”), and ESCO is not responsible for repair or replacement under Sections 11 (*Equipment Warranties*), 17 (*Equipment Service*) or 18 (*Insurance Requirements*), then, if Customer elects to repair or replace such Equipment or ECM, Customer will bear the costs to replace the same with like Equipment in good repair and shall promptly do so following the event giving rise to such damage, it being understood that the foregoing obligation shall be subject to any claim of relief from obligation under Section 19 (*Conditions Beyond Control of the Parties*) below. All amounts owed by Customer to ESCO under this Agreement, including payments owing under the Schedule of Values set forth in Schedule D (*Schedule of Values*) will be paid to ESCO without regard to the occurrence of such Irreparable Damage to the Equipment or any ECM. In the event that Customer elects not to repair or replace any such Equipment or ECM pursuant to the provisions of this Section, the Energy and Cost Savings Guarantee shall be adjusted accordingly.

SECTION 18.7 Casualty or Condemnation of Premises. If any Casualty or condemnation renders more than fifty percent (50%) of the Premises uninhabitable or unusable and, in the case of a Casualty, reconstruction or restoration is not commenced upon the affected portion within one hundred twenty (120) days of such Casualty, either Customer or ESCO shall have the option to terminate this Agreement by notice to the other Party. In the event of termination of the Agreement by either Party due to Casualty or condemnation, ESCO shall be entitled to payment from Customer for all Work executed and for all proven loss, cost or expense in connection with the Work, including payment for the cost of preparing the CEA Report, plus all reasonable demobilization costs, reasonable damages and reasonable allocation of overhead up until the effective date of termination.

¹ Clause may be adapted to the type of commercial general liability insurance in fact maintained by Customer.

SECTION 19. CONDITIONS BEYOND CONTROL OF THE PARTIES

SECTION 19.1 Relief due to Force Majeure. Except with respect to the obligation to pay money in a timely manner for liabilities actually incurred, each Party shall be excused from performance hereunder and shall not be considered to be in default or be liable in damages or otherwise with respect to any obligation hereunder, if and to the extent that such Party's failure of, or delay in, performance is due to the occurrence of an event of Force Majeure.

SECTION 19.2 Definition of Force Majeure. An event of "Force Majeure" means, with respect to a Party, any event, occurrence, condition or imminent threat thereof which is beyond the reasonable control of such Party and prevents the performance of such Party's obligation under this Agreement, but in no event shall an event, occurrence or condition caused by the negligence, bad faith or willful misconduct of a Party claiming Force Majeure constitute Force Majeure. Events of Force Majeure include, but are not limited to, acts of God; sudden action of elements; strikes, lockouts or other industrial or labor disturbances; acts of the public enemy or acts of terrorism; wars; epidemics; pandemics; fires; explosions; lightning; interruption by government or court orders; present and future orders of any Governmental Authority; non-issuance of any required permit or consent by any Governmental Authority or Local Serving Utility, including approvals of interconnection requests; civil disturbances; inability to secure or a delay in securing labor or materials, including delay in securing or inability to secure materials by reason of allocations promulgated by any Governmental Authority; breakage, accident or freezing of machinery or pipelines that could not have been reasonably anticipated; inability to obtain fuel supply or transportation that could not have been reasonably anticipated and avoided; or any other cause, whether of the kind enumerated above or otherwise, so long as the cause is beyond the reasonable control and without the fault or negligence of the Party claiming Force Majeure. Where the performance of either Party is prevented or delayed by actions or inactions of any supplier or contractor to such Party, such prevented or delayed performance shall be an event of Force Majeure hereunder only if the supplier's or contractor's performance is prevented or delayed by circumstances that would constitute an event of Force Majeure hereunder.

SECTION 19.3 Notice and Mitigation Obligations. The Party whose performance is affected by any event of Force Majeure shall promptly, but in no event later than five (5) days after the occurrence of the event of Force Majeure or the date on which the effects of an event of Force Majeure become known, or reasonably should have been known, to the Party so affected, notify the other Party in writing of the occurrence of such event. Such notice shall be accompanied by any information reasonably available regarding the nature and duration of such Force Majeure. The non-performing Party shall use reasonable commercial efforts to continue to perform its obligations hereunder and to overcome the effects of the event of Force Majeure. The suspension of performance shall be of no greater scope and of no longer duration than is reasonably required by the event of Force Majeure.

SECTION 19.4 End of Force Majeure Event. The affected Party shall provide the other Party with prompt notice of the cessation of an event of the Force Majeure and shall promptly resume performance hereunder.

SECTION 20. EVENTS OF DEFAULT

SECTION 20.1 Events of Default by Customer. Each of the following events or conditions shall constitute an "Event of Default" by Customer:

- (i) any failure by Customer to pay ESCO any sum due hereunder by a date which is five (5) days after the due date specified herein for such payment;
- (ii) any other material failure by Customer 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 Customer demanding that such failure to perform be cured or if such cure cannot be effected in such thirty (30) days, Customer shall be deemed to have cured default upon the commencement of a cure within such thirty (30) days and diligent subsequent completion thereof;
- (iii) any representation or warranty furnished by Customer in this Agreement that was false or misleading in any material respect when made; or
- (iv) the filing of a bankruptcy petition whether by Customer, or by its creditors against Customer, which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors of the liquidation of Customer.

SECTION 20.2 Events of Default by ESCO. Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

- (i) any failure by ESCO to pay Customer any sum due hereunder by a date which is five (5) days after the due date specified herein for such payment;
- (ii) any representation or warranty furnished by ESCO in this Agreement that was false or misleading in any material respect when made;
- (iii) any material failure by ESCO to perform or comply with any material terms or conditions of this Agreement, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Agreement; and provided further if that such cure cannot be effected in such thirty (30) days, ESCO shall be deemed to have cured any such default upon the commencement of a cure within such thirty (30) days and diligent subsequent completion thereof;
- (iv) any lien or encumbrance upon the Equipment by any subcontractor, laborer or materialman of ESCO which is not released in thirty days; or
- (v) the filing of a bankruptcy petition whether by ESCO, or by 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.

SECTION 21. REMEDIES UPON DEFAULT

SECTION 21.1 Remedies upon Default by Customer. If an Event of Default by Customer occurs, ESCO may, without a waiver of other remedies that exist in law or equity:

- (i) exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions for recovery of amounts due and unpaid by Customer, breach of contract and/or for recovery of damages which shall include all costs and expenses reasonably incurred, including reasonable attorney fees; and
- (ii) terminate this Agreement and the Energy and Cost Savings Guarantee.

21.1.2 Without limiting the foregoing, upon ESCO's termination of this Agreement as a result of the occurrence of an Event of Default by Customer, ESCO shall be entitled to receive from Customer the termination payment specified in Schedule M (*Termination Payment Schedule*) of this Agreement.

21.1.3 Customer shall make payment to ESCO of the appropriate amount set forth in the Termination Payment Schedule within no later than thirty (30) days after the date of termination of this Agreement.

21.1.4 Prior to the Performance Commencement Date, ESCO may terminate this Agreement upon ten (10) days prior written notice to Customer for any of the following reasons: (a) if the Work has been stopped for a sixty (60) day period or (b) under court order or order of other Governmental Authorities having jurisdiction. Upon termination by ESCO in accordance with this subsection, ESCO shall be entitled to recover from Customer payment for all Work executed and for all proven loss, cost or expense in connection with the Work, plus all reasonable demobilization costs, reasonable damages and a reasonable allocation of overhead up until the effective date of termination.

SECTION 21.2 Remedies Upon Default by ESCO. In the Event of Default by ESCO, Customer may, without waiver of other remedies which exist in law or equity, terminate this Agreement and exercise any and all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions for breach of contract and/or for the recovery of damages, which shall include all costs and expenses reasonably incurred, including reasonable attorney fees.

SECTION 22. ASSIGNMENT

SECTION 22.1 Assignment by ESCO.

ESCO acknowledges that Customer is induced to enter into this Agreement by, among other things, the professional qualifications of the ESCO.

22.1.1 ESCO agrees that except as provided below, neither this Agreement nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of Customer.

22.1.2 Notwithstanding the foregoing, in the event of a sale, transfer, or reorganization of ESCO as an entity, or the sale of substantially all of ESCO's energy services business, ESCO shall have the right to assign all of its rights and delegate all of its duties under or pursuant to this Agreement without the consent of Customer. In addition, ESCO may, without prior consent or approval of Customer, assign all of its rights under or pursuant to this Agreement to any third party providing financing to ESCO in connection with the performance of ESCO's obligations to Customer hereunder.

22.1.3 ESCO may utilize subcontractors, provided that any subcontractor(s) shall fully comply with the terms of this Agreement. The provisions of Section 13.3 (*Subcontracts*) pertaining to subcontracts shall apply to any and all subcontract(s). No such utilization of subcontractors shall relieve ESCO of any obligation under this Agreement.

SECTION 22.2 Assignment by Customer. Customer may transfer or assign this Agreement and its rights and obligations herein to a successor or purchaser of the Premises or an interest therein with the prior written consent of ESCO, which shall not be unreasonably withheld. In addition, Customer may, without prior consent or approval of ESCO, assign all of its rights under or pursuant to this Agreement to any third party providing Financing to Customer.

SECTION 23. 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 Agreement and perform its obligations hereunder;
- (ii) its execution, delivery, and performance of this agreement have been duly authorized by, or are in accordance with, its organic instruments, and this Agreement 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 Agreement will not result in a breach or violation of, or constitute a default under any Agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected;
- (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, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder; and
- (v) the information in all documents furnished, or to be furnished by it to the other Party is true and accurate, and does not fail to include any statement of a material fact, the omission of which would be misleading.

SECTION 24. ADDITIONAL REPRESENTATIONS OF THE PARTIES

SECTION 24.1 By Customer. Customer hereby warrants, represents and promises that:

- (i) Customer is authorized under the laws of the State of New York to enter into this Agreement, each transaction contemplated hereby, and to perform all of its obligations under this Agreement;

- (ii) Customer has provided or shall provide on a timely basis to ESCO, all records relating to energy and water usage and energy-related maintenance of Premises requested by ESCO and the information set forth therein is, and all information in those and other records to be subsequently provided pursuant to this Agreement is and will be true and accurate in all material respects to the best of Customer's knowledge;
- (iii) Customer has not entered into any prior leases, contracts or agreements with other persons or entities regarding the leasing or acquisition of water or 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 that would encroach upon the scope of this Agreement; and
- (iv) the authorization, approval and execution of the Agreement and all other proceedings of Customer relating to the transactions contemplated thereby have been performed in accordance with all applicable open meeting, public records, public bidding and all other laws, rules and regulations of Customer.
- (v) The undersigned representative of the Customer warrants and agrees that he/she is a duly authorized agent of the Customer who possesses the legal right and authority to enter into this Agreement and bind the Customer with respect to its obligations set forth herein. This Agreement shall not become valid and binding upon either party hereto until it is approved by a formal resolution of the Customer's Board of Education at a duly convened meeting of the Board.

SECTION 24.2 By ESCO. ESCO hereby warrants, represents and promises that:

- (i) It is duly licensed and qualified to do business and otherwise permitted to perform the services described herein and do business in the State of New York; and
- (ii) ESCO shall make available, upon reasonable request, documents relating to its performance under this Agreement, including contracts and subcontracts it shall enter into;
- (iii) ESCO shall use subcontractors who are qualified, licensed and bonded in this State to perform the work so subcontracted pursuant to the terms hereof;
- (iv) ESCO has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Agreement;
- (v) the Equipment will meet or exceed the Acceptance Testing Standards set forth in this Agreement;
- (vi) the Equipment is or will be compatible with all other mechanical and electrical systems, subsystems, or components with which the Equipment interacts at the Premises, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation;
- (vii) ESCO is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Installation and perform its obligations under this Agreement and there are no other circumstances which would adversely affect the ESCO's ability to execute this Agreement and fully perform its obligations herein;
- (viii) ESCO is familiar with all applicable Incentive programs; and
- (ix) ESCO is familiar with all Applicable Laws and regulations pertaining to the Agreement.

SECTION 25. PERFORMANCE BONDS AND PAYMENT BONDS

SECTION 25.1 Performance/Payment Bonds. ESCO shall furnish by no later than the date on which it is required to commence Work pursuant to the Notice to Proceed issued by Customer a Performance Bond and Payment Bond on the forms set forth in Exhibits I and IV hereof, respectively, executed by a corporate surety licensed to transact such business in the State. The amount of the Performance Bond shall be the Contract Sum and shall cover ESCO's obligations hereunder with respect to the design, procurement, installation, testing, performance of the Equipment and ECMs installed up until Substantial Completion thereof, and its warranties with respect thereto. The amount of the Payment Bond shall be one hundred percent (100%) of the Contract Sum. The expense of these bonds shall be borne by the ESCO. Such bonds, once executed, are incorporated herein by reference. If, at any time, a surety on such a bond becomes irresponsible or loses his right to do business in the State, another surety will be required, which the ESCO shall furnish to the Customer thirty (30) days after receipt of Notice.

SECTION 26. COMPLIANCE WITH LAW AND STANDARD PRACTICES

ESCO shall perform its obligations hereunder in compliance with all Applicable Laws, in accordance with sound engineering and safety practices and in compliance with any and all reasonable rules of Customer relative to the Premises. ESCO shall be responsible for obtaining all governmental permits, consents, and authorizations as may be required to perform its obligations hereunder.

SECTION 27. CUSTOMER'S MAINTENANCE RESPONSIBILITIES

SECTION 27.1 Parties' Acknowledgement. The Parties acknowledge and agree that the Energy and Cost Savings will not be achieved unless the Customer performs regular maintenance of the Equipment and ECMs and certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by Customer on a regular and continuous basis.

SECTION 27.2 Development of O&M Plan and Operational Procedures. The operations and maintenance plan ("O&M Plan") for Customer to follow during the Performance Term is set forth in the CEA Report, as referenced in Schedule I (*Customer's Maintenance Responsibilities*) to this Agreement. As the Equipment and ECMs are being installed and implemented, ESCO shall consult and coordinate with Customer's buildings and grounds staff in order to refine the O&M Plan and Customer shall make such personnel available to ESCO for such purposes. Within a reasonable time prior to the anticipated commissioning of the Equipment and all ECMs, ESCO shall deliver to Customer draft revisions, if any, to the O&M Plan for Customer's input and comment. Customer shall promptly review and provide comments to such draft. ESCO and Customer shall then in good faith negotiate any final revisions to the O&M Plan, which shall be set forth in this Agreement as Schedule I upon and within a reasonable time after the substantial completion of the installation of the Equipment and the ECMs. Such O&M Plan shall include a checklist of those routine and scheduled maintenance checks and procedures and methods of operation as shall be appropriate to achieve the Energy and Cost Savings contemplated by this Agreement.

SECTION 27.3 Customer's Maintenance and Operational Responsibilities. Customer and its personnel shall throughout the Performance Term of this Agreement operate all Equipment and ECMs and perform all routine, scheduled and non-scheduled maintenance, repair and replacement of the Equipment and ECMs, or shall contract for such services with a reliable service provider to perform such tasks. The Customer shall adhere to, follow and implement the O&M Plan and the energy conservation procedures and methods of operation to be set forth on Schedule I (*Customer's Maintenance Responsibilities*), to be attached hereto and made a part hereof as contemplated by Section 27.2 above.

SECTION 27.4 ESCO's O&M Oversight Obligations. ESCO shall perform the O&M oversight obligations set forth in Schedule L hereto (*M&V and O&M Oversight Services*) at such intervals and contingent upon ESCO's receipt of such annual payments as are set forth in Schedule L. Such payments shall be made in advance by no later than each anniversary of the date of Substantial Completion of the Work of each year during the Performance Term for ESCO's services to be performed during the period commencing on such anniversary and ending on the day prior to the following anniversary. Said payments shall be pro-rated for any partial year period during which the Equipment and ECMs shall operate prior to the first full Fiscal Year of the Performance Term.

SECTION 27.5 ESCO Right to Inspect and Monitor. The annual O&M Oversight costs set forth in Schedule L (*M&V and O&M Oversight Services*) assume quarterly visits to the Premises by ESCO to evaluate the condition of the Equipment and

ECMs installed and to assure compliance with Customer's obligations set forth above in Section 27.3. Customer further agrees that ESCO shall have the right once a month, with prior notice, to inspect Premises to determine if Customer is complying, and has complied, with its obligations as set forth above in Section 27.3. Customer shall make the Premises available to ESCO for and during each quarterly or monthly inspection, and shall have the right to witness each inspection and ESCO's recordation on the checklist. Customer may complete its own checklist at the same time. For the purpose of determining Customer's said compliance, the checklist to be set forth at Schedule I (*Customer's Maintenance Responsibilities*) shall be used to measure and record Customer's said compliance. Customer agrees to provide a copy of such checklist on a quarterly basis to ESCO during the Performance Term of this Agreement.

SECTION 28. INDEMNIFICATION / LIABILITY

SECTION 28.1 Customer's Right to Indemnification. ESCO shall indemnify Customer and the Customer Related Persons from and against any and all Losses that are attributable to (a) any breach of this Agreement by ESCO, (b) any failure of ESCO's representations or warranties in this Agreement to be true when made, (c) any death, personal injury or property damage suffered by ESCO or any ESCO Related Person in connection with, directly or indirectly, the performance by ESCO of its obligations hereunder or (d) any third party claims, demands and actions based upon or arising out of any activities performed by ESCO and its employees and agents under this Agreement.

SECTION 28.2 ESCO's Right to Indemnification. Customer shall indemnify ESCO and the ESCO Related Persons from and against any and all Losses that are attributable to (a) any breach of this Agreement by Customer, or (b) any failure of Customer's representations or warranties in this Agreement to be true when made or (c) any death, personal injury or property damage suffered by Customer or any Customer Related Person in connection with, directly or indirectly, the performance by Customer of its obligations hereunder or (d) any third party claims, demands and actions based upon or arising out of any activities performed by Customer and its employees and agents under this Agreement.

SECTION 28.3 Procedure. If any person indemnified under Section 28.1 or 28.2 (an "Indemnified Person") seeks indemnification thereunder for a Claim that is asserted against it, such Indemnified Person shall give prompt written notice of such Claim to the Party from which it seeks indemnification (the "Indemnifying Party"), stating the nature and basis of the Claim and, to the extent known, the actual or estimated Losses claimed thereby. The failure to give such notice, however, will not affect the obligation of the Indemnifying Party to provide indemnification in accordance with the provisions of this Section 28 unless, and only to the extent that, such Indemnifying Party is actually prejudiced by such failure.

28.3.1 If an Indemnified Person is made the subject of a Proceeding for which an Indemnifying Party may have an Indemnification Obligation under Section 28.1 or 28.2, the Indemnifying Party shall have the right and the duty, at its sole cost and expense, to defend such Proceeding in the name or on behalf of the Indemnified Person. In connection with any such Proceeding, the Indemnifying Party and the Indemnified Person shall render to each other such assistance as may reasonably be required in order to ensure the proper and adequate defense of such Proceeding.

28.3.2 Notwithstanding the foregoing, an Indemnified Person shall have the right (following notice to the Indemnifying Party) to retain its own counsel, with the reasonable fees and expenses to be paid by the Indemnifying Party, if (i) representation of such Indemnified Person by the counsel retained by the Indemnifying Party would be inappropriate because of actual or potential differing interests between such Indemnified Person and the Indemnifying Party; (ii) the Indemnifying Party shall have elected in writing, or failed, to employ counsel to defend such Proceeding; (iii) the Indemnifying Party shall fail to prosecute such defense with reasonable diligence; or (iv) the Indemnified Person shall have been advised by counsel chosen by it that there may be one or more legal defenses available to such Indemnified Person that are different from or additional to those available to the Indemnifying Party in such Proceeding. If the immediately-preceding sentence is inapplicable (or if the Indemnified Person waives its right thereunder), the Indemnified Person shall have the right to employ separate counsel at its own cost and expense in the Proceeding and to consult with the Indemnifying Party regarding the defense thereof; provided that, except as otherwise provided below, the Indemnifying Party shall at all times control such defense of such Proceeding.

28.3.3 No settlement of any Claim or Proceeding may be made by the Indemnifying Party without the Indemnified Person's consent; provided that such consent shall not be necessary if the settlement results in an unconditional release of the Indemnified Person without the admission by the Indemnified Person of guilt, complicity, responsibility, or culpability. An Indemnifying Party shall not be liable for any settlement of any Claim or Proceeding without its consent.

28.3.4 Any Indemnified Person that seeks Indemnification under Section 28.1 or 28.2 for a Loss that is not attributable to a Claim or Proceeding shall notify the Indemnifying Party, stating the nature and basis of the Loss and, to the extent known, the actual or estimated amount thereof. Unless the Indemnifying Party submits the matter for resolution under Section 30 (*Resolution of Disputes*), the Indemnifying Party shall pay the amount of such Loss, as specified in such notice, in the manner described in Section 28.4.

SECTION 28.4 Payments. Upon a determination that an Indemnified Party is entitled to Indemnification under Section 28.1 or 28.2 (by admission of the Indemnifying Party, agreement of the Indemnifying Party and Indemnified Person, completion of the procedures set forth in Section 28.3, or resolution of any Dispute relating thereto pursuant to Section 30 (*Resolution of Disputes*)), the Indemnifying Party shall pay to the Indemnified Person, within ten (10) days after such determination, the amount of the Loss Indemnified thereby. Upon the payment in full of any such Loss, the Indemnifying Party making such payment shall be subrogated to the rights of the Indemnified Person against any other Person with respect to the subject matter of such Loss and of any Claim or Proceeding relating thereto.

SECTION 28.5 Waiver of Consequential Damages. Neither Party shall be liable hereunder for any special, incidental, indirect, punitive or consequential damages, whether foreseeable or not, arising out of, or in connection with, this Agreement or such Party's performance of its obligations hereunder, including, but not limited to, damage or loss of property or equipment, damages or costs related to transmission interruptions or problems, loss of profits or revenue, cost of capital, or cost of replacement services, whether occasioned by any repair or maintenance performed, or failed to be performed, by ESCO, or any other cause whatsoever, including, without limitation, breach of contract, breach of warranty, negligence or strict liability.

SECTION 28.6 Limitation on Liability Generally. Notwithstanding anything to the contrary contained in this Agreement, the liability of either Party under this Agreement, including in connection with any termination of this Agreement pursuant to Sections 20 (*Events of Default*) or 22 (*Assignment*), shall not exceed the Contract Sum in the aggregate. Further, in accordance with the provisions of Section 28.5 hereof, in no event shall ESCO be liable to Customer under any provision of this Agreement for any lost business opportunities, or consequential, incidental, punitive or exemplary damages incurred or suffered by an Indemnified Person.

SECTION 29. CHOICE OF LAW

SECTION 30. This Agreement shall be governed, interpreted and enforced in all respects by the laws of the State of New York, without regard to conflict or choice of law principles. Furthermore, all claims relating to or arising out of this Agreement, or breach thereof, including, but not limited to, claims sounding in contract or tort, shall also be governed, interpreted and enforced in all aspects by the laws of the State of New York without regard to conflict or choice of law principles. RESOLUTION OF DISPUTES

SECTION 30.1 Initial Dispute Resolution. Any claim, controversy or dispute (a "Dispute") arising out of or in relation to this Agreement and the interpretation and the implementation thereof shall be settled in accordance with the procedures set forth in this section. If any such Dispute arises, the Parties shall endeavor to settle the claim or dispute first through direct discussions for a period of thirty (30) days following notice by one of the Parties to the other of a Dispute. If the Dispute cannot be settled through direct discussions in such 30-day time period, the Parties shall endeavor to settle the Dispute by mediation under the Construction Industry Mediation Rules of the American Arbitration Association before recourse to the dispute resolution procedures contained in this Agreement. The location of the mediation shall be in Westchester County, New York. Once one Party files a request for mediation with the other party and with the American Arbitration Association, the Parties agree to conclude such mediation within sixty (60) days of filing of the request. Either Party may terminate the mediation at any time after the first session by written notice to the other Party and the mediator.

SECTION 30.2 Venue and Forum. If the Dispute cannot be settled by mediation within sixty (60) days or the mediation is terminated by one Party as set forth above, Either of the parties agrees to submit to the jurisdictions of the courts of the State of New York, County of Westchester (or the Federal Court otherwise having jurisdiction over such County and subject jurisdiction over the dispute.) As such, the parties agree that any action related to this Agreement shall be litigated in such courts and waives any defense it may have with regards to improper venue or forum non convenience.

SECTION 30.3 Cost of Dispute Resolution. The prevailing Party in any Dispute that is not resolved by direct discussion of the Parties or mediation shall be entitled to recover from the other Party reasonable attorney's fees, costs and expenses incurred by the prevailing Party in connection with such dispute resolution process after direct discussions and mediation.

SECTION 31. NOTICE AND CONSENT

SECTION 31.1 Notice; Effectiveness. All notices, requests, demands, claims, consents and other communications or deliveries hereunder shall be in writing and (a) delivered in person or by courier, or (b) mailed, registered or certified first class mail, postage prepaid, return receipt requested, or overnight/express mail, signature required, to the appropriate Party at the following addresses or such other address as the Parties set forth above by notice given as provided herein. Such notices shall be effective (i) if delivered in person or by courier, upon actual receipt by the intended recipient, (ii) or if mailed, upon the date of delivery as shown by the return receipt therefor.

TO ESCO: RWE Clean Energy Solutions, Inc.
 100 Summit Lake Drive, Suite 210
 Valhalla, New York 10595
 Attn: Senior Vice President and Chief Operating Officer

With a copy to:

RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595

Attn: Vice President and General Counsel

TO CUSTOMER:

Attn:

With a copy to:

Attn:

SECTION 31.2 Customer's Representative. The Customer's representative is [Dennis Pugliese, Director of Facilities] ("Customer's Representative"). Customer's Representative: (a) shall be fully acquainted with the project, Scope of Work and the terms and conditions of this Agreement; (b) agrees to furnish all information, review, services and access to ESCO so as not to delay ESCO's work or hinder the performance of ESCO's services hereunder; and (c) shall have authority to bind Customer in all matters requiring Customer's approval, authorization and written notice. If Customer changes the Customer Representative or his or her authority, as described above, Customer shall notify ESCO in writing in advance.

SECTION 32. EMPLOYEES

SECTION 32.1 Non-Discrimination. In connection with the performance of this Agreement, ESCO agrees on behalf of itself and its agents and subcontractors not to discriminate against any employee or applicant for employment with respect to hire, discharge, or any term, condition or privilege of employment because of the individual's race, color, religion, age, sex, marital or Veteran's status, national origin, ancestry, present or past history of mental disorder, mental retardation, learning disability or physical disability, sexual orientation, or any other group protected under applicable federal, state or local law, except in the case of a bona fide occupational qualification or need. The ESCO further agrees that every subcontract entered into for the performance of this Agreement will contain a provision requiring nondiscrimination in employment, as herein specified, binding upon each subcontractor with three or more persons in its employ.

SECTION 32.2 Prevailing Wages. This contract is for public work or building service as covered by Article 8 or 9, respectively, of the New York State Labor Law. Neither ESCO's employees nor employees of ESCO's subcontractors may be required or permitted to work greater than the number of hours or days in those statutes except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the New York State Department of Labor. In addition, in accordance with Labor Law section 220, rates which are the minimum rates to be paid on the project have been established by the Department of Labor. ESCO and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements including premium rates for overtime, as determined by the Department of Labor and in accordance with New York State Labor Law.

SECTION 33. MISCELLANEOUS

SECTION 33.1 No Waiver. The failure of ESCO or Customer 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 ESCO or Customer.

SECTION 33.2 Severability. In the event that any clause or provision of this Agreement or any part thereof shall be declared invalid, void, or unenforceable by any court having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Agreement unless the result would be manifestly inequitable or unconscionable or unlawful.

SECTION 33.3 Complete Agreement. This Agreement, when executed, together with all Schedules attached hereto or to be attached hereto, as provided for by this Agreement shall constitute the entire Agreement between both Parties and supersedes and terminates all prior or contemporaneous arrangements, understandings and agreements, whether oral or written (including, without limitation, ESCO's Response to the RFP dated September 15, 2021). This Agreement may not be amended, modified or revised except by a written Agreement signed by Customer and ESCO.

SECTION 33.4 Further Assurances. 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.

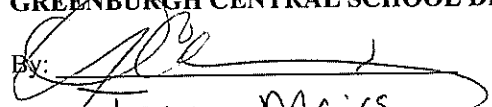
SECTION 33.5 Titles and Headings. Headings and subtitles used throughout this Agreement are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

SECTION 33.6 Independent Capacity of ESCO. ESCO shall perform its duties hereunder as an independent contractor and not as an employee. Neither ESCO nor any agent, employee, contractor or subcontractor of ESCO shall be or shall be deemed to be an agent or employee of Customer.

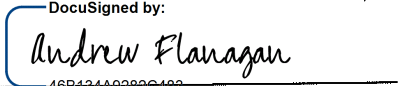
SECTION 33.7 Survival. All provisions of this Agreement that would reasonably be expected to survive the termination or expiration of this Agreement shall do so.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this Agreement by their duly authorized officers on the date first above written.

**THE BOARD OF EDUCATION OF THE
GREENBURGH CENTRAL SCHOOL DISTRICT**

By: 
Name: Tracy Mairs
Title: President, BOE

RWE CLEAN ENERGY SOLUTIONS, INC.

DocuSigned by:
By: 
46D134A9282C483...
Name: Andrew Flanagan
Title: Chief Executive Officer

CONTRACT ATTACHMENT I: Schedules, Exhibits, Appendices

SCHEDULE A. CEA REPORT

The CEA Report is the Investment Grade Audit Report prepared for [Greenburgh Central School District] by ESCO and dated [June 27, 2023].

SCHEDULE B. SCOPE OF WORK

The Scope of Work is set forth in [Section III: Proposed Energy Conservation Measures] of the CEA Report.

SCHEDULE C: ENERGY AND COST SAVINGS

The following table contains an illustration of the monetary savings Customer can expect to achieve during each year of the Performance Term of the Agreement as a result of energy unit savings and VDER bill credits based upon the unit of energy saved times the energy prices stipulated in [Section II] of the CEA Report:

Year 1	\$1,376,266
Year 2	\$1,415,883
Year 3	\$1,463,634
Year 4	\$1,514,863
Year 5	\$1,570,644
Year 6	\$1,625,925
Year 7	\$1,683,140
Year 8	\$1,743,599
Year 9	\$1,801,357
Year 10	\$1,865,128
Year 11	\$1,932,838
Year 12	\$2,000,786
Year 13	\$2,072,282
Year 14	\$2,143,848
Year 15	\$2,216,011
Year 16	\$2,295,523
Year 17	\$2,378,050
Year 18	\$2,461,566

The foregoing dollar savings are for purposes of illustration only. Actual monetary savings achieved by Customer may vary based on actual utility rates at the time.

Projected energy savings are (i) based on the assumptions stipulated in the CEA Report and the Summaries of Savings and Costs for ECM therein, including those relating to stipulated energy costs, (ii) qualified by the options selected by Customer in the Risk Responsibility Matrix, and (iii) otherwise subject to the terms and conditions of this Agreement.

SCHEDULE D: SCHEDULE OF VALUES

TO BE COMPLETED AFTER NOTICE TO PROCEED IN ACCORDANCE WITH SECTION 5.1 OF THE AGREEMENT (*ESCO Compensation and Fees*).

SCHEDULE E: BASELINE ENERGY CONSUMPTIONEnergy Consumption Baselines are set forth in Section [II] of the CEA Report (*Energy Usage Baseline*)

Greenburgh Central School District - Baseline Utility Monthly Usage and Cost Detail for January 2022 – December 2022

Month	Year	kWh	Peak kW	kWh Cost	kW Cost	Total Elec. Cost	#2 Fuel Oil Consumption (gallons)	Cost/gallon	Total Fuel Oil Cost	Natural Gas Consumption (therms)	Cost/therm	Total Natural Gas Cost	Total Utility Cost
Jan	2022	232,144	616	\$20,754	\$16,537	\$37,290	49,670	\$3.838	\$190,635	9,016	\$1.538	\$13,868	\$241,794
Feb	2022	231,208	654	\$20,670	\$17,647	\$38,317	41,883	\$4.279	\$179,218	8,960	\$1.628	\$14,584	\$232,120
March	2022	386,504	654	\$34,553	\$17,455	\$52,009	33,324	\$5.358	\$178,551	8,525	\$1.112	\$9,482	\$240,042
April	2022	297,916	658	\$26,634	\$17,650	\$44,284	23,629	\$5.247	\$123,979	3,940	\$0.998	\$3,932	\$172,195
May	2022	201,128	759	\$17,981	\$19,871	\$37,852	5,584	\$6.286	\$35,101	775	\$1.183	\$917	\$73,869
June	2022	207,808	747	\$18,578	\$20,000	\$38,578	5,151	\$6.101	\$31,426		\$1.352	\$0	\$70,004
July	2022	205,152	760	\$18,341	\$21,007	\$39,347	-	\$5.450	\$0		\$1.158	\$0	\$39,347
August	2022	194,560	805	\$17,394	\$21,519	\$38,913	-	\$5.078	\$0		\$1.341	\$0	\$38,913
September	2022	197,768	849	\$17,680	\$23,083	\$40,763	2,159	\$4.962	\$10,713		\$1.397	\$0	\$51,476
October	2022	199,528	736	\$17,838	\$20,024	\$37,862	9,249	\$5.630	\$52,072	2,790	\$1.142	\$3,185	\$93,119
November	2022	225,032	691	\$20,118	\$18,751	\$38,868	25,205	\$5.733	\$144,500	3,940	\$1.139	\$4,488	\$187,856
December	2022	227,016	637	\$20,295	\$17,068	\$37,363	42,252	\$4.875	\$205,977	8,720	\$1.700	\$14,822	\$258,162
Total For Y2022		2,805,764	8564.64	\$250,835.30	\$230,612.33	\$481,447.63	238,106		\$1,152,172	46,666		\$65,278	\$1,698,898
Average Unit Cost				\$0.0894	\$26.93				\$4.84			\$1.399	

Greenburgh Central School District - Baseline Utility Annual Usage and Cost Summary for January 2022 – December 2022

	Annual Consumption	Annual Cost	Unit Cost	
Electricity, kWh	2,805,764	\$250,835	\$0.0894	cost/kWh
Electric Demand, kW	8,565	\$230,612	\$26.93	cost/kW
Total Electric Cost		\$481,447		
Fuel Oil, gallons	238,106	\$1,152,172	\$4.84	cost/gallon
Natural Gas, therms	46,666	\$65,278	\$1.399	cost/therm
Total Fuel Oil and Natural Gas Cost		\$1,217,451		
Total Baseline Utility Cost		\$1,698,898		

Baseline and Performance Year 1 Utility Rates

Utility	Baseline Utility Rates (January 2022 – December 2022)	Performance Year 1 Estimated Utility Rates (July 2025 – June 2026)
Electricity, cost/kWh	\$0.0894	\$0.1008
Electric Demand, cost/kW	\$26.93	\$30.38
Fuel Oil, cost/gallon	\$4.84	\$5.46
Natural gas, cost/therm	\$1.399	\$1.578

SCHEDULE F: SAVINGS MEASUREMENT & CALCULATION FORMULAE

The methodology used by ESCO for calculating units of energy saved in all facilities comprising the Premises is the Calibrated Energy Simulation Model, as further described in [Appendix 2] of the CEA Report.

SCHEDULE G: CONSTRUCTION AND INSTALLATION SCHEDULE

TO BE COMPLETED AFTER NOTICE TO PROCEED IN ACCORDANCE WITH SECTION 4.1 OF THE AGREEMENT (*Construction Commencement Date and Time for Completion of Work*).

The schedule for completing the Work is predicated on the assumptions set forth in the CEA REPORT (*Proposed ESPC Implementation Schedule*). Should any of those assumptions prove not to be the case and this results in ESCO's being delayed in the performance and installation of the Work, ESCO shall be entitled to a Change Order in accordance with the provisions of Section 13.7 of this Agreement (*Changes in the Work*).

A sample construction schedule is provided in Appendix 1 of the CEA report.

SCHEDULE H: SYSTEMS START-UP AND COMMISSIONING ; OPERATING PARAMETERS OF INSTALLED EQUIPMENT

The Commissioning Plan and commissioning protocols are set forth in Section [IV] of the CEA Report (*Commissioning*).

SCHEDULE I: CUSTOMER'S MAINTENANCE RESPONSIBILITIES AND FACILITY MAINTENANCE CHECKLIST

Customer's O&M obligations are set forth in Section [V] of the CEA Report (*Operation and Maintenance*).

SCHEDULE J: ESCO'S TRAINING RESPONSIBILITIES

ESCO's Training and Support obligations are set forth in [Section IV] of the CEA Report (*Training of Onsite staff*)

SCHEDULE K: GENERAL CONDITIONS

This contract shall be deemed executory only to the extent of the monies appropriated and available for the purpose of the contract, and no liability on account therefore shall be incurred beyond the amount of such monies. It is understood that neither this contract nor any representation by any public employee or officers creates any legal or moral obligation or request to appropriate or make available monies for the purposes of this contract.

SCHEDULE L: M&V AND O&M OVERSIGHT SERVICES

M&V obligations are set forth in Section [V] of the CEA Report (*Preliminary Measurement and Verification Plan*) and the specific additional M&V parameters to be measured and measurement methodology included in the CEA Report.

O&M oversight obligations are set forth in Section [V] of the CEA Report (*Operation and Maintenance*) .

Payments owing to ESCO for its Performance Term M&V and O&M Oversight Services are specified in Section V of the CEA Report – summarized as follows:

	M&V Costs	O&M Costs (Solar PV+BESS)
Year 1	\$20,500	\$22,555
Year 2	\$20,500	\$23,683
Year 3	\$20,500	\$24,867
Year 4	\$20,500	\$26,110
Year 5	\$20,500	\$27,416
Year 6		\$28,787
Year 7		\$30,226
Year 8		\$31,737
Year 9		\$33,324
Year 10		\$34,990
Year 11		\$36,740
Year 12		\$38,577
Year 13		\$40,506
Year 14		\$42,531
Year 15		\$44,657
Year 16		\$46,890
Year 17		\$49,235
Year 18		\$51,696

SCHEDULE M – TERMINATION PAYMENT SCHEDULE

Present Discounted Value of Payments Specified in Schedule 11.

APPENDICES

APPENDIX A GLOSSARY OF TERMS

Agreement means the Energy Performance Contract dated as of [July 11, 2023], by and between the Board of Education of the Greenburgh Central School District, as Customer, and RWE Clean Energy Solutions, Inc., as ESCO.

Applicable Laws means all applicable federal, state and local law, rules, regulations, orders, determinations, code requirements and/or Customer policies/regulations.

Annual M&V Report has the meaning specified in Section 5.4 (*Annual Review and Reimbursement/Reconciliation*) of the Agreement.

Baseline Electricity, Demand, Fuel and O&M Costs has the meaning specified in Schedule E (*Baseline Energy Consumption*) of the Agreement.

Baseline Energy Costs has the meaning specified in Schedule E (*Baseline Energy Consumption*) of the Agreement.

Casualty means any circumstance including but not limited to an event of Force Majeure by which the Equipment, an ECM or any facility comprising the Premises is damaged physically.

Certificate of Acceptance for Installed Equipment means a certificate of acceptance in the form attached as Exhibit II(iv) of the Agreement for Equipment that is installed and accepted.

Certificate of Acceptance means a Certificate of Acceptance in the form attached as Exhibit II(i), evidencing Customer's approval and acceptance of the CEA report.

Change Order has the meaning specified in Section 13.7 of the Agreement (*Changes in the Work*).

Claim means any action, suit or proceeding brought by a third party against ESCO or Customer with respect to which the ESCO or the Customer, respectively, may have liability.

Construction and Installation Schedule means the construction and installation schedule attached as Schedule G to the Agreement (*Construction and Installation Schedule*).

Contract Sum has the meaning specified in Section 2.2 of the Agreement (*Contract Sum*).

Customer means the Board of Education of the Greenburgh Central School District a public school district located at 475 W. Hartsdale Avenue, Hartsdale, New York 10530.

Customer Related Persons means Customer's shareholders, members, board members, directors, officers and employees.

Differing Site Conditions are conditions that materially differ from the conditions indicated in the RFP are of an unusual nature, differing materially from the conditions ordinarily encountered and generally recognized in the trade as inherent in the Work.

Drawings has the meaning specified in Section 15.2 (*Ownership of Documents*) of the Agreement.

Energy and Cost Savings means all those energy and other costs savings achieved by the Customers as a result of the installation and operation of the Equipment and ECMs and provision of services provided for in this Agreement as specified in Schedule L (*M&V and O&M Oversight Services*) of the Agreement.

Energy and Cost Savings Guarantee has the meaning specified in Section 5.3 (*Energy and Cost Savings Guarantee*) of the Agreement.

Energy Conservation Measures or “ECMs” means those measures agreed to by the Parties as set forth in Schedule B (*Scope of Work*) to the Agreement, with reference to the CEA Report.

Energy Star means the federal Energy Star program administered by the EPA.

Energy Star Label means the label ascribed to qualifying Energy Star projects pursuant to standards promulgated by the EPA.

Environmental Protection Agency or “EPA” means the federal Environmental Protection Agency or its successor.

Equipment means the items of equipment to be installed by ESCO on the Premises, as set forth in Schedule B (*Scope of Work*) of the Agreement.

ESCO means RWE Clean Energy Solutions, Inc., a New York corporation.

ESCO Related Persons means ESCO’s shareholders, members, board members, directors, officers and employees.

Event of Default has the meaning specified in Section 20 (*Events of Default*) of the Agreement.

Excluded Material and Activities has the meaning set forth in Section 9.1 (*Excluded Materials and Activities*) of the Agreement.

Financing has the meaning specified in Section 2.1 (*Purchase and Sale Obligations*) of the Agreement.

Force Majeure has the meaning specified in Section 19.2 (*Definition of Force Majeure*) of the Agreement. An “event” of Force Majeure shall be construed accordingly.

General Conditions has the meaning specified in Schedule K of the Agreement.

Governmental Authority means any federal, state or local court, arbitration tribunal or governmental or quasi-governmental department, board, commission, bureau, agency, authority or instrumentality.

Guaranteed Energy and Cost Savings means the level of Energy and Cost Savings guaranteed pursuant to the Energy and Cost Savings Guarantee set forth in Section 5.3 (*Energy and Cost Savings Guarantee*) of the Agreement.

Hazardous Materials has the meaning specified in Section 9.1 (*Excluded Material and Activities*) of the Agreement.

CEA Report has the meaning specified in the fourth paragraph of the Introduction of the Agreement.

Incentive has the meaning specified in Section 8.1 (*Availability of Incentives*) of the Agreement.

Indemnified Person has the meaning specified in Section 28.3 (*Procedure*) of the Agreement.

Indemnifying Person has the meaning specified in Section 28.3 (*Procedure*) of the Agreement.

Irreparable Damage has the meaning specified in Section 18.6.2 (*Title to Equipment / Risk of Loss*) of the Agreement.

Local Serving Utility means, as applicable, the local electric, gas, water or other utility in whose service territory the Premises are located.

Losses means, with respect to any Party, an amount equal to the present value of the economic loss to it, if any, resulting from to (a) any breach of the Agreement by the other Party, (b) any failure of the other Party’s representations or warranties in the Agreement to be true when made, (c) any death, personal injury or property damage suffered, (i) in the case of the ESCO, by ESCO or any ESCO Related Person in connection with, directly or indirectly, the performance by ESCO of its obligations under the Agreement, or (ii) in the case of the Customer, by Customer or any Customer Related Person in connection with, directly or indirectly, the performance by Customer of its obligations under the Agreement; or (d) any third party claims, demands and actions based upon or arising out of any activities performed by the other Party and its employees and agents under the Agreement.

M&V means measurement and verification.

M&V Fees has the meaning specified in Section 5.2 (*M&V and O&M Oversight Fees*) of the Agreement.

M&V Plan means the M&V Plan developed by ESCO and set forth in Schedule L of the Agreement (*M&V and O&M Oversight Services*).

M&V Services means M&V services as set forth in Schedule L of the Agreement (*M&V and O&M Oversight Services*).

Measurement and Verification Equipment has the meaning specified in Section 15.5 (*Ownership of Measurement and Verification Equipment*) of the Agreement.

M&V and O&M Oversight Services means M&V and O&M Oversight Services specified in Schedule L of the Agreement (*M&V and O&M Oversight Services*).

Notice has the meaning specified in Section 31 (*Notice and Consent*) of the Agreement.

Notice to Proceed is the notice sent by Customer to ESCO to commence installation of the Work in the form set forth in Exhibit II(ii) hereto.

O&M means operations and maintenance.

O&M Oversight Fees has the meaning specified in Section 5.2 (*M&V and O&M Oversight Fees*) of the Agreement.

O&M Oversight Services means ESCO's O&M oversight services as set forth in Schedule L of the Agreement (*M&V and O&M Oversight Services*).

O&M Plan has the meaning specified in Section 27.2 (*Development of O&M Plan and Operational Procedures*) of the Agreement.

Party and Parties have the meaning specified in the sixth paragraph of the Introduction to the Agreement.

Performance Bond means a performance bond in the form set out in Exhibit I to this Agreement.

Payment Bond means a payment bond in the form set out in Exhibit I to this Agreement.

Performance Commencement Date has the meaning specified in Section 4.2 (*Performance Commencement Date*) of the Agreement.

Performance Term has the meaning specified in Section 4.3 (*Performance Term of Agreement*) of the Agreement.

Premises means Customer's premises identified in the CEA Report

Proposal has the meaning specified in the third paragraph of the Introduction to the Agreement.

Proceeding means any hearing, trial, arbitration, mediation, negotiation, or other process through which a Claim is sought to be resolved.

Risk Responsibility Matrix means the ESPC Risk and Responsibility Matrix set forth at Appendix D to the CEA Report.

RFP has the meaning specified in the second paragraph of the Introduction to the Agreement.

Savings Calculation Formula means the savings calculation formula set forth in Schedule F of the Agreement.

Schedule of Values is the schedule of values submitted by ESCO and approved by Customer in accordance with the provisions of Section 5.1 (*ESCO Compensation and Fees*) of the Agreement, as set out in Schedule D of the Agreement

State means the State of [New York].

Substantial Completion is the date on which the installation of the Equipment and the ECMs, or a definable portion of the Equipment and ECMs, is sufficiently complete so the Customer may make use of such Equipment or ECMs for their intended purposes. The term “substantially complete” shall be construed accordingly.

Surety means a corporate surety licensed to transact the business of a surety in the State.

Term means the term of the Agreement, which will become effective as of the date on which it has been executed by both Parties, [_____], until the completion of the Performance Term.

Time for Completion means the period of time specified for performing the Work in accordance with the Construction and Installation Schedule set forth in Schedule G (*Construction and Installation Schedule*) of the Agreement.

Warranty Period has the meaning specified in Section 11.1 (*Basic Warranty*) of the Agreement.

Work has the meaning specified in Section 2.1 (*Purchase and Sale Obligations*) of the Agreement.

EXHIBITS

EXHIBIT I FORM OF PERFORMANCE AND PAYMENT BONDS

AIA A312-2010 Performance Bond

AIA A312-2010 Payment Bond

EXHIBIT II (i) CERTIFICATE OF FINAL ACCEPTANCE—COMPREHENSIVE ENERGY AUDIT

To: RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595
("ESCO")

Re: Energy Performance Contract for [_____]

This Certificate of Final Acceptance of the Comprehensive Energy Audit Report dated [_____] (the "CEA Report"), which is attached as Schedule A to the Energy Performance Contract between ESCO and RWE Clean Energy Solutions, Inc. dated _____, _____, ("EPC"), is hereby executed by [Customer] pursuant to the EPC.

[Customer] hereby acknowledges and represents that the CEA Report is approved and accepted.

[CUSTOMER]

Signature

[Name]

Acceptance Date:_____

EXHIBIT II (ii) FORM OF NOTICE TO PROCEED WITH WORK

RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595
("ESCO")

Re: Energy Performance Contract for [_____]

[Customer] hereby serves this Notice to Proceed with Work pursuant to the Energy Performance Contract dated _____, ____ ("EPC") between [Customer] and RWE Clean Energy Solutions, Inc.

ESCO shall commence work within thirty (30) days after the receipt of this Notice to Proceed, in accordance with the EPC.

[CUSTOMER]

Signature

[Name]

Date: _____

EXHIBIT II(iii) FORM OF CERTIFICATE OF SUBSTANTIAL COMPLETION

To: RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595
("ESCO")

Re: Energy Performance Contract for [_____]

This Certificate of Substantial Completion of the Equipment and the ECMs listed below ("Certificate") is hereby executed by Customer pursuant to the EPC.

Customer hereby acknowledges and represents that the following Equipment and ECMs are:

1. delivered, installed and substantially complete as of the date of issuance of this Certificate;
2. the remaining items of Work to be completed before Final Acceptance of such Equipment and ECMs listed below are as follows: _____;
3. warranties on such Equipment and ECMs commence as of the date of issuance of this Certificate; and
4. other applicable provisions are as follows: _____.

[LIST OF EQUIPMENT/ECMs]

[CUSTOMER]

Signature

[Name]

Substantial Completion Date: _____

EXHIBIT II (iv) FORM OF CERTIFICATE OF ACCEPTANCE—INSTALLED EQUIPMENT AND ECMs

To: RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595
("ESCO")

Re: Energy Performance Contract for [_____]

This Certificate of Acceptance of the Equipment and the ECMs specified in Schedule B of the Energy Performance Contract between [Customer] and RWE Clean Energy Solutions, Inc. dated _____, _____, ("EPC"), is hereby executed by [Customer] pursuant to the EPC.

[Customer] hereby acknowledges and represents that the Equipment and the ECMs specified in Schedule B of the EPC are:

1. delivered, installed and available for use and are placed in service as of the Acceptance Date indicated; and
2. in good operating condition and repair and are accepted as satisfactory in all respects for the purposes of the Agreement.

[CUSTOMER]

Signature

[Name]

Acceptance Date: _____

EXHIBIT III EQUIPMENT WARRANTIES

EXHIBIT IV FORM OF CHANGE ORDER

CUSTOMER:

ESCO: RWE Clean Energy Solutions, Inc.
100 Summit Lake Drive, Suite 210
Valhalla, New York 10595

This Change Order is made this _____ date of _____, _____ by Customer and ESCO for the following changes in the Work: _____

(Attach separate pages if necessary)

Customer agrees to pay for all changes in the Work performed by ESCO under this Change Order according to all terms of the Energy Performance Contract between them for the above Premises, dated _____, _____ (“EPC”). The amount paid by Customer shall be full compensation for all Work requested and for all effects of this Change Order on the Work. The change, if any, in the Contract Sum of the EPC, shall be calculated as follows:

- No change
- Unit price
- Mutually agreed lump sum of \$ _____
- Costs, fees and any other markups set forth in the EPC

(Check accordingly)

ESCO has provided sufficient substantiating data to permit evaluation of the Change Order by Customer, including itemized labor and material breakdowns as Customer may require. ESCO shall include the cost of this Change Order in its next application for payment as a separate line item.

The change, if any, in the Time for Completion of Work, the Contract sum or the Energy and Cost Savings under the EPC resulting from the Work requested by this Change Order shall be determined in accordance with the terms of the EPC.

The Time for Completion of Work under the EPC resulting from the Work in this Change Order shall be increased/decreased *(delete accordingly)* by _____ days, which will result in a new Time for Completion of _____, _____.

The savings in units of energy specified in the CEA Report as a result of the Work in this Change Order shall be adjusted as follows: _____

(Attach separate pages if necessary)

[CUSTOMER]

RWE CLEAN ENERGY SOLUTIONS, INC.

[Name]

[Name]

Signature

Signature

Date: _____

Date: _____