

CITY OF SANTA FE, NM
PROFESSIONAL SERVICES CONTRACT
FOR ENERGY PERFORMANCE CONTRACTING

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PROFESSIONAL SERVICES CONTRACT # _____

THIS CONTRACT is made and entered into by and between **City of Santa Fe, NM**, hereinafter referred to as the "Agency," and **YEAROUT ENERGY SERVICES COMPANY**, a New Mexico Limited Liability Company, hereinafter referred to as the "Contractor," and is effective as of the date set forth below upon which it is executed by all parties.

RECITALS

WHEREAS, Agency owns and operates the Project Site(s), and is in need of energy and water cost saving equipment and services designed to save energy and associated energy costs at said Project Sites; and

WHEREAS, Agency has been authorized to enter into a third party financing agreement for all professional services, equipment and construction for the purchase and installation of energy and water cost savings measures, collectively referred to as the "Work" (as hereinafter defined); and

WHEREAS, Contractor has developed or become knowledgeable about certain procedures for controlling energy and water consumption through services provided and equipment installed and maintained at project sites similar in scope and scale of Agency; and

WHEREAS, Contractor was awarded a Statewide Price Agreement (#90-000-18-0001AH) with the State of New Mexico pursuant to a Request for Proposal, published and reviewed in accordance with the New Mexico Procurement Code, NMSA 1978, Sections 13-1-29 et seq., which resulted in the award of a contract for the Investment Grade Audit and Project Development Proposal (as hereinafter defined), after a determination that its services were most advantageous to the Agency; and

WHEREAS, Contractor has made an assessment of the utility consumption characteristics of the Project Site(s) and existing Equipment described in Schedule Q (Description of Project Site(s)), which was delivered to Agency as an Investment-Grade Energy Audit Report which Agency has approved and is attached as Appendix D; and

WHEREAS, Agency desires to retain Contractor to purchase, install and service certain energy and water cost savings equipment and to provide other services and strategies described in the attached Schedules, for the purpose of achieving energy and water cost reductions within Project Site(s), as more fully described herein; and

WHEREAS, Agency is authorized under the New Mexico Constitution and the Public Building Energy Efficiency and Water Conservation Act (the "Act"), NMSA 1978, Sections 6-23-1 et seq., to enter into this Contract for the purposes set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Agency and Contractor hereto covenant and agree that the following Schedules, Exhibits and Appendices are attached hereto (or will be, as provided in this Contract) and are made a part of this Contract by reference.

IT IS AGREED BETWEEN THE PARTIES:

1. **Definitions.**

- a. "Commencement Date" means the date described in Section 6 (Commencement Date);
- b. "Contract" means this Energy Performance Contract and all Schedules, Exhibits, and Appendices attached hereto;
- c. "Contract Sum" means the sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services related to the project;
- d. "Energy and Cost Savings Guarantee" means the guarantee of Schedule A (Savings Guarantee) that is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in Schedule J (Compensation to Contractor for Annual Services) and in accordance with the Savings Calculation Formula as set forth in Schedule C (Savings Measurement and Verification (M&V) Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements);
- e. "Energy and Water Cost Savings" means the savings as provided in Schedule A (Savings Guarantee);
- f. "Equipment" means the material goods enumerated in Schedule R (Equipment to be Installed by Contractor) that is now, or hereafter from time to time, attached hereto and incorporated herein by reference, together and with any and all additions, modifications, attachments, replacements and parts thereof;
- g. "Event of Default" means those events described in Sections 65 (Events of Default by Contractor) and 64 (Events of Default by Agency) hereof;
- h. "Guarantee Period" or "Performance Guarantee Period" means the period of time during which the Contractor has guaranteed energy savings. That period shall commence upon project completion, as specified in Schedule S (Construction and Installation Schedule) and conclude 25 years thereafter.
- i. "Interim Period" means the period from contract execution until the Commencement Date;
- j. "Investment Grade Audit" means a study by the Contractor selected for a particular energy performance contracting project, which includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements and the utility and operations and maintenance cost savings projected to result from the recommended improvements;
- k. "Project Site(s)" means the facilities of the Agency in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Project Site(s);

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- l. "Qualified Provider" means the Contractor, who is a person experienced in the design, implementation and installation of energy or water conservation measures and who meets the experience qualifications developed by the Energy, Minerals and Natural Resources Department (EMNRD) for energy conservation measures or the Office of the State Engineer for water conservation measures;
- m. "Substantial Completion" means the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that the Agency can utilize and take beneficial use of the Work for its intended use or purpose.
- n. "Work" means the Equipment, materials, professional services and construction services for the project at the Agency's Project Site, as described by this Contract and attachments.

2. **Scope of Work.**

Contractor shall:

- a. perform and complete the Work at the Agency's Project Site, as defined and described in this Contract and the attached Schedules, Exhibits, and Appendices;
- b. provide the Equipment, together with installation, maintenance and other services as provided herein, as in Schedule R (Equipment to be Installed by Contractor) based upon the terms and conditions set forth in Schedule S (Construction and Installation Schedule);
- c. provide the Work and all related services identified in Schedule R (Equipment to be Installed by Contractor) and the services detailed in Schedule BB (Contractor's Maintenance Responsibilities) and Schedule J (Compensation to Contractor for Annual Services);
- d. supervise and direct the Work and shall be responsible for the engineering, design, and quality control; construction means, methods, techniques, sequences, and procedures; and for coordinating all portions of the Work under this Contract; and

3. **Compensation.**

- a. The Agency shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work at the rate of fourteen-million two-hundred-forty-one-thousand one-hundred-eighty-five dollars (\$14,241,185) in FY2021/FY2022. The New Mexico gross receipts tax levied on the amounts payable under this Contract in FY2021/FY2022 totaling one-million two-hundred-one-thousand six-hundred dollars (\$1,201,600) shall be paid by the Agency to the Contractor. The total amount payable to the Contractor under this Contract, including gross receipts tax and expenses, shall not exceed fifteen-million four-hundred-forty-two-thousand seven-hundred-eighty-five dollars (\$15,442,785) in FY2021/FY2022.
- b. Payment in FY2021/FY2022 is subject to availability of funds pursuant to the Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work. All invoices must be received

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by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

- c. The total amount payable to the Contractor under this Contract, including gross receipts tax and expenses shall not exceed fifteen-million four-hundred-forty-two-thousand seven-hundred-eighty-five dollars (\$15,442,785) as set forth in Schedule H (Final Project Cost & Project Cash Flow Analysis). This amount is a maximum and not a guarantee that the work assigned to the Contractor under this Contract to be performed shall equal the amount stated herein. Payment terms are described in Schedule I (Financing Contract and Payment Schedule).
- d. Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the Agency finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the Agency that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked. However, the Agency shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

4. **Term.**

- a. This Contract shall terminate upon conclusion of the performance guarantee period unless terminated pursuant to paragraph 4, infra, or paragraph 5. In accordance with NMSA 1978, Section 13-1-150, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in NMSA 1978, Section 13-1-150. An exception is provided for contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act NMSA 1978), Section 6-23-1 et seq., the term of which shall not exceed twenty-five years, including all extensions and renewals.
- b. Subject to the following sentence, the term of this Contract shall be defined by the Performance Guarantee Period. Nonetheless, the Contract shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period will be fully credited to the Agency, and if required, can be attributed by the Contractor to offset a shortfall in the first year guaranteed savings if properly verified.

5. **Termination.**

- a. **Termination.** This Contract may be terminated by the Agency upon written notice delivered to the Contractor at least ten (10) days prior to the intended date of termination. By such termination, the Contractor may not nullify obligations already incurred for performance or failure to perform prior to the date of termination.

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Notwithstanding the foregoing, this Contract may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this Contract, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE AGENCY'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS CONTRACT.

- b. Termination Management. Immediately upon receipt by the Contractor of notice of termination of this Contract, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Contract without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Contract; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Contract. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the Agency as soon as practicable.

6. Commencement Date.

- a. The Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by Agency and Contractor shall have delivered a Notice to Agency that it has installed and commenced operating all of the Equipment specified in Schedule R (Equipment to be Installed by Contractor) and in accordance with the provisions of Schedule S (Construction and Installation Schedule) and Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment); and the Agency has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in Exhibit VI (Certificate of Project Substantial Completion).
- b. Notwithstanding anything to the contrary in **Sections herein (Purchase and Sale; Commencement Date and Terms; Interim Period)**, the Commencement Date shall not occur and the Agency shall not be required to accept the work under this Contract unless and until all Equipment installation for the Project Site(s) is completed by Contractor in accordance with the terms and conditions of this Contract. Agency shall have 10 days after notification by the Contractor to inspect and accept the Equipment. Agency reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. Contractor shall not be paid in full, including retainage, until after the punch list is completed and Contractor has satisfied any and all claims for labor and materials and the Certificate of Acceptance has been signed. The Certificate of Acceptance will not be unreasonably withheld by the Agency.

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- c. Compensation payments due to Contractor for on-going services and maintenance under this Contract as set forth in Schedule J (Compensation to Contractor for Annual Services) shall begin no earlier than 90 days from the Commencement Date as defined herein.

7. **Performance Measures.**

Contractor shall substantially perform the following Agency Performance Measures:

- a. Contractor will perform the Work and provide the Equipment in accordance with the scope of work indicated in Schedule R (Equipment to be Installed by Contractor) based upon the terms and conditions set forth in Schedule S (Construction and Installation Schedule);
- b. Contractor's Work shall create the savings indicated in Schedule A (Savings Guarantee) and Schedule D (Operations and Maintenance O&M Savings), all as collectively indicated in Schedule H (Final Project Cost & Project Cash flow Analysis)

Agency Performance Measures documentation is provided as Attachment I.

8. **Contractor is Qualified Provider.**

Contractor is certified as a Qualified Provider by NM-GSD to perform the Work, pursuant to NMSA 1978, Sections 6-23-2E and 6-23-5 and as shown by Exhibit III (NM-GSD Certification of Contractor as Qualified Provider).

9. **Investment-Grade Energy Audit Report and Project Development Proposal.**

Contractor has provided the complete Investment-Grade Energy Audit Report and Project Development Proposal of the Project Site(s), as set forth in Appendix D (Investment-Grade Energy Audit and Project Proposal Contract) and dated August 21, 2020. The Investment-Grade Energy Audit Report includes all energy conservation measures agreed upon by the Agency and Contractor for implementation in the Work. The guaranteed energy savings of energy conservation measures stated in the Investment-Grade Energy Audit Report appear to be accurately estimated and reasonable and are certified by NM-EMNRD and NM-OSE, as shown in Exhibit IV (NM-EMNRD and NM-OSE Certification of Guaranteed Energy Savings).

10. **Schedules, Exhibits and Appendices.**

Contractor has provided and Agency has approved the Schedules, Exhibits and Appendices, copies of which are attached hereto (or will be as provided for in the Contract), set forth in their entirety as Attachment II and made a part of this Contract by reference.

11. **Purchase and Sale.**

- a. Agency agrees to fund all or a portion of the Equipment through a third-party financier, the debt service schedule for which, following funding becoming available pursuant

thereto, shall be attached hereto as Schedule I (Financing Agreement and Payment Schedule).

- b. Contractor 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.

12. Energy Usage Records and Data.

Agency has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract to Contractor or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Project Site(s).

13. Location and Access.

Contractor acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Agency shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Contract. Agency shall provide access to the Project Site(s) for Contractor to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by Contractor and acceptable to the Agency. Contractor shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The Contractor's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Agency. Contractor shall immediately notify the Agency when emergency action is taken and follow up with written notice within three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Project Site(s), if any.

14. Permits and Approvals.

Agency shall use its best efforts to assist the Contractor in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall the Agency, however, be responsible for payment of any permit fees. The equipment and the operation of the equipment by Contractor shall at all times conform to all federal, state and local code requirements. Contractor shall furnish copies of each permit or license which is required to perform the work to the Agency before the Contractor commences the portion of the work requiring such permit or license.

15. Coordination During Installation.

The Agency and Contractor shall coordinate the activities of Contractor's equipment installers with those of the Agency, its employees, and agents. Contractor shall not commit or permit any act which will interfere with the performance of business activities conducted by the Agency or its employees without prior written approval of the Agency.

16. Construction Schedule; Equipment Installation.

Construction and equipment installation shall proceed in accordance with the construction schedule approved by the Agency and attached as Schedule S (Construction and Equipment Installation Schedule).

17. Systems Startup and Equipment Commissioning.

The Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment) and prior to acceptance of the project by the Agency as specified in Exhibit VI (Certificate of Project Substantial Completion). Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The Contractor shall provide notice to the Agency of the scheduled test(s) and the Agency and/or its designees shall have the right to be present at any or all such tests conducted by Contractor and/or manufacturers of the Equipment. The Contractor shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures as specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment). The Contractor shall be responsible for correcting and/or adjusting all deficiencies in Equipment operation that may be observed during system testing procedures. Prior to Agency acceptance Contractor shall also provide the Agency with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in Schedule R (Equipment to be Installed by Contractor).

18. Equipment Warranties.

- a. Contractor warrants that all equipment sold and installed as part of this Contract is new, will be materially 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 at least one (1) year from the date of the Substantial Completion for the particular energy conservation measure, if operated and maintained in accordance with the procedures established per building. Substantial Completion does not occur until the Equipment or system has been commissioned, accepted, and Exhibit V (Certificate of Acceptance – Measure) is fully executed.
- b. After the warranty period, the Contractor shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in Schedule BB (Contractor's Maintenance Responsibilities).
- c. Contractor further agrees to assign to the Agency all available manufacturer's warranties relating to the Equipment and include such written warranties in the O&M manuals. Contractor will have no responsibility for performing repairs beyond the 1-year warranty period.
- d. All warranties, to the extent transferable, shall be transferable and extend to the Agency. The warranties shall specify that only new, not reconditioned, parts may be used and

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installed when repair is necessitated by malfunction. All extended warranties shall be addressed as the property of the owner and appropriately documented and titled.

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

19. Standards of Comfort.

Agency shall maintain and operate the Equipment in a manner which will provide the standards of heating, cooling, ventilation, hot water supply, and lighting quality and levels as described in Schedule U (Standards of Comfort). During the term of this Contract, Contractor and Agency will maintain, according to Schedule BB (Contractor's Maintenance Responsibilities) and Schedule CC (Agency's Maintenance Responsibilities), and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in Schedule U (Standards of Comfort).

20. Environmental Requirements, Excluded Material and Activities.

Agency recognizes that in connection with the installation and/or service or maintenance of Equipment at Agency's Project Site(s), Contractor 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) fungus (any type of form of fungi, including mold or mildew, and mycotoxins, spores, scents or by-products produced or released by fungi); (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this Contract; or (iv) 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." Agency agrees that if performance of work involves any Excluded Materials and Activities, Agency will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. In the event Contractor discovers Hazardous or Excluded Materials, Contractor shall immediately cease work, remove all Contractor personnel or subcontractors from the site, and notify the Agency. The Agency shall be responsible to handle such Materials at its expense. Contractor shall undertake no further work on the Project Site(s) except as authorized by the Agency in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Agency shall not constitute a default by the Agency. In the event of such stoppage of work by Contractor, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by Contractor as a result will be added by Change Order.

Contractor shall be responsible for any hazardous or other materials, including, without limitation, those listed in this section that it may bring to the Project Site(s).

21. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps.

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- a. Contractor shall enter into an agreement with an approved PCB ballast disposal company that will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from Agency's PCB ballasts will be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction will be provided by the approved facility to the Agency. Contractor's responsibility shall be for the proper and legal management of any of Agency's PCB ballasts removed as a result of the installation of the Equipment and shall be limited only until said PCB ballasts are loaded onto an approved PCB ballast disposal Contractor's vehicle for transportation.
- b. Contractor shall enter into an agreement with an approved lamp disposal company, who will provide approved containers, materials required to label, transportation, recycling or incineration in accordance with EPA requirements, and a copy of the manifest.
- c. Agency agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Project Site(s).

22. **Training by Contractor.**

The Contractor shall conduct the training program described in Schedule V (Contractor's Training Responsibilities) hereto. The must be completed prior to acceptance of the Equipment installation. The Contractor shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to the Agency and shall have no effect on prior acceptance of Equipment installation.

23. **Equipment Service, Actions by Contractor.**

Contractor shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to Schedule BB (Contractor's Maintenance Responsibilities). Agency shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in Schedule J (Compensation to Contractor for Annual Services), provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of the Agency or any employee or other agent of Agency, and Contractor can so demonstrate such causal connection, Contractor may charge Agency for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

24. **Malfunctions and Emergencies.**

- a. Agency shall use its best efforts to notify the Contractor or its designated subcontractors within 24 hours after the Agency's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings, (ii) any interruption or alteration to the energy supply to the Project Site(s), or (iii) any alteration or modification in any energy-related equipment or its operation.

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- b. Where Agency exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings. Agency shall notify Contractor within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. Contractor shall respond or cause its designee(s) to respond within 72 hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Agency shall be followed within three business days by written notice to Contractor from Agency. If Agency unreasonably delays in so notifying Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, Contractor may charge Agency for its loss, due to the delay, associated with the guaranteed savings under this Contract for the particular time period, provided that Contractor is able to show the direct causal connection between the delay and the loss.
- c. The Contractor shall provide a written record of all service work performed. This record will indicate the reason for the service, description of the problem and the corrective action performed.

25. **Actions by Agency.**

Agency shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of Contractor except as set forth in Schedule CC (Agency's Maintenance Responsibilities). Notwithstanding the foregoing, the Agency may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify the Contractor before taking any such actions. In the event of such an emergency, the Agency shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by the Contractor. Agency agrees to maintain the Project Site(s) in good repair and to protect and preserve all portions thereof which may in any way affect the operation or maintenance of the Equipment.

26. **Modification of Equipment.**

During the Term of this Contract, Agency will not, without the prior written consent of Contractor, affix or install any accessory Equipment or device on any of the Equipment if such addition will change or impair the originally intended functions, value or use of the Equipment without Contractor's prior written approval, which shall not be unreasonably withheld.

27. **Upgrade or Alteration of Equipment.**

- a. Contractor shall at all times have the right, subject to Agency's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions in the Project Site(s), provided that: (i) the Contractor complies with the standards of comfort and services set forth in Schedule U (Standards of Comfort) herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the Contractor to achieve the

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guaranteed energy and cost savings at the Project Site(s) and; (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the Contractor.

- b. All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Agency for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. The Contractor shall have the right to update any and all software to be used in connection with the Equipment in accordance with the provisions of Section 41 (Ownership of Certain Proprietary Rights) and Schedule BB (Contractor's Maintenance Responsibilities). All replacements of and alterations or additions to the Equipment shall become part the Equipment described in Schedule R (Equipment to be Installed by Contractor) and shall be covered by the provisions and terms of **Section 16 (Construction Schedule; Equipment Installation)**.

28. **Material Change Defined.**

- a. A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Agency, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) by at least 3.0% after adjustments for climatic variations.
- b. Actions by the Agency which may result in a Material Change include, but are not limited to, the following:
 - i) manner of use of the Project Site(s) by the Agency; or
 - ii) hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s); or
 - iii) Permanent changes in the comfort and service parameters set forth in Schedule U (Standards of Comfort); or
 - iv) occupancy of the Project Site(s); or
 - v) structure of the Project Site(s); or
 - vi) types and quantities of equipment used at the Project Site(s) or
 - vii) modification, renovation, or construction at the Project Site(s); or
 - viii) the Agency's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule CC (Agency's Maintenance Responsibilities); or

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- ix) any other conditions other than climate affecting energy use at the Project Site(s) including but not limited to the replacement, addition or removal of energy and water consuming devices whether plug in or fixed assets,
- x) casualty or condemnation of the Project Site(s) or Equipment, or
- xi) changes in utility provider or utility rate classification, or
- xii) any other conditions other than climate affecting energy or water use at the Project Site(s).
- xiii) Modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.
- xiv) Other changes described in Schedule B.

29. Reported Material Changes; Notice by Agency.

The Agency shall use its best efforts to deliver to the Contractor a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) at least 30 days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the Contractor of Material Changes which results because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Agency within 72 hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Agency to have occurred.

30. Other Adjustments.

As agreed in **Section 29 (Reported Material Changes; Notice by Agency)** Agency will alert Contractor of materials changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, the Contractor shall work with the Agency to investigate, identify, and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, Contractor and Agency shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). Any disputes between the Agency and the Contractor concerning any such adjustment shall be resolved in accordance with the provisions of Schedule JJ (Alternative Dispute Resolution Procedures) hereto.

31. Corrective Action; Accuracy of the Services.

- a. Contractor shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Schedule U (Standards of Comfort) and the construction schedule specified in Schedule S (Construction and Installation Schedule). Contractor shall repair and restore to its original

condition any area of damage caused by Contractor's performance under this Contract. The Agency reserves the right to review the work performed by Contractor and to direct Contractor to take certain corrective action if, in the opinion of the Agency, the structural integrity of the Project Site(s) or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by Contractor's performance of the work shall be borne by Contractor.

- b. Contractor shall remain responsible for the professional and technical accuracy of all services performed, whether by the Contractor or its subcontractors or others on its behalf, throughout the term of this Contract.

32. Annual Reporting Requirements.

At the end of each year during the guarantee period as specified in Schedule A (Savings Guarantee) and no later than ninety (90) days thereafter, the Contractor shall complete and submit the data required in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements).

33. Other Documents.

This Contract incorporates herein and makes a part hereof the entire Request for Proposal and Project Development Proposal, labeled Appendix A and B, respectively. Notwithstanding, the provisions of this Contract and the attached Schedules, Exhibits and Appendices shall govern in the event of any inconsistencies between the Investment-Grade Energy Audit Report and the provisions of this Contract.

34. Energy and Cost Savings Guarantee.

Contractor has formulated and, subject to the adjustments provided for in Sections 28, 29 and 30 (Material Changes), has guaranteed the annual level of energy and water cost savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract in accordance with the methods of savings measurement and verification as set forth in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Schedule A (Savings Guarantee) and has been structured by the Contractor to be sufficient to cover any and all annual payments required to be made by the Agency as set forth in Schedule J (Compensation to Contractor for Annual Services) and Schedule I (Financing Agreement and Payment Schedule).

35. Annual Review and Reimbursement/Reconciliation.

- a. Energy-related cost savings shall be measured and/or calculated as specified in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) and a report provided within ninety (90) days of the end of the year for the previous year for each anniversary of the Commencement Date.

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- b. Annual savings shall exceed annual payments each and every year while this Contract is in effect. In the event the Energy and Cost Savings achieved during such guarantee year are less than the Guaranteed Energy and Cost Savings as defined in Schedule A (Savings Guarantee), Contractor shall pay the Agency an amount equal to the deficiency.
- c. The Contractor shall remit such payments to the Agency within 60 days of written notice by the Agency of such monies due. Such excess savings will be retained by the Agency and will not be allocated to shortfalls in savings in other years. In no event shall credit for excess savings be used to satisfy saving guarantees in any other year(s) of the Contract.

36. Contractor Compensation and Fees.

Contractor has structured the Energy and Cost Savings Guarantee referred to in Section 34 above, to be sufficient to include any and all annual payments required to be made by the Agency in connection with financing/purchasing the Equipment to be installed by Contractor under this Contract as set forth in Schedule I (Financing Agreement and Payment Schedule). Actual energy and operations savings achieved by Contractor through the operation of Equipment and performance of services by Contractor shall be sufficient to cover any and all annual fees to be paid by Agency to Contractor for the provision of services as set forth and in accordance with the provisions of Schedules J (Compensation to Contractor) and BB (Contractor's Maintenance Responsibilities).

37. Billing Information Procedure.

- a. Payments due to Contractor shall be calculated each quarter in the following manner:
 - i) By the 15th day after receipt, Agency shall provide Contractor with copies of all energy bills for the Project Site(s) which it shall have received for the preceding month;
 - ii) Upon receipt of the required information, the Contractor shall calculate the savings in accordance with the agreed-upon calculation formulae in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements).
- b. Based upon paragraphs (i) and (ii) above, Contractor shall prepare and send to Agency a Measurement & Verification invoice which shall set forth for each year the amounts of the energy and operations dollar savings calculated in accordance with Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) and for the services as provided for in Schedule J (Compensation to Contractor for Annual Services). The invoice will set forth the total quarterly payment due from the Agency.

38. Payment.

Agency shall pay the Contractor within 30 days of receipt of the Contractor's invoice.

39. Effective Date of Payment Obligation.

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Notwithstanding the above provisions, Agency shall not be required to begin any payments to Contractor under this Contract unless and until all equipment installation is completed by Contractor in accordance with the provisions of Section 16 (Construction Schedule; Equipment Installation) and Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment), and accepted by Agency as evidenced by the signed Certificate of Acceptance as set forth in Exhibit V (Certificate of Acceptance - Measure), and unless and until said equipment is fully and properly functioning.

40. Open Book Pricing.

Open book pricing will be required, such that the Contractor shall fully disclose all costs of materials and labor purchased and subcontracted by the Contractor and a list of hourly rates and position descriptions for labor or services provided by the Contractor. Estimates for the number of hours required for the project and deviations of these budgeted hours shall require prior written approval by the owner or shall not be paid. Contractor shall maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. Contractor shall afford Agency access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. The pricing methodology and individual cost markups disclosed during preliminary contract negotiations will be expected to be applied, providing the scope and size of the project remain the same as assumed when markups were disclosed.

41. Ownership of Certain Proprietary Property Rights.

Agency shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. The Contractor shall grant to the Agency a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Agency to continue to operate, maintain, and repair the Equipment in a manner that will yield guaranteed utility consumption reductions for the specified contract term. Contractor shall not be liable for providing new versions of software or other enhancements if or unless such new versions or enhancements are necessary to achieve the guaranteed utility consumption reductions.

42. Ownership of Existing Equipment.

Ownership of the equipment and materials presently existing at the Project Site(s) at the time of execution of this Contract shall remain the property of the Agency even if it is replaced or its operation made unnecessary by work performed by Contractor pursuant to this Contract. If applicable, Contractor shall advise the Agency in writing of all equipment and materials to be replaced at the Project Site(s) and the Agency shall within 5 days designate in writing to the Contractor which equipment and materials that should not be disposed of off-site by the Contractor. It is understood and agreed to by both Parties that the Agency shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The Contractor shall be responsible for the disposal of all equipment and materials designated by the Agency as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

43. **Damages to Equipment or Property.**

Contractor shall be responsible for (i) any damage to the Equipment or other property on the Project Site(s) and (ii) any personal injury where such damage or injury occurs as a result of Contractor's performance under this Contract.

44. **Liabilities.**

The Contractor shall not be liable for any special, incidental, indirect, punitive or consequential damages, arising out of or in connection with this Contract. Further, the liability of the Contractor under this Contract shall not exceed the Contract Sum in the aggregate.

45. **Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Governing Body for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Governing Body, this Agreement shall terminate immediately upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

46. **Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Contract. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment, and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

47. **Subcontracting.**

The Contractor shall notify the Agency of all subcontractors delivering any portion of the services to be performed under this Contract.

48. **Release.**

Final payment of the amounts due under this Contract shall operate as a release of the Agency, its officers and employees, from all liabilities, claims and obligations whatsoever arising from or under this Contract.

49. **Confidentiality.**

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Any confidential information provided to or developed by the Contractor in the performance of this Contract shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency. Contractor's systems, methods, means and methodologies of evaluating, implementing, and performing under this Agreement shall be considered confidential. When any request for disclosure of such information is made under the New Mexico Inspection of Public Records Act, Agency shall provide prompt notice to Contractor so that Contractor may have the opportunity to object.

50. **Product of Service -- Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall be the property of the Contractor.

51. **Conflict of Interest; Governmental Conduct Act.**

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Contract. The Contractor certifies that the requirements of the Governmental Conduct Act, NMSA 1978, Sections 10-16-1 through 10-16-18, regarding contracting with a public officer or state employee or former state employee have been followed.

52. **Amendment.**

This Contract shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

53. **Merger.**

This Contract incorporates all the agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, agreements and understandings have been merged into this written Contract. No prior agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Contract.

54. **Penalties for violation of law.**

The Procurement Code, NMSA 1978, Sections 13-1-28 through 13-1-199, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

55. **Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and Santa Fe City Code, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or

participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Contract. If Contractor is found not to be in compliance with these requirements during the life of this Contract, Contractor agrees to take appropriate steps to correct these deficiencies.

56. **Applicable Law.**

The laws of the State of New Mexico shall govern this Contract, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with NMSA 1978, Section 38-3-1 (G). By execution of this Contract, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Contract.

57. **Insurance.**

If the services contemplated under this Agreement will be performed on or in Agency facilities or property, Contractor shall, at its sole cost and expense, maintain in force for a period of 2 years from the Commencement Date or during construction, systems startup, and equipment commissioning, whichever is longer, the following insurance coverage(s):

- A. **Workers' Compensation Insurance** with statutory limits, and **Employer's Liability insurance** with limits of not less than \$1,000,000 per accident or disease. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the Agency, its directors, officials, officers, employees, agents, and volunteers.
- B. **Commercial General Liability Insurance** which shall be written on an occurrence basis and be at least as broad as the latest version of ISO form CG 00 01 with limits of not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate for claims against bodily injury, personal and advertising injury, and property damage, including a \$2,000,000 aggregate for products-completed operations. Such policy shall include Broad Form Contractual Liability coverage and shall be endorsed to include the Agency, its, directors, officials, officers, employees, agents, and volunteers as additional insureds on all primary and excess policies for ongoing and completed operations performed by, or behalf of Contractor. Such additional insured coverage shall be as broad as that provided by ISO form CG 20 10 (ongoing operations) and CG 20 37 (completed operations).
- C. **Business Automobile Liability insurance** which shall be as broad as ISO form CA 00 01 covering bodily injury and property damage with a combined single limit of not less than \$1,000,000 per accident for all owned, non-owned, and hired automobiles used in connection with the services or operations to be performed under this Agreement. The policy shall be endorsed to include the Agency, its, directors, officials, officers, employees, agents, and volunteers as additional insureds.
- D. **Professional Liability insurance (Errors & Omissions)** with limits of not less than \$1,000,000 per claim and \$2,000,000 in the aggregate.

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E. Subcontractors/Subconsultants. Contractor shall ensure that all subcontractors performing work on behalf of Contractor pursuant to this Contract shall be covered under Contractor's insurance or maintain insurance subject to the same terms and conditions as set forth herein for Contractor. Contractor shall not allow subcontractors to work if subcontractors have less than the level of coverage required by the Agency from Contractor under this Contract. It is the obligation of Contractor to provide notice of the insurance requirements to every subcontractor and to receive proof of insurance prior to allowing any subcontractor to begin work. Such proof of insurance must be maintained by Contractor through the entirety of this Contract for inspection by Agency's representative(s) at any reasonable time.

F. Additional Insurance Requirements.

1. **Acceptability of Insurers.** Unless otherwise reviewed and accepted by the Agency, all required insurance must be placed with insurers with a current A.M. Best rating of not less than A- VII and be admitted to do business in California, or approved by the Surplus Lines Association.

2. **Verification of Coverage.** Contractor shall furnish the Agency with Certificates of Insurance and applicable endorsements effecting coverage required by this Agreement on forms satisfactory to the Agency. The certificates of insurance shall be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements must be received by the Agency before work commences. Acceptance of Contractor's Certificates of Insurance does not relieve Contractor of the insurance requirements, nor decrease the liability of Contractor under this Agreement. It is Contractor's responsibility to ensure its compliance with these insurance requirements. Any actual or alleged failure on the part of the Agency to obtain proof of insurance required under this Agreement shall not in any way be construed to be a waiver of any right or remedy of the Agency, in this or any regard.

3. **Primary and Noncontributory.** The insurance required to be maintained by Contractor shall primary and any insurance or self-insurance maintained by the Agency shall be excess only, and not be required to contribute with it.

4. **Umbrella or Excess Insurance.** Any Umbrella or Excess insurance shall also apply on a primary and noncontributory basis for the benefit of the Agency, before the Agency's own primary insurance or self-insurance shall be called upon to protect it as a Named Insured.

5. **Waiver of Subrogation.** Contractor shall obtain waiver of subrogation endorsements stating that Contractor and its insurers waive any and all rights of recovery against the Agency, its directors, officials, officers, employees, agents, and volunteers. Contractor shall pay all damages and costs arising out of Contractor's failure to provide a waiver of subrogation from its insurers.

6. **Broader Coverage and Limits.** The insurance requirements under this Agreement shall be the greater of (1) the minimum coverage and limits specified in this Agreement, or (2) the broader coverage and maximum limits of coverage of any insurance policy or proceeds available to the Named Insured. It is agreed that these insurance requirements shall not in any way act to reduce coverage that is broader or that includes higher limits than the minimums required herein. No

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representation is made that the minimum insurance requirements of this Agreement are sufficient to cover the obligations of Contractor hereunder.

7. **Severability of Interest (Cross Liability)**. A severability of interest provision must apply for the additional insureds, ensuring that Contractor's insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the policy's(ies') limits.

8. **Notices; Cancellation or Reduction of Coverage**. At least fifteen (15) days prior to the expiration of any policy required to be maintained under this Agreement, evidence showing that such insurance coverage has been renewed or extended shall be filed with the Agency. If such coverage is canceled or materially reduced, Contractor shall, within ten (10) days after receipt of written notice of such cancellation or reduction of coverage, file with the Agency evidence of insurance showing that the required insurance has been reinstated or has been provided through another insurance company or companies. In the event any policy of insurance required under this Contract does not comply with these specifications or is canceled and not replaced, the Agency may suspend or terminate this Agreement. No policy required to be maintained by Contractor shall be canceled and not replaced with equivalent coverage without thirty (30) days prior written notice to the Agency, unless cancellation is due to the non-payment of premium, in which case, ten (10) days prior written notice shall be provided.

58. **Workers Compensation.**

The Contractor agrees to comply with state laws and rules applicable to workers compensation benefits for its employees. If the Contractor fails to comply with the Workers Compensation Act and applicable rules when required to do so, this Contract may be terminated by the Agency.

59. **Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during this Contract's term and effect and retain them for a period of three (3) years from the date of final payment under this Contract. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Contract shall not foreclose the right of the Agency to recover excessive or illegal payments.

60. **Indemnification.**

The Contractor shall defend, indemnify and hold harmless the Agency from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Contract, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Contract. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Contract is brought against the Contractor, the Contractor shall, as soon as practicable but no later than

ten (10) days after it receives notice thereof, notify the legal counsel and insurer of the Agency by certified mail.

61. Invalid Term or Condition.

If any term or condition of this Contract shall be held invalid or unenforceable, the remainder of this Contract shall not be affected and shall be valid and enforceable.

62. Enforcement of Contract.

A party's failure to require strict performance of any provision of this Contract shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Contract shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

63. Conditions Beyond Control Of The Parties.

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

Notwithstanding any provision(s) of this Contract, if as a direct or indirect result of any virus, disease, contagion, or any other widespread communicable disease that causes disruption, including but not limited to COVID-19, (individually or together "Epidemic") the Work is delayed, disrupted, suspended, or otherwise impacted by, including, but not limited to (1) disruptions to material and/or equipment supply; (2) illness of the Contractor's workforce and/or unavailability of labor; (3) government quarantines, shelter-in-place orders, closures or other mandates, restrictions and/or directives; (4) Agency restrictions and/or directives; and/or (5) fulfillment of Contractor's contractual or legal health and safety obligations associated with an Epidemic; then the Contractor shall be entitled to an equitable adjustment to the Contract Schedule and duration to account for such disruptions, suspensions, and impacts. To the extent any of the causes identified herein results in an increase in the price of labor, materials, or equipment used in the performance of the Work, Contractor shall be entitled to an equitable adjustment to the Contract Price for such increases, provided Contractor presents documentation of such increases (including the original prices and/or estimates) and evidence of the Contractor's reasonable efforts to find alternative sources of material or equipment supply and/or labor at the original/non-impacted prices and/or estimates.

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to a Force Majeure Event (or if Contractor is otherwise unable to perform any of its obligations due to Agency failure to provide Contractor reasonable access to the premises to complete the Work in accordance with the project schedule), performing party's obligations shall be suspended

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until the said events shall have ended and, if applicable, an equitable adjustment in the time for performance, price and payment terms, and the Energy Cost and Savings Guarantee shall be made.

64. **Events of Default by Agency.**

- a. Each of the following events or conditions shall constitute an "Event of Default" by Agency:
 - i) any failure by Agency to pay Contractor any sum due for a service and maintenance period of more than 45 days after written notification by Contractor that Agency is delinquent in making payment and provided that Contractor is not in default in its performance under the terms of this Contract; or
 - ii) any other material failure by Agency to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for 30 days after notice to Agency demanding that such failures to perform be cured or if such cure cannot be effected in 30 days, Agency shall be deemed to have cured default upon the commencement of a cure within 21 days and diligent subsequent completion thereof; or
 - iii) any representation or warranty furnished by Agency in this Contract which was false or misleading in any material respect when made.

65. **Events of Default by Contractor.**

- a. Each of the following events or conditions shall constitute an "Event of Default" by Contractor:
 - i) the standards of comfort and service set forth in Schedule U (Standards of Comfort) are not provided due to failure of Contractor to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within 30 days after written notice by Agency to Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract; or
 - ii) any representation or warranty furnished by Contractor in this Contract is false or misleading in any material respect when made; or
 - iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in Schedule R (Equipment to be Installed by Contractor) and Schedule S (Construction and Installation Schedule); or
 - iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in Schedule U (Standards of Comfort) are maintained, any failure by Contractor to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within 90 days after written notice

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by the Agency to Contractor demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract; or

- v) any lien or encumbrance upon the equipment by any subcontractor, laborer or material vendor of Contractor; or
- vi) the filing of a bankruptcy petition whether by Contractor or its creditors against Contractor which proceeding shall not have been dismissed within 90 days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of Contractor; or
- vii) failure by the Contractor to pay any amount due the Agency or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in Schedule A (Savings Guarantee).

66. Remedies upon Default by Agency.

If an Event of Default by Agency occurs, Contractor may, without a waiver of other remedies which exist in law or equity, exercise any remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Agency, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy.

67. Remedies Upon Default by Contractor.

In the Event of Default by Contractor, Agency may exercise any remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees.

68. Assignment.

The Contractor shall not assign or transfer any interest in this Contract or assign any claims for money due or to become due under this Contract without the prior written approval of the Agency.

69. Assignment by Contractor.

The Contractor may, with prior written approval of the Agency, which consent shall not be unreasonably withheld, delegate its duties and performance under this Contract, and/or utilize Contractors, provided that any assignee(s), delegatee(s), or Contractor(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, the Contractor shall remain jointly and severally liable with its assignees(s), or transferee(s) to the Agency for all of its obligations under this Contract.

70. Assignment by Agency.

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Agency may transfer or assign this Contract and its rights and obligations herein to a successor or purchaser of the Buildings or an interest therein. The Agency shall remain jointly and severally liable with its assignees or transferees to the Contractor for all of its obligations under this Contract.

71. **Representations and Warranties.**

- a. Each party warrants and represents to the other that:
 - i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
 - ii) its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
 - iii) its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or
 - iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

72. **Additional Representations of the Parties.**

- a. Agency hereby warrants, represents and promises that:
 - i) it has provided or shall provide timely to Contractor, all records relating to energy usage and energy-related maintenance of Project Site(s) requested by Contractor and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract will be true and accurate in all material respects; and
 - ii) it has not entered into any leases, contracts or Contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Project Site(s) or with regard to servicing any of the energy related equipment located in the Project Site(s). Agency shall provide Contractor with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Project Site(s) which may be executed from time to time hereafter within 14 days after execution thereof.
- b. Contractor hereby warrants, represents and promises that before commencing performance of this Contract:

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- i) it shall have become licensed or otherwise permitted to do business in the State of New Mexico.
- ii) it shall have provided proof and documentation of required insurance and bonds pursuant to this Contract;
- iii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- iv) it shall use qualified subcontractors who are qualified, licensed and bonded in this state to perform the work so subcontracted pursuant to the terms hereof;
- v) the Equipment will meet or exceed the provisions set forth in Section 17 (Systems Start Up and Equipment Commissioning) and in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment;
- vi) the Equipment is or will be compatible with all other Project Site(s) mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation; and
- vii) it is financially solvent, able to pay its debts as they mature and possess sufficient working capital to complete the Work and perform its obligations under this Contract.

73. Construction Performance and Payment Bonds, Labor and Material Payment Bonds.

Such executed bonds are incorporated herein by reference as Exhibit I (Performance Bond) and Exhibit II (Labor and Material Payment Bond, if applicable). The Performance and Payment Bonds shall cover Contractor warranty obligations under this Contract but only for a period of one (1) year from the date of substantial completion. All other warranty and maintenance obligations in the Contract shall be excluded from the Performance and Payment Bonds. Further, the Performance and Payment Bonds shall exclude any and all coverage for the Energy Performance, Energy and Cost Savings Guarantees, and Annual Review and Reimbursement/Reconciliation obligations arising under the Contract. The limitation of Performance and Payment Bond liability as provided above shall not amend or limit the warranty and energy savings obligations that may be owed by the Contractor or any manufacturers' warranties required under the Contract.

74. Further Documents.

The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

75. Methods of Operation by Agency.

The parties acknowledge and agree that said Energy and Cost Savings would not likely be obtained unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by the Agency on a regular and continuous basis. Agency's Maintenance Responsibilities.

76. Agency's Maintenance Responsibilities.

Agency agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule CC (Agency Maintenance Responsibilities), to be attached hereto and made a part hereof after Agency's approval, such approval not to be unreasonably withheld, conditioned or delayed.

77. Inspection of Project Site(s).

Agency agrees that Contractor shall have the right once a month, with prior notice, to inspect Project Site(s) to determine if Agency is complying, and shall have complied with its obligations as set forth in **Section 75 (Agency's Maintenance Responsibilities)**. For the purpose of determining Agency's said compliance, the checklist to be set forth at **Schedule DD (Facility Maintenance Checklist)** as completed and recorded by Contractor during its monthly inspections, shall be used to measure and record Agency's said compliance. Agency shall make the Project Site(s) available to Contractor for and during each monthly inspection, and shall have the right to witness each inspection and Contractor's recordation on the checklist. Agency may complete its own checklist at the same time. Contractor agrees to not interfere with the Agency operations during any monthly inspection.

78. Waiver of Liens.

Contractor shall obtain and furnish to Agency a Waiver of Liens from each subcontractor, vendor, material manufacturer, supplier and laborer in the supply, installation and servicing of each piece of Equipment.

79. Conflicts of Interest.

Conflicts of interest relating to this Contract are strictly prohibited. Except as otherwise expressly provided herein, neither party hereto nor any director, employee or agent of any party hereto shall give to or receive from any director, employee or agent of any other party hereto any gift, entertainment or other favor of significant value, or any commission, fee or rebate in connection with this Contract. Likewise, neither party hereto nor any director, employee or agent of either party hereto, shall without prior notification thereof to the other party enter into any business relationship with any director, employee or agent of the other party or of any affiliate of the other party, unless such person is acting for and on behalf of the other party or any such affiliate. A party shall promptly notify the other party of any violation of this section and any consideration received as a result of such violation shall be paid over or credited to the party against whom it was charged. Any representative of any party, authorized by that party, may audit the records of the other party related to this Contract, upon reasonable notice and during regular business hours including the expense records of the party's employees involved in this Contract, upon reasonable notice and during regular business hours, for the sole purpose of determining whether there has been compliance with this section.

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80. **Notices.**

Any notice required to be given to either party by this Contract shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

To the Agency:

Jarel LaPan Hill
City Manager
City of Santa Fe
200 Lincoln Avenue
Santa Fe, NM 87504
(505) 955-6848
jlapanhill@santafenm.gov

To the Contractor:

Colby Geer
President or Successor
Yearout Energy Services Company
8501 Washington St NE
Albuquerque, NM 87113
(505) 991-7711
colby.geer@yearoutenergy.com

81. **Non-Substitution.**

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by Contractor due to a default by the Agency, the Agency agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by Contractor under the terms of this Contract for a period of three-hundred sixty five (365) calendar days following such default by Agency, or termination of this Contract due to non-appropriations.

82. **New Mexico Tort Claims Act**

Any liability incurred by the City of Santa Fe in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, Section 41-4-1, et. seq. NMSA 1978, as amended. The City and its "public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense and do not waive any limitation of liability pursuant to law. No provision in this Agreement modifies or waives any provision of the New Mexico Tort Claims Act.

83. **Authority.**

If Contractor is other than a natural person, the individual(s) signing this Contract on behalf of Contractor represents and warrants that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract.

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IN WITNESS WHEREOF, the parties have executed this Contract as of the date of signatures below.


CITY OF SANTA FE:

CONTRACTOR:

ALAN WEBBER, MAYOR

DATE: _____

ATTEST:



COLBY GEER, PRESIDENT
Yearout Energy Services Company, LLC
DATE: 2/4/2021
CRS# 03260362-00-2
Registration # 224758

KRISTINE BUSTOS-MIHELIC, CITY CLERK

CITY ATTORNEY'S OFFICE:



Marcos Martinez (Feb 4, 2021 07:58 MST)

SENIOR ASSISTANT CITY ATTORNEY

APPROVED FOR FINANCES:

MARY MCCOY, FINANCE DIRECTOR

Project Code: FA183200I, Org: 3209980, Object: 572960

APPROVED FOR BUCKMAN DIRECT DIVERSION:

JOANNE VIGIL COPPLER, BDD BOARD CHAIR

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Savings Guarantee Schedules

Schedule A. Savings Guarantee Schedule

The following table depicts the calculated estimated savings for each measure prior to applying a guarantee factor.

ANNUAL UTILITY SAVINGS (BEFORE GUARANTEE FACTOR)						
Measure No.	Measure Name	GF	Electricity		Natural Gas	Water
			kW	kWh	therm	kgal
1.00	LED Lighting	90%	3,559	2,578,138	(4,089)	0
2.00	Renewable Energy	90%	0	4,816,946	0	0
3.00	Water Conservation	90%	0	0	6,509	2,230
4.00	Building Envelope	90%	0	2,060	30,140	0
5.00	HE Transformers	90%	70	134,830	0	0
6.00	Utility Management	100%	0	0	0	0
7.00	GCCC Solar Carport Repairs	90%	0	529,737	0	0
8.00	Roof Replacement	N/A	0	0	0	0
Total			3,629	8,061,710	32,560	2,230

A measure specific guarantee factor is applied to the calculated estimated savings to determine the guaranteed savings for each measure. The applied guarantee factor is dependent on the measure type, methodology for calculating savings, understanding of the facility, experience implementing similar measures, and the level of risk acceptable to meet the Agency's financial objectives for the project.

Where the estimated savings are positive, the guarantee factor is applied as follows:

[Guaranteed Savings = Estimated Savings * Guarantee Factor]

Where the Estimated Savings are a negative value, the Guarantee Factor is applied as follows:

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[Guaranteed Savings = Estimated Savings * (1 + (1 – Guarantee Factor))]

The following table depicts the guarantee factor applied to each measure and the resultant guaranteed savings.

GUARANTEED ANNUAL UTILITY SAVINGS (AFTER GUARANTEE FACTOR)						
Measure No.	Measure Name	GF	Electricity		Natural Gas	Water
			kW	kWh	therm	kgal
1.00	LED Lighting	90%	3,203	2,320,324	(4,498)	0
2.00	Renewable Energy	90%	0	4,335,251	0	0
3.00	Water Conservation	90%	0	0	5,858	2,007
4.00	Building Envelope	90%	0	1,854	27,126	0
5.00	HE Transformers	90%	63	121,347	0	0
6.00	Utility Management	100%	0	0	0	0
7.00	GCCC Solar Carport Repairs	90%	0	476,763	0	0
8.00	Roof Replacement	N/A	0	0	0	0
Total			3,266	7,255,538	28,486	2,007

Guarantee Accounting

Contractor shall prepare an annual reconciliation statement within ninety (90) calendar days of the last day of each Performance Guarantee Period to determine whether Realized Annual Savings for such Performance Guarantee Period resulted in an Excess Savings or a Savings Shortfall by comparing the Annual Guaranteed Savings and the Realized Annual Savings.

All operational, maintenance, and energy costs avoided by the Agency from any steps taken by

Contractor will be included in the Realized Annual Savings for each year. If, during the Construction Period, additional measures are identified and implemented that generate additional energy, maintenance, and operational savings, these savings may be included in the Realized Annual Savings after the Performance Commencement Date. In addition, any refunds collected, including but not limited to refunds from utility companies or maintenance Contractors after the Performance Commencement Date will be added to total savings.

If Contractor can correct a shortfall through operational improvement at no expense to the Agency and with no future operational expenses or negative impact on the operations of the Agency, and the Agency declines to allow such operational improvement without reasonable cause, then any future shortfall the improvement would have corrected will be deemed met and added to the savings on an annual basis. Should the Accumulated Realized Savings at the end of the Annual Period be less than the Accumulated Guaranteed Savings, Contractor shall pay the Agency the Savings Shortfall within sixty (60) days following the completion of the annual reconciliation for such Annual Period.

Guarantee Limits

The payments and credits based on Savings Shortfalls, if any, are the sole remedy of Agency for this Performance Guarantee. Any payments made or to be made to the Agency under the terms of this Performance Guarantee shall not exceed the payments actually made by Agency to Contractor for the Contract Sum.

Schedule B. Baseline Energy Consumption; Methodology to Adjust Baseline

B.1. Baseline Energy Consumption

Refer to **Section 3 of Appendix D – Investment Grade Audit (IGA) Report** for baseline utility consumption and cost information.

B.2 Methodology to Adjust Baseline.

Periodically (at least on an annual basis), the baseline will be adjusted to account for the prevailing conditions during the measurement period. Adjustments made to the energy baseline shall be made for any of the following changes in conditions affecting the facility:

- **Weather:** Adjustments for actual weather conditions during the performance period will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy calculations developed during the IGA.
- **Occupancy / Population:** Refer to Schedule Q for baseline population information. Significant changes to the facility's occupancy / population will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy model developed during the IGA.
- **Floor Area:** Refer to Schedule Q for baseline facility information. Significant changes to the facility's floor area will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy model developed during the IGA.
- **Space Type(s):** Refer to Schedule Q for baseline facility information. Significant changes to the facility's space types will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy model developed during the IGA.

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- **Operational Schedule:** Refer to Schedule Q for baseline facility information. Significant changes to the facility's operational schedule will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy model developed during the IGA.
- **Temperatures Set Points:** Refer to Schedule U for proposed Standards of Comfort. Any changes to the values will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy model developed during the IGA.
- **Equipment & Materials Change(s):** Refer to existing equipment schedule and proposed equipment retrofits/replacement. Any changes to the facility's equipment will be normalized against the established baseline. These changes will be accounted for by adjusting the applicable baseline and proposed variables in the energy model developed during the IGA.
- **Rate Escalation:** The approved annual escalation rates are as follows:

RATE ESCALATION SUMMARY

Electricity	3.600% / Year
Natural Gas	4.000% / Year
Water/Sewer	3.000% / Year
Operations & Maintenance	3.000% / Year

Schedule C. Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements

C.1 Savings Measurement and Verification Plan.

RISK, RESPONSIBILITY AND PERFORMANCE MATRIX

RESPONSIBILITY/DESCRIPTION	CONTRACTOR PROPOSED APPROACH
1. Financial	
a. Interest rates: Neither the Contractor nor the Agency has significant control over prevailing interest rates. Higher interest rates will increase project cost, financing/project term, or both. The timing of the Contract signing may impact the available interest rate and project cost.	At the time of Contract, an estimated interest rate of 2.250% was carried in the preliminary project proforma. The Agency will work directly with its financial advisor to secure funding for the project.
b. Construction costs: The Contractor is responsible for determining construction costs and defining a budget. In a fixed-price	During the Design/Pre-Construction phase, if determined that the cost to implement any individual measure is 10% or greater than the

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design/build contract, the Agency assumes little responsibility for cost overruns. However, if construction estimates are significantly greater than originally assumed, the Contractor may find that the project or measure is no longer viable and drop it before the Contract award. In any design/build contract, the Agency loses some design control.	amount budgeted at the time of Contract, Contractor will notify the Agency and either submit a change order to the project scope or eliminate the measure altogether.
<u>c. M&V confidence:</u> The Agency assumes the responsibility to determine the confidence that it desires to have in the M&V program and energy savings determinations. The desired confidence will be reflected in the resources required for the M&V program, and the Contractor must consider the requirement prior to submission of the final proposal.	Refer to the M&V Plan provided herein.
<u>d. Energy Related Cost Savings:</u> The Agency and the Contractor may agree that the project will include savings from <i>recurring</i> and/or <i>one-time</i> costs. This may include one-time savings from avoided expenditures for projects that were appropriated but will no longer be necessary. Including one-time cost savings before the money has been appropriated may involve some risk to the Agency. Recurring savings generally result from reduced O&M expenses or reduced water consumption. These O&M and water savings must be based on actual spending reductions.	Limited historic records were available during the IGA to support significant operations and maintenance (O&M) savings. Therefore, the Contractor is proposing a conservative annual O&M savings as detailed in the IGA Report.
<u>e. Delays:</u> Both the Contractor and the Agency can cause delays. Failure to implement a viable project in a timely manner costs the Agency in the form of lost savings, and can add cost to the project (e.g., construction interest, re-mobilization).	Refer to Schedule S – Construction and Installation Schedule Any delays will be clearly communicated to the Agency and added to the overall project schedule if necessary.
<u>f. Major changes in facility:</u> The Agency controls major changes in facility use, including closure.	The Agency agrees to immediately notify the Contractor of any major changes to the facility. An appropriate course of action will then be determined based on the severity of the change, and impact to the project scope and guarantee.

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	These changes may require adjustment to the energy calculations developed during the IGA.
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RESPONSIBILITY/DESCRIPTION	Contractor PROPOSED APPROACH
2. Operational	
<p>a. Operating hours: The Agency generally has control over operating hours. Increases and decreases in operating hours can show up as increases or decreases in “savings” depending on the M&V method (e.g., operating hours multiplied by improved efficiency of equipment vs. whole-building/utility bill analysis).</p>	<p>The Agency agrees to immediately notify the Contractor of any major changes to the operating hours of the facility. An appropriate course of action will then be determined based on the severity of the change, and impact to the project scope and guarantee.</p> <p>Operating hours are stipulated, and any changes will require adjustment to the energy calculations developed during the IGA.</p>
<p>b. Load: Equipment loads can change over time. The Agency generally has control over hours of operation, conditioned floor area, intensity of use (e.g., changes in occupancy or level of automation). Changes in load can show up as increases or decreases in “savings” depending on the M&V method.</p>	<p>The Agency agrees to immediately notify the Contractor of any major changes to the equipment loads of the facility. An appropriate course of action will then be determined based on the severity of the change, and impact to the project scope and guarantee.</p> <p>Equipment loads are stipulated, and any changes will require adjustment to the energy calculations developed during the IGA.</p>
<p>c. Weather: A number of energy efficiency measures are affected by weather. Neither the Contractor nor the Agency has control over the weather. Should the Agency agree to accept risk for weather fluctuations, it shall be contingent upon aggregate payments not exceeding aggregate savings.</p>	<p>Significant variations in weather will require adjustment to the energy calculations developed during the IGA.</p>
<p>d. User participation: Many facility improvement measures require user participation to generate savings (e.g., control settings). The savings can be variable, and the Contractor may be unwilling to invest in these measures.</p>	<p>The Agency agrees to maintain the proposed HVAC setpoints and sequences of operation proposed as part of this project. Any changes to these variables must be immediately reported to the Contractor in writing.</p> <p>If 5% or more of the conditioned space area deviates from the above proposed space temperature set points, the Contractor shall calculate the impact to the guaranteed savings and apply adjustments accordingly.</p>

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RESPONSIBILITY/DESCRIPTION	Contractor PROPOSED APPROACH
3. Performance	
<p>a. Equipment performance: The Contractor has control over the selection of equipment and is responsible for its proper installation, commissioning, and performance. The Contractor has responsibility to demonstrate that the new improvements meet expected performance levels including specified equipment capacity, standards of service, and efficiency.</p>	<p>Contractor is responsible for the proper installation, commissioning, and initial verified performance of the installed equipment (Post-Installation of 1st year of operation). The Agency agrees to thereafter properly document and maintain the new equipment per the manufacturer's and Contractor's recommendations. Failure by the Agency to properly maintain the equipment will void the long-term performance guarantee.</p>
<p>b. Operations: Performance of the day-to-day operations activities is negotiable and can impact performance. However, the Contractor bears the ultimate risk regardless of which party performs the activity.</p>	<p>The Agency will be responsible for the operation of the equipment and agrees to immediately notify the Contractor of any major changes to the operation. An appropriate course of action will then be determined based on the severity of the change, and impact to the project scope and guarantee.</p>
<p>c. Preventive Maintenance: Performance of day-to-day maintenance activities is negotiable and can impact performance. However, the Contractor bears the ultimate risk regardless of which party performs the activity.</p>	<p>Contractor is responsible for the proper installation, commissioning and initial verified performance of the installed equipment (Post-Installation of 1st year of operation). The Agency agrees to thereafter properly document and maintain the new equipment per the manufacturer's and Contractor's recommendations. Failure by the Agency to properly maintain the equipment will void the long-term performance guarantee.</p>
<p>d. Equipment Repair and Replacement: Performance of day-to-day repair and replacement of Contractor-installed equipment is negotiable; however, it is often tied to project performance. The Contractor bears the ultimate risk regardless of which party performs the activity.</p>	<p>Contractor will provide an industry standard 1-Year materials and workmanship warranty on all new work. Any material warranties that extend beyond the standard 1-Year period will be transferred to the Agency upon project closeout. The Agency will be responsible for the repair and replacement of all installed equipment following the standard 1-Year warranty period.</p>

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M&V PLAN AND SAVINGS CALCULATION METHODS OUTLINE

PROPOSED ANNUAL SAVINGS OVERVIEW

Measure No.	Measure Name	Electricity		Natural Gas	Water	All Utilities	O&M	Total
		kW	On-Peak kWh	therm	kgal	\$	\$	\$
1.00	LED Lighting	3,203	1,244,780	(4,498)	0	\$217,056	\$21,761	\$238,818
2.00	Renewable Energy	0	3,199,669	0	0	\$473,609	\$0	\$473,609
3.00	Water Conservation	0	0	5,858	2,007	\$14,404	\$1,135	\$15,539
4.00	Building Envelope	0	1,091	27,126	0	\$10,477	\$1,572	\$12,048
5.00	HE Transformers	63	45,009	0	0	\$9,567	\$1,435	\$11,002
6.00	Utility Management	0	0	0	0	\$1,821	\$0	\$1,821
7.00	GCCC Solar Carport Repairs	0	351,158	0	0	\$25,204	\$0	\$25,204
8.00	Roof Replacement	0	0	0	0	\$0	\$1,740	\$1,740
Total		3,266	4,841,707	28,486	2,007	\$752,137	\$27,643	\$779,780

Conversion Factors

Electric (MMBtu) = kWh * 0.003412

Natural Gas (MMBtu) = therm * 0.1

Propane (MMBtu) = gallon * 0.092

SITE USE AND SAVINGS OVERVIEW

	Total Energy	Electricity		Natural Gas
	MMBtu	kW	On- Peak kWh	therm
Total Proposed Savings	19,369	3,266	4,841,707	28,486
Usage for Entire Site	234,840	27,570	46,631,822	757,327
% of Total Site Usage Saved	8.25%	11.85%	10.38%	3.76%
Project Area (ft ²)	1,023,900			

Total Site Area (ft ²)	1,023,900
% of Total Site Area Affected	100.00%

Guarantee Types

There are five options to measure and verify savings:

- Option A – Partially Measured Retrofit Isolation
- Option B – Retrofit Isolation
- Option C – Whole Facility Energy Use
- Option D – Calibrated Simulation
- Option E – Non-Measured

Option A – Partially Measured Retrofit Isolation

Option A is a retrofit isolation approach designed for projects in which the potential to generate savings must be verified, but the actual savings can be determined from short-term data collection, engineering calculations, and non-measured factors. Post-installation energy use, equipment performance, and usage are NOT measured throughout the term of the CONTRACT. Post-installation and baseline energy use is estimated using an engineering analysis of information that does not involve long-term measurements.

The intent of Option A is to verify performance through pre- and post-retrofit measurements. Usage factors can be measured or deemed based upon engineering estimates, operating schedules, operator logs, typical weather data, or other documented information sources. Post-retrofit measurements are made only once. Thereafter, inspections verify that the 'potential to perform' exists. As long as the 'potential to perform' is verified, the savings are as originally claimed and do not vary over the CONTRACT term.

Option B – Retrofit Isolation

Option B is a retrofit isolation or system level approach and requires continuous measurement to provide long-term verification of the savings. This method is intended for retrofits with performance factors and operational factors that can be measured at the component or system level and where long-term performance needs to be verified. Option B is similar to Option A but uses periodic or continuous metering. Short-term periodic measurements can be used when variations in the measured factor are small. Continuous monitoring information can be used to improve or optimize the operation of the equipment over time, thereby improving the performance of the retrofit.

The intent of Option B is to verify performance periodically or continuously with long-term measurements. Usage factors may be pre-determined as in Option A or measured continuously.

Option C – Whole Facility Energy Use

Option C is a whole-building verification method. Savings are based on actual energy consumption as measured by the utility meter(s) and/or regression modeling. Estimated savings will vary over the CONTRACT term.

Option C verification methods determine savings by studying overall energy use in a facility. The evaluation of whole-building or facility-level metered data is completed using techniques ranging from simple billing comparison to multivariate regression analysis. Regression analysis can be used to account for weather and other factors to adjust the baseline and determine savings.

Option C is an appropriate and cost-effective method ONLY if facility operation is stable and savings are expected to exceed 20% of total energy consumption. However, Option C cannot verify the performance of individual measures but can verify the total performance of all measures including interactions. Option C methods are appropriate for projects whose measures have a high degree of interaction that would be difficult to predict, when overall energy savings are very large, or when dedicated utility meters are available for retrofitted equipment or systems.

Option D – Calibrated Simulation

Option D is primarily a whole-building method but can be used at the component level. Savings are based on the results of a calibrated computer simulation model. Estimated savings may vary over the CONTRACT term if real weather data is used.

Option D uses calibrated computer simulation models of component or whole-building energy consumption to determine energy savings. Linking simulation inputs to baseline and post-installation conditions completes the calibration and may involve metering performance and operating factors before and after the retrofit. Specialized software packages, such as DOE-2 or e-Quest, are used in Option D and the development of accurate building models requires substantial time and expertise.

Option D methods are appropriate for complex projects where complex system interactions need to be tracked. Due to the expense of properly conducting Option D, suitable projects should have substantial cost savings or major building renovations such as window replacements and building insulation.

Non-Measured

The Non-Measured option is appropriate on measures where no utility and/or operational savings are proposed, or when variables that are known and agreed upon by the Agency and the Contractor in advance, that are used in a calculation or simulated analysis that will pre-determine the outcome. Based on the established analytical methodology the savings will be achieved upon completion of installation and commissioning of the measure and no further measurements or calculations will need to be performed.

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M&V PLAN SUMMARY

Measure No.	Measure Name	M&V Option
1.00	LED Lighting	Option A – Retrofit Isolation
2.00	Renewable Energy	Option B – Retrofit Isolation
3.00	Water Conservation	Option A – Retrofit Isolation
4.00	Building Envelope	Option A – Retrofit Isolation
5.00	HE Transformers	Option A – Retrofit Isolation
6.00	Utility Management	Non-Measured (No Savings Proposed)
7.00	GCCC Solar Carport Repairs	Option B – Retrofit Isolation
8.00	Roof Replacement	Non-Measured (No Savings Proposed)

SCHEDULE OF VERIFICATION REPORTING ACTIVITIES

Item	Time of Submission	Agency's Review and Acceptance Period
Post-Installation M&V Report	60 to 90 Days After Acceptance	30 Days
Annual M&V Report	60 to 90 Days After Annual Performance Period	30 Days

MEASURE SPECIFIC M&V PLAN AND SAVINGS CALCULATION METHODS

Refer to Appendix D – Investment Grade Audit (IGA) Report for a measure specific measurement and verification (M&V) plan.

Refer to Appendix D – Investment Grade Audit (IGA) Report for measure specific Savings Calculation Methods.

C.2 Post-Retrofit M&V Plan.

A Post-Installation M&V Report that aligns with industry best practices will be provided following project acceptance per the table above, and will include the following:

- Proposed Annual Savings Overview
- Expected Savings Overview for First Performance Year
- Impact to Energy Cost Savings from Changes between Final Proposal and As-Built Conditions per Measure

- Expected Year 1 Savings per Measure

C.3 Annual M&V Reporting Requirements

An Annual M&V Report that aligns with industry best practices will be provided at the end of each performance period per the table above, and will include the following:

- Annual Report Overview
- Proposed Annual Savings Overview
- Verified Savings Overview for Performance Year
- Verified Savings for Performance Period to Date
- Verified Annual Savings per measure for Performance Year

Schedule D. Operations and Maintenance (O&M) Savings

Refer to Appendix D – Investment Grade Audit (IGA) Report for measure specific Operations and Maintenance (O&M) Savings.

Schedule E. (NOT USED)

Schedule F. (NOT USED)

Schedule G. (NOT USED)

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Payments Schedules

Schedule H. Final Project Cost & Project Cash Flow Analysis

PROJECT COST SUMMARY							
FIM No.	FIM Name	Year 1 Annual Utility Savings	Year 1 Annual O&M Savings	Year 1 Total Annual Savings	Labor, Equip & Material Costs	Estimated Utility Rebate	Net Cost
1.00	LED Lighting	\$217,056	\$21,761	\$238,818	\$2,222,158	\$192,032	\$2,030,126
2.00	Renewable Energy	\$473,609	\$0	\$473,609	\$7,167,913	\$0	\$7,167,913
3.00	Water Conservation	\$14,404	\$1,135	\$15,539	\$173,807	\$21,450	\$152,357
4.00	Building Envelope	\$10,477	\$1,572	\$12,048	\$206,170	\$0	\$206,170
5.00	HE Transformers	\$9,567	\$1,435	\$11,002	\$199,171	\$7,766	\$191,405
6.00	Utility Management	\$1,821	\$0	\$1,821	\$0	\$1,516	(\$1,516)
7.00	GCCC Solar Carport Repairs	\$25,204	\$0	\$25,204	\$155,730	\$7,628	\$148,102
8.00	Roof Replacement	\$0	\$1,740	\$1,740	\$199,918	\$0	\$199,918
Total		\$752,137	\$27,643	\$779,780	\$10,324,867	\$230,392	\$10,094,474
Investment Audit	Grade						\$104,650
Pre-Construction Cost							\$800,876
Construction Cost (Includes FIM Labor, Equipment and Materials Cost)							\$11,655,884
Profit							\$1,256,141
Contingency							\$282,632
Total Funded Amount (Before Taxes and State Fees)							\$14,100,183
Gross Receipts Tax							\$141,002
State Review Fee							\$1,201,600
Total Funded Amount							\$15,442,785

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PROJECT CASH FLOW ANALYSIS

This preliminary cash flow is for reference only. A final cash flow will be provided by the lender or Agency's Municipal Advisor.

	Total Annual Savings Less Costs	Interest	Principal	Total Payment	Ending Balance	Annual Cash Flow
Year 1	\$666,797	(\$321,308)	(\$345,490)	(\$666,796)	\$13,934,857	\$1
Year 2	\$692,461	(\$313,534)	(\$378,927)	(\$692,460)	\$13,555,930	\$1
Year 3	\$719,065	(\$305,008)	(\$414,057)	(\$719,064)	\$13,141,873	\$1
Year 4	\$820,553	(\$295,692)	(\$524,861)	(\$820,552)	\$12,617,012	\$1
Year 5	\$850,990	(\$283,883)	(\$567,107)	(\$850,989)	\$12,049,905	\$1
Year 6	\$882,520	(\$271,123)	(\$611,397)	(\$882,519)	\$11,438,508	\$1
Year 7	\$915,182	(\$257,366)	(\$657,816)	(\$915,181)	\$10,780,692	\$1
Year 8	\$949,017	(\$242,566)	(\$706,452)	(\$949,016)	\$10,074,240	\$1
Year 9	\$984,068	(\$226,670)	(\$757,397)	(\$984,067)	\$9,316,843	\$1
Year 10	\$1,020,377	(\$209,629)	(\$810,748)	(\$1,020,376)	\$8,506,095	\$1
Year 11	\$1,057,991	(\$191,387)	(\$866,604)	(\$1,057,990)	\$7,639,491	\$1
Year 12	\$1,096,956	(\$171,889)	(\$925,067)	(\$1,096,955)	\$6,714,424	\$1
Year 13	\$1,137,320	(\$151,075)	(\$986,246)	(\$1,137,319)	\$5,728,178	\$1
Year 14	\$1,179,135	(\$128,884)	(\$1,050,251)	(\$1,179,134)	\$4,677,927	\$1
Year 15	\$1,222,452	(\$105,253)	(\$1,117,198)	(\$1,222,451)	\$3,560,729	\$1
Year 16	\$1,267,324	(\$80,116)	(\$1,187,208)	(\$1,267,323)	\$2,373,520	\$1
Year 17	\$1,313,809	(\$53,404)	(\$1,260,405)	(\$1,313,808)	\$1,113,115	\$1
Year 18	\$1,361,965	(\$25,045)	(\$1,113,115)	(\$1,138,159)	\$0	\$223,805
Year 19	\$1,411,850	\$0	\$0	\$0	\$0	\$1,411,850
Year 20	\$1,463,527	\$0	\$0	\$0	\$0	\$1,463,527
Year 21	\$1,517,062	\$0	\$0	\$0	\$0	\$1,517,062
Year 22	\$1,572,519	\$0	\$0	\$0	\$0	\$1,572,519
Year 23	\$1,629,970	\$0	\$0	\$0	\$0	\$1,629,970
Year 24	\$1,689,485	\$0	\$0	\$0	\$0	\$1,689,485
Year 25	\$1,751,139	\$0	\$0	\$0	\$0	\$1,751,139
Total	\$29,173,536	(\$3,633,833)	(\$14,280,347)	(\$17,914,162)	-----	\$11,259,374

Schedule I. Financing Agreement and Payment Schedule

FINANCING AGREEMENT

Due to federal regulations, the terms of the final financing agreement are negotiated directly between the Agency and their financial advisor and/or financial lending Agency. The Contractor is excluded from participation in these negotiations.

PROPOSED BILLING SCHEDULE

The following Proposed Billing Schedule demonstrates the billing schedule anticipated for the project based on project milestones and completion targets for installation of the Work as defined in this Contract. Payment terms are net 30 days from receipt of invoice. This billing schedule is based on timeline milestones, and the actual billing schedule may differ based on individual measures' commencement and completion dates.

The following Proposed Billing Schedule is based on an anticipated Contract award by January 29, 2021.

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PROPOSED BILLING SCHEDULE

FIM No.	FIM Name	Contract Amount	Feb-21	Mar-21	Apr-21	May-21	Jun-21	Jul-21	Aug-21	Sept-21
1.00	LED Lighting	\$2,222,158		\$44,443	\$44,443	\$888,863	\$166,662	\$166,662	\$166,662	\$166,662
2.00	Renewable Energy	\$7,167,913		\$143,358	\$143,358	\$3,583,956	\$358,396	\$358,396	\$358,396	\$358,396
3.00	Water Conservation	\$173,807				\$28,968	\$28,968	\$28,968	\$28,968	\$28,968
4.00	Building Envelope	\$206,170				\$34,362	\$34,362	\$34,362	\$34,362	\$34,362
5.00	HE Transformers	\$199,171				\$66,390	\$66,390	\$66,390		
6.00	Utility Management	\$0								
7.00	GCCC Solar Carport Repairs	\$155,730				\$77,865	\$77,865			
8.00	Roof Replacement	\$199,918				\$99,959	\$99,959			
Investment Grade Audit (IGA)										
Investment Grade Audit (IGA) Cost		\$104,650	\$104,650							
Pre-Construction Costs										
Design and Other Engineering		\$279,734	\$195,814	\$55,947	\$27,973					
Pre-Construction Services		\$329,737	\$109,912	\$109,912	\$109,912					
Other Pre-Construction Costs		\$191,405	\$63,802	\$63,802	\$63,802					
Construction Costs										
Construction Management		\$346,196				\$28,850	\$28,850	\$28,850	\$28,850	\$28,850
Project Engineering		\$93,582				\$7,799	\$7,799	\$7,799	\$7,799	\$7,799
General Conditions		\$238,266				\$19,856	\$19,856	\$19,856	\$19,856	\$19,856
Construction Completion		\$175,283								
Other Construction Costs		\$477,690				\$39,807	\$39,807	\$39,807	\$39,807	\$39,807
Profit Contingency										
Profit		\$1,256,141	\$47,418	\$41,746	\$38,949	\$487,667	\$92,891	\$75,109	\$68,470	\$68,470
Contingency		\$282,632	\$10,669	\$10,669	\$9,393	\$8,764	\$109,725	\$20,901	\$16,899	\$16,899
Other Project Cost										
State Review Fees		\$141,002	\$141,002							
Gross Receipts Tax		\$1,201,600	\$56,807	\$39,538	\$36,889	\$461,874	\$87,978	\$71,136	\$64,848	\$64,848
Total Billing		\$15,442,785	\$730,073	\$508,140	\$474,090	\$5,935,942	\$1,130,682	\$914,233	\$833,422	\$833,422

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Schedule J. Compensation to Contractor for Annual Services

MEASUREMENT AND VERIFICATION FEE

The Year-1 M&V Fee is \$68,632. The M&V Fee will be billed quarterly and will escalate at a rate of 2.500% annually for the duration of the project as depicted in the table below. The Agency shall be responsible for payment of the annual M&V Fee, as these ongoing costs are considered annual fees, and cannot be financed up front.

ANNUAL M&V FEE SUMMARY

Year	M&V Fee	Year	M&V Fee
1	\$68,632	10	\$85,712
2	\$70,348	11	\$87,855
3	\$72,106	12	\$90,051
4	\$73,909	13	\$92,302
5	\$75,757	14	\$94,610
6	\$77,651	15	\$96,975
7	\$79,592	16	\$99,400
8	\$81,582	17	\$101,885
9	\$83,621	18	\$104,432

Failure by the Agency to issue payment to the Contractor for annual M&V Services within the parameters detailed herein will result in the termination of the Guarantee and annual M&V reporting requirements for the remainder of the performance period. Refer to the **APPENDIX E - Sample Annual M&V Agreement**.

Schedule K. Rebates, Incentives and Grants

UTILITY REBATES

Contractor shall coordinate with utility providers and submit required documentation during the implementation period. Utility rebates are estimated and subject to availability and final award by the utility provider. Rebates are not guaranteed by the Contractor, as these programs are at the discretion of the utility company. All awarded rebates will be paid directly to the Agency by the utility provider.

Refer to **Appendix D – Investment Grade Audit (IGA) Report** for estimated utility rebates per measure.

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Schedule L. (NOT USED)
Schedule M. (NOT USED)
Schedule N. (NOT USED)
Schedule O. (NOT USED)
Schedule P. (NOT USED)

Design, Audit and Construction Phase Schedules

Schedule Q. Description of Project Site(s)

Refer to **Appendix D – Investment Grade Audit (IGA) Report** for a description of the project site(s) and existing equipment.

Schedule R. Equipment to be Installed by Contractor

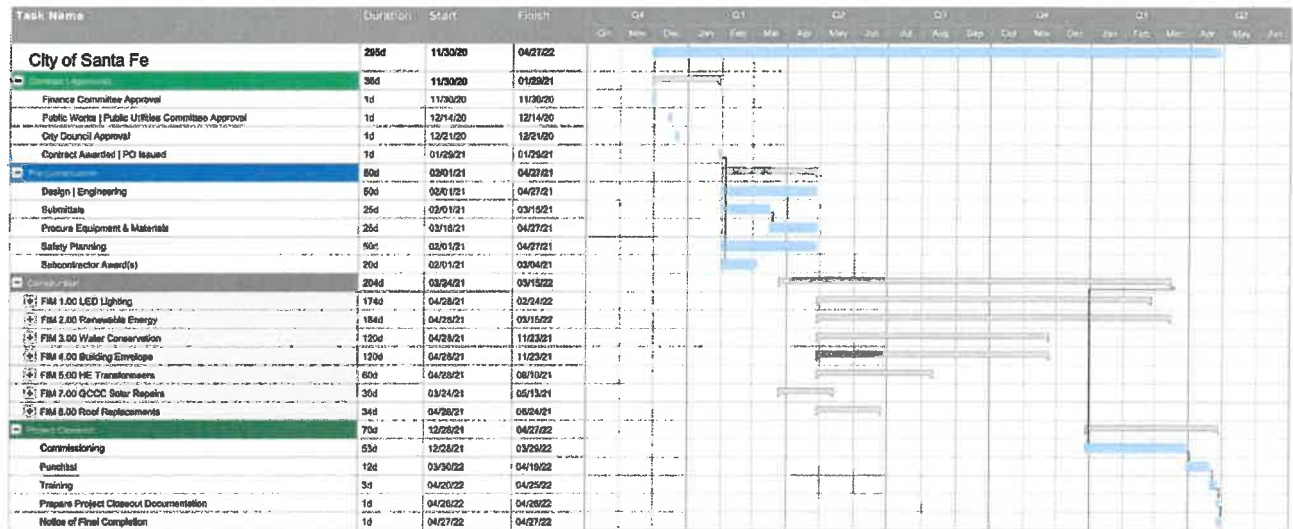
Refer to **Appendix D – Investment Grade Audit (IGA) Report** for a measure specific scope of work and description of equipment to be installed.

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Schedule S. Construction and Installation Schedule

Contractor anticipates a 15-Month overall construction period from the time of Contract. A detailed construction schedule will be co-developed with the Agency following the Contract award. **The parties may amend the contract amount and schedule due to any delays related to the required approvals of interconnection documents and land acquisition.**

COSF Preliminary Construction Schedule



Schedule T. Systems Start-up and Commissioning of Equipment; Operating Parameters of Installed Equipment

A preliminary commissioning plan per measures is provided in **Appendix D – Investment Grade Audit Report** and is intended to serve as the outline from which the final commissioning plan will be developed during the pre-construction / design phase. The final commissioning plan will be primarily focused on validating the proposed equipment and implemented strategies in accordance with the savings methodology associated with each measure.

- Develop and issue construction phase commissioning plan
- Review equipment submittals to validate the specified performance criteria is in alignment with the proposed savings methodology
- Review sequences of operation and controls strategies to validate alignment with proposed savings methodology
- Review manufacturer's startup documentation
- Develop equipment Prefunctional Checklists (PFCs)
- Develop and conduct Functional Performance Testing (FPT) procedures on equipment and sequences of operation to ensure proper operation
- Create and maintain a commissioning issues log
- Establish trends as required to validate system operation
- Coordinate Owner participation as required during commissioning and equipment startup efforts
- Participate in staff training activities

Schedule U. Standards of Comfort

GENERAL

While optimizing energy consumption and costs are central to the project's success, maintaining an acceptable level of building occupant comfort is equally important. The following standards of comfort are therefore established to ensure comfortable indoor space conditions are maintained post-retrofit.

INTERIOR LIGHTING

Interior light levels shall comply with the current recommendations, at the time the Contract becomes effective, by the Illuminating Engineering Society of North America (IESNA)

SPACE HEATING AND COOLING

The proposed design shall comply with the current editions, at the time the Contract becomes effective, of ASHRAE Standards 55, 62 and 90.1.

SPACE TEMPERATURE SET POINTS:

The Agency agrees to maintain the following indoor space temperature set points:

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Classroom and Office Areas

- Cooling Occupied Set Point: 74 °F (+/- 1 °F)
- Cooling Unoccupied Set Point: 82 °F
- Heating Occupied Set Point: 70 °F (+/- 1 °F)
- Heating Unoccupied Set Point: 62 °F

Unoccupied periods include, but are not limited to:

- Scheduled shutdowns
- Holidays
- All time outside of normal business hours

Cooling standards of comfort do not apply to areas that have evaporative or no cooling.

If 5% or more of the conditioned space area deviates from the above proposed space temperature set points, the Contractor shall calculate the impact to the guaranteed savings and apply adjustments accordingly. Data logging devices may be used to confirm actual space temperatures in place of trended data from the building automation system.

VENTILATION

Minimum ventilation rates shall comply with ASHRAE 62.1 guidelines that are current when the Contract takes effect.

DOMESTIC HOT WATER (DHW)

The Agency agrees to maintain the following domestic hot water supply temperature set points:

- Domestic Fixtures Set Point: 120 °F

Swimming Pool

The Agency agrees to maintain the following domestic hot water supply temperature set points:

- Water Temperature Set Point: 82 °F
- Space temperature setpoint 80 °F

Schedule V. Contractor's Training Responsibilities

Contractor shall co-develop a training plan with the Agency that is tailored to the needs and skill-level of the trainees. Contractor shall record training sessions and provide in electronic format to the Agency for future reference. The final agreed upon training agenda may include topics such as:

- Equipment start-up, proper operation, shutdown, power failure, etc.
- Sequences of operation
- Operations and maintenance (O&M) manuals

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- Diagnosing and troubleshooting common equipment issues
- Preventative maintenance and required documentation
- Health & safety considerations
- Warranty information
- Identified system deficiencies

Schedule W. (NOT USED)

Schedule X. (NOT USED)

Schedule Y. (NOT USED)

Schedule Z. (NOT USED)

Schedule AA. (NOT USED)

Post-Construction Schedules

Schedule BB. Contractor's Maintenance Responsibilities

Contractor shall provide warranty services for an industry standard one-year period. This warranty is specific to defects to original quality and/or workmanship. Contractor hereby also provides warranty services for a one-year period covering defects in installation services provided by Contractor. Any material warranties that extend beyond the standard one-year period will be transferred to the Agency upon project closeout.

Schedule CC. Agency's Maintenance Responsibilities

1. Agency shall be responsible for annual operations and maintenance of installed solar photovoltaic systems to ensure proper operation.
2. Agency shall maintain all equipment per manufacturer's & Contractor's recommendations.
3. Maintain active and updated maintenance logs for all equipment. Logs shall be kept for a minimum of the warranty period and must be provided to the Contractor upon request in either electronic or hard copy format.
4. During the first-year construction warranty period, the Agency shall promptly notify the Contractor of any equipment which fails to operate as intended. Subsequent to the first year, the Agency shall coordinate repair of any failed equipment with the equipment manufacturer or other qualified entity to address equipment failures in a timely manner.
5. Maintain all sequence of operations and performance criteria related to installed systems as proposed and designed. This shall include, but not be limited to, adjusting occupancy schedules based upon operational calendars, considering holidays, regular breaks, etc. The Agency shall maintain schedules to minimize equipment operation.
6. Upon request of Contractor, provide Contractor with copies of actual monthly utility billing information on a quarterly basis for the duration of the ongoing service period. This includes utility bills from all providers. For this project, the ongoing service period shall be for the term of the contract. Utility information shall include all meters providing direct or indirect service to all building(s) included in this project.

7. Provide Contractor continuous full remote access to the Building Automation System (BAS) for the purpose of collecting and trending data over time as required for performance verification.
8. The Agency shall notify Contractor in writing with regard to any changes or alterations to buildings that will affect energy usage. This notification must be provided within 30 days of the change. This includes changes to utilization, occupancy, internal or external loads, facility operation, scheduling, and sequences of operation.
9. In addition to the maintenance responsibilities described above, the Agency shall maintain a log of all maintenance activities as described in the maintenance checklist provided with O&M manuals.

Schedule DD. Facility Maintenance Checklists

Facility maintenance checklists will be provided as a part of the Operation and Maintenance (O&M) Manuals delivered at project completion. All on-going facility maintenance shall be completed by Agency staff in accordance with manufacturer's and Contractor's recommendations and specifications.

Schedule EE. (NOT USED)

Schedule FF. (NOT USED)

Schedule GG. (NOT USED)

Schedule HH. (NOT USED)

Schedule II. (NOT USED)

Administration Schedules

Schedule JJ. Alternative Dispute Resolution

Mediation

Contractor and Agency shall endeavor to resolve claims, disputes and other matters in question between them by mediation. A request for mediation shall be made in writing, delivered to the other party to the Contract, and filed with the person or entity administering the mediation. The request may be made concurrently with the filing of a complaint or other appropriate demand for binding dispute resolution but, in such event, mediation shall proceed in advance of binding dispute resolution proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order. If an arbitration proceeding is stayed pursuant to this section, the parties may nonetheless proceed to the selection of the arbitrator(s) and agree upon a schedule for later proceedings.

The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in Santa Fe, New Mexico, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

If the parties do not resolve a dispute through mediation pursuant to this Section, the method of binding dispute resolution shall be the following:

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(Check the appropriate box. If the Contractor and Agency do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, the dispute will be resolved in a court of competent jurisdiction.)

- [] Arbitration pursuant to Section of this Contract
[X] Litigation in a court of competent jurisdiction
[] Other (Specify)

Schedule KK. (NOT USED)
Schedule LL. (NOT USED)
Schedule MM. (NOT USED)
Schedule NN. (NOT USED)
Schedule OO. (NOT USED)

Exhibits

Exhibit I. Performance Bond/Construction Bond

To be provided following Contract execution.

Exhibit II. Labor and Material Payment Bond

To be provided following Contract execution.

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Exhibit III. NM-GSD Certification of Contractor as Qualified Provider



State of New Mexico
General Services Department

GSD/PD (Rev. 01/11)

Statewide Price Agreement

Awarded Vendor
0000141975
Yearout Energy Services Co., LLC
8501 Washington St NE
Albuquerque, NM 87113

Telephone No. (505) 883-0915

Contract Number: 90-000-18-00017AH

Payment Terms: See Contract

F.O.B.: See Contract

Delivery: See Contract

Ship To:
All State of New Mexico agencies, commissions,
institutions, political subdivisions and local public
bodies allowed by law.

Procurement Specialist: Michael Saavedra

Telephone No.: (505) 827-0610

Invoice:
As requested.

Email: Michael.Saavedra@state.nm.us

Title: Qualified Providers of Energy Performance Contracting Services, ESCO

Term: June 13, 2019 – June 12, 2023

This Price Agreement is made subject to the "terms and conditions" shown on the reverse side of this page, and as indicated in this Price Agreement.

Accepted for the State of New Mexico


New Mexico State Purchasing Agent

Date: 07/08/2019

Purchasing Division, 1100 St. Francis Drive, PO Box 6850, Santa Fe, NM 87502-6850 (505) 827-0472
MS

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Exhibit IV. NM-EMNRD & NM-OSE Certification of Guaranteed Savings

State of New Mexico
Energy, Minerals and Natural Resources Department

Michelle Lujan Grisham
Governor

Sarah Cottrell Propst
Cabinet Secretary

Todd E. Leahy, JD, PhD
Deputy Secretary

Louise N. Martinez, Director
Energy Conservation and Management Division



September 12, 2020

BY EMAIL: mayor@santafenm.gov

Mayor Alan Webber
City of Santa Fe
200 Lincoln Ave
Santa Fe, NM 87504

SUBJECT: Certification of Guaranteed Energy Savings under the Public Facility Energy Efficiency and Water Conservation Act (NMSA 1978, Section 6-23-5) – City of Santa Fe

Dear Mayor Webber:

The Investment Grade Energy Audit submitted by the City of Santa Fe to implement energy efficiency and renewable measures in city facilities has been reviewed and is hereby approved. The Investment Grade Energy Audit was performed by Yearout Energy Services Co. (YESCO).

The Energy Conservation and Management Division (ECMD) of the New Mexico Energy, Minerals and Natural Resources Department (EMNRD) has certification responsibilities and provides technical assistance to governmental entities under the Public Facility Energy Efficiency and Water Conservation Act (Act). The two certifications needed from EMNRD for each energy performance contracting project under the Act are:

- Vendor is a Qualified Provider and meets EMNRD experience requirements; and
- Guaranteed energy savings appear to be accurately estimated and reasonable.

EMNRD reviewed the Investment Grade Energy Audit. EMNRD now issues the following certification:

- Qualifications were provided on December 1, 2017 approving YESCO as a qualified entity under EMNRD's experience criteria.
- EMNRD certifies that the guaranteed energy savings from the proposed efficiency measures appear to be accurately estimated and reasonable.

The City of Santa Fe Investment Grade Audit is hereby certified with these Special Conditions:

- Certification is contingent upon implementation of the measures as outlined in the investment grade energy audit. No significant changes in scope are to be considered unless submitted for review and approval by EMNRD.
- Section 6-23-4 Requires that the savings be guaranteed by the provider. Measurement and Verification of the savings is essential to determine if the savings are being met. A copy of the Annual Measurement and

1220 South St. Francis Drive • Santa Fe, New Mexico 87505
Phone (505) 476-3315 • Fax (505) 476-3322 • www.CleanEnergyNM.org

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September 15, 2020
Page 2

Verification Report shall be provided to EMNRD every year the contract is in place by January 31st of the following year. These reports are essential to meet legislative reporting requirements.

- The 3-rd party reviewer costs of 1.0% percent of the total project cost are to be included and accounted for in the project contract to reimburse EMNRD.

Pursuant to NMSA 1978, Section 6-23-5 of the Act, EMNRD has performed its certification duties. It is recommended that The City of Santa Fe implement its approval requirements to comply with NMSA 1978, 6-23-8 of the Act. Please contact me at Harold.Trujillo@state.nm.us, 505-490-7912 or Louise.N.Martinez@state.nm.us, 505-476-3315 if there are any questions.

Sincerely,


Harold Trujillo, PE
Bureau Chief
ECMD Energy Technology & Engineering

cc: Regina Wheeler, Public Works Director rwheeler@santafenm.gov
Caryn Grosse, Project Administrator cgrosse@santafenm.gov
Louise Martinez, Director ECMD
David Griego, Engineer ECMD
Alex Montano, YESCO

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STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER
CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501
TELEPHONE: (505) 827-6091 FAX: (505) 827-3806

JOHN R. D'ANTONIO JR., P.E.
STATE ENGINEER

August 28, 2020

Mailing Address:
P.O. Box 25102
Santa Fe, NM 87504-5102

VIA EMAIL

Mr. Alex Montano
Yearout Energy Services Company
8501 Washington St. NE
Albuquerque, NM 87113

Re: City of Santa Fe - Investment Grade Audit Report

Dear Mr. Montano:

The Water Use & Conservation Bureau (WUCB) of the Office of the State Engineer (OSE) has reviewed various submittals from Yearout Energy Services Company for the above-referenced project including the **City of Santa Fe-Investment Grade Audit (IGA) Report** dated August 21, 2020. The review of the final IGA was completed in accordance with NMSA 1978, Section 6-23-5.B(3) of the Public Facility Energy Efficiency and Water Conservation Act (Act).

The proposal submitted is for the installation of approximately 760 fixture upgrades at 15 City facilities. NMSA 1978 Section 72-14-3.2D.(e) recognizes "water-efficient fixtures and appliances" as a water conservation measure. Consequently, the fixture retrofits proposed were considered for guaranteed water savings.

The OSE has certification responsibilities and provides technical assistance to governmental entities under the Act. The Act conditions any water conservation guaranteed utility savings contract approval on two certifications from the OSE. The OSE is required to certify that:

- "...the qualified provider of water conservation measures meets the experience requirements set by that office", and
- "...the guaranteed water savings from the water conservation measures proposed appear to be accurately estimated and reasonable."

Pursuant to NMSA 1978, Section 6-23-5.B(3) of the Act, the WUCB reviewed the proposal. The OSE provides the following certifications:

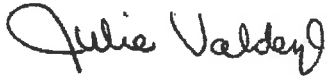
- For the purposes of this proposed project, based upon documents submitted to this office, the OSE certifies that the project team of Yearout Energy Services Company meets the experience requirements and shall be considered a "qualified provider."

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- Based on the documents and information provided, the OSE certifies that the guaranteed water savings from water conservation measures appear to be accurately estimated and reasonable.

If you have any questions, please call Chuck Lawler at 505-827-6664.

Sincerely,

A handwritten signature in black ink that reads "Julie Valdez". The signature is written in a cursive, flowing style.

Julie Valdez
Acting Bureau Chief, Water Use and Conservation Bureau

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Exhibit V. Certificate of Acceptance - Measure

CERTIFICATE OF ACCEPTANCE - MEASURE

Date: _____

Measure Description: _____

City of Santa Fe, NM accepts the installed equipment for the measure noted above and establishes a warranty period commencement date as _____.

Authorized Representative

Name (Printed)

Title

Signature

Date

Once executed, this form shall signify final acceptance of the installed equipment for the noted measure.

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Exhibit VI. Certificate of Project Substantial Completion

CERTIFICATE OF PROJECT SUBSTANTIAL COMPLETION

Date: _____

City of Santa Fe, NM accepts the project as substantially complete and establishes a performance period
commencement date as _____.

Authorized Representative

Name (Printed)

Title

Signature

Date

Once executed, this form shall signify final project acceptance and substantial completion of the proposed work. This will also signal commencement of the Year 1 Performance Period.

Exhibit VII. Equipment Warranties

An industry standard 1-Year materials and workmanship warranty is provided by Contractor as part of the project. Any material warranties that extend beyond the standard 1-Year period will be transferred to the Agency upon project closeout.

Appendices

Appendix A. Contractor Solicitation (Selection Phase)

The Contractor was selected from the NM-GSD Statewide Price agreement. Appendix is not used.

Appendix B. Contractor Proposal (Pre-Qualification Phase)

The Contractor was selected from the NM-GSD Statewide Price agreement. Appendix is not used.

Appendix C. Investment Grade Audit and Project Proposal Contract

The Investment Grade Audit (IGA) and Project Proposal Contract have been published under separate cover and are incorporated herein by this reference.

Appendix D. Investment Grade Audit Report

The Investment Grade Audit (IGA) Report has been published under separate cover and is incorporated herein by this reference.

Appendix E. Sample Annual M&V Agreement

Measurement and Verification (M&V) is the process of quantifying the annual utility consumption savings resulting from the measures implemented as part of the Guaranteed Energy Savings Performance Contract (GESPC) project. M&V activities include ongoing site surveys, metering of energy and other independent variables, review of operations and maintenance documentation, engineering calculations, and reporting. The annual cost for M&V services is outlined in Schedule J and shall be billed quarterly during each performance year. The Agency shall be responsible for payment of the annual M&V Fee, as these ongoing costs are considered annual fees, and cannot be financed up front. This section provides a sample of the annual agreement for reference.






2021-02-03 Yearout Energy_EPC_COSF

Final Audit Report

2021-02-04

Created:	2021-02-04
By:	Irene Romero (ikromero@ci.santa-fe.nm.us)
Status:	Signed
Transaction ID:	CBJCHBCAABAADv7dJaNRLpqFGi65zb2wqFMyDBZQuw0A

"2021-02-03 Yearout Energy_EPC_COSF" History

-  Document created by Irene Romero (ikromero@ci.santa-fe.nm.us)
2021-02-04 - 2:21:43 PM GMT- IP address: 63.232.20.2
-  Document emailed to Marcos Martinez (mdmartinez@santafenm.gov) for signature
2021-02-04 - 2:26:06 PM GMT
-  Email viewed by Marcos Martinez (mdmartinez@santafenm.gov)
2021-02-04 - 2:58:16 PM GMT- IP address: 174.56.49.116
-  Document e-signed by Marcos Martinez (mdmartinez@santafenm.gov)
Signature Date: 2021-02-04 - 2:58:27 PM GMT - Time Source: server- IP address: 174.56.49.116
-  Agreement completed.
2021-02-04 - 2:58:27 PM GMT



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