

GUARANTEED ENERGY SAVINGS AGREEMENT

*GESA-1 Project: Russell Conwell Middle School, Samuel Gompers Elementary School
& Abraham Lincoln High School*

This Guaranteed Energy Savings Agreement (the “**Contract**”) is made and entered into as of this ____ day of _____, 2019 (“**Effective Date**”) by and between **THE SCHOOL DISTRICT OF PHILADELPHIA**, a body politic and corporate subdivision formed and existing under the laws of the Commonwealth of Pennsylvania (the “**School District**”), located at the Education Center, 440 North Broad Street, Philadelphia, Pennsylvania 19130; and _____, a _____ [corporation or partnership or limited liability company] (the “**Energy Services Company**” hereinafter referred to as “**ESCO**”), having its principal offices at _____.

I. BACKGROUND

WHEREAS, the School District owns and operates Russell Conwell Middle School, located at 1849 E. Clearfield Street, Philadelphia, Pennsylvania 19134, Samuel Gompers Elementary School, located at 5701 Wynnefield Avenue, Philadelphia, Pennsylvania 19131, and Abraham Lincoln High School, located at 3201 Ryan Avenue, Philadelphia, Pennsylvania 19136 (collectively, the “**Premises**”); and is in need of Energy Conservation Measures (“**ECMs**”) that include programs, facility alternations or upgrades designed to reduce energy, water, wastewater or other measurable consumption or operating costs at said Premises; and

WHEREAS, the School District solicited proposals from qualified firms through issuance of that certain Request for Proposals to provide a Guaranteed Energy Savings Act (GESA) Contract Inclusive of Energy Efficient Building Upgrades, dated November 2, 2018 (“**RFP**”) set forth in **Appendix A: RFP for ESCO Solicitation**; and

WHEREAS, ESCO submitted a proposal, dated _____, 2018 and set forth in **Appendix B: ESCO Proposal** (the “**Proposal**”); and

WHEREAS, ESCO has made an assessment of the energy and water consumption characteristics of the Premises and pre-existing equipment described in **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)**, which was delivered to the School District as the Investment Grade Audit (“**IGA**”) dated _____, 2018 set forth in **Appendix D: Investment Grade Audit**, and approved and accepted by the School District as set forth in **Exhibit II (i) (Certificate of Acceptance—Investment Grade Audit)**; and

WHEREAS, the School District desires to retain ESCO to purchase, install and service certain energy conservation measures described in the IGA, including certain energy and

water cost saving equipment of the type or class described in **Schedule A (Selected ECMs to be Installed by ESCO)**, attached hereto and made part hereof, and to provide other services designed to achieve cost savings by reducing energy and water consumption at the Premises, as more fully set forth herein;

WHEREAS, the Board of Education (“**Board**”) is the governing body of the School District pursuant to the Public School Code, 24 P.S. §21-2102 and §3-301. The Board and the School District are referred to throughout the Contract as if singular in number and neuter in gender.

WHEREAS, the School District is authorized by the Board, by action item number A-___, dated _____, 2019, and under the laws of the Commonwealth of Pennsylvania (hereinafter “**the Commonwealth**”), including without limitation, the Guaranteed Energy Savings Act (62 Pa. C.S. §3751 *et seq.*), to enter into the Contract for the purpose of implementing Select ECMs from the IGA as set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties hereto covenant and agree as follows:

ARTICLE 1. INCORPORATION OF BACKGROUND; DEFINITIONS

1.1 **Incorporation of Background.** The Background paragraphs above are incorporated by reference into this Contract and made a part of this Contract.

1.2 **Definitions.** The terms used in this Contract shall have the following meanings:

- (a) **“Acceptance Date”** has the meaning set forth in Paragraph 4.3.
- (b) **“Amendment”** means a written modification or change to any Contract Document signed by both Parties.
- (c) **“Annual Guaranteed Savings”** means the Guaranteed Savings for each year of the Guarantee Period, as set forth in Schedule C.
- (d) **“Applicable Law”** means all applicable present and future federal, state or local laws, ordinances, executive orders, rules, regulations and court orders, injunctions, decrees, and other official interpretation thereof by any federal, state or local court, administrative agency or government body, including the City, the Commonwealth and the United States of America. Applicable Law includes, without limitation, the Philadelphia Home Rule Charter, The Philadelphia Code, the Guaranteed Energy Savings Act (62 Pa. C.S. §3751 *et seq.*); Chapter 39 of Act 57 of May 5, 1998 (62 Pa. C.S. §3901 *et seq.*); the Prevailing Wage Act (43 P.S. §165-1 *et seq.*); the Steel

Products Procurement Act (73 P.S. §1881 *et seq.*); the Trade Practices Act of July 23, 1968 (71 P.S. §686 *et seq.*); the Uniform Construction Code (13 P.S. §1101 *et seq.*); the Pennsylvania Workers' Compensation Act, 77 P.S. §1 *et seq.*); the Pennsylvania Solid Waste Management Act (35 P.S. §6018.101 *et seq.*); the Pennsylvania Hazardous Sites Cleanup Act (35 P.S. §6020.101 *et seq.*); the Pennsylvania Clean Streams Law (35 P.S. §691.1 *et seq.*); the Pennsylvania Storage Tank and Spill Prevention Act (35 P.S. §6021.101, *et seq.*); the Pennsylvania Land Recycling and Environmental Remediation Standards Act (35 P.S. §6026.101 *et seq.*); the Pennsylvania Hazardous Material Emergency Planning and Response Act, (35 P.S. §6022.101 *et seq.*); the Pennsylvania Air Pollution Control, 35 P.S. §4001, *et seq.*), the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 *et seq.*); the National Environmental Policy Act (42 U.S.C. §4321 *et seq.*); the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §9601 *et seq.*); the Resource Conservation and Recovery Act (42 U.S.C. §6901 *et seq.*); the Toxic Substances Control Act (15 U.S.C. §2601 *et seq.*); the Hazardous Materials Transportation Act (49 U.S.C. §1801 *et seq.*); the Clean Air Act (42 U.S.C. §7401 *et seq.*); the Clean Water Act (33 U.S.C. §1251 *et seq.*); the Oil Pollution Act of 1990 (33 U.S.C. §2701 *et seq.*); the Safe Drinking Water Act (42 U.S.C. §300f *et seq.*); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §136 *et seq.*); and the other specific Applicable Laws set forth herein, each as amended from time to time.

- (e) **“As-Built Documentation”** means a final set of Design and Engineering Documents that has been updated to accurately and clearly depict the as-built conditions of each of the Selected ECMs to be implemented under this Contract, including any supplemental details, drawings, or plans that are necessary to demonstrate the location of each Selected ECM, its relation to Premises, and any information necessary for making future alternations, connections or upgrades to the Selected ECM, such as power supplies and interconnecting wiring between units, installation of accessories, and appurtenances.
- (f) **“Business Days”** means calendar days, excluding all Saturdays and Sundays in addition to New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day, Christmas Day, or the Monday thereafter when these days occur on Saturday or Sunday.
- (g) **“Capacity Rights”** means the rights associated with the electric generation and load reduction capacity and capability of the selected ECMs, including the right to use and receive payment for generation capacity or load reduction capability of selected ECMs in the PJM Reliability Price Model Base Residual Auctions and/or in other appropriate PJM capacity, emergency load reduction or demand response programs or markets.

- (h) **“Change Order”** means an instrument altering the scope of work under the Contract issued under Paragraph 7.3.3 below.
- (i) **“Contract Sum”** has the meaning set forth in Paragraph 5.1.
- (j) The **“City”** means The City of Philadelphia, a corporation and body politic existing under the laws of the Commonwealth, and includes its various executive and administrative departments, agencies, boards, commissions and offices, including the Department, and its legislature, the City Council. The City is a City of the First Class under the laws of the Commonwealth.
- (k) **“Commonwealth”** means the Commonwealth of Pennsylvania.
- (l) **“Concealed Conditions”** means subsurface or otherwise concealed physical conditions on the Premises of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in the Work anticipated by this Contract.
- (m) **“Contract”** means this Guaranteed Energy Savings Agreement between the Parties as evidenced by the Contract Documents.
- (n) **“Contract Documents”** means this Contract; any and all exhibits, Schedules, drawings, specifications, diagrams, plans, addenda or other documents incorporated by reference; any approved Design and Engineering Documents, as set forth in Paragraph 7.2.2. (Design and Engineering Approval); the Notice(s) to Proceed with Selected ECMs; the performance and payment bonds; and any and all Amendments to any of these documents.
- (o) **“Department”** means the department, board, commission, office or agency of the School District for which the ESCO carries out the Work under this Contract, as designated in writing by the School District from time to time.
- (p) **“Design and Engineering Documents”** means the drawings, plans, technical specifications, or other design and engineering documents prepared for the School District by or on behalf of the ESCO.
- (q) **“ECM Implementation”** has the meaning set forth in Paragraph 7.1.
- (r) **“ECM Service Responsibilities”** has the meaning set forth in Paragraph 14.1.
- (s) **“Energy Conservation Measure” (“ECM”)** has the meaning set forth in 62 Pa. C.S. §3752 (Definition of “Energy Conservation Measure”).

- (t) **“Energy Savings Guarantee”** has the meaning set forth in Paragraph 5.2, and shall consist of both the Total Guaranteed Savings and the Annual Guaranteed Savings.
- (u) **“Effective Date”** has the meaning set forth in the Background and Paragraph 4.1.
- (v) **“Environmental Incentives”** means all rights, credits (including tax credits), rebates, grants, benefits, reductions, offsets, and allowances and entitlements of any kind, howsoever entitled or named (including carbon credits and allowances), whether arising under federal, state or local law, international treaty, trade association membership or the like, arising from the development or installation of the ECMs and the reduction of energy usage at the Site. Without limiting the forgoing, “Environmental Incentives” includes utility rebates or incentive programs, green tags, renewable energy credits, tradable renewable certificates, portfolio energy credits, the right to apply for (and entitlement to receive) incentives under any state tax credit program, grants from nongovernmental organizations, and the right to claim federal income tax credits under Sections 45 and/or 48 of the Internal Revenue Code.
- (w) **“Equipment”** means the property described in the Schedules and all replacements, substitutions, repairs, restorations, modifications, attachments, accessions, additions and improvements thereof or thereto. Whenever reference is made in this Contract to Equipment listed in a Schedule, that reference shall be deemed to include all replacements, repairs, restorations, modifications, and improvements of that Equipment.
- (x) **“Excessive Shortfall Penalty”** has the meaning set forth in Paragraph 5.3.3.
- (y) **“Excessive Savings”** has the meaning set forth in Paragraph 5.3.4.
- (z) **“Fiscal Year”** means the annual accounting year of the School District, which currently begins on July 1 of each year.
- (aa) **“Guaranteed Savings”** means the amount of energy, water or wastewater cost savings, operational cost savings or revenue increases resulting from the Selected ECMs. The Guaranteed Savings may be referenced in this Contract (and the Schedules and Exhibits thereto) on either an annual basis, meaning the Annual Guaranteed Savings for any single year of the Guarantee Period, or on a grand total basis, meaning the Total Guaranteed Savings achieved during the fifteen-year Guarantee Period.
- (bb) **“Guarantee Period”** has the meaning set forth in Paragraph 4.4.

- (cc) **“Implementation Period”** has the meaning set forth in Paragraph 4.2.
- (dd) **“Implementation Schedule”** has the meaning set forth in Paragraph 7.3.1.
- (ee) **“Investment Grade Audit” (“IGA”)** has the meaning set forth in Paragraph 2.1.
- (ff) **“Material Change”** has the meaning set forth in Paragraph 17.1.
- (gg) **“Notice of Nonappropriation”** has the meaning set forth in Paragraph 6.2.
- (hh) **“Notice to Proceed”** means a notice from the School District to the ESCO authorizing the ESCO to commence work on Selected ECMs under the Contract as set forth in Paragraph 4.2. (Dates and Contract Term).
- (ii) **“Parties”** means the School District and the ESCO, and a **“Party”** means either the School District or the ESCO.
- (jj) **“Person”** means any individual, sole proprietorship, association, company, firm, partnership, limited partnership, joint venture, corporation, limited liability company or other form of entity or association recognized at law.
- (kk) **“PJM”** means the regional transmission organization operated by PJM Interconnection, LLC or any successor organization thereto.
- (ll) **“Premises”** means the Russell Conwell Middle School, located at 1849 E. Clearfield Street, Philadelphia, Pennsylvania 19134, Samuel Gompers Elementary School, located at 5701 Wynnefield Avenue, Philadelphia, Pennsylvania 19131, and Abraham Lincoln High School, located at 3201 Ryan Avenue, Philadelphia, Pennsylvania 19136, as more fully described in the Background and Schedule B.
- (mm) **“Project Site”** means all portions of the Premises for which the School District has provided the ESCO rent-free access for the installation and operation of the Selected ECM as more fully described in Article 18 (Ownership and Access).
- (nn) **“Project Manager”** means the individual specification designated in writing by the School District as the School District’s Project Manger, and any other individual who may be designated in writing by the Project Manager as his or her representative.
- (oo) **“Requested Information”** has the meaning set forth in Paragraph 48.3.

- (pp) **“Schedule”** means any schedule to this Contract, substantially in the form of the schedules attached to this Contract, executed from time to time by the Parties hereto.
- (qq) **“Selected ECMs”** means the ECMs selected from the IGA by the School District for design, implementation and installation at the Premises by the ESCO pursuant to this Contract.
- (rr) **“Shortfall Payment”** has the meaning set forth in Paragraph 5.3.2.
- (ss) **“Stop Work Order”** has the meaning set forth in Paragraph 7.3.4.1.
- (tt) **“Subcontract”** means a contract made between the ESCO and a Subcontractor, or between a Subcontractor and a sub-subcontractor at any tier, providing for the compensation of one or more persons for the Work which the ESCO has agreed to perform under the Contract, including agreements for the manufacture or supply of Equipment, systems or components forming part of such Work.
- (uu) **“Subcontractor”** means a Person performing at any tier under the contract with the ESCO or another Subcontractor one or more portions of the Work which the ESCO has agreed to perform under the Contract. Subcontractors shall include, without limitation, vendors, manufacturers, suppliers, or other Persons contracting with a Subcontractor or the Contractor for the manufacturer or supply of Equipment, systems or components forming part of the Work under the Contract.
- (vv) **“Substantial Completion”** means the stage of the Project, or portion thereof, that the Work is sufficiently complete, in accordance with the Contract Documents, certified by the Architect/Engineer when construction is sufficiently complete in accordance with the Contract Documents, for the use for which it is intended, so that the School District may fully utilize and occupy the ECMs, or a portion thereof, for their intended purposes, with all of the Project’s parts and systems operable as required by the Contract Documents. Substantial Completion may be documented on a per ECM per building basis.
- (ww) **“Term”** has the meaning set forth in Paragraph 4.5.
- (xx) **“Total Guaranteed Savings”** means the total cumulative Guaranteed Savings during the twenty-year Guarantee Period, as set forth in Schedule C.
- (yy) **“True-Up Period”** has the meaning set forth in Paragraph 5.3.1.

- (zz) **“Verified Actual Savings”** means the actual energy, water, and operational cost savings achieved from the ECMs as measured and verified in accordance with Schedule F.
- (aaa) **“Work”** means all professional services, Equipment, software and construction services that are required for the design, implementation and installation of the Selected ECMs.

1.3 **Interpretation; number; gender.** The words “herein” “hereof” and “hereunder” and other words of similar import refer to the Contract as a whole, including all Contract Documents, and not to any particular article, paragraph, subparagraph of clause contained in the Contract Documents. Whenever the context requires, words used in the singular shall be construed to include the plural and vice versa, and pronouns of any gender shall be deemed to include the masculine, feminine and neutral genders.

ARTICLE 2. SCHEDULES, EXHIBITS AND APPENDICES

2.1 **Investment Grade Audit.** ESCO has prepared the complete Technical Energy Audit and Analysis of the Premises set forth in **Appendix D: Investment Grade Audit** and dated _____, 2018 (**“Investment Grade Audit”**), which has been approved and accepted by School District as set forth in **Exhibit II (i) (Certificate of Acceptance—Investment Grade Audit)**. The audit includes all of the Selected ECMs.

2.2 **Schedules.** ESCO has prepared, and the School District has approved and accepted, the Schedules as set forth below, copies of which are attached hereto (or will be as provided for in the contract), set forth in their entirety as Attachment I and made a part of this contract by reference.

Background

- Schedule A Selected ECMs to be Installed by ESCO
- Schedule B Description of Premises; Pre-Existing Equipment Inventory

Savings Guarantee and Payments

- Schedule C Energy Saving Guarantee
- Schedule D ESCO Compensation and Payment Schedule
- Schedule E Baseline Energy Consumption; Baseline Adjustments
- Schedule F Measurement and Verification
- Schedule G Analysis Final Project Costs and Final Project Cash Flow
- Schedule H [Intentionally Left Blank]
- Schedule I [Intentionally Left Blank]

Implementation Phase

- Schedule J Implementation Schedule
- Schedule K Start-Up and Commissioning Plan
- Schedule L Standards of Comfort

- Schedule M ESCO's Training Responsibilities
- Schedule N Waste and Hazardous Material Removal Responsibilities
- Schedule O School District Approved Subcontractor List
- Schedule P Manufacturers' Warranties

Post-Implementation Phase

- Schedule Q ESCO's ECM Service Responsibilities
- Schedule R School District's ECM Service Responsibilities
- Schedule S ECM Service Responsibilities Checklist
- Schedule T Annual Reporting Requirements

2.3 **Exhibits.** The Exhibits set forth below are attached hereto in their entirety as Attachment II and are incorporated and made a part of this Contract by reference.

- Exhibit I Performance Bond/Construction Bond
- Exhibit II (i) Certificate of Acceptance—Investment Grade Audit
- Exhibit II (ii) Certificate of Acceptance—Final Acceptance
- Exhibit II (iii) Certificate of Acceptance—Hazardous Material Removal
- Exhibit III General Contracting Requirements – Prevailing Wage Rate Schedule
- Exhibit IV Economic Opportunity Plan
- Exhibit V Financing Agreement and Payment Schedule [If Applicable]

2.4 **Appendices.** The Appendices set forth below are attached hereto in their entirety as Attachment III and are incorporated and made a part of this Contract by reference.

- Appendix A: RFP for ESCO Solicitation
- Appendix B: ESCO Proposal
- Appendix C: Professional Services Agreement
- Appendix D: Investment Grade Audit

ARTICLE 3. ENERGY USAGE RECORDS AND DATA

The School District has furnished or shall furnish (or cause its energy suppliers to furnish) to ESCO, upon its request, all of its records and complete data concerning energy usage and energy-related maintenance for the Premises described in **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)**, including the following data for the most current thirty-six (36) month period:

- (a) utility records;
- (b) occupancy information;
- (c) descriptions of any changes in the building structure or its heating, cooling, lighting or other systems or energy requirements;

- (d) descriptions of all energy consuming or saving equipment used in the Premises;
- (e) bills and records relating to maintenance of energy-related equipment, and a description of energy management procedures presently utilized.

If requested, the School District shall also provide any prior energy audits of the Premises, and copies of the School District's financial statements and records related to energy usage and operations for said thirty-six (36) month period at said Premises, and shall make agents and employees familiar with such records available for consultations and discussions with ESCO. Any information or documentation provided by the School District to the ESCO relating to the Premises is provided only for the convenience of the ESCO. The School District makes no representation or warranty as to the sufficiency, completeness, or accuracy of any information submitted to the ESCO.

II. SAVINGS GUARANTEE AND PAYMENTS

ARTICLE 4. DATES AND CONTRACT TERM

The following dates are terms in this Contract are to be defined as follows:

4.1 **Effective Date.** This Contract shall be effective and binding upon the Parties immediately upon the Effective Date.

4.2 **Implementation Period.** The period from the Effective Date until the Acceptance Date, as further defined herein, shall be known as the Implementation Period ("**Implementation Period**"). The Work performed during the Implementation Period shall commence on the date specified in a Notice to Proceed. Prior to issuing a Notice to Proceed, the School District shall secure funds in an amount necessary to cover the total project cost listed in **Schedule D (ESCO Compensation and Payment Schedule)**.

4.3 **Acceptance Date.** The "**Acceptance Date**" shall be defined as the first day of the month after the month in which ESCO has delivered a notice to the School District that it has installed, commenced operating, and completed training for all of the Selected ECMs specified in **Schedule A (Selected ECMs to be Installed by ESCO)** and in accordance with the provisions of **Article 7 (ECM Implementation)**, **Article 9 (Training by ESCO)** and **Schedule K (Start-Up and Commissioning Plan)**; and the School District has inspected and provide written notice of final acceptance of Work and all Selected ECMs, as evidenced by a signed Certificate of Final Acceptance as set forth in **Exhibit II (ii) (Certificate of Acceptance—Final Acceptance)**, such that both parties agree that the Guarantee Period, as defined in **Paragraph 4.4 (Guarantee Period)** below, has commenced and is now in effect.

4.4 **Guarantee Period.** The "**Guarantee Period**" is 20 years, beginning on the Acceptance Date, as defined above, unless, prior to the Acceptance Date, the School

District provides ESCO with written notice that it has opted to defer the beginning of the Guarantee Period to the first day of the School District's Fiscal Year after the Acceptance Date, in which event the Guarantee Period will be 20 years, beginning on the first day of the Fiscal Year after the Acceptance Date less the True-up Period. The exercise of the forgoing option to defer the beginning of the Guarantee Period shall be in the School District's sole discretion. Where the Guarantee Period is deferred to the first day of the Fiscal Year, an equitable adjustment to the Annual Guaranteed Savings and Total Guaranteed Savings shall be mutually agreed to between the Parties.

4.5 **Term.** The Term of this Contract shall commence on the Effective Date and, unless earlier terminated in accordance with this Contract, shall expire on the last day of the Guarantee Period, as defined above ("**Term**").

ARTICLE 5. PAYMENT

5.1 **Contract Sum.** The agreed to Contract Sum for the Work shall not exceed _____ Dollars (\$ _____) as set forth in **Schedule G (Final Project Cost and Project Cash Flow Analysis)**. ESCO agrees that the Contract Sum shall include the total amount of compensation due to ESCO under this Contract as set forth in **Schedule D (ESCO Compensation and Payment Schedule)**.

5.2 **Energy Savings Guarantee.** Pursuant to 62 Pa. Const. Stat. §3754(b) of the Pennsylvania Guaranteed Energy Savings Act, ESCO guarantees that the Total Guaranteed Savings will meet or exceed the cost of the Selected ECMs. Additionally, ESCO guarantees that the Annual Guaranteed Savings set forth on an annual basis in **Schedule C (Energy Savings Guarantee)** shall be achieved on an annual basis. The guarantees made in the Section 5.5 constitute the "Energy Savings Guarantee."

5.2.1 **Stipulated Savings.** ESCO agrees that all Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** can be accurately defined, measured, and verified using the savings calculation formula's provided in **Schedule F (Measurement and Verification)** and that all sources of stipulated savings values, if any, have been included and documented in **Schedule F (Measurement and Verification)**.

5.2.2 **Environmental Incentives.** The Parties agree that the School District shall own, and may assign in its sole discretion, all right, title, and interest associated with Environmental Incentives; and that Environmental Incentives will not be included within any calculation of savings, or otherwise, to reduce the ESCO's responsibility for achieving the Energy Savings Guarantee.

5.2.3 **Capacity Rights and Demand Response Programs.** ESCO and the School District agree that the School District shall own, and may assign in its sole discretion, all Capacity Rights associated with the ECMs, and that all payments available to the School District from its participating in regional transmission organization's demand

reduction programs will not be included within any calculation of savings, or otherwise, to reduce the ESCO's responsibility for achieving the Energy Savings Guarantee.

5.3 **Annual Review and Reimbursement/Reconciliation.** Cost savings shall be measured and/or calculated as specified in **Schedule F (Measurement and Verification)** and reported to the School District within ninety (90) days of the end of year for the previous year for each year of the Guarantee Period as set forth in **Schedule T (Annual Reporting Requirements)**.

5.3.1 **True-Up Period.** All annual cost savings during the Guarantee Period shall be calculated from an anniversary date of July 1st to coincide with the first day of School District's Fiscal Year. The period after the Acceptance Date and before the July 1st subsequent to ECM Implementation shall be known as the "**True-Up Period**". All guaranteed savings achieved during the True-Up Period shall be accounted for in **Schedule C (Energy Savings Guarantee)** and, if applicable, shall cover any corresponding annual payments required to be made by the School District during the True-Up Period.

5.3.2 **Shortfall Payments.** In the event that the Verified Actual Savings during any one year of the Guarantee Period are less than the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)**, ESCO shall pay the School District an amount equal to the deficiency ("**Shortfall Payment**"). The ESCO shall remit all Shortfall Payments to the School District within thirty (30) days of written notice by the School District of such monies due.

5.3.3 **Excessive Shortfall Penalty.** In the event that the Verified Actual Savings in any one (1) year of the Guaranteed Period are less than fifty percent (50%) of the guaranteed savings set forth in **Schedule C (Energy Savings Guarantee)**, then upon written request by the School District, which shall be given no earlier than the end of such year and no later than ninety (90) days thereafter, ESCO agrees to pay a non-reimbursable "**Excessive Shortfall Penalty**" equivalent to an additional 100% of the Shortfall Payment for that year.

5.3.4 **Excess Savings.** ESCO agrees that any amount of Verified Actual Savings during any one (1) year of the Guarantee Period that exceed the Annual Guaranteed Savings set forth in **Schedule C (Energy Savings Guarantee)** shall be available for use by the School District in subsequent years as "**Excess Savings**", and that in no event shall said Excess Savings be used to reimburse the ESCO for Shortfall Payments or penalties incurred by the ESCO in any preceding or subsequent years or be attributable to the Annual Guaranteed Savings of any preceding or subsequent years.

5.4 **Billing Information Procedure.** Payments due to ESCO under **Schedule D (ESCO Compensation and Payment Schedule)** shall be payable within forty-five (45) days from approval of ESCO's invoice.

5.5. Installment Payments.

5.5.1 Retainage. Act 57 of 1998, 62 Pa.C.S. §3921, shall govern the withholding of retainage on this Contract, except that applications for payment of retained amounts shall be approved by the Project Manager.

(a) The School District shall have the right, but not the obligation, to reduce and/or release retainage held on any individual line item delineated on the ESCO's approved Detailed Cost Breakdown upon the ESCO's satisfactory completion and the School District's formal acceptance of said item. The School District of Philadelphia is a "first class school district" under the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class (known as "PICA Act"), Act of June 5, 1991, P.L. 9, No. 6 (53 P.S. §12720.104), and therefore the following provisions of the Commonwealth Procurement Code, Part II. General Procurement Provisions, Chapter 39. Contracts for Public Works, (62 Pa.C.S.A. §§3938(b)(2)&(4)), do not apply to the School District of Philadelphia: (1) Subchapter C. Retainage, §3921. Retainage; (2) Subchapter C. Retainage, §3922. Payment of retainage to subcontractors; and (3) Subchapter E. Substantial/Final Payment, §3941. Substantial/final payment under contract. The School District shall retain ten percent (10%) of the amount of all Progress Payments until thirty (30) calendar days after the Work is finally completed and accepted. Notwithstanding the foregoing, at such time that the ESCO determines that he has completed fifty percent (50%) of his Work under the Contract, he shall notify the School District and his Surety in writing of this fact and upon the School District's verification of such completion, said retainage then held may be reduced by one-half (1/2), at the School District's sole discretion, provided the ESCO is making satisfactory progress and there exists no other specific cause or reason for withholding additional sums. In the event the School District decides to reduce the retainage then held by one-half (1/2), thereafter, the sum or sums withheld on each Progress Payment shall be five percent (5%) of the value of the completed Work as based upon the Certificate of Payment. Subsequent to the reduction in retainage, the School District may (at its sole discretion) reinstitute the full ten percent (10%) retainage if it is determined that the ESCO is behind schedule, or is not prosecuting the Work with his best possible efforts, or is not strictly adhering to directives issued by the School District or Architect/Engineer.

(b) The ESCO shall pay each Subcontractor (including suppliers, laborers, and materialmen) performing labor or furnishing material for the Work promptly, but in any event within fourteen (14) calendar days after receipt of payment from the School District out of the amount paid to the ESCO on account of the Work of such Subcontractor, supplier, laborer, or materialman, the amount to which said Subcontractor is entitled, reflecting the percentage actually retained, if any, from payments to the ESCO on account of such Work, in accordance with the ESCO and Subcontractor Payment Act, Act of February 17, 1994, P.L. 73, No. 7 (73 P.S. §501 *et seq.*). The ESCO shall, by an appropriate agreement with each Subcontractor, also require each Subcontractor to make payments to his Sub-subcontractors in similar manner.

5.6. **Measurement and Verification Fees.** School District shall pay measurement and verification fees (“**Measurement and Verification Fees**”) to ESCO for certain measurement and verification services rendered by ESCO pursuant to **Schedule F (Measurement and Verification)**. The Measurement and Verification Fees shall be paid in annual installments as set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, with the first installment payment due thirty (30) days after the commencement of the Guarantee Period and each subsequent annual payment due within thirty days of the date of each anniversary of the commencement of the Guarantee Period.

5.7. **Offset Provision.** Except as provided in herein, ESCO agrees that School District may set off the amount of any tax liability or other obligation of ESCO or its subsidiaries to the School District against any payments due ESCO under any contract with the School District.

5.8 **Allowances.** (If Applicable)

5.8.1. **Steam System Leak Repair.** The ESCO shall be responsible for the cost of the steam leak repairs in the existing boiler room at _____ as required to complete the Work up to a maximum value of _____ Dollars (\$_____) (the “Steam System Leak Repair Allowance”). At the completion of the Work, any and all unused Steam System Leak Repair Allowance funds will revert to the School District. The School District and ESCO may negotiate the methodology for such leak repair, but ESCO shall bear the cost, up to the value of the Steam System Leak Repair Allowance, and assumes full responsibility for scheduling and coordination. Each party’s specific responsibilities and the reconciliation procedures of the Steam System Leak Repair Allowance will be set forth in **Schedule D (ESCO Compensation and Payment Schedule)**.

5.8.2. **Cosmetic Masonry Repair.** The ESCO shall be responsible for the cost of the cosmetic masonry repairs in the installation of new windows at _____ as required to complete the Work up to a maximum value of _____ Dollars (\$_____) (the “Cosmetic Masonry Repair Allowance”). At the completion of the Work, any and all unused Cosmetic Masonry Repair Allowance funds will revert to the School District. The School District and ESCO may negotiate the methodology for such leak repair, but ESCO shall bear the cost, up to the value of the Cosmetic Masonry Repair Allowance, and assumes full responsibility for scheduling and coordination. Each party’s specific responsibilities and the reconciliation procedures of the Cosmetic Masonry Repair Allowance will be set forth in **Schedule D (ESCO Compensation and Payment Schedule)**.

ARTICLE 6. NONAPPROPRIATION OF FUNDS

6.1 In the event no School District funds or insufficient School District funds are appropriated and budgeted in any School District Fiscal Year for payments due under this Contract, then the School District will immediately notify ESCO or its assignee of such occurrence and this Contract shall terminate on the last day of School District's Fiscal Year for which appropriations were received without penalty or expense to School District of any kind whatsoever.

6.1.1 If, in the event that ESCO has a rightful claim to title of the Selected ECMs at the time of such termination, then the School District agrees to peaceably surrender possession of all the Selected ECMs in good operating condition, subject to normal wear and tear, to ESCO or its assignee on the date of such termination. ESCO or its assignee will have all legal and equitable rights and remedies to take possession of the Selected ECMs. Upon such termination, title to the Selected ECMs will revert to ESCO or its assignee.

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

6.3 **Non-Authorization of Funds.** The ESCO acknowledges that payments under the Contract may not exceed the amount that the School District's Auditing Services Office certifies as available for the Contract. During the term of the Contract, the School District reserves the right to fund the balance of the Compensation in varying amounts from time to time as funds become available, not to exceed in total the maximum amount stated in the Contract. The ESCO agrees that the School District shall not be obligated to fund the Contract except out of funds certified by the School District's Auditing Services Office as currently available, even if those funds are less than the maximum amount stated in the Contract. If at any time sufficient funds are not certified as available, the School District may, at its sole discretion, exercise its options described herein.

6.4 **Unavailability of Funds.**

6.4.1. In the event the School District, in its sole discretion, does not or cannot obtain or continue funding for the Contract from any source or sources at an

aggregate level sufficient to allow for payment for the Work required under the Contract, the School District may, in its sole discretion, exercise one of the following alternatives:

(a) Terminate the Contract effective upon a date specified in a Termination Notice pursuant to this Contract; or

(b) Continue the Contract by reducing, through written notice to the ESCO, the amount of the Contract and the scope of the Work, consistent with the nature, amount, and circumstances of loss of funding. Provided that, in the event the School District exercises this option, the reduction in the Contract Sum shall be limited to the direct costs the ESCO avoids from the avoided Work and the associated overhead and profit.

6.4.2. Any termination or reduction of the Contract pursuant to this paragraph shall not affect any obligations or liabilities of either party accruing prior to such termination or reduction. The School District shall not face any liability or penalty as a result of such termination or reduction of the Contract.

6.5 **Crossing Fiscal Years.** If the School District will pay any portion of the compensation set forth in the Contract in any School District fiscal year subsequent to the current fiscal year (the School District's fiscal year runs July 1 – June 30), the portion of the compensation that may accrue hereunder in a subsequent fiscal year remains subject to legally mandated budget authorization by the Board of Education of the School District, under Applicable Law. If for any reason funds for that portion of the compensation that may accrue hereunder in a subsequent fiscal year are not continued in any subsequent School District fiscal year, the Contract and the School District's liability under the Contract shall automatically terminate at the end of the fiscal year for which the Board of Education authorized funds.

III. IMPLEMENTATION PHASE

ARTICLE 7. ECM IMPLEMENTATION

7.1 **General.** ESCO shall provide overall coordination, management, and responsibility for purchasing or providing all labor, materials, Equipment, software, tools, construction equipment and machinery, transportation and other facilities and services necessary for design, installation and start-up of the Selected ECMs, and completion of the Work necessary to install and implement all of the Selected ECMs (collectively referred to as "**ECM Implementation**"), and shall assure that all Selected ECMs are installed in a good and workmanlike manner during the Implementation Period.

7.2 **Status and Authority of the Project Manager.** The School District's Project Manager shall be responsible for the general direction of ECM Implementation, including the interpretation the Contract Documents, the issuance of Change Orders, and the determination of final acceptance of the Work and Selected ECMs. The Project Manager shall give all orders and directions contemplated under the Contract. The

Project Manager shall in all cases determine the amount, quality, acceptability, and fitness of the several kinds of Work and materials which are to be paid for under the Contract, and shall have authority and sole discretion to reject all Work and materials which in his or her opinion do not conform to the requirements of the Contract. The Project Manager shall determine all other questions that may arise in relation to the execution of the Work and shall have the authority to issue a Stop Work Order whenever such action may be necessary to secure the safe and proper execution of the Contract. The provisions of this Paragraph 7.2 are not intended to supersede or limit ESCO's obligations under other provisions of this Contract or the Contract Documents.

7.2.1 Design and Engineering Documents. The ESCO assumes complete responsibility for the development of the Design and Engineering Documents that are necessary for the ECM Implementation. The ESCO covenants and agrees that all Design and Engineering Documents shall be accurate and free from any errors or omissions, shall be in compliance with and accurately reflect all Applicable Laws, and, where required by law, shall bear the stamp or seal of a professional architect or engineer licensed in the Commonwealth. All Design and Engineering Documents shall conform to standards specified by the Contract Documents, and provisions of the Uniform Construction Code to the extent they are applicable to the Work.

7.2.2 Design and Engineering Approval. The ESCO shall prepare and submit the Design and Engineering Documents for each of the Selected ECMs to the Project Manager for review prior to commencement of the Work. By preparing and submitting the Design and Engineering Documents, the ESCO represents that it has determined and verified materials, field measurements, and field construction criteria related thereto and has checked and coordinated the information contained within the Design and Engineering Documents for consistency with one another and the requirements of the Contract Documents. Following the review of the Design and Engineering Drawings and prior to the ESCO's commencement of Work on a Selected ECM, the School District or its designee will issue Notices to Proceed authorizing the ESCO to proceed with the installation of one or more of the Selected ECMs. The ESCO agrees that it shall not proceed with the implementation of any Selected ECM until the Project Manager has approved the Design and Engineering Documents by providing the ESCO with written approval of the Selected ECMs design. The Design and Engineering Documents, once approved by the Project Manager, and the Notice(s) to Proceed will become part of the Contract Documents. To the extent the School District rejects the Design and Engineering Documents or any portion thereof, and such rejection causes a change to the Contract Sum, the time of completion, the Annual Guaranteed Savings, the Total Guaranteed Savings or any component of this Contract, there shall be an equitable adjustment made. Where the Parties disagree as to the appropriate equitable adjustment, the equitable adjustment may be determined in accordance with any remedies available to the Parties under this Contract.

7.2.3 As-Built Documentation. After the completion of the Work, the ESCO shall deliver an electronic copy of all As-Built Documentation to the Project Manager prior to the Acceptance Date. As-built documentation will become the sole

property of the School District for its unrestricted use. The acceptance of As-Built Documentation shall not relieve the ESCO of responsibility for the proper fit of the Work, nor for its completion pursuant the Contract.

7.3 Construction and Installation. Subject to other provisions of this Contract, ESCO will act as a turn-key general contractor assuming total responsibility for all phases of construction and installation, including but no limited to: (a) selecting Subcontractors in concert with the School District; (b) awarding Subcontracts in accordance with **Exhibit IV (Economic Opportunity Plan)** as approved by the School District and set forth in **Schedule O (School District Approved Subcontractor List)** and notifying the School District in writing of any changes in first-tier subcontractors prior to their selection and subcontract awards; (c) preparing and submitting all Design and Engineering Documents for approval by the School District's Project Manager in accordance with **Paragraph 7.2.2 (Design and Engineering Approval)**; (d) obtaining all necessary permits, licenses and approvals and coordination during installation in accordance with the provisions of **Articles 10 (Coordination and Construction Requirements)** and **33 (Compliance with Applicable Laws)**; (e) purchasing of Equipment, software and materials for the Selected ECMs; (f) installation and start-up of the Equipment, software and materials for the Selected ECMs' (g) progress inspections during installation; (h) developing and presenting subcontractor punch lists after each inspection; (i) receiving and evaluating record drawings and operation and maintenance manuals from Subcontractors; (i) training of School District staff and service providers on proper operation and service of the newly installed Selected ECMs in accordance with the provisions of **Article 9 (Training by ESCO)**; and (k) final inspection and recommendation for approval by the School District.

7.3.1 Implementation Schedule. Construction and installation of all Selected ECMs shall proceed in accordance with the Implementation Schedule approved by School District and attached hereto as **Schedule J (Implementation Schedule)**.

7.3.2 Means and Methods. The ESCO's means and methods for the performance of the Work must be those best adapted for the safe, efficient, and expeditious prosecution of the Work, with a minimum of interference to adjoining work sites, to adjoining properties, and to public traffic and convenience. The ESCO shall prosecute the Work vigorously, without delay, and with such workforces and equipment as is necessary and required to comply with and meet the Implementation Schedule. The ESCO shall supervise and direct the Work, and ESCO shall be solely responsible for and have control over all construction means, methods, techniques, sequences and procedures and for coordinating all portions of its Work under this Contract. Before commencing the Work, the ESCO, when required by the Project Manager, shall submit for approval its proposed methods of prosecution of the Work, including the maintenance of both vehicular and pedestrian traffic; underpinning, bulkheading, shoring; sinking foundations; handling spoil; lighting; fencing; street surfaces; drainage; and all other branches of its work operation. Such approval is intended to safeguard the School District's interest, but such approval will not be deemed to relieve the ESCO of its obligation or responsibility for the safe and proper conduct of the Work. The ESCO shall

at all times ensure that its work site, and its Subcontractor's personnel, while performing any part of the Work under this Contract, are and remain free of the influence of alcohol or illegal drugs. The ESCO shall at all times enforce good discipline and order among its employees, and shall not employ any unfit Person or anyone not skilled in the task assigned. Any contact by the ESCO or its employees with adjacent property owners, passing motorists or pedestrians, and the general public shall at all times be professional, courteous, and respectful.

7.3.3 Change Orders/Amendments. The Project Manager may issue Change Orders if necessary to address an increase in the scope or cost of the Work arising from "**Concealed Conditions**" or other circumstances that were unforeseeable to the ESCO upon commencement of the Work. Changes to the Contract Sum and/or the Implementation Schedule will be allowed based upon a cost and schedule impact proposal submitted by the ESCO to the Project Manager and approved by the School District. The proposal shall detail the costs in substantially the same manner as is set forth in **Schedule D (ESCO Compensation and Payment Schedule)**, as well as any proposed changes to **Schedule J (Implementation Schedule)**. If such alterations or changes reduce the cost of the Work to the ESCO, the amount of such reduction shall be credited to the School District during the Implementation Period. Credit Change Orders will include the same mark-ups as chargeable Change Orders. The ESCO shall submit its cost proposal within twenty (20) days after the Project Manager gives notification to the ESCO that the change is permissible. Thereafter, a formal Change Order will be executed and signed by the School District reflecting all changes, including any changes to the Contract Sum and the Implementation Schedule.

7.3.3.1 A Change Order negotiated and agreed to by the ESCO and the School District and then executed as a Change Order by the School District and the ESCO shall be deemed to cover all of the ESCO's costs associated with the change or alteration to the Work, as reflected in the Change Order, including all costs and expenses incurred by the ESCO for time, material, labor, and extended or field office or home office overhead. No loss of profit on account of any changes or alterations to the Work or on account of Work not executed or performed by the ESCO will be allowed, except that the ESCO may be entitled to an extension of time on account of changes or alterations to the Work. Mark-ups for Equipment and Subcontractors in the cost proposal for any Change Order shall not exceed the percentages set forth by the ESCO in **Schedule D (ESCO Compensation and Payment Schedule)**.

7.3.3.2 The ESCO agrees and acknowledges that after a Change Order is negotiated and agreed to by the Parties and then executed by the School District, the Change Order shall operate as a full and complete waiver and release of any and all claims of the ESCO related to or arising out of such change or alteration, whether such change or alteration is considered individually or cumulatively, including, but not limited to, any claim by the ESCO for extended home office overhead, extended field office overhead, time-impact costs, schedule delay costs, acceleration costs, compression costs, loss of productivity costs, extra work, additional work, and interference costs, or any combination of such costs.

All Change Orders relating to price and/or time are subject to prior acceptance or approval by action item of the Board of Education for the School District of Philadelphia, or express ratification of Change Order work already performed by action item of the Board of Education for the School District of Philadelphia.

7.3.4 **Correction of the Work.** The Parties agree that the Project Manager shall have the right and authority to reject in writing, stating the reasons therefore, Work which does not conform with the Contract Documents. The ESCO shall promptly correct any Work rejected by the School District for failing to conform with the Contract Documents, whether observed before or after final acceptance by the School District and whether or not the Selected ECM is fabricated, installed, or completed, and shall make such corrections in accordance with **Article 8 (Warranties)**. These provisions apply to Work done by Subcontractors as well as to Work done by direct employees of the ESCO.

7.3.4.1 **Stop Work Order.** If the ESCO fails to correct the Work, or any portion thereof, that is not in accordance with the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, and the ESCO, after receipt of written notice from the School District, either (i) has not cured such failure within ten (10) days or (ii) if the nature of the failure is such that it is not capable of cure within ten (10) days, has not reached agreement with the School District for a plan to cure such failure or has not commenced and diligently and continuously pursued the cure of such failure in accordance with such plan within such ten (10) day period, then the School District, by written order signed by the School District or by an agent specifically so empowered by the School District in writing, may order the ESCO to stop the Work (“**Stop Work Order**”), or any portion thereof, until the cause for such order has been eliminated or the ESCO has provided the School District with a plan for corrective action acceptable to the School District in its reasonable judgment. The right of the School District to stop the Work shall not, however, give rise to a duty on the part of the School District to exercise this right for the benefit of the ESCO or any other person or entity.

7.3.4.2 Nothing contained in this **Article 7 (ECM Implementation)** shall be construed to establish a period of limitation with respect to other obligations which the ESCO might have under the Contract Documents. Establishment of such time period as described in **Paragraph 7.3.4.1 (Stop Work Order)** relates only to the specific obligation of the ESCO to correct Work that does not conform with the Contract Documents, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the ESCO’s liability with respect to the ESCO’s obligations other than specifically to correct the nonconforming Work.

7.4 **Start-Up and Commissioning Plan.** To the extent detailed in **Schedule K (Start-Up and Commissioning Plan)**, the ESCO shall test each Selected ECM, and all component Equipment, and all parts of each Selected ECM. All such tests must be

completed prior to final acceptance of the Selected ECMs by the School District. The ESCO shall provide notice to the School District of the scheduled test(s) and the School District and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Selected ECMs. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in the operation of the Selected ECMs that may be observed during system commissioning procedures described in **Schedule K (Start-Up and Commissioning Plan)**.

7.5 **Performance Bond, Labor and Materialmen's Bond and Maintenance Bond.** A Performance Bond, a Labor and Materialmen's Bond (7.5.1), and a Maintenance Bond (7.5.2) shall be required as indicated herein. The ESCO shall provide evidence of bonding in **Exhibit I (Performance Bond/Construction Bond)**, include evidence satisfactory to the School District that the party issuing the bonds has the authority to bind the issuing surety company. If the ESCO fails to furnish and maintain such bonds, the School District may purchase such bonds on behalf of the ESCO and the ESCO shall pay the cost thereof to the School District upon demand.

7.5.1 Within five (5) calendar days of the date of the Notice of Award, the ESCO shall furnish to the School District, together with the executed Contract Documents, an executed original and three (3) copies of bonds covering the faithful performance of the Contract, the payment in full of all persons providing labor or materials for the Work and inuring to the benefit of all such persons so as to give them a right of action to recover upon said bond, and providing for certain maintenance and repair of the Work. The bonds shall be in the amount of the Contract Sum. The amount of said bonds shall be increased whenever the Contract Sum is increased by a Change Order approved by the School District. The bonds shall be issued by a reputable surety acceptable to the School District and by the same Surety, under consent, who provided bid security, and legally authorized to do business as a Surety in the Commonwealth of Pennsylvania. A company which does not of itself have bonding capacity at least equal to the amount of the Contract upon which the proposed bond is to be issued shall not be acceptable. Bonds may be secured through the ESCO's usual sources. The cost of the bonds shall be included in the Contract Sum.

7.5.2 Within five (5) calendar days after the date of the Notice of Award, the ESCO shall furnish to the School District, together with the executed Contract Documents, an executed original and three (3) copies of a bond covering the faithful performance and payment in full of all warranty related services and to issue against defective or inferior materials or workmanship which may develop during the period of one (1) year or a longer period as stated elsewhere in the Contract Documents from the date of final completion and acceptance of the Work performed under this Contract. This bond shall be in the amount of ten percent (10%) of the Contract Sum. This bond shall be issued by a reputable surety acceptable to the School District, and by the same Surety, under consent, who provided bid security, and legally authorized to do business as a Surety in the Commonwealth of Pennsylvania.

7.5.3 The ESCO shall require the attorney-in-fact who executes the required bonds on behalf of the Surety to affix thereto a certified and current copy of his Power of Attorney.

7.5.4 The form of bonds shall be the same as issued with the RFP or Contract or Contract Documents, and any other form of bonds shall be rejected by the School District.

7.5.5 The Pennsylvania statutes of limitation, 42 Pa.C.S.A. §§5523, 5524, 5525 & 5527, and the Pennsylvania statute of repose, 42 Pa.C.S.A. §5536, do not apply to the School District of Philadelphia and its contracts for work or services for its school grounds and buildings and its school construction projects. Performance bonds, labor and materialmen's or payment bonds and maintenance bonds containing time restrictions on commencement of suit on the bonds shall be rejected by the School District.

7.5.6 If at any time the School District, for justifiable cause, shall be or become dissatisfied with any surety or sureties then upon the bonds, or said surety or sureties be declared insolvent and ordered liquidated by a court of competent legal jurisdiction, the ESCO shall, within five (5) calendar days after notice from the School District to do so or notice of said court order of insolvency and liquidation, substitute an acceptable bond (or bonds) in such form and sum and signed by such other surety or sureties as may be satisfactory to the School District. The premiums on such bond(s) shall be paid by the ESCO. No further payments shall be deemed due nor shall be made until the new surety or sureties shall have furnished such an acceptable bond(s) to the School District.

7.5.7 Any person, partnership, association or corporation furnishing materials or rendering services for this Project may institute an action to recover for the same against the principal of any Payment or Labor and Materialmen's Bond in connection with this Project, as though such person, partnership, association or corporation were named therein, under and subject to the provisions of the Act of Assembly, December 20, 1967, P.L. 869, No. 385, known as the "Public Works Contractors' Bond Law" (8 P.S. §191 *et seq.*) and the Act of Assembly, May 15, 1998, P.L. 358, No. 57, known as the "Commonwealth Procurement Code", 62 Pa.C.S.A. §903.

7.5.8 The School District is a "political subdivision" and an "agency of the legislature" of the Commonwealth of Pennsylvania. Pursuant to the Constitution of the Commonwealth of Pennsylvania, Pa. Cons. Art. 3, §14, the Public School Code, 24 P.S. §7-701, and the Pennsylvania Code, 25 Pa. Admin. Code §171.13, the School District of Philadelphia has mandatory duties and obligations to provide necessary grounds and suitable school buildings to accommodate children attending school in its school district, and to construct, furnish, equip, and maintain its school buildings and grounds in a proper, safe and healthful manner. Therefore, the School District of Philadelphia has the right to invoke the doctrine of "*nullum tempus occurrit regi*", and the Pennsylvania statutes of limitation, 42 Pa.C.S.A. §§5523, 5524, 5525 & 5527, and Pennsylvania statute of repose, 42 Pa.C.S.A. §5536, do not apply to the School District of Philadelphia and its contracts

for work or services for its school grounds and buildings and its school construction projects.

ARTICLE 8. WARRANTIES

8.1 **ESCO Warranty.** ESCO warrants that all Selected ECMs installed as part of this Contract are new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will functional properly for a period of one (1) year from the Acceptance Date (“**Warranty Period**”). Should any Selected ECM, or any component systems, Equipment or parts of any Selected ECM, be found to be defective within one (1) year from such date, ESCO agrees to repair such item or, if necessary, furnish and install, without charge, similar items to replace it; provided, however, that the original item is returned to ESCO and inspection by the manufacturer establishes the claim.

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

8.1.2 **ECM Failure.** If any Selected ECM, or any Equipment, parts, or systems of any Selected ECM, fails to fulfill the performance guarantees during the warranty period, ESCO shall have a reasonable opportunity to make such changes as it deems necessary to fulfill such guarantees. If a demonstration is required, ESCO shall be given the opportunity to test the Selected ECM, or its component Equipment, parts, or systems under requisite conditions.

8.1.3 **Misc. Costs.** All shipping, transportation, or other miscellaneous costs involved in the repair or replacement of the defective Selected ECMs shall be paid by ESCO.

8.2 **Manufacturers’ Warranties.** ESCO covenants and agrees that all Selected ECMs installed as part of this Contract are protected by appropriate written manufacturers’ warranties covering the performance of all Selected ECMs and all component Equipment, parts, and systems of all ECMS, as further detailed and described in **Schedule P (Manufacturers’ Warranties)** hereto.

8.2.1 **Delivery of Manufacturers’ Warranties.** Prior to final acceptance of the Work and Selected ECMs by the School District, the ESCO shall deliver two (2) original complete sets of all manufacturer’s warranty certificates, guarantees, parts lists, and operating or maintenance literature applicable to Equipment, systems, fittings, and furnishings included in the Work for each Selected ECM to the Project Manager for inspection and approval. All manufacturers’ warranties will be for applicable periods and contain terms not less favorable to the School District than those terms that are standard

for the applicable industries, and will either be issued in the first instance in the name and for the benefit of the School District, or be in a freely assignable form and be assigned to the School District without limitations. All warranties shall be transferable and extend to the School District. The manufacturers' warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessitated by malfunction.

8.2.2 The manufacturers' warranties are in addition to and not in lieu of the ESCO's Warranty provisions under **Paragraph 8.1 (ESCO Warranty)**, and the School District is entitled to look to the ESCO for remedy in all cases where the ESCO's warranty applies regardless of whether a manufacturers' warranty also applies.

8.2.3 **ECM Malfunction.** In the event of a malfunction or improper or defective function of a Selected ECM, or other defect in parts, workmanship and performance, the ESCO agrees to (a) pursue rights and remedies against manufacturer of the Selected ECM under the manufacturers' warranties; (b) notify the School District whenever defects in Selected ECM performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO; and (c) compensate the School District for related expenses, damages to real or personal property, or liabilities assumed resulting from Selected ECM malfunction to the extent caused by nonperformance or error by the ESCO or its subcontractors.

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

ARTICLE 9. TRAINING BY ESCO

The ESCO shall develop and conduct a training program, described in **Schedule M (ESCO's Training Responsibilities)** hereto, as necessary to provide School District maintenance staff and service providers with the ability to comply with the terms of this Contract by maintaining system efficiencies during the Guarantee Period. This training program shall adequately prepare the School District for the management of all ongoing services associated with the project, including: (a) managing the ongoing service of all Selected ECMs; (b) utilizing the ESCO's measurement and verification reports to maintain system efficiencies; (c) transitioning of School District staff or service providers; and (d) communicating any Material Changes to ESCO. The ESCO must complete the training program specified in Exhibit M prior to acceptance of the Selected ECMs by the School District; however, such acceptance shall not be unreasonably delayed by the School District. The ESCO shall provide ongoing training whenever needed with respect to updated or altered Selected ECMs, including training for upgraded software. Such training shall be provided at no additional charge to the School District. The ESCO shall also provide additional future training for School District staff or service providers to account for employee transition and renegotiations of service provider agreements during the Guarantee Period.

ARTICLE 10. COORDINATION AND CONSTRUCTION REQUIREMENTS

10.1 **Coordination During Installation.** The ESCO shall have the duty to cooperate and coordinate with any other contractors on other work which is being performed concurrently on or adjacent to the Project Site, including specifically the School District and its employees and agents, the Philadelphia Gas Works and the Philadelphia Water Department, or their contractors, or any other non-City utilities or authorities, and shall afford reasonable facilities and access to them. The Project Manager will decide any matters in dispute as to the performance of the Work, including access to the Project Site and priority of performance on either side of any division line between contiguous sections of the Project Site where the ESCO and another contractor each work.

10.2 **Maintenance of Traffic and Access to Buildings.** Traffic of all kinds shall be maintained continuously and access to buildings shall be provided for at all times, except where otherwise specifically permitted by this Contract, or where temporary interference is authorized by the Project Manager, in which case it shall be interrupted only for such time as is necessary to provide temporary substitutes for surfaces disturbed by the construction and to restore street and sidewalk surfaces after the completion of the Work. Suitable bridges or other means of access shall be built and maintained to permit owners and occupants to reach their premises. Where necessary, the ESCO shall maintain proper and easy means for passengers to enter or exit public transportation. Where partial occupation of the street is allowed, materials and equipment shall be so placed as to ensure a minimum of interference with traffic; no materials shall be placed on the sidewalk within one foot of the curb line, and a clear sidewalk passage not less than four (4) feet in width shall be maintained at all times. The Work shall be so conducted that annoyance to residents and interference with the normal use of the properties will be reduced to a minimum. The flow in gutters and inlets shall be maintained. When access to any adjacent property is temporarily cut off, owing to occupancy of the street by the ESCO or its Subcontractors, the ESCO shall render every assistance to the owner or occupant in handling materials of every description that must be delivered to or removed from such property, including recyclables, rubbish, and garbage, and such materials shall be taken to or from the nearest accessible point that, in the opinion of the Project Manager, is convenient for handling. No additional compensation will be allowed for the various items of expense above noted.

10.3 **Access to Fire Hydrants and Fire Alarm Boxes.** Fire hydrants shall be left at all times clear of obstructions and readily accessible to fire apparatus. No material or other obstructions shall be placed within ten (10) feet of a fire hydrant. Fire alarm boxes shall be supported and protected and maintained so as to be readily accessible and open to view. Excavation shall be decked or bridged, where necessary, to permit the safe passage of fire apparatus and to give access to fire hydrants and to adjacent buildings for the extinguishing of fires. Where necessary, branch pipes shall be extended from the nozzles of the fire hydrants to the mains. Fire hydrants and any branch pipes shall be protected from freezing, and the fire hydrants (particularly the high pressure type) shall, where necessary, be braced or tied to the connecting pipes to prevent movement under water pressure.

10.4 **Danger Signals.** The ESCO, at ESCO's own expense, shall erect and maintain all necessary barricades, and danger signs and signals. The ESCO shall keep all necessary lights burning on the barricades, danger signals and signals from sunset until sunrise, and shall provide security personnel as necessary for the safety of the public. The ESCO shall observe such rules relative to signals and safeguards as the police regulations, harbor regulations, and other Applicable Laws require.

10.5 **Contract Identification Signs.** The ESCO shall, unless specified otherwise in writing by the Project Manager, at ESCO's own expense, erect and maintain in a prominent position upon the Project Site at a location approved by the Project Manager, a suitable sign, plainly lettered with the name and address of the ESCO, the character of the Work and the name of the Department under which the Contract is being carried out. No advertising matter other than the signs above noted shall be displayed on the Work.

10.6 **Safety and Sanitary Provisions.** The ESCO shall provide means and appliances and shall enforce suitable rules for the safe prosecution of the Work and for the safety and health of the work force employed on it. The completed portions of the Work shall be kept clean and in a sanitary condition. The ESCO shall provide and maintain properly secluded sanitary conveniences, in accordance with existing regulations of the Department of Public Health, for the use of ESCO's work force, and the ESCO shall strictly enforce the exclusive use of them by its work force.

10.7 **Storage Space.** Except as provided otherwise in Paragraph 18.4 below, buildings, yards, or sidings that may be required for the delivery or storage of materials shall be provided by and at the cost of the ESCO. The ESCO and its Subcontractors may not use streets for storing materials unless otherwise specifically authorized in writing by a permit issued by the City's Department of Streets. Upon request of the Project Manager, the ESCO shall furnish a copy of any agreement for the use of a property or building for construction purposes, except where owned by the ESCO.

10.8 **Hours.** Work shall be carried on with due regard to the comfort of, and so as to minimize any disturbance to, building occupants and nearby residents, and the methods to carry out such Work shall be subject to the approval of the Project Manager, who may, if conditions so require, order that no work be done during specific hours or in specific localities. The work force of the ESCO and its Subcontractors shall refrain from loud noises, calls, whistles, and the operation of air compressors, rock drills, riveting machinery, and blasting between the hours of 7:00 p.m. and 7:00 a.m. unless specifically permitted by the Project Manager. During occupied hours, the ESCO and its Subcontractors shall limit construction operations to methods and procedures that do not adversely and unduly effect the environment of occupied spaces within the Premises, included, but not limited to creating noise, odors, air pollution, ambient discomfort, poor lighting, or power interruptions.

10.9 **Power and Light.** In developed portions of the City, and elsewhere when ordered by the Project Manager, the ESCO and its Subcontractors shall use either

electric, compressed air or internal combustion engine power. When compressed internal combustion engines are used, the exhaust shall be muffled. None but electric lights shall be used in or under buildings.

10.10 **Use of Water.** Permission for the use of City water shall be obtained directly from the Philadelphia Water Department. Water may be obtained through a hydrant attachment or as otherwise as specified by the Project Manager. In all cases, ESCO and its Subcontractors shall obtain and use such water in accordance with regulations of the Water Department. No charge will be made for the use of water actually used for the construction work.

10.11 **Prevention of Dust and Smoke.** The ESCO and its Subcontractors shall keep the surface of the sidewalks and streets affected by its work, including decking and temporary paving, in a clean, neat condition. The ESCO and its Subcontractors shall sprinkle with water or otherwise treat the surface sufficiently to keep down any dust generated during the progress of work. Piles of dirt or other material shall not be left on the surface. The aforementioned requirements are not intended to take the place of the usual duties of the Department of Streets but to supplement them. No fires of any kind or burning of debris on the site or adjacent to it will be permitted; the debris shall be disposed of off the Project Site.

10.12 **Prevention of Air Pollution.** The ESCO and its Subcontractors shall comply strictly with the provisions of the Air Pollution Code (Title 3 of The Philadelphia Code).

10.13 **Work in Freezing Weather.** Masonry of all kinds, pointing, grouting, plastering, and other work subject to the action of frost shall not be done when exposed to freezing weather, except under conditions where the Project Manager may specifically direct or permit such work, subject to the heating of materials, the protection of finished work and such other measures as may be deemed necessary. If operations are suspended on account of freezing weather, the entire work shall be properly protected until the resumption of work is permitted. If a suspension of the work on account of freezing weather or from any other cause is necessary, the site shall be cleaned up, left in good order, and continuously maintained by the ESCO and its Subcontractors during the period of such suspension.

10.14 **Clean-up of Project Site.** ESCO and its Subcontractors shall remove all rubbish or refuse and all unused materials and tools from the Project Site daily, if required by the Project Manager, and as the Work progresses the ESCO shall carefully clean and keep the Project Site clean from any rubbish and refuse. The ESCO shall furnish to the Project Manager upon request all documentation regarding the proper disposal of all rubbish, soil, refuse and other debris. ESCO acknowledges that the School District will not approve the completion of the Work under the Contract until the Project Site and any other place or places affected by the Work have been thoroughly cleared of all construction and other debris and dust, and left clean, free from debris, and in as good condition as existed before the Work was begun. The ESCO shall resod or plant anew

any grass plot or plots disturbed and replace any shrubbery destroyed. Structures shall be broom clean, free from stains, spots or other blemishes, and ready for use and all glass shall be washed. The clean-up work shall be governed by the record of existing conditions made and submitted to the Project Manager prior to the commencement of Work.

10.15 **Recycling.** The ESCO shall cooperate with any recycling program established for the Premises. Upon request by the Project Manager, the ESCO shall furnish information and documentation regarding the recycled content of the Equipment and materials used in the Selected ECMs and the amount of construction waste or other materials recycled by the ESCO during the Implementation Period.

10.16 **Safety of Persons and Property.** The ESCO and each Subcontractor shall be solely responsible for safety on the Project. The ESCO and each Subcontractor shall establish a Safety Program on the Project that, at a minimum, complies with all local, state and federal safety standards and any safety standards established by the School District for the Project, including the School District's health and safety program, guidelines, procedures, and requirements. The ESCO and all Subcontractors shall provide sufficient, safe, and proper facilities at all times for the installation of the Work, and shall make sure the same is available for inspection by the School District and its representatives.

10.17 **Safety Responsibility.** The ESCO's and Subcontractors' employees, suppliers, and agents shall, when about the jobsite, observe and comply with the strictest of the applicable laws and any regulations prescribed by School District or as set forth in the Contract Documents. The School District reserves the right to assign job specific safety requirements in the Project bid specifications. The assignment of safety responsibility on each Project site (unless otherwise specified by the School District of Philadelphia) shall be as follows:

(a) The ESCO shall assume responsibility for overall site safety coordination and shall perform its safety responsibility on the Project through a competent Superintendent who shall be acceptable to the School District. The Superintendent of the ESCO must have at least attended a 10-Hour OSHA Construction Outreach Program and have an up-to-date CPR and First Aid Certification. The Superintendent of the ESCO shall be on site daily. The ESCO shall supply an alternate Superintendent if this individual is on vacation, out sick, etc. The Superintendent of the ESCO shall be responsible for the implementation and enforcement of the safety requirements set forth in the Contract Documents, OSHA, and the School District's health and safety program, guidelines, procedures, and requirements by all employees on site. The Superintendent of the ESCO shall have the authority to stop work if an imminent danger situation occurs.

(b) Each Subcontractor shall perform its safety responsibility on the Project through a competent foreman or superintendent. The foreman or superintendent of the Subcontractor shall be responsible for the implementation and enforcement of the safety requirements set forth in the Contract Documents, OSHA, and the School District's

health and safety program, guidelines, procedures, and requirements by its employees on site. If at any one time the Subcontractor intends to or does have forty (40) or more employees on the jobsite for a period of twenty (20) consecutive work days or more ("high employment"), such Subcontractor's foreman or superintendent shall be present on the jobsite on a full-time basis to ensure the safety of its employees and operations during the period of such high employment.

The ESCO and each Subcontractor shall be responsible for the payment of all fines and/or claims for damages levied against them for safety or environmental deficiencies related to the conduct of their employees or Work. In accordance with the Contract Documents, the ESCO and all Subcontractors shall defend and indemnify the School District and School District's Representatives from and against any loss, damage or expense, including attorneys' fees, related to the failure of the ESCO or any Subcontractor to comply with the School District's health and safety program, guidelines, procedures, and requirements and Paragraph GC-10.5 of these General Conditions.

10.18 General Safety Requirements. The following safety provisions, to the extent they are stricter than applicable laws or any separate regulations prescribed by the School District, shall be complied with for all personnel on the jobsite and enforced by the ESCO:

(a) The School District requires 100% fall protection for all trades on all Projects. This requirement is mandatory for all work greater than or equal to six (6) feet above a lower working level or surface. This policy shall be strictly enforced. There shall be no second chances under this policy. Employees observed in violation of this policy shall be immediately removed from the Project and shall not be permitted to return to a School District Project, at the sole discretion of the School District. Employers shall receive Safety Violation Fines for violation of this policy.

(b) Appropriate eye protection is required when there is a potential for a foreign object to enter an employee's eye. Eye protection must meet ANSI standards. The ESCO shall have the option to require 100% eye protection at all times. This must be conveyed to all Subcontractors at the time of the Bid.

(c) 100% wearing of heavy duty work boots/shoes is required (no sneakers or sandals).

(d) 100% wearing of hard-hat.

(e) 100% wearing of shirt with at least a 4 inch sleeve and long pants (no shorts). No muscle shirts or cut off shirts are permitted.

(f) Operations that require a Ground Fault Circuit Interrupter (GFCI) or an Assured Equipment Grounding Program in accordance with the OSHA 1926 Construction Safety and Health Standards shall use GFCIs and not the Assured Equipment Grounding Program option.

- (g) No flammable liquids shall be stored within the building overnight.
- (h) Hot work permits shall be issued by the ESCO. Fire watch shall be 2 hour in duration in all active schools. Fire watch for new construction shall be per OSHA regulations.
- (i) Annual crane inspection certificate must be presented to the ESCO prior to any mobile crane being brought onto the site. All mobile cranes must have an anti-two block device. Only qualified operators (CCO or equivalent training/experience) are permitted to operate cranes on site. Operator qualifications must be submitted to the ESCO prior to the use of the crane on site. The ESCO shall forward the annual crane inspection certification and the operator qualification to the School District prior to crane usage on site.
- (j) The ESCO or Subcontractor shall submit a Crane Lift Plan to the School District for each phase of work on site if a crane is to be used.
- (k) All confined spaces on site shall be designated "Permit Required Confined Spaces". The ESCO is responsible for verifying that the Subcontractor has proper controls on all confined space entries.
- (l) All trenches and excavations must meet OSHA Regulations.
- (m) Each ESCO and Subcontractor must conduct weekly toolbox safety meetings. The toolbox meetings must be documented. The ESCO must forward documentation of toolbox talks to the School District.
- (n) Each ESCO and Subcontractor must inspect work areas daily. Safety deficiencies must be corrected immediately. The ESCO shall submit a weekly Project Self-Inspection Report to the School District.
- (o) Housekeeping shall be closely monitored. Work areas must be cleaned by the end of the workday and debris must be properly disposed of. The ESCO shall strictly monitor and enforce this requirement.
- (p) The ESCO shall conduct safety meetings at least every 2 weeks on the site. Attendance by each Subcontractor is required. The ESCO shall be responsible for maintaining and distributing meeting minutes.
- (q) The ESCO shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including barriers, fences, railings, and floor coverings. The ESCO shall post and maintain danger signs and other warnings against hazards, promulgate safety regulations and notify owners and users of adjacent utilities of any dangerous or hazardous conditions.

(r) The ESCO shall comply with the storm water discharge environmental regulations.

(s) Security on the jobsite shall be the responsibility of the ESCO.

The ESCO and Subcontractors shall make certain all vendors, suppliers, material dealers, haulers, and/or independent haulers or others who merely transport, pick-up, deliver or carry materials, personnel, parts, or equipment, or other items or persons working under them, conform and adhere to all School District health and safety program, guidelines, procedures, and requirements and Paragraph GC-10.5 of these General Conditions.

10.19 Safety Training. Each ESCO and Subcontractor have the responsibility to make sure their employees receive adequate safety training for the tasks to be performed prior to the employee of the ESCO or Subcontractor being permitted to perform any Project work on site. Each ESCO and Subcontractor shall review site specific safety requirements with their employees. The ESCO and Subcontractors shall determine the appropriate amount of time required to complete this training. Documentation as proof of this training shall be maintained. This documentation shall be available upon request.

10.20 Exposure Identification. The ESCO shall require each Subcontractor to attend a Pre-Construction Meeting during which safety will be discussed. Primary exposures and expectant controls shall be discussed during this meeting. If the ESCO or any Subcontractor is involved in extra hazardous work, as designated by the School District, the affected ESCO or Subcontractor shall be required to provide a written Job Safety Analysis (JSA) covering those extra hazardous operations before those operations begin. The JSA must identify the hazard, the appropriate work processes required, the approximate number of site personnel exposed, methods of safeguarding those employees, safety equipment to be used, methods of instruction employees in proper work processes and the method of monitoring these controls. "Extra hazardous work" includes, but is not limited to, steel erection, cast in place concrete work on elevated decks, work on steep slope roofs, etc. Imminent danger situations brought to the attention of the ESCO shall be corrected immediately by the ESCO in accordance with the School District's health and safety program, guidelines, procedures, and requirements and the Contract Documents. All work shall cease in the area where the imminent danger situation exists until the exposure is corrected. Other unsafe conditions on the jobsite including, without limitation, unsafe work, construction or permanent equipment, tools or actions by persons shall be brought to the School District's attention or the attention of the ESCO's Superintendent or the Subcontractor's foreman or superintendent as soon as reasonably possible. Within 24 hours after receiving written notice, the condition shall be corrected or removed from the jobsite. Lost time and lost productivity associated with this or any safety violation shall not entitle the ESCO or Subcontractor to an increase in the Contract Sum or a delay in the Project Schedule. The ESCO and Subcontractors must immediately notify the School District by telephone (followed by written confirmation within 24 hours) when they become aware of any product or material that is a part of or is to be used in performing the Work which fails to comply with any applicable law or applicable

safety rules or standards of any government agencies (including the Environmental Protection Agency), or which contains a defect which could present a substantial risk to the public health or of injury to the public or the environment.

10.21 **Drug and Alcohol Policy.** The ESCO and all Subcontractors are prohibited from use and possession of alcoholic beverages, drugs (other than prescription), carrying weapons or ammunition onto the jobsite. The ESCO agrees to comply, and ensure that all Subcontractors comply, with any postings or notices located at the jobsite regarding safety, security or weapons.

10.22 **Identification Badge.** All personnel who have access to the jobsite are required to wear the identification badge required by the School District on their outer garment. Personnel visiting the site must be escorted by an individual with an identification badge. The identification badge will be issued and monitored by the ESCO. The ESCO shall be responsible for photographing the employee and for laminating the identification badges. The background for the identification badges will be supplied by the ESCO and approved by the School District of Philadelphia.

10.23 **Visitors.** All visitors to the site must report to the ESCO and sign a "Visitor's Release". All visitors must be briefed by the ESCO as to the site specific hazards present and must be escorted at all times while on site.

10.24 **Safety Programs.** The ESCO shall submit his Safety Program to the School District fourteen (14) days prior to the Pre-Construction Meeting. The ESCO shall not begin work on site until the Safety Program has been approved. The ESCO shall require each Subcontractor to provide, and the ESCO shall be responsible for monitoring, the following items:

(1) Records, including the OSHA 300 Log, of Occupational Injuries and Illnesses that occur on the site; and

(2) A copy of their Safety Program. The Safety Program must meet or exceed the School District health and safety program, guidelines, procedures, and requirements. No Subcontractor is permitted to work on site without an approved Safety Program. The Subcontractor may work under the provisions in the ESCO's Safety Program. If the Subcontractor works under the ESCO's Safety Program, a letter stating this must be forwarded to the School District; and

(3) The foreman or superintendent of the Subcontractor shall be responsible for review and approval of the Subcontractor's Safety Program. The ESCO shall also review Safety Programs for critical Subcontractors. Feedback shall be given to the foreman or superintendent of the Subcontractor.

10.25 **Hazard Communication.** The ESCO shall exercise the utmost care in the use and handling of hazardous materials or equipment and only competent, trained and experienced employees of the ESCO or of any Subcontractor shall be permitted to handle

hazardous materials or equipment. The ESCO and Subcontractors shall have written Hazard Communication Programs. The ESCO shall maintain and have readily available the list and the MSDS for each of the materials on the premises covered under the OSHA Hazard Communication Standard. The Subcontractors shall not bring any materials on the premises covered under the OSHA Hazard Communication Standard until a list of the materials and the MSDS have been given to the ESCO. The ESCO shall ensure that all personnel that could have exposure to materials covered under the OSHA Hazard Communication Standard will be notified of the possible exposure. In the performance of the Work, the ESCO and all Subcontractors shall transport, store, use and/or dispose of all materials categorized by any applicable law or governmental authority as petroleum products or hazardous substances in strict compliance with all applicable laws relating thereto. The ESCO shall indemnify and hold harmless the Indemnified Parties, Architect/Engineer, and their respective consultants, agents, and employees, from and against all claims, damages, losses and expenses, including but not limited to, attorneys' fees, arising out of or resulting from the ESCO's failure to comply with this requirement whether or not caused by the actions or inactions of the parties indemnified. Except for the materials specifically identified in the scope of work in Schedule A, nothing contained in this Subparagraph 10.25 or in the Contract Documents shall obligate the ESCO to handle or remove petroleum products or hazardous materials presently located on the Project site. The foregoing obligations of the ESCO are in addition to the ESCO's obligations under the School District's health and safety program, guidelines, procedures, and requirements and the Contract Documents. The ESCO shall require each Subcontractor to provide records of the disposal hazardous wastes. Copies of hazardous waste manifests shall be forwarded to the School District.

10.26 Accident Reporting. All ESCOs and Subcontractors must report all known injuries, occupational-related illnesses, potential general liability incidents, or property damage immediately. Verbal notification shall be given immediately to the School District, ESCO or Subcontractor of any bodily injury to persons not employed on the jobsite, e.g., visitors, invitees, or trespassers, as well as damage to property of others arising out of operations on the jobsite. Verbal notification shall be given immediately to the School District, ESCO or Subcontractor of any pollution incident or any environmental hazard or incident that occurs on the jobsite. All known accidents and occurrences must be reported within 24 hours. At the School District's discretion, failure to report a claim within 24 hours of an occurrence shall result in a \$400 penalty. This penalty shall be issued through a Non-Negotiable Deduct Change Order or other means approved by the School District.

10.27 Accident Investigation. Accident Investigation reports are required for all employee injuries (no matter how minor), occupational-related illnesses, property damage, general liability, near miss incidents, pollution incidents, and environmental hazards or incidents. Accident Investigation Reports must be completed within 24 hours of the incident unless the ESCO or Subcontractor notifies the Superintendent of the ESCO or the foreman or superintendent of the Subcontractor that the circumstances surrounding the incident will require additional investigation. Failure to complete an Accident Investigation Report within 24 hours of an occurrence shall result in a \$250

penalty. This penalty shall be issued through a Non-Negotiable Deduct Change Order or other means approved by the School District.

10.28 **Return to Work.** All ESCOs shall promptly return injured workers to full or light duty work (as their physical condition permits) as soon as they are advised of the employee's ability to return to work. Upon such notification, the ESCO or Subcontractor shall immediately return such injured worker to work, whether or not a job is immediately available, and whether such work is on the Project. Failure to do so shall result in a penalty assessment to the ESCO of \$1,500 weekly until such time as the injured worker is returned to work. This penalty shall be issued through a Non-Negotiable Deduct Change Order or other means approved by the School District.

10.29 **Safety Violations.** Penalties for non-compliance with the School District's health and safety program, guidelines, procedures, and requirements, other safety regulations and requirements set forth in the Contract Documents, and OSHA Regulations are as follows:

(a) The School District may withhold progress payments until such non-compliance has been corrected; and

(b) The School District has the right to correct the safety infraction and charge back to the ESCO the cost of such correction; and

(c) The School District has the right to dismiss the ESCO or Subcontractor from the jobsite, any employee of the ESCO, or any Subcontractor for continued non-compliance or a serious safety infraction.

The ESCO shall take all necessary precautions to protect the safety and health of its employees, Subcontractors' employees and others on the jobsite, including compliance with all applicable federal, state, county and municipal safety and health laws, regulations, and building codes, and shall adhere to and enforce the safety regulations set forth in the Contract Documents, and the School District's health and safety program, guidelines, procedures, and requirements. In order to reduce ESCO and Subcontractor safety violations, the School District has instituted penalties for safety violations. Safety Violation fines may be issued to the ESCO or Subcontractors by the School District. Safety Violation Fines shall be issued through a Non-Negotiable Deduct Change Order or other method approved by the School District with written notification sent to the ESCO or Subcontractors. Safety Violation Fines affect both the employee(s) observed violating safety policies and his/her employer, who is responsible for the safety of their employees. For ANY safety violation the following penalties shall apply:

Employee

1st offense – Employee will be issued a written warning.

2nd offense for the same violation - The worker will be directed to leave the project for the remainder of the day or period determined by the School District.

3rd offense for the same violation – The worker will be directed to leave the project and will not be permitted to return to any School District project, at the sole discretion of the School District.

Employer

1st offense – The ESCO or Subcontractor will be issued a written warning.

2nd offense for the same type of violation – The ESCO or Subcontractor shall be fined according to the fine schedule and may be subject to a fine of up to \$1,000 per repeat violation (see following schedule for specific fines).

3rd offense for the same type of violation – In addition to the fines issued, the School District will arrange a separate agency safety awareness training at the ESCO’s or Subcontractor’s expense. The training shall be given for a period of 2 hours. All of the ESCO’s or Subcontractor’s personnel working on the project shall attend the training.

Note: ESCO or Subcontractor employees may be permanently removed from the site on the 1st offense for serious safety violations (e.g., violation of the 6 foot fall protection policy, use of alcohol or drugs on site, fighting, etc.).

The School District requires a detailed safety orientation prior to the ESCO’s or Subcontractor’s employees performing work on site. Site specific safety requirements must be reviewed in detail. In addition to this orientation, the School District expects all ESCOs to train employees per Project safety requirements and federal, state, and local requirements. The School District considers the safety orientation to be the Employees “written” warning, and therefore, individuals shall be cited without warning. There shall be no second chances.

Safety Violation Fines		
ESCO/Subcontractor:		Project Name:
	No Hard-hats or Safety Glasses (if necessary) per employee.	\$100/violation
	Smoking or eating in non-designated area per employee.	\$100/violation
	Removal of guardrail without adequate replacement.	\$1,000/violation

Safety Violation Fines		
	Working with fall hazard 6' or greater with no fall Protection or guardrail.	\$1,000/violation
	Failure to provide adequate protection during excavation and trenching work.	\$1,000/violation
	Removal of opening protection without adequate replacement.	\$1,000/violation
	Failure to use Lockout/Tagout Program.	\$1,000/violation
	Unsecured compressed gas cylinder.	\$500/violation
	Openings in electric panels.	\$1,000/violation
	Failure to properly protect reinforcing or form stakes that present an impalement hazard.	\$500/violation
	All others:	\$100/violation

Note: Safety Violation Fines are issued per violation. If a ESCO or Subcontractor has more than one (1) employee in violation of a known safety requirement (example: 2 employees working in an improperly sloped trench, etc.), the ESCO or Subcontractor is subject to a \$1,000 fine per violation. The School District considers this 2 violations since 2 employees were exposed.

ARTICLE 11. [Intentionally Left Blank]

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ARTICLE 13. [Intentionally Left Blank]

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IV. POST-IMPLEMENTATION PHASE

ARTICLE 14. ECM SERVICE RESPONSIBILITIES

14.1 **General.** The Parties acknowledge and agree that the Annual Guaranteed Savings and Total Guaranteed Savings set forth on **Schedule C (Energy Saving Guarantee)** cannot be realized and maintained unless certain ongoing procedures and methods of operation designed for energy conservation (collective known as “**ECM Service Responsibilities**”) are implemented and followed by the Parties on a regular and continuous basis. The Parties further acknowledge and agree that School District is relying upon the ESCO’s skill, knowledge, professional training, and experience to develop a program for Selected ECM service that it can utilize to realize said Annual Guaranteed Savings and Total Guaranteed Savings during the Guarantee Period.

14.2 **ESCO Responsibilities.** ESCO is responsible for all service, repairs, and adjustments to the Selected ECMs installed under terms of this Contract to the extent required in **Article 8 (Warranties)** and **Schedule Q (ESCO’s ECM Service Responsibilities)**, and for the training of all School District maintenance staff and service providers pursuant to **Schedule M (ESCO’s Training Responsibilities)**.

14.3 **School District Responsibilities.** School District is responsible for all ECM Service Responsibilities set forth by ESCO on **Schedule R (School District’s ECM Service Responsibilities)** of this Contract.

14.4 **ESCO Inspections.** School District agrees that ESCO shall have the right, upon written request, to inspect the Premises to determine if School District is complying, and shall have complied with its ECM Service Responsibilities as set forth in **Schedule R (School District’s ECM Service Responsibilities)**. For the purpose of determining School District's said compliance, the ESCO agrees to utilize the checklist set forth at **Schedule S (ECM Service Responsibilities Checklist)** during its inspections to measure and record the School District's said compliance. School District shall make the Premises available to ESCO for and during each inspection, and shall have the right to witness each inspection and the recordations on the checklist. The ESCO further agrees to provide the School District with copies of all inspection documentation, including a copy of the completed checklist and any related reports or studies, within seven (7) days of the completion of each inspection.

ARTICLE 15. UPGRADING OR ALTERING THE ECMS

15.1 **General.** ESCO shall at all times have the right, subject to the School District's prior written approval, which approval shall not be unreasonably withheld, to change any Selected ECMs, or any component equipment, parts, software, or systems of any Selected ECMs, to revise any procedures for the operation of the Selected ECMs, or to implement any alternative ECMs on the Premises, provided that: (a) the ESCO complies with the standards of comfort and services set forth in **Article 16 (Standards of Comfort)** herein; (b) such modifications or additions to, or replacement of the Selected

ECMs, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings at the Premises; and (c) any cost incurred relative to such modifications, additions or replacement of the Selected ECMs, or operational changes or new procedures shall be the responsibility of the ESCO.

15.2 All modifications, additions or replacements of the Selected ECMs or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the School District by ESCO for approval, which shall not be unreasonably withheld, provided that any replacement of the Selected ECMs shall be new and have equal or better potential to reduce energy consumption at the Premises than the Selected ECMs being replaced. The ESCO shall update any and all software to be used in connection with the Selected ECMs. All replacements of and alterations or additions to the Selected ECMs shall become part of the Selected ECMs described in **Schedule A (Selected ECMs to be Installed by ESCO)** and shall be covered by the provisions and terms of **Article 7 (ECM Implementation)**.

ARTICLE 16. STANDARDS OF COMFORT

Before the Guarantee Period, ESCO will maintain and operate the Selected ECMs in a manner that will provide the standards of heating, cooling, hot water, and lighting as described in **Schedule L (Standards of Comfort)**. During the Guarantee Period, ESCO and the School District will maintain, according to **Schedule Q (ESCO's ECM Service Responsibilities)** and **Schedule R (School District's ECM Service Responsibilities)**, and operate the Selected ECMs in a manner that will provide the standards of comfort and levels of operation as described in **Schedule L (Standards of Comfort)**.

ARTICLE 17. MATERIAL CHANGES

17.1 **Material Change Defined.** A Material Change means any change in or to the Premises, whether structural, operational or otherwise in nature which reasonably could be expected to increase or decrease energy consumption in accordance with the provisions and procedures set forth in **Schedule E (Baseline Energy Consumption; Baseline Adjustments)** and **Schedule F (Measurement and Verification)** by at least ten percent (10%) in any single quarter of the Guarantee Period from that same quarter of the baseline year, after adjustments for climatic variations ("**Material Change**"). Actions by the School District that may result in a Material Change include but are not limited to the following:

- (a) Manner of use of the Premises by the School District; or
- (b) Hours of operation for the Premises or for any Selected ECM or energy using systems operating at the Premises; or
- (c) Permanent changes in the comfort and service parameters set forth in **Article 16 (Standards of Comfort)**; or

- (d) Occupancy of the Premises; or
- (e) Structure of the Premises; or
- (f) Types and quantities of ECMs used at the Premises or
- (g) Modification, renovation or construction at the Premises; or
- (h) The School District's failure to perform its ECM Service Responsibilities in accordance with **Schedule R (School District's ECM Service Responsibilities)**; or
- (i) Any other conditions other than climate affecting energy use at the Premises.

17.2 **Reported Material Changes; Notice by School District.** The School District shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Premises or in the operations of the Premises at least ten (10) 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 ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the School District within seventy-two (72) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the School District to have occurred.

17.3 **Reported and Responding to Material Changes; Responsibilities of ESCO.** In the event that School District delivers written notice to the ESCO of a pending Material Change in accordance with **Paragraph 17.2 (Reported Material Changes; Notice by School District)** that will impact an ECM being measured and verified using IPMVP Option C, then the ESCO agrees to acknowledge receipt of the notice and will endeavor to provide technical guidance at least ten (10) days thereafter. Any analysis under this section shall be limited to 40 hours per year.

17.4 **Unreported Material Change.** In the absence of any Material Changes in the Premises or in their operations, the energy consumption should not change more than ten percent (10%) during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions. Therefore, if thermal energy consumption for any month deviates by more than ten percent (10%) from the energy consumption for the same month of the preceding contract year, after adjustments for changes to climactic conditions or Material Changes, then such deviation shall be reviewed by the ESCO within thirty (30) days of actual or constructive notice to ascertain the cause of deviation. Within a further thirty (30) days, and no more than sixty (60) days from notice of the deviation, the ESCO shall report its findings to the School District so that the ESCO and School District can determine what remedial actions are necessary to correct the

deviation, and what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Schedule F (Measurement and Verification)**.

V. ADMINISTRATION

ARTICLE 18. OWNERSHIP AND ACCESS

18.1 **Ownership of Certain Proprietary Property Rights.** The School District 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 Selected ECMs. The ESCO shall grant to the School District a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the School District to continue to operate, maintain, and repair the Selected ECMs in a manner that will yield maximal energy consumption reductions.

18.2 **Ownership of Existing Equipment.** Ownership of the equipment and materials presently existing at the Premises at the time of execution of this Contract shall remain the property of the School District even if it is replaced or its operation made unnecessary by Work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the School District in writing of all equipment and materials to be replaced at the Premises and the School District shall within ten (10) days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that the School District shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site.

18.3 **Ownership of New ECMs.** Upon installation of the Selected ECMs by ESCO, and upon final acceptance by the School District as set forth in **Paragraph 4.3 (Acceptance Date)**, and upon payment to ESCO for same and release of retainage set forth in Article 5, the School District shall own the Selected ECMs.

18.4 **Access to the Premises.** Prior to commencement of the Work, the ESCO shall provide the Project Manager with a written description of the portions of the Premises for which it seeks access from the School District for the installation and operation of the Selected ECMs. The Project Manager may approve or disapprove ESCO's access request, or suggest that the ESCO modify and resubmit a revised version for approval or disapproval. Upon approval of the ESCO's access request by the Project Manager, the School District shall provide sufficient rent-free space on the Premises for the installation and operation of the Selected ECMs and shall take reasonable steps to protect such Selected ECMs from harm, theft and misuse, as specified in the logistics plan. The ESCO shall confine its operations to the portions of the Premises approved by the School District, and shall not unreasonably encumber the portions of the Premises used for Work with materials, equipment, or similar items. The ESCO and all Subcontractors shall only use such entrances to the Premises as are designated by the School District. The School District shall not unreasonably restrict the ESCO's access to Premises for Work in progress or emergency repairs or corrections as it may determine are needed.

ARTICLE 19. INSURANCE

19.1 **The ESCO's Insurance.** Unless otherwise approved by the School District's Office of Risk Management in writing, prior to commencing Work under the Contract, the ESCO shall, at its sole cost and expense, procure and maintain in full force and effect, covering the performance of the Work required under the Contract, the types and minimum limits of insurance specified below. All insurance shall be procured from reputable insurers who are financially responsible and authorized to do business on an admitted basis in the Commonwealth of Pennsylvania or otherwise acceptable to the School District Office of Risk Management. All insurance must be afforded by an insurance carrier with at least an A- (Excellent) rating from a reputable agency (e.g., A.M. Best). All insurance required herein, except the Professional Liability Insurance, shall be written on an "occurrence" basis and not a "claims-made" basis. **IN NO EVENT SHALL SERVICES BE PERFORMED UNTIL THE REQUIRED EVIDENCE OF INSURANCE HAS BEEN FURNISHED.** The insurance shall provide for at least thirty (30) calendar days' prior written notice to be given to the School District in the event coverage is cancelled or non-renewed. The ESCO shall advise the School District immediately upon receiving any notice of cancellation or nonrenewal of the required insurance. The School District of Philadelphia, its commission members, board directors, officers, employees and agents, shall be named as Additional Insureds on the General Liability Insurance and the Automobile Liability Insurance policies and the policies shall be so endorsed. An endorsement is required stating that the coverage afforded the School District and its commission members, board directors, officers, employees and agents, as Additional Insureds, will be primary to any other coverage available to them. The ESCO shall require its Subcontractors under this Contract to maintain the required levels of insurance.

INSURANCE COVERAGE REQUIREMENTS

Prior to commencement of any work under the Contract and until completion and final payment is made for the work, the ESCO shall, at its sole expense, maintain the following insurance on its own behalf and furnish to the School District Certificates of Insurance evidencing same. The School District reserves the right to request, and the ESCO agrees to provide requested insurance endorsements within ten (10) days of a written request for same.

19.1.1 **Workers' Compensation and Employer's Liability:** in the State in which the work is to be performed and elsewhere as may be required and shall include, where applicable, U.S. Longshoremen's and Harbor Workers' Coverage.

(a) Workers' Compensation Coverage: Statutory Requirements.

(b) Employers Liability Limits not less than:

Bodily Injury by Accident:	\$ 500,000 Each Accident.
Bodily Injury by Disease:	\$ 500,000 Each Employee.

Bodily Injury by Disease: \$ 500,000 Policy Limit.

(c) Including Waiver of Right to Recover from Others Endorsement (WC 000313) where permitted by state law.

19.1.2 **Commercial General Liability:** (including Premises - Operations, Independent Contractors, Products/Completed Operations, Broad Form Property Damage, Contractual Liability (including Liability for Employee Injury assumed under a Contract as provided in the standard ISO policy form), and Explosion, Collapse and Underground Coverages).

(a) Occurrence Form with the following limits:

- (1) General Aggregate: \$2,000,000.
- (2) Products/Completed Operations Aggregate: \$2,000,000.
- (3) Each Occurrence: \$1,000,000.
- (4) Personal and Advertising Injury: \$1,000,000.
- (5) Fire Damage (any one fire): \$ 50,000.
- (6) Medical Expense (any one person): \$ 10,000.

(7) Coverage to also include: Premises Operations; Blanket Contractual Liability; Personal Injury Liability; Products and Completed Operations; Independent Contractors, Employees and Volunteers as Additional Insureds; Cross Liability; and Broad Form Property Damage (including Completed Operations).

(b) Products/Completed Operations Coverage must be maintained for a period of at least three (3) years after final payment (including coverage for the Additional Insureds as set forth in these Insurance Requirements).

(c) The General Aggregate Limit must apply on a Per Project basis.

(d) Coverage for Mold/Fungus (no Mold/Fungus exclusion) or, in the alternative, coverage for Mold/Fungus can be provided by a ESCO's Pollution Liability Policy.

(e) No Exterior Insulated Finishing System ("EIFS") or similar exterior wall system exclusion.

19.1.3 **Automobile Liability:**

(a) Coverage to include:

(1) All Owned, Hired and Non-Owned Vehicles (or "Any Auto").

(2) Contractual Liability Coverage (including Liability for Employee Injury assumed under a Contract as provided in the standard ISO policy form).

(3) Per Accident Combined Single Limit \$1,000,000 (including death) and property damage liability.

(4) For those contractors involved in the transportation of hazardous material, the policy shall include the following endorsements: MCS-90 and ISO-9948.

19.1.4 **Commercial Umbrella Liability:**

(a) Occurrence Limit: \$3,000,000.

(b) Aggregate Limit (where applicable): \$3,000,000.

(c) Policy to apply excess of the Commercial General Liability (following form Per Project General Aggregate Limit including full coverage for mold/fungus, EIFS, Commercial Automobile Liability and Employers Liability Coverage.

(d) An Additional Insured endorsement as indicated elsewhere in this Paragraph.

(e) Coverage: Limits in excess of underlying limits in underlying primary insurance policies and broader coverage than combined scope of underlying primary insurance policies.

19.1.5 **Builder's Risk Insurance:**

(a) The ESCO shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, builder's risk insurance. Such insurance shall be written on a completed value form and in the amount of the initial Contract Sum as well as subsequent modifications (including but not limited to architects' fees and materials and equipment supplied by the School District) thereto for the entire Work at the site on an agreed amount basis. Such builder's risk insurance shall be maintained, unless otherwise provided in the Contract Documents or otherwise agreed in writing by all persons and entities who are beneficiaries of such insurance, until final payment has been made or until no person or entity other than the School District has an insurable interest in the property to be covered, whichever is earlier. This insurance shall include interests of the School District, the ESCO, Subcontractors and Sub-subcontractors in the Work.

(b) Builder's Risk Insurance shall be on an "all-risk" policy form and shall insure against the perils of fire and extended coverage (including earthquake and flood) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, false work, temporary buildings and debris removal including demolition as may be made legally necessary by the operation of any law, ordinance, or regulation.

(c) Soft Costs: The Builder's Risk Insurance shall provide compensation for expenditures that are necessarily incurred due to a delay in the completion of the Project caused by or resulting from an insured loss.

(d) Extra Expense: The Builder's Risk Insurance shall provide compensation for expenditures over and above normal expenses incurred due to physical loss or damage.

(e) Unless otherwise provided in the Contract Documents, this Builder's Risk Insurance shall cover portions of the Work stored off the site after written approval of the School District at the value established in the approval, and also portions of the Work in transit.

(f) Reserved.

(g) Any deductible applicable to the insurance purchased shall be the responsibility for paying the part of any loss not covered because of the operation of such deductible shall be borne by the ESCO. The ESCO is responsible for any uninsured or underinsured losses as well as, if applicable, reimbursement to the School District of payments of the deductible for any losses caused by the negligence or faulty workmanship of the ESCO and its Subcontractors and Sub-subcontractors.

(h) Reserved.

(i) The Builder's Risk Insurance shall include an endorsement to allow for automatic permission to occupy the Project premises.

(j) If the School District is damaged by the failure of the ESCO to maintain insurance as required, then the ESCO shall bear all reasonable costs properly attributable to that failure.

(k) In the event of a claim or an incident that may result in a claim under the Builder's Risk Insurance policy, the ESCO shall provide the School District with details of such claim within ten (10) days of the incident and allow the School District and/or its representatives to inspect the Project site and/or partake in the investigation.

(l) The following supplemental coverages (sublimits) are required for the Builder's Risk Insurance:

- | | | |
|-----|---|--------------|
| (1) | Flood and Earthquake (Earth Movement) limits for \$5,000,000. | |
| (2) | Ordinance or Law Coverages | \$1,000,000. |
| (3) | Soft Costs | \$1,000,000. |

19.1.6 **Rigger's Liability Insurance (to be carried by any subcontractor performing rigging):**

- | | | |
|-----|---------------------------------------|--------------|
| (a) | "All Risk" Replacement Cost Coverage. | |
| (b) | Occurrence Limit: | \$1,000,000. |
| (c) | No overload exclusion. | |

19.1.7 **Pollution Liability Insurance:**

- (a) Each Claim/Aggregate: \$1,000,000.
- (b) Deductible/Self Insured Retention Not to exceed \$50,000.
- (c) Occurrence Form – Gradual and Sudden/Accidental Pollution.
- (d) Insurance to be maintained for the duration of the work and for a period of five (5) years thereafter.
- (e) Pay on behalf of in lieu of indemnity.
- (f) Covered operations – all those performed by or on behalf of the Named Insured.
- (g) All disposal facilities must be licensed and maintain pollution liability insurance of not less than \$5,000,000.

19.1.8 **Professional Liability Insurance:**

- (a) Per Claim Limit: \$2,000,000.
Aggregate Limit: \$2,000,000.
Deductible/Self Insured Retention Not to exceed \$50,000.
- (b) Coverage shall be maintained continuously starting on the date of the Contract award and for a period of three (3) years after Contract completion.
- (c) Reserved.
- (d) Professional Liability Insurance may be written on a claims-made basis provided that coverage for occurrences arising out of the performance of the Services or Work required under this Contract shall be maintained in full force and effect for a retroactive date prior to work and an extending reporting period of thirty-six (36) months.
- (e) Policy retroactive date must be on or before the date that Work begins.
- (f) Any deductibles associated therewith shall be the sole responsibility of the ESCO.

19.1.9 **Environmental Liability Insurance.** If the scope of work includes environmental remediation for asbestos, avian droppings, lead paint, mold, polychlorinated biphenyls (PCB's) underground storage tank removal or soil remediation, the ESCO shall also provide the following insurance:

ENVIRONMENTAL LIABILITY INSURANCE

- (a) Limit of Liability: \$1,000,000 with a deductible not to exceed \$50,000.
- (b) Coverage: Pollution Liability.
- (1) Remediation 5 Years Completed Operations.

- (2) Pay on behalf of in lieu of indemnity.
- (3) Occurrence form – Gradual and Sudden/Accidental Pollution.
- (4) Covered operations – all those performed by or on behalf of the Named Insured.

This coverage may be provided either under policies issued to the ESCO or to the Remediation Subcontractor, in which case the ESCO shall be an Additional Named Insured. In both cases, the School District shall also be an Additional Named Insured.

19.1.10 **Self Insured Retentions:**

None of the policies of insurance required of the ESCO by this Contract shall contain self-insured retentions in excess of \$50,000.

19.1.11 **Financial Rating of Insurance Companies:**

- (a) A.M. Best Rating: A- (Excellent) or Higher.
- (b) A.M. Financial Size Category: Class VII or Higher.

19.1.12 The School District of Philadelphia (including the School Reform Commission and the Board of Education), its officers, agents and employees, board members and commissioners shall be added as an ADDITIONAL INSURED on all liability policies (except Workers' Compensation and Professional Liability Policy, where applicable), even for claims regarding their partial negligence (but not willful misconduct) on a primary, non-contributory basis for liability arising out of this Contract. Additional Insured Coverage should be provided by attaching both ISO endorsements CG 2010 (for ongoing operations) and CG 2037 (for Completed Operations) or their equivalent.

The School District reserves the right to require the ESCO to name other parties as additional insured(s).

19.1.13 It is agreed the ESCO will not cancel, materially change, or non-renew the coverage described herein without at least thirty (30) days' advance written notice to the School District by Certified Mail – Return Receipt Requested.

19.1.14 **Waiver of Rights of Recovery and Waiver of Rights of Subrogation:**

(a) The ESCO, Subcontractors and Sub-subcontractors waive all rights of recovery against the School District and the Additional Insured(s) for loss or damage covered by any of the insurance maintained by the ESCO, Subcontractors or Sub-subcontractors.

(b) The ESCO, Subcontractors and Sub-subcontractors and their respective insurance carriers hereby waive all rights of subrogation against the School District and

the Additional Insured(s) for loss or damage covered by any of the insurance maintained by the ESCO, Subcontractors or Sub-subcontractors.

(c) If any of the policies of insurance required under this Contract require an endorsement to provide for the waiver of subrogation set forth in b) above, then the named insureds of such policies will cause them to be so endorsed.

19.1.15 The amount of insurance provided in the aforementioned insurance coverages shall not be construed to be a limitation of the liability on the part of the ESCO, Subcontractors or Sub-subcontractors.

19.1.16 Any type of insurance or any increase in limits of liability not described above which the ESCO requires for its own protection or on account of statute shall be its own responsibility and at its own expense.

19.1.17 The carrying of insurance described shall in no way be interpreted as relieving the ESCO of any responsibility or liability under the Contract.

19.1.18 Prior to the commencement of work and/or payment, the ESCO shall file Certificates of Insurance with the School District which shall be subject to the School District's approval of adequacy of protection and the satisfactory character of the insurer. The Certificates of Insurance should be mailed within five (5) days of receipt of these insurance requirements to the School District, regardless of when the ESCO's Work will start. The Project description and Project Number must be shown on the Certificate of Insurance.

In the event of a failure of the ESCO to furnish and maintain said insurance and to furnish satisfactory evidence thereof, the School District shall have the right (but not the obligation) to take out and maintain the same for all parties on behalf of the ESCO who agrees to furnish all necessary information thereof and to pay the cost thereof to the School District immediately upon presentation of an invoice.

19.1.19 In no event is the ESCO to begin Work until a Certificate of Insurance showing coverage in the aforementioned amounts required for the Work is received and approved by the School District. Any Work performed without having the Certificate of Insurance received and approved by the School District shall be at the ESCO's own risk.

19.2 Evidence of Insurance Coverage. The ESCO shall deliver the required Certificate(s) of Insurance, together with the executed Contract Documents, to the School District within five (5) calendar days after the date of Notice of Contract Award and receipt of the Contract Documents. Certificates of Insurance evidencing the required coverages must specifically reference the School District Contract number for which they are being submitted, and the ESCO shall attach a copy of each insurance certificate to this Contract. The original of the Certificate(s) of Insurance shall be submitted to the School District at the following address:

The School District of Philadelphia
Office of Risk Management
440 N. Broad Street – Suite 325
Philadelphia, PA 19130-4950
(Fax No.: 215-400-4591)
Attn.: Director of Insurance Risk Management

with a copy to:

The School District of Philadelphia
Office of Capital Programs
440 N. Broad Street, Suite 371
Philadelphia, PA 19130-4015
Attn.: Contracts Manager
(Fax No.: 215-400-4731)

Both submissions must be made at least ten (10) calendar days before Work is begun and again at least ten (10) calendar days before an additional Term of the Contract. The ten (10) calendar day requirement for advance documentation of coverage may be waived in situations where such waiver will, in the sole judgment of the School District Risk Manager, benefit the School District; but under no circumstances shall the ESCO actually begin Work (or continue Work, in the case of an additional Term of the Contract) without providing the required evidence of insurance.

19.3 Notice of Claim or Lawsuit. The ESCO shall advise the School District in writing, within ten (10) calendar days upon notification of a claim or lawsuit based upon the ESCO's services, omission or breach, that it will abide fully by Articles 19 and 20 herein, and that the applicable insurance carrier(s) has (have) been advised to defend, indemnify, and hold harmless the School District in accordance with the provisions of Articles 19 and 20 of the Contract. The ESCO shall not decline to provide the School District with full protection and coverage under Articles 19 and 20 of the Contract because another party may be partially responsible, or because a subcontractor was fully responsible, for the occurrence, death, injury, damage, or loss to persons or property, or economic loss, damage, or expense, or because the School District may be a co-insured or an additional insured on some other ESCO's or consultant's policy of insurance. The ESCO agrees that any violation of this Subparagraph 19.3 shall be deemed a material breach of the Contract.

19.4 Self-Insurance. The ESCO may not self-insure any of the coverages required under the Contract without the prior written approval of the School District Risk Manager. In the event that the ESCO desires to self-insure any of the coverages listed above, it shall submit to the School District's Contracts Manager of Capital Programs and School District Risk Manager, prior to the commencement of Work hereunder, a certified copy of the ESCO's most recent audited financial statement, and such other evidence of its qualifications to act as a self-insurer (e.g., State approval) as may be requested by the School District's Contracts Manager of Capital Programs or School District Risk Manager.

In the event such approval is granted, it is understood and agreed that the School District, its commission members, board directors, officers, employees and agents shall be entitled to receive the same coverages and benefits under the ESCO's self-insurance program that they would have received had the insurance requirements been satisfied by a reputable insurance carrier authorized to do business in the Commonwealth of Pennsylvania or otherwise acceptable to the School District Risk Manager. If at the time of commencement of the Contract, the ESCO self-insures its workers' compensation and employers' liability coverage, the ESCO may, in lieu of the foregoing, furnish to the School District Risk Manager and School District a current copy of the State certification form for self-insurance or a current copy of the State Insurance Commissioner's letter of approval, whichever is appropriate. The insurance (including self-insurance) requirements set forth herein are not intended and shall not be construed to modify, limit, or reduce the indemnifications made in the Contract by the ESCO to the School District, or to limit the ESCO's liability under this Contract to the limits of the policies of insurance (or self-insurance) required to be maintained by the ESCO hereunder.

ARTICLE 20. INDEMNIFICATION

20.1 The ESCO shall, at his sole cost and expense, release, indemnify, defend, and satisfy all judgments and hold harmless the School District (including the members of the School Reform Commission and the Board of Education), the Architect/Engineer, and any other School District Consultants on the Project and their respective officers, agents, representatives, and employees from and against all claims, demands, suits, actions, judgments, costs, penalties, liabilities, damages, delays, losses and expenses (including attorneys' fees, defense costs, court costs and costs of suit), for or on account of actual or alleged death, injury, damage or loss to persons and/or property (including but not limited to employees of such ESCO or any of his Subcontractors), or economic loss, damage or expense, or employment discrimination, in any way arising out of or relating to or resulting from the performance or non-performance of the Work under this Contract, or the subsequent completion of such Work, by the ESCO and/or his Subcontractors, or any of their respective officers, agents, representatives and employees, or through the negligence of the ESCO or caused, in whole or in part, by any acts or omissions of the ESCO, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable (including Sub-subcontractors and material suppliers), regardless of whether or not it is caused in part by a party indemnified hereunder, or from the use of facilities or equipment furnished to the ESCO and/or any of his Subcontractors on behalf of the School District in connection with the performance of such Work of such ESCO and/or Subcontractors (including but not limited to all claims arising out of the operation of any law imposing liability out of the use of scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances, or any site conditions or site use).

20.2 In any and all claims against the School District (including the members of the School Reform Commission and the Board of Education) or the Architect/Engineer or any other School District Consultants on the Project or any of their respective officers, agents, representatives or employees by any employee of the ESCO, any Subcontractor,

anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Article 20 shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for the ESCO or any Subcontractor under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts. This indemnity provision is intended, inter alia., to protect the School District (including the members of the School Reform Commission and the Board of Education), its officers, agents, representatives and employees from all claims that are asserted by employees, agents, or workers of the ESCO or Subcontractors who are injured on or by School District real property, or on, by or as a result of School District personal property, or who assert an employment claim of any kind (including claims relating to the termination of employment) regardless of when the claim is made, from the commencement to the completion of this Contract, whether the death, injury, damage or loss to persons and/or property, or the economic loss, damage or expense, or employment discrimination, is due to School District negligence, in whole or in part, and is not limited to death, injury, damage or loss to persons or property, or economic loss, damage or expense, or employment discrimination, which occur in actual performance of this Contract, nor is this indemnity provision limited by the Pennsylvania Workers' Compensation Act. The Contractor and all of its Subcontractors, and all of their respective officers, agents, representatives and employees, shall have no claim against the School District, its officers, employees and agents and the members of the School Reform Commission and the Board of Education for the acts, failures to act or negligence of the School District, or its officers, employees and members of the School Reform Commission or Board of Education, to the extent the claim in whole or in any part lies within the Contractor's, any of its Subcontractors, or any affiliate of the Contractor's, duties and obligations under any workers compensation law or statute, including but not limited to the Pennsylvania Workers' Compensation Law.

20.3 No provision of this Article 20 shall give rise to any duties on the part of the Architect/Engineer, or the School District, or any of their agents, representatives, or employees.

20.4 Obligations of the ESCO arising under this Article 20 shall survive final payment or termination under this Contract.

20.5 This indemnity provision is independent of whether or not the ESCO and/or any of his Subcontractors has (have) insurance. This indemnity provision shall apply, particularly but not exclusively, to the claims of the ESCO and all of his Subcontractors, and all of their respective officers, agents, representatives and employees, against the School District (including the members of the School Reform Commission and the Board of Education) and all its officers, agents, representatives and employees. Any violation of any of the provisions of this Article 20 by the ESCO and/or any of his Subcontractors shall be deemed a material breach of this Contract. The ESCO and all of his Subcontractors, and all of their respective officers, agents, representatives and employees, shall have no claim against the School District, its officers, agents, representatives and employees for the acts, failures to act or negligence of the School District, directly or indirectly, or its officers and employees; and should this exculpatory

clause be declared invalid by law, such invalidity shall in no manner affect or invalidate any or all other foregoing provisions in this Article 20.

ARTICLE 21. RISK OF LOSS

21.1 Prior to Substantial Completion of each ECM, or portion thereof, ESCO shall assume all risk and responsibility for casualties of every description in connection with the Work, shall have charge of the entire Work, and shall alone be liable and responsible for any injuries to persons and any loss or damage to the property, buildings, Equipment and adjacent work that may occur as a consequence of or during the progress of the Work under this Contract, whether such damage or accident is due to the ESCO's own negligence or that of its servants, agents, employees, or representatives, or whether such damage or accident be due to the inherent nature of the Work or whether such damage or accident be due to other causes. Risk of loss shall transfer to the School District upon Substantial Completion of each ECM, or portion thereof.

21.2 Except as provided in **Article 8 (Warranties)**, **Article 14 (ECM Service Responsibilities)**, **Article 19 (insurance)**, and **Article 20 (Indemnification)**, upon Substantial Completion of each ECM, or portion thereof, the School District assumes all risk of loss of or damage to the Selected ECMs from any cause whatsoever and no such loss of or damage to the Selected ECMs shall relieve the School District of the obligation to make payments or to perform any other obligation under this Contract. In the event of damage to any Selected ECMs, or any Equipment, parts or systems of the Selected ECMs, the School District will immediately notify ESCO or its assignee. If the School District determines that the damaged Selected ECMs are repairable, and ESCO is not responsible for repair or replacement under this Contract, the School District may repair the same. If School District determines that any of the Selected ECMs have been lost, stolen, destroyed, or damaged beyond repair, and ESCO is not responsible for repair or replacement under this Contract, then the Energy Savings Guarantee will be adjusted by mutual agreement to account for the losses associated with the Selected ECMs.

21.3 Notwithstanding any other provisions of the Contract or any Addenda or Modifications to the contrary or the School District's health and safety program, guidelines, procedures, and requirements, the School District retains its statutory immunity as provided pursuant to the laws of the Commonwealth of Pennsylvania, 42 Pa C.S.A. §§8501, 8541. The ESCO acknowledges that the School District:

21.3.1 Is a local agency, as defined in 42 Pa. C.S.A. §8501, §8541,
and,

21.3.2 Does not waive its defense of statutory immunity derived
therefrom.

ARTICLE 22. SUBCONTRACTS

22.1 **School District Review and Approval of Permitted Subcontractors.**

The School District shall have the right to approve all first-tier Subcontractors which the ESCO is permitted to engage under this Contract, such approval not to be unreasonably withheld, except that no approval shall be necessary for use of approved Subcontractors listed in Exhibit IV and Subcontractors hired by ESCO for purposes of remedying an emergency situation. ESCO shall furnish School District written notice of its intention to engage a Subcontractor not listed on Schedule O (School District-Approved Subcontractor List), along with its proper entity name and address. In no event shall any Subcontract be awarded to any person debarred, suspended or disqualified from State, City or School District contracting.

22.2 **Subcontract Terms and Subcontractor Actions.** The ESCO shall remain responsible for performance of the Work, regardless of any Work that may be subcontracted. No failure of any Subcontractor used by ESCO to perform the Work shall relieve the ESCO from its obligations hereunder to perform the Work, unless such failure, if experienced directly by ESCO, would be excused under the terms of this Contract, such as in the case of an Event as defined in Article 24 or School District fault. ESCO shall be responsible for settling and resolving with all Subcontractors all claims arising out of delay, disruption, interference, hindrance, or schedule extension.

22.3 **Subcontractor Claims.** ESCO shall pay or cause to be paid all Subcontractors all amounts due in accordance with their respective Subcontracts. No Subcontractor shall have any right against the School District for labor, services, materials or equipment furnished for the School District.

22.4 **Assignability.** All Subcontracts entered into by the ESCO with respect to the Premises shall be assignable to School District, solely at School District's election and without cost or penalty, upon the expiration or termination of this Contract.

22.5 The Mechanics' Lien Law, Act of August 24, 1963, P.L. 1175, No. 497 (49 P.S. §1101 *et seq.*) prohibits the filing of mechanics' liens on School District construction projects. Subcontractors and Sub-subcontractors therefore agree to keep the Work and the Project site on which Work is to be performed free and clear of all liens and claims of liens on materials furnished pursuant to a Subcontract or other transaction with the ESCO. Subcontractors and Sub-subcontractors hereby waive any rights they may have in connection with the Work to file any liens, mechanics or otherwise. The substitute remedy for the Mechanics' Lien Law is the Public Works Contractors' Bond Law, Act of December 20, 1967, P.L. 869, No. 385 (8 P.S. §191 *et seq.*).

22.6 The School District of Philadelphia is a "first class school district" under the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class (known as "PICA Act"), Act of June 5, 1991, P.L. 9, No. 6 (53 P.S. §12720.104), and therefore the prompt payment provisions of the Award and Execution of Public Contracts Law, Act of December 12, 1994, P.L. 1042, No. 142 (73 P.S. §1626.8(c)(2)&(4))

(repealed), and the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions, Act of May 15, 1998, P.L. 358, No. 57 (62 Pa.C.S.A. §3938(b)(2)&(4)), do not apply to the School District of Philadelphia and its construction contracts. Subcontractors and Sub-subcontractors cannot make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the prompt payment provisions of the Award and Execution of Public Contracts Law (repealed), or the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions.

22.7 The School District of Philadelphia is a “school district” and a “political subdivision” of the Commonwealth of Pennsylvania, and therefore the Contractor and Subcontractor Payment Act, Act of February 17, 1994, P.L. 73, No. 7 (73 P.S. §501 *et seq.*), does not apply to the School District of Philadelphia and its construction contracts. Subcontractors and Sub-subcontractors cannot make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the Contractor and Subcontractor Payment Act.

22.8 The Mechanics’ Lien Law, Act of August 24, 1963, P.L. 1175, No. 497 (49 P.S. §1101 *et seq.*) prohibits the filing of mechanics’ liens on School District construction projects. The ESCO therefore agrees to keep the Work and the Project site on which Work is to be performed, free and clear of all liens and claims of liens on materials furnished pursuant to the Contract Documents. The ESCO hereby waives any right he may have in connection with the Work to file any liens, mechanics or otherwise. Notwithstanding anything to the contrary contained in the Contract Documents, if any such lien is filed, or there is any reason to believe that any lien may be filed at any time during the progress of the Work or within the duration of this Contract, the School District may refuse to make any payment otherwise due the ESCO, or withhold from any payment due the ESCO, a sum sufficient in the opinion of the School District to pay all obligations and expenses necessary to satisfy such lien or claim and completely indemnify the School District against any such action or claim, unless and until the ESCO shall furnish satisfactory evidence that the indebtedness and the lien in respect thereof, if any, have been satisfied, discharged and released of record and as provided by law pending the resolution of any dispute between the ESCO and the person filing such lien; and if such evidence is not furnished by the ESCO to the School District within a period of five (5) calendar days after demand therefore, the School District may discharge such indebtedness and deduct the amount required therefore, together with any and all losses, costs, damages, and attorneys’ fees suffered or incurred by the School District, from any sum payable to the ESCO under the Contract Documents. Final payment to the ESCO may be withheld until the Work and the Project site on which the Work is to be performed are free and clear of any and all liens or rights thereto arising because of Work performed or materials furnished under the Contract Documents. This Subparagraph 22.8 of the Contract shall be specifically included in all Subcontracts and purchase orders entered into by the ESCO.

22.9 The substitute remedy for the Mechanics' Lien Law is the Public Works Contractors' Bond Law, Act of December 20, 1967, P.L. 869, No. 385 (8 P.S. §191 *et seq.*).

22.10 The School District of Philadelphia is a "first class school district" under the Pennsylvania Intergovernmental Cooperation Authority Act for Cities of the First Class (known as "PICA Act"), Act of June 5, 1991, P.L. 9, No. 6 (53 P.S. §12720.104), and therefore the prompt payment provisions of the Award and Execution of Public Contracts Law, Act of December 12, 1994, P.L. 1042, No. 142 (73 P.S. § 1626.8(c)(2)&(4)) (repealed), and the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions, Act of May 15, 1998, P.L. 358, No. 57 (62 Pa.C.S.A. §3938(b)(2)&(4)), do not apply to the School District of Philadelphia and its construction contracts. The School District of Philadelphia has no obligation to make progress payments, final payments, retainage payments, or any other type of payment to the ESCO within the time periods set forth in the Award and Execution of Public Contracts Law (repealed) or the Commonwealth Procurement Code, General Procurement Provisions. The School District of Philadelphia has no obligation to pay interest, penalties, attorneys' fees, costs, and expenses to the ESCO or any of his Subcontractors under the Award and Execution of Public Contracts Law (repealed) or the Commonwealth Procurement Code, General Procurement Provisions. Neither the ESCO nor his Subcontractors can make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the prompt payment provisions of the Award and Execution of Public Contracts Law (repealed), or the prompt payment provisions of the Commonwealth Procurement Code, General Procurement Provisions.

22.11 The School District of Philadelphia is a "school district" and a "political subdivision" of the Commonwealth of Pennsylvania, and therefore the Contractor and Subcontractor Payment Act, Act of February 17, 1994, P.L. 73, No. 7 (73 P.S. §501 *et seq.*), does not apply to the School District of Philadelphia and its construction contracts. The School District of Philadelphia has no obligation to make progress payments, final payments, retainage payments, or any other type of payment to the ESCO within the time periods set forth in the Contractor and Subcontractor Payment Act. The School District of Philadelphia has no obligation to pay interest, penalties, attorneys' fees, costs, and expenses to the ESCO or any of his Subcontractors under the Contractor and Subcontractor Payment Act. Neither the ESCO nor any of his Subcontractors can make, assert or file a claim, cause of action or lawsuit against the School District of Philadelphia for violation of the Contractor and Subcontractor Payment Act.

ARTICLE 23. CASUALTY OR CONDEMNATION OF PREMISES

23.1 Any construction or restoration of the Premises following or necessitated by fire, flood, or other casualty, or any condemnation affecting any portion of the Premises, shall be deemed a Material Change, and the provisions of **Article 17 (Material Changes)** shall be applicable. If the casualty or condemnation renders fifty percent (50%) or more of the Premises uninhabitable or unusable and, in the case of a casualty, the affected portion is not reconstructed or restored within one-hundred-and-twenty (120) days from

the date of such casualty, School District shall have the option to terminate this Contract by a notice to ESCO. In the event of condemnation, School District agrees that ESCO shall be entitled to that portion of the condemnation award equal to the purchase option value applicable at that time with appropriate adjustments for applicable portions of the Premises that are condemned versus portions of the Premises that are unaffected. Upon such termination, ESCO may remove the Selected ECMs from the condemned portion of the Premises.

ARTICLE 24. CONDITIONS BEYOND CONTROL OF THE PARTIES

24.1 If a Party (“**performing party**”) shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, similar events, or causes beyond that party’s control (collectively, “Event” or “Events”), this Contract shall at the other party’s option: (a) remain in effect but said performing party’s obligations shall be suspended until the said Events shall have ended; or (b) be terminated upon ten (10) days notice to the performing party, in which event neither party shall have any further liability to the other, with the exception that ESCO shall be paid for all Work performed. Where the Contract is not terminated under this Article 24, an equitable adjustment shall be made to the Contract Sum, Implementation Period and to any other contract terms necessitated by the Event.

24.2 If, in the judgment of the School District, the ESCO is taking undue risk of damage to any part of the Project by proceeding with the Work during unfavorable weather or other conditions, then the Architect/Engineer or the School District shall immediately verbally notify the ESCO or his representative, at the Project site, to suspend operations because of said condition or conditions. The School District shall thereupon, by letter or telegram, confirm the verbal order to suspend the Work, either wholly or in part, for such period of time as may be necessary.

24.3 In case of suspension under Section 24.3, an extension of the Contract Time may be requested by the ESCO, but regardless of whether it is granted or not, no allowance or additional compensation shall be made to the ESCO for any expense resulting from suspension of the Work under Section 24.3. The School District shall not be liable to the ESCO in any event for any expenses, damages, losses or profits, anticipated or otherwise, or any other charges whatsoever arising out of a suspension under Section 24.3 in the Work of the ESCO or any ESCO engaged on this Project.

24.4 It shall be clearly understood that the failure of the Architect/Engineer or the School District to so advise the ESCO regarding unfavorable conditions shall not relieve the ESCO of his responsibility for compliance with all the terms of the Contract.

24.5 The School District shall have the right, at any time, during the term of the Contract, to suspend all or any part of the Work, for the convenience of the School District, for the period of time that the School District, in its sole discretion, determines to be in the best interest of the School District, upon written notice to the ESCO stating the effective date and extent of the work suspended.

24.6 If a suspension of the Work occurs pursuant to Section 24.5, the ESCO shall have the right to submit a claim to the School District for the payment of costs for all Work performed and expenses incurred in accordance with the provisions of the Contract prior to the effective date of the suspension.

24.7 The ESCO shall be entitled to an equitable extension of the time of performance provided in the Contract for any suspension pursuant to this Article 24.

24.8 The School District shall have the right, during the period of any suspension pursuant to this Article 24, to terminate the Contract as provided herein, and elsewhere in the Contract.

ARTICLE 25. TERMINATION FOR CONVENIENCE

25.1 The School District may, at any time upon ten (10) calendar days' written notice to the ESCO, terminate (without prejudice to any right or remedy of the School District or a purchaser) the whole or any portion of the Work for the convenience of the School District. Such termination for convenience shall be, at the School District's sole discretion, and without penalty, cost, or liability to the School District.

25.2 The ESCO shall be entitled to payment from the School District for any Work satisfactorily performed in accordance with the provisions of the Contract prior to the effective date of termination.

25.3 The ESCO shall continue to perform the Contract in accordance with its terms through the effective date of the termination, and shall make diligent efforts to mitigate all costs and losses associated with the termination.

25.4 The School District shall incur no liability beyond such stated amount for any Work that is terminated under this Paragraph or for the unavailability of funds. Without limiting the generality of the foregoing, in no event shall the ESCO be entitled to receive, or to submit any claim for, any of the following costs directly or indirectly caused by the termination: (i) field or home office overhead; or (ii) costs caused by or related to loss of productivity or loss of profit related to the Work and the Contract, or to any other Contract or work that the ESCO performed or could have performed but was prevented from performing because of the termination or its commitment to the Work.

25.5 In the event the School District partially terminates the Contract pursuant to this Article, the ESCO shall continue to perform the Contract in accordance with its terms with respect to all Work not terminated. The School District shall pay the ESCO in accordance with the Contract for Work that is not terminated. The deductive change order shall be calculated by the actual verified and reasonable subcontracted costs of the Work deleted. In no event, however, shall ESCO be paid for loss of anticipated profits on Work not yet performed.

ARTICLE 26. EVENTS OF DEFAULT

26.1 **Events of Default by School District.** Each of the following events or conditions shall constitute an “Event of Default” by School District:

- (a) Any failure by School District to pay ESCO any sum due for a period of more than sixty (60) days after written notification by ESCO that the School District is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract; and/or
- (b) Any other material failure by School District to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for sixty (60) days after notice to School District demanding that such failures to perform be cured or if such cure cannot be effected in sixty (60) days, School District shall be deemed to have cured default upon the commencement of a cure within sixty (60) days and diligent subsequent completion thereof; and/or
- (c) Any representation or warranty furnished by School District in this Contract that was false or misleading in any material respect when made.

26.2 **Events of Default by ESCO.** Each of the following events or conditions shall constitute an “Event of Default” by ESCO:

- (a) Abandonment of the Work set forth in the Contract;
- (b) Failure or refusal to supply a sufficient number of properly skilled workers and necessary equipment or either of them;
- (c) The standards of comfort and service set forth in **Schedule L (Standards of Comfort)** are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Selected ECMs except that such failure, if corrected or cured within thirty (30) days after written notice by School District to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;
- (d) Any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (e) Failure to furnish and install all of the Selected ECMs and make them ready for use within the time specified by this Contract as set forth in **Schedule A (Selected ECMs to be Installed by ESCO)** and **Schedule D (ESCO Compensation and Payment Schedule)**;
- (f) Any other material failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained

herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure to perform be cured, but, if corrected or cured within thirty (30) days after ESCO's receipt of such written notice such material failure shall be deemed cured for the purpose of this Contract.

- (g) Any lien or encumbrance upon the Selected ECMs by any Subcontractor, laborer or materialman of ESCO;
- (h) The filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within thirty (30) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO;
- (i) Any change in majority ownership or control of the ESCO without the prior approval of the School District, which shall not be unreasonably withheld;
- (j) Failure by the ESCO to pay any amount due the School District or perform any obligation under the terms of this contract or the Energy Savings Guarantee as set forth in **Schedule C (Energy Savings Guarantee)**; or
- (k) Repossession or removal of the Selected ECMs by ESCO or a third party without good cause.

26.3 **Default Termination.**

26.3.1 If the ESCO has not cured any default within 30 days from written notice of default from the School District, or begun curing in instances where the default cannot be cured within 30 days, the School District may, upon seventy-two (72) hours' written notice to the ESCO, terminate (without prejudice to any right or remedy of the School District or a purchaser) the whole or any portion of the Work required by the Contract Documents, in any one (1) of the following circumstances:

26.3.1.1 if the ESCO abandons the Work or refuses or fails to prosecute the Work or any separable part thereof with such diligence as will ensure the Substantial Completion of the Project within the Contract Time, or refuses or fails to complete said Work within such time;

26.3.1.2 if the ESCO is in default in carrying out any provisions of this Contract for a cause within his control or fails to comply with any material provision, term or condition of the Contract;

26.3.1.3 if a petition under any bankruptcy or insolvency law is filed against the ESCO, or the ESCO petitions for relief under the Bankruptcy Code, or makes a general assignment for the benefit of his creditors, or if a receiver is appointed on account of his insolvency, or there is the appointment of a receiver, trustee or

custodian to take possession of all or substantially all the assets of the ESCO for the benefit of creditors, or any action is taken or suffered by the ESCO under any federal or state insolvency, bankruptcy, reorganization, moratorium or other debtor relief act or statute;

26.3.1.4 if the ESCO fails to supply a sufficient number of properly skilled workers or proper materials;

26.3.1.5 if the ESCO fails to make prompt payment to Subcontractors or for materials or labor;

26.3.1.6 if the ESCO submits an Application for Payment or any other document which is intentionally falsified;

26.3.1.7 if a lien or notice of lien is filed against any Work or the Project site;

26.3.1.8 if the ESCO disregards any laws, ordinances, rules, regulations, or orders of any public authority having jurisdiction;

26.3.1.9 if there is a material falseness or inaccuracy of any representation or commitment of the ESCO contained in the Contract or in any other document submitted to the School District by the ESCO in relation to the Work or the ESCO's Bid;

26.3.1.10 if there is misappropriation by the ESCO of any funds provided under the Contract or failure by the ESCO to notify the School District upon discovery of any misappropriation;

26.3.1.11 if there is a violation of law which results in a guilty plea, a plea of nolo contendere, or conviction of a criminal offense by the ESCO, its directors, employees, or agents (1) directly or indirectly relating to the Contract or the Work required under the Contract, whether or not such offense is ultimately adjudged to have occurred, or (2) which adversely affects the performance of the Contract; or.

26.3.1.12 if the ESCO violates any provision of the Contract Documents.

The right of the ESCO to proceed shall not be so terminated under this Article 26 because of any delays in the completion of the Work due to unforeseeable causes, beyond the control and without the fault or negligence of the ESCO or his Subcontractors, as set forth herein.

26.3.2 If, after the ESCO has been terminated for default pursuant to this Article 26, it is determined that none of the circumstances set forth in Subparagraph

26.3.1 of these General Conditions exist, then such termination shall be considered a termination for convenience pursuant to Article 25 of this Contract.

ARTICLE 27. REMEDIES UPON DEFAULT

27.1 **Remedies upon Default by School District.** If an Event of Default by School District occurs, ESCO may, without a waiver of other remedies that exist in law or equity, elect one or both of the following remedies:

- (a) Exercise any and all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by School District, and/or for damages that shall include all costs and expenses reasonably incurred in exercise of its remedy;
- (b) Without recourse to legal remedies, terminate this Contract by delivery of a notice declaring termination.

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

- (a) Exercise any and 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;
- (b) If the payments under this Contract have been assigned, and the Selected ECM has been accepted by School District, the School District shall declare ESCO to be in default, but continue to make the payments under **Schedule D (ESCO Compensation and Payment Schedule)** for the Selected ECMs that have been so accepted. If no Selected ECM has been so accepted, School District may terminate this Contract without liability to make any payments;
- (c) If the payments under this Contract have not been assigned, School District may set off or counterclaim against its obligation to make any of the payments provided in default; or
- (d) ESCO (but not the assignee) will be liable to School District for damages incurred by School District as a result of any default by ESCO. Such damages may include, but are not limited to:

- (1) Payments made to ESCO or its assignee which represents payment towards the Selected ECMs for which acceptance was revoked because of a latent defect;
 - (2) The difference in price between the market price of the Selected ECMs that were either not delivered or rejected (or the actual purchase price if School District purchases like-for-like replacements for any undelivered or rejected Selected ECMs) and the purchase price indicated in the Contract for such Selected ECMs;
 - (3) Damages as a result of breach of warranty, failure to meet specifications, or damages incurred by School District resulting from the delivery of Selected ECMs that are defective or fail to meet specifications, or resulting from ESCO's failure to comply with any other requirements of this Contract, and
 - (4) Any other damages recoverable by law.
- (e) Without recourse to any legal remedies, terminate this Contract by delivery of a notice declaring termination.

ARTICLE 28. CONTROVERSY AND DISPUTE RESOLUTION

28.1 Claims.

(a) Except as otherwise provided in this Contract, the ESCO must notify the Project Manager in writing of any and all claims whatsoever relating to or arising out of ESCO's performance of the Work under the Contract within ten (10) days of the event or occurrence giving rise to the claim, except where a shorter time is specified by the Contract Documents. The written notice of claim to the Project Manager shall provide a detailed statement of and basis for the claim, with supporting documentation attached. For purposes of this Article, a "claim" shall mean a demand or assertion seeking, as a matter of right, an adjustment or interpretation of the Contract, payment of money, extension of time or other specific relief with respect to the terms and conditions of the Contract. The Project Manager will review all claims submitted by the ESCO and shall approve or reject each claim in whole or part, or shall request additional documentation in support of the claim from the ESCO.

(b) The School District and the ESCO hereby release and waive any and all claims against each other for consequential damages arising out of or related to the Contract and the Work performed thereunder. This mutual release and waiver includes damages incurred by the ESCO for principal home office expenses, including home office overhead and the compensation of personnel stationed there, for losses of financing, business, and reputation, and for loss of profit associated with any other work, except anticipated profit arising directly from the ESCO and the work thereunder. Nothing

hereunder shall preclude, however, the assessment by the School District of penalties, liquidated direct damages, or other damages when applicable in accordance with any provision of this Contract.

(c) Prior to the final acceptance by the School District, the ESCO shall notify the Project Manager in writing of any and all unresolved and previously asserted claims relating to or arising out of the Work. The ESCO's written notice of claims to the Project Manager shall list the claims by number, assign a dollar value to each claim, and provide a detailed statement of each claim, with supporting documentation attached, including a copy of the notice by which the ESCO first brought the claim to the attention of the Project Manager.

(d) Failure of the ESCO to notify the Project Manager of any claims in accordance with subparagraphs (a) and (c) above shall constitute and operate as a full and final release and a waiver of all such claims by the ESCO.

28.2 Review by Project Manager of ESCO Claims and Compulsory Non-Binding Mediation of Claims.

(a) Within thirty (30) days after receipt of the ESCO's notice to the Project Manager under Paragraph 28.1 above, the Project Manager shall review all identified claims of the ESCO and shall notify the ESCO whether the claims are approved or rejected, in whole or in part.

(b) Any claim of the ESCO which shall have been rejected by the Project Manager, in whole or in part, shall be subject to non-binding mediation. Mediation of the claim shall be an irrevocable condition precedent to institution of legal proceedings by the ESCO against the School District with respect to such claim.

(c) The ESCO must submit its demand for mediation to the Project Manager and the School District Office of General Counsel, c/o General Counsel, not later than 30 days after the Project Manager's notice of rejection. Failure of the ESCO to submit such claim to mediation within this time period shall be an absolute bar to institution of legal proceedings by the ESCO.

(d) The ESCO shall submit a written timely request for mediation by the Project Manager and the School District Office of General Counsel, c/o General Counsel. Upon submission of the claim to mediation, the School District and the ESCO shall endeavor to resolve the claim by mediation in accordance with such rules as may be mutually agreed upon by the School District and the ESCO.

(e) The fee of the mediator, who shall be selected jointly by the Parties, and the common expenses and costs incurred in connection with conduct of the mediation, shall be borne equally by the School District and the ESCO. The mediation shall be conducted in the City of Philadelphia. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

ARTICLE 29. ASSIGNMENT

29.1 **General.** ESCO acknowledges that School District is induced to enter into this Contract by, among other things, the professional qualifications of ESCO. ESCO agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of School District, with the exception that ESCO may subcontract all or certain portions of the Work to the Subcontractors.

29.2 **Assignment by ESCO.** ESCO may, with prior written approval of School District, delegate its duties and performance under this Contract, and/or utilize Subcontractors, provided that any assignee(s), delegee(s), and/or utilization of Subcontractor(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, ESCO shall remain jointly and severally liable with its assignee(s) or transferee(s) to School District for all of its obligations under this Contract.

29.3 **Assignment by the School District.** The School District may transfer or assign this Contract and its rights and obligations herein to a purchaser, landlord, tenant or subsequent owner of the Premises or an interest therein. The School District shall remain jointly and severally liable with its assignees or transferees to the ESCO for all of its obligations under this Contract.

ARTICLE 30. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

- (a) It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
- (b) 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;
- (c) Its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any other contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected;
or
- (d) 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 which would materially and adversely affect its ability to perform hereunder.

ARTICLE 31. ADDITIONAL REPRESENTATIONS OF THE PARTIES.

31.1 School District hereby warrants and represents that it has not entered into any leases or contracts with other persons or entities regarding the leasing of the Selected ECMs set forth **Schedule A (Selected ECMs to be Installed by ESCO)**, or for the provision of any energy management services in conflict with those set forth in **Schedule F (Measurement and Verification)** and **Schedule Q ESCO's ECM Service Responsibilities**. Upon written request, the School District shall provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of the preexisting equipment identified **Schedule B (Description of Premises; Pre-Existing Equipment Inventory)** which may be executed from time to time hereafter within thirty (30) days after execution of this Contract.

31.2 ESCO hereby warrants, represents and promises that:

(a) Before commencing performance of this Contract:

- (1) It is or shall become licensed or otherwise permitted to do business in the Commonwealth.
- (2) It has a City of Philadelphia Business Privilege License.
- (3) It shall confirm that it and any of its Subcontractors to be employed in connection with any services rendered under the Contract and/or the parent company(ies) and subsidiary(ies) thereof, are not currently in default of the terms of any indebtedness to the School District and, to the best of its knowledge, will not at any time during the Contract Term (including any extensions or renewals thereof) be indebted to the School District, for or on account of any delinquent taxes, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the School District has been established. With respect to Subcontractors, ESCO will be deemed to have satisfied the requirements of the Section 31.2(3) so long as the following is included in each Subcontract:

Subcontractor hereby certifies and represents that Subcontractor and Subcontractor's parent company(ies) and subsidiary(ies) are not currently indebted to the School District and will not at any time during the term of ESCO's Agreement with School District, including any extensions or renewals thereof, be indebted to the School District, for or on account of any delinquent taxes, liens, judgments, fees or other debts for which no written agreement or payment plan satisfactory to the School District has been established. In addition to any other rights or remedies available to School District and ESCO at law or in equity, Subcontractor acknowledges that any breach of failure to conform to this certification may, at the option and direction

of School District and ESCO, result in the withholding of payments otherwise due to Subcontractor for services rendered in connection with the Contract and, if such breach or failure is not resolved to School District's or ESCO's satisfaction within a reasonable time frame specified by School District or ESCO in writing, may result in the offset of any such indebtedness against said payments otherwise due to Subcontractor and/or the termination of Subcontractor for default (in which case Subcontractor will be liable for all excess costs and other damages resulting from the termination)."

To the best of ESCO's knowledge, information and belief, the representations made in and Subcontract that Subcontractor is not indebted to the School District are true and correct.

- (4) It shall have provided proof and documentation of required insurance pursuant to **Article 19 (Insurance)**, and it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- (b) It shall use Subcontractors and delegees that have the necessary experience and skill for the Work, and that are licensed and bonded in this state to perform the work so subcontracted or delegated pursuant to the terms hereof;
- (c) It is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

ARTICLE 32. WAIVER OF LIENS

ESCO will obtain and furnish to School District a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each Selected ECM and the component equipment, parts, and systems of each Selected ECM.

ARTICLE 33. COMPLIANCE WITH APPLICABLE LAWS

33.1 **Compliance With Applicable Law and Standard Practices.** ESCO and all Subcontractors, shall perform its obligations hereunder in compliance with all Applicable Laws, sound engineering and safety practices, and rules of the School District related to the Premises, and shall give all notices required by all Applicable Laws. The Selected ECMs shall at all times conform to all Applicable Laws. ESCO shall promptly remedy any violation of any such Applicable Laws that comes to its attention to the extent that the same results from its performance of the Work. ESCO shall promptly, and in no event later than the close of the next business day following receipt, give notice to the Project Manager, by telephone, with confirmation in writing, of receipt by the ESCO of any information relation to violation of Applicable Laws. To the extent any unforeseeable

change in Applicable Law (including, without limitation, new or increased taxes or tariffs) or rule of the School District after the Effective Date impacts ESCOs cost or time for performance, ESCO shall be entitled to an equitable adjustment of the Contract Sum and/or time for performance, as applicable.

33.2 **Wastes and Hazardous Materials.** The ESCO shall be responsible for the cost of proper removal, remediation, treatment storage and disposal of all wastes and hazardous materials (including but not limited to asbestos) as required to complete the Work up to a maximum value of Eight Hundred Forty Thousand Nine Hundred Ten Dollars (\$840,910.00) (the "Hazardous Materials Abatement Allowance"). Any removal, remediation, treatment, storage and disposal costs above the Hazardous Materials Abatement Allowance will be the sole responsibility of the School District. At the completion of the Work, any and all unused Hazardous Material Abatement Allowance funds will revert to the School District. The School District and ESCO may negotiate the methodology for such removal, remediation, treatment, storage and disposal, but ESCO shall bear the cost, up to the value of the Hazardous Materials Abatement Allowance, and assumes full responsibility for scheduling and coordination. Each party's specific responsibilities and the reconciliation procedures of the Hazardous Materials Abatement Allowance will be set forth in **Schedule N (Waste and Hazardous Material Removal Responsibilities)** and accepted in **Exhibit II (iii) (Certificate of Acceptance—Waste and Hazardous Material Removal)**. ESCO shall treat, store and dispose of any waste and hazardous materials in accordance with all Applicable Laws. For purposes of this Section 33.2, any preexisting issue known to the School District has been identified in information provided to ESCO. Any issue outside of said information is considered unforeseen by ESCO.

33.3 **Permits, Licenses and Approvals.**

- (a) ESCO or its Subcontractors, as may be appropriate, shall obtain all permits, licenses and approvals required pursuant to Applicable Law in connection with the performance of all or any part of the Work under the Contract throughout the Term, unless otherwise specifically directed by the Project Manager. ESCO or its Subcontractors, as appropriate, will be required to pay the current fee for such permits, license and approvals required in connection with all or any portion of the Work under the Contract, including permits and licenses required in connection with any Equipment, system or component forming part of the Work. Where requested by the School District, ESCO shall furnish copies of each permit or license which is required to perform the Work to the School District before the ESCO commences the portion of the Work requiring such permit or license.
- (b) The City Administrative Board has approved a waiver of the construction permit fees imposed under Section A902.2 of the City Administrative Code and levied by the City Department of Licenses and Inspections ("L&I Department") for School District capital projects, effective prospectively from October 12, 1999. In accordance with the City Administrative Board

Rule No. 4, no permit fee is to be paid by the School District to the City for the following permits: zoning, building, fire service, plumbing, electrical, and other similar construction permits. With assistance from the Architect/Engineer, the School District shall provide the required Waiver of Permit Fees applications to the ESCO for the zoning, building, fire service, plumbing, electrical and other similar construction permits issued by the L&I Department, Permit Services Division, in order to obtain City waivers of the permit fees for the Project. The building permit shall be applied for by the Architect/Engineer and shall be issued to the ESCO and obtained by the ESCO. The remaining construction permits for the Project shall be secured by the ESCO.

- (c) These permit fee waivers do not apply to permits or licenses issued by other Federal, State or local agencies. The ESCO shall, without additional expense to the School District, be responsible for obtaining and paying for any other necessary licenses and permits and for complying with all applicable Federal, State and local laws, codes and regulations in connection with the prosecution of the Work.

33.4 **Environmental Provisions.** In the performance of this Contract, ESCO shall minimize pollution and shall strictly comply with all Applicable Laws concerning the environment. The ESCO is responsible for any of its violations (but not existing violations of the District that are considered unforeseen per Section 33.2 above) and shall secure all required permits, licenses and approvals for performance of the Work. Erosion control measures, if required, must be shown on drawings and specifications prepared by the ESCO, and the ESCO shall obtain an erosion control permit, if required.

ARTICLE 34. INDEPENDENT CAPACITY OF ESCO

The Parties hereto agree that ESCO, and any agents and employees of ESCO, in the performance of this Contract, shall act in an independent capacity and not as officers, employees, or agents of the School District. Neither the ESCO nor its employees or Subcontractors shall in any way represent that they are acting as employees, officials or agents of the School District.

ARTICLE 35. NO WAIVER

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

ARTICLE 36. ANTI-DISCRIMINATION POLICY; MBE/WBE PARTICIPATION REQUIREMENTS

36.1 It is the policy of the School District acting through and by the School Reform Commission and its successor body, the Board of Education, to ensure equal opportunity in all contracts let by the District (the "Contracts"). In light of this policy, the School District has adopted this Anti-Discrimination Policy (the "Policy") which is applicable to all Contracts, including but not limited to, Contracts for the design, development, construction, operation and maintenance of school buildings and other buildings and structures owned, leased or used by the School District or its contractors, assignees, lessees and licensees (the "Facilities"); Contracts for professional services and Contracts for the purchase of goods, services, supplies and equipment for the District and the Facilities. The objective of the Policy is the promotion of prime contract and subcontract opportunities for minority and woman-owned business enterprises ("M/W/Bes") that are approved by the District or that are certified by the Minority Business Enterprise Council of the City of Philadelphia, Southeastern Pennsylvania Transportation Authority or any other certifying agency designated by the District in its discretion.

36.2 The fundamental requirement of the Policy is that all contractors, vendors and consultants that contract with the School District (the "Contractors"), satisfy the School District that they will: (1) not discriminate against any person in regard to race, color, religion, age, national origin, sex, ancestry, handicap or disability; and (ii) provide a full and fair opportunity for the participation of M/W/BEs in Contracts. Contractors must demonstrate that the participation of M/W/BEs is "meaningful and substantial" in all phases of a Contract under criteria adopted by the School District. "Meaningful and substantial" shall be interpreted by the School District as meaning the range of participation that reflects the availability of bona fide M/W/BEs in the Philadelphia Metropolitan Statistical Area. Participation shall be measured in terms of the actual dollars received by M/W/BEs. The complete provisions of the Policy of the School District adopted November 14, 2007 are incorporated herein by reference and set forth in the Attachments to the Contract.

36.3 The ESCO shall submit with its proposal either: (i) a completed Minority/Woman-Owned Business Enterprise (MWBE) Participation Plan ("MWBE Participation Plan") that meets the Participation Range for the Contract set forth in the Anti-Discrimination Policy Notice to proposers in the RFP and lists the names, addresses, dollar amounts and scope of work to be performed by the minority-owned business enterprises (MBEs) and woman-owned business enterprises (WBEs), or (ii) a brief narrative explaining its reasons for not submitting a MWBE Participation Plan that meets the Participation Range set forth in the Anti-Discrimination Policy Notice to proposers in the RFP. Submission of the MWBE Participation Plan is an element of proposer responsiveness. Failure to submit a completed MWBE Participation Plan or a narrative explaining the reasons that the Participation Plan could not be met may result in the rejection of a proposal.

ARTICLE 37. LABOR-MANAGEMENT RELATIONSHIPS; WAGES AND BENEFITS

37.1 School District Partnership Agreement.

- (a) Pursuant to School Reform Commission (SRC) Resolution No. SRC-3 dated May 24, 2006, the SRC has entered into a Partnership Agreement with the Philadelphia Building and Construction Trades Council ("Philadelphia Building Trades Council"), dated June 7, 2006, which will, among other things:
- (1) cover all its construction, reconstruction, alteration and maintenance projects included in its approved Capital Improvement Program; and
 - (2) include a goal that Local residents as defined in the Partnership Agreement will perform twenty-five percent (25%) of all hours worked, on a craft-by-craft basis, on such School District projects; and
 - (3) include a goal that apprentices who are Local residents will perform twenty percent (20%) of all apprentices hours worked, on a craft-by-craft basis, on such School District projects; and
 - (4) permit minority-owned and women-owned Contractors who have not previously been signatory to collective bargaining agreements with unions participating in the Partnership Agreement, if awarded a contract within the scope of the Partnership Agreement, to utilize all of their employees on a covered project; and provide for referral of such employees for admission to the appropriate craft union for journeyman assignment or apprentice recruitment; and
 - (5) prohibit strikes, sympathy strikes, picketing, work stoppages, slowdowns, sickouts, handbilling, lockouts, or other disruptive activity on School District property, except with regard to the non-payment of fringe benefit payments or wages or the remission of monies withheld from such wages.
- (b) The ESCO agrees to become a signatory to the School District's Partnership Agreement with the Philadelphia Building Trades Council at the time of contract award, and to accept and to be bound by all the goals, terms and conditions contained in this Partnership Agreement, which goals in this Partnership Agreement do not override other commitments contained in the Contracts as awarded. The ESCO shall require each Subcontractor, to the extent of the work to be performed by the Subcontractor, to accept and to be bound by all the goals, terms and conditions contained in this Partnership Agreement, which goals in this Partnership Agreement do not override other commitments contained in the Contracts as awarded, and to evidence its

acceptance by the execution of a written Agreement or a Letter of Assent prior to the commencement of work. The Partnership Agreement is attached to and hereby incorporated by reference into this Contract.

37.2 Reserved.

37.3 **Tax Compliance.**

- (a) It is the policy of the School District to ensure that firms, businesses and other legal entities receiving School District contracts are current in their payment of City taxes and School District taxes or other indebtedness owed to the City or the School District, including but not limited to taxes collected by the City on behalf of the School District, at the time of contract award. Pursuant to SRC Resolution SRC-2 dated February 21, 2013, the SRC has adopted a Tax Compliance of Vendors Policy which provides that generally, the SRC will not authorize the award of a School District contract to a firm, business or other legal entity that is delinquent in its payment of City or School District taxes or other indebtedness owed to the City and/or the School District at the time of contract award.
- (b) All firms, businesses and other legal entities wanting to receive a School District contract or receiving a School District contract shall comply with all of the terms and conditions of the Tax Compliance of Vendors Policy, which is set forth in detail herein.
- (c) **Tax Indebtedness Representation, Warranty and Covenant.**
 - (1) The ESCO represents, warrants and covenants to the School District that the ESCO and any other person controlling, controlled by, or under common control with the ESCO are not currently indebted to the City or the Commonwealth of Pennsylvania for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District) for which no written settlement agreement or payment plan with the City, or the Commonwealth of Pennsylvania, as the case may be, has been executed and delivered.
 - (2) The ESCO further represents, warrants and covenants to the School District that the ESCO and any other person controlling, controlled by, or under common control with the ESCO will not at any time during the term of this Contract (including any extensions or renewals thereof) be indebted to the City or the Commonwealth of Pennsylvania for or on account of any delinquent taxes (including, but not limited to, taxes collected by the City on behalf of the School District), liens, judgments, fees or other debts for which no written settlement agreement or payment plan with the City of Philadelphia,

or the Commonwealth of Pennsylvania, as the case may be, has been executed and delivered.

- (d) Proof of Tax Compliance. During the duration of any School District contract, the ESCO shall provide proof of its tax compliance in the form of a "Certificate of Tax Clearance" from the City's Department of Revenue to the School District, at the School District's written request, in the sole discretion of the School District.

- (e) Satisfactory Arrangement, Settlement Agreement or Payment Plan with City.
 - (1) The ESCO agrees to provide written proof to the School District of its execution and delivery of any satisfactory arrangement, settlement agreement or payment plan with the City to become compliant in the payment of City or School District taxes or other indebtedness owed to the City or the School District, or other necessary and appropriate documentation in satisfaction of said taxes or other indebtedness.

 - (2) The ESCO shall continue to comply with said City satisfactory arrangement, settlement agreement or payment plan during the duration of any School District contract.

- (f) Agreement to Set off or Offset for Delinquent Tax or other Indebtedness.
 - (1) The ESCO agrees that the School District may set off or offset the amount of any City or School District tax or taxes or other indebtedness owed to the City or the School District against any School District payment or payments due under any School District contract. The School District and the ESCO shall have the right to rely on certificates and other official documents provided by the City in proceeding to set off or offset under this Subparagraph 37.3(f)(1).

 - (2) In addition to any other rights or remedies available to the School District at law or in equity, the ESCO acknowledges and agrees that the School District may set off or offset the amount of any City or School District tax or taxes or other indebtedness owed to the City or the School District against any School District payment or payments due under any School District contract if the ESCO breaches the tax indebtedness representation, warranty and covenant, and such breach is not resolved, to the School District's satisfaction, within a reasonable time frame specified by the School District in writing.

(g) Agreement to Withholding of Contract Payment.

- (1) The ESCO agrees that the School District may withhold payment or payments due to the ESCO under any School District contract if the ESCO is delinquent in its payment of City or School District tax or taxes or other indebtedness owed to the City or the School District. The School District and the ESCO shall have the right to rely on certificates and other official documents provided by the City in proceeding to withhold under this Subparagraph 37.3(g)(1).
- (2) The ESCO agrees that the School District may withhold payment or payments due to the ESCO under any School District contract if the ESCO is delinquent in its payment of City or School District tax or taxes or other indebtedness owed to the City or the School District, and the ESCO has not entered into a satisfactory arrangement, settlement agreement or payment plan with the City to become compliant in the payment of City or School District tax or taxes or other indebtedness owed to the City or the School District.
- (1) The ESCO agrees that the School District may withhold payment or payments due to the ESCO under any School District contract if the ESCO is in default of any satisfactory arrangement, settlement agreement or payment plan with the City.
- (2) In addition to any other rights or remedies available to the School District at law or in equity, the ESCO acknowledges and agrees that the School District may withhold payment or payments due to the ESCO under any School District contract if the ESCO breaches the tax indebtedness representation, warranty and covenant, and such breach is not resolved, to the School District's satisfaction, within a reasonable time frame specified by the School District in writing.
- (3) The ESCO agrees that the School District may continue withholding payment or payments due to the ESCO under any School District contract until the City Revenue Department notifies the School District that the ESCO is tax compliant.

(h) Good Faith Contest.

- (1) The ESCO shall be permitted to, in good faith, contest the amount of any Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District.
- (2) The ESCO shall diligently and expeditiously proceed to resolve the matter with the City, or the Commonwealth of Pennsylvania, as the

case may be, in order to reach a satisfactory settlement agreement or payment plan with the City, or the Commonwealth of Pennsylvania, as the case may be.

- (3) The ESCO shall expeditiously pay all uncontested taxes and other indebtedness or obligations to the City or the Commonwealth of Pennsylvania.

(i) Termination of Contract.

- (1) Termination for Convenience. The School District, at its sole discretion, may terminate any School District contract for its convenience, at any time, upon fourteen (14) days' prior written notice to the ESCO of the School District's intention to terminate said contract ("Termination Notice"), and without penalty, cost or liability to the School District, provided the ESCO is:

- a. delinquent in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and
- b. the ESCO has not contested the amount of the Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and
- c. the ESCO has not entered into or executed any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Philadelphia or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District; or
- d. the ESCO is in default of any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Philadelphia or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District.

- (2) Termination for Default. The School District may terminate any School District contract for default by giving the ESCO a Termination Notice provided:

- a. the ESCO is delinquent in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and
- b. the ESCO has not contested the amount of the Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, the City or the School District; and
- c. the School District has requested in writing that the ESCO enter into or execute a satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Philadelphia or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District, and the ESCO has willfully or in bad faith refused or declined to comply with said School District request; or
- d. the School District has requested in writing that the ESCO cure its default of any satisfactory arrangement, settlement agreement or payment plan with the Commonwealth of Philadelphia or the City, as the case may be, to become compliant in the payment of Commonwealth of Pennsylvania, City or School District tax or taxes or other indebtedness owed to the Commonwealth of Pennsylvania, City or the School District, and the ESCO has willfully or in bad faith refused or declined to comply with said School District request.

The ESCO shall be liable for all excess costs and other damages resulting from said termination for default.

37.4 **Prevailing Wages.** This Contract is subject to the requirements of the Pennsylvania Prevailing Wage Act and other related statutes and regulations governing wages, hours and conditions of employment, which are set forth in detail in Section 52.17 herein. The ESCO is required, among other things, to comply with the Prevailing Minimum Wage Determination included in the RFP.

[ARTICLE 38. INTENTIONALLY LEFT BLANK.]

[ARTICLE 39. INTENTIONALLY LEFT BLANK.]

[ARTICLE 40. INTENTIONALLY LEFT BLANK.]

ARTICLE 41. CONTRACTOR RESPONSIBILITY PROVISIONS

41.1 The ESCO represents and warrants to the School District that neither the ESCO nor any of its principals or Subcontractors are under suspension or debarment, have received a notice of commencement of proceedings for debarment, or have been declared ineligible by the Commonwealth of Pennsylvania, the City of Philadelphia, any Federal agency or any school district. The ESCO shall provide immediate written notice to the School District's Director of Capital Programs, if at any time during the term of the Contract, the ESCO learns that the certification made in this Article 41 of the Contract was erroneous when the ESCO signed the Contract or subsequently became erroneous by reason of changed circumstances.

41.2 If ESCO enters into any Subcontracts under this Contract with Subcontractors who are currently suspended or debarred by the School District, the City, the Commonwealth, or federal government or who become suspended or debarred by the City, the Commonwealth or federal government during the Term or any extensions or renewals thereof, School District shall have the right to require ESCO to terminate such Subcontracts.

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

41.4 **Disqualification, Suspension or Debarment of Bidders.** The School District shall solicit or accept proposals from and shall award contracts to or consent to subcontracting only with responsible proposers. Proposers, contractors, or affiliates may be disqualified, suspended or debarred as not responsible to protect the School District's and the public's interest in accordance with the standards and procedures adopted by the School District and any other applicable law. A complete statement of Policy No. 621 entitled "Disqualification, Suspension or Debarment of Bidders" adopted June 16, 1986, as amended is incorporated herein by reference and included in the Attachments to the Contract.

ARTICLE 42. THE AMERICANS WITH DISABILITIES ACT

42.1 ESCO understands and agrees that, pursuant to federal regulations promulgated under the authority of the Americans With Disabilities Act, 28 C.F.R. §35.101 *et seq.*, no individual with a disability shall, on the basis of the disability be excluded from participation in the Contract or from activities or services provided under the Contract. As a condition of accepting and executing the Contract, ESCO shall comply with all

provisions of the Americans With Disabilities Act (the "ADA"), 42 U.S.C. §§12101-12213, and all regulations promulgated thereunder, as the ADA and regulations may be amended from time to time, which are applicable to: (a) the ESCO; (b) the benefits, services, activities, facilities and programs provided in connection with the Contract; (c) the City or the Commonwealth; and the benefits, services, activities, facilities and programs of the City or of the Commonwealth, and, (d) if any funds for payments or otherwise under the Contract are provided by the federal government and its benefits, services, activities, facilities and programs the benefits. Without limiting the applicability of the preceding sentence, ESCO shall comply with the "General Prohibition Against Discrimination", 28 C.F.R. Part 35.130, and all other regulations promulgated under Title II of the ADA, as they may be amended from time to time, which are applicable to the benefits, services, programs and activities provided by the City through Contracts with outside contractors.

42.2 ESCO shall be responsible for and agrees to indemnify and hold harmless City from all losses, damages, expenses, claims, demands, suits, and actions brought by any party against the City as a result of ESCO's failure to comply with the provisions of Paragraph 42.1 above.

ARTICLE 43. GENERAL PERFORMANCE REQUIREMENTS

43.1 **Standards of Performance.** ESCO shall perform all tasks/phases under this Contract, including construction and services required for ECM Implementation, in such a manner so as to 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 L (Standards of Comfort)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. The School District reserves the right to review the Work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of the School District, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the Work shall be borne by ESCO.

43.2 **Professional and Technical Accuracy.** ESCO shall remain responsible for the professional and technical accuracy of all services performed, whether by the ESCO or its Subcontractors or others on its behalf, throughout the Term of this Contract. In no event shall any review, approval, comment, or evaluation by the School District relieve the ESCO of any liability or responsibility under this Contract, it being ultimately understood that the School District is relying upon the ESCO's skill, knowledge, and professional training and experience to complete the Work.

43.3 **Safety.** The ESCO shall be responsible for initiating, maintaining, and supervising reasonable safety precautions and programs in connection with the performance of this Contract. The ESCO shall take all reasonable precautions for safety of, and shall provide reasonable and appropriate protection to prevent damage, injury, or loss to (a) employees on the Work and other persons who may be affected thereby; (b)

the Work and materials and Equipment to incorporated therein; and (c) other property on the Premises or adjacent thereto.

43.4 **Documentation.** The ESCO and its Subcontractors shall furnish the School District with such documentation and information as the School District reasonably requests regarding the progress and execution of this Contract. The provisions of this Paragraph are not intended to supersede or limit the provisions of the Contract related to furnishing information or documents to the School District.

ARTICLE 44. STEEL PRODUCTS PROCUREMENT ACT

The Steel Products Procurement Act, 73 P.S. §1881, *et seq.*, as amended, shall govern payments to the ESCO under the Contract. In seeking payment under the Contract, the ESCO represents, warrants and covenants that only steel products made in the United States as defined by the Steel Products Procurement Act have been used or supplied in the performance of the Contract and all Subcontracts thereunder. Where unidentified steel products are supplied or used under the Contract, the School District will not authorize, provide for, or make any payments to the ESCO for such steel products, unless and until the ESCO shall first provide to the Project Manager documentation, including, but not limited to, invoices, bills of lading, and mill certification, attesting that the steel was melted and manufactured in the United States. Where a steel product is identifiable from its face, the School District will authorize, provide for, and make payments to the ESCO for such steel products, only after the ESCO shall have submitted a certification, in a form satisfactory to the Project Manager, that the ESCO has fully complied with the requirements of the Steel Products Procurement Act. Where the Project Manager has determined, in writing, that a particular steel product is not produced in the United States in sufficient quantities to satisfy the requirements of the Contract, then this Paragraph shall not apply to payments for that steel product. Failure of the ESCO to comply with the Steel Products Procurement Act shall constitute a violation of the Contract which shall entitle the School District to exercise all rights and remedies provided to it by the Steel Products Procurement Act and provided to it under the Contract, either at law or in equity.

44.1 All ferrous metal products used on this Project must comply with the requirements of the Steel Products Procurement Act (73 P.S. §1881 *et seq.*, as amended).

44.2 The ESCO shall complete and submit to the School District or Project Manager the appropriate Steel Origin Certification on forms ST1 to ST4, provided with this Contract for all ferrous metal products prior to incorporating them into the Project, attached hereto.

44.3 The ESCO shall be responsible for procuring and submitting appropriate Steel Origin Certifications from his Subcontractors or fabricators, as applicable.

44.4 The School District shall enforce the Steel Products Procurement Act by means of removal and replacement of non-complying steel products, at the sole expense of the ESCO.

ARTICLE 45. SALES AND USE TAX; FEDERAL EXCISE TAX

45.1 The School District is not subject to federal, state or local sales or use tax or federal excise tax. ESCO hereby assigns to the School District all of its right, title and interest in any sales and use tax which may be refunded as a result of the purchase of any materials in connection with the Contract, and the ESCO, unless directed by the School District, shall not file a claim for any sales or use tax refund subject to this assignment. The ESCO authorizes the School District, or its agent, in its own name, or in the name of the ESCO, to file a claim for a refund of any sales or use tax subject to this assignment. To the extent it may be applicable to the work under this Contract, the ESCO covenants and agrees that it shall not bill the School District for or otherwise pass-through to the School District for payment any Federal Excise Tax paid in connection with the work under this Contract; in consideration of the ESCO's foregoing covenant, the School District hereby consents to any filing by the ESCO for a refund of any Federal Excise Tax paid in connection with the work under this contract.

45.2 The ESCO agrees to include the above referenced Paragraph in any Subcontracts with Subcontractors.

ARTICLE 46. AUDITS; INSPECTION RIGHTS; RECORDS

46.1 **Audits.** From time to time during the term of the Contract and for a period of six (6) years after the expiration or termination of the Contract (see 24 P.S. §5-518), the School District (including, without limitation, the Auditing Services Office), the Controller of the City of Philadelphia ("City"), the Commonwealth of Pennsylvania, including without limitation its Auditor General and the Pennsylvania Department of Education, or a department, agency or instrumentality of the United States of America, if the School District funds the Contract with federal funds or bonds, or any of their authorized representatives, (each, for the purposes of this Article 46, an "Auditor") may audit any and all aspects of the ESCO's performance under the Contract, including but not limited to his billings and invoices and payments received. If requested by an Auditor or the School District, the ESCO shall submit to the Auditor and the School District, for review and inspection, all vouchers and invoices presented for payment pursuant to the Contract, all cancelled checks, materials, invoices, vouchers, reports, work product, work papers, books, records and accounts (whether in electronic, paper, or other form or medium) upon which the vouchers or invoices are based, and any and all documentation and justification in support of expenditures or fees incurred pursuant to the Contract. All such vouchers or invoices, reports, work product, work papers, books, records, accounts, cancelled checks, materials, documentation and justification shall be subject to periodic review and audit by the School District.

46.2 **Inspection.** The ESCO acknowledges and agrees that any Auditor may inspect or review all of its Work and materials and all of its sites, locations and facilities related to his performance under the Contract. Inspection and review of Work and materials shall take place at the offices of the ESCO or the School District or in another location with the Auditor's consent. The ESCO shall cooperate with all School District, City, Commonwealth of Pennsylvania and federal inspections and reviews conducted in accordance with the provisions of the Contract. The scope of such inspection and review of the Work and materials, and sites, locations and facilities lies in the sole discretion of the Auditor. Such inspection or review may include, without limitation, meetings with any of the ESCO's staff members who either directly or indirectly participate or participated in carrying out any of the Work, including preparing, delivering or installing any materials.

46.3 **Availability of Records.** The ESCO shall make available, within the School District or at the ESCO's offices during regular business hours, or in another location with the Auditor's consent, at reasonable times during the term of the Contract and for the period set forth in this Article 46, all records (whether in electronic, paper, or other form or medium) pertaining to the Contract for the purpose of inspection, audit or reproduction by any authorized representative of the School District or any Auditor. The ESCO shall provide such records without unreasonable delay when requested by the School District or any Auditor.

46.4 **Retention of Records.** The ESCO shall retain all such records, books of account and documentation pertaining to the Contract, including but not limited to invoices, payments, or the documentation thereof under the Contract, for the greater of the period required by Applicable Law or the six (6) year period following expiration or termination of this Contract set forth in this Article 46; however, if any litigation, claim or audit commences prior to expiration of such six (6) year period, then the ESCO shall retain the records until all litigation, claims or audit findings have been completely terminated or resolved, without right of further appeal. The ESCO shall include this Article 46 in all Subcontracts for Work required by the Contract.

ARTICLE 47. COVENANT OF QUIET ENJOYMENT

ESCO will perform its duties and obligations without disturbing the quiet use and enjoyment of the Premises during the Term, except as otherwise expressly set forth herein.

ARTICLE 48. RIGHT-TO-KNOW LAW

48.1 The Pennsylvania Right-to-Know Law, 65 P.S. §§67.101-3104, applies to this Contract.

48.2 The School District shall notify the ESCO using the legal contact information provided in this Contract if the School District needs the ESCO's assistance in any matter arising out of the Right to Know Law ("RTKL"). The ESCO shall notify the School District

in writing of any change in the name or the contact information within a reasonable time prior to the change.

48.3 Upon notification from the School District that the School District requires the ESCO's assistance in responding to the RTKL request ("**Requested Information**"), ESCO shall have five days from receipt of notification from the School District to provide input on the release of the requested information and such other records and assistance as the School District may request in order to comply with the RTKL. If the ESCO fails to provide such input, records or assistance within five (5) days after receipt of such a request from the School District, ESCO shall indemnify and hold the School District harmless for any damages, penalties, detriment or harm that the Commonwealth may incur as a result of the ESCO's failure, including any statutory damages assessed against the School District.

48.4 The School District's determination as to whether the Requested Information is a public record is dispositive of the question as between the parties. The ESCO agrees not to challenge the School District's decision to deem the Requested Information a public record. If, upon review of the information and records provided by the ESCO, the School District decides to release the Requested Information in response to the RTKL request, the ESCO will not challenge or in any way hold the School District liable for such a decision.

48.5 The School District will reimburse the ESCO for any costs associated with complying with this provision only to the extent allowed under the fee schedule established by the Office of Open Records or as otherwise provided by the RTKL if the fee schedule is inapplicable.

48.6 The ESCO agrees to abide by any decision to release a record to the public made by the Office of Open Records, or by the Pennsylvania courts. The ESCO agrees to waive all rights or remedies that may be available to it as a result of the School District's disclosure of Requested Information pursuant to the RTKL. The ESCO's duties relating to the RTKL are continuing duties that survive the expiration of this Contract and shall continue as long as the ESCO has Requested Information in its possession.

ARTICLE 49. NOTICE

All notices from either party to the other shall be effective only if in writing and signed by the party giving notice and given by being delivered personally or sent electronically or by registered or certified mail, return receipt requested, postage prepaid, or delivered to a nationally recognized express mail service, charges prepaid, receipt obtained, to the address shown below or to such other persons or addresses as are specified by similar notice.

IF TO ESCO:

Attention: _____

IF TO SCHOOL DISTRICT:

The School District of Philadelphia
440 N. Broad Street, 3rd Floor
Philadelphia, PA 19130
Attention: Director, Office of Capital Programs

With copy to:

The School District of Philadelphia
Office of General Counsel
440 N. Broad Street, 3rd Floor
Philadelphia, PA 19130
Attention: General Counsel

[ARTICLE 50. INTENTIONALLY LEFT BLANK.]

ARTICLE 51. APPROVALS BY SCHOOL DISTRICT; ENFORCEMENT BY SCHOOL DISTRICT

51.1 **Approval Not a Guarantee or Warranty.** School District's review, approval or acceptance under this Contract of plans and specifications and any other document, work, matter, or thing, shall not constitute a representation, warranty or guaranty by School District as to the substance, accuracy, or quality of such document, matter, or thing. At all times, ESCO, its officials, officers, employees, agents, contractors and subcontractors, must each use their own independent judgment as to the substance, accuracy and quality of all such documents, work, matter, and other things.

51.2 **Approvals Under Applicable Law.** No consent, approval, or agreement of the School District under this Contract shall be deemed a consent, approval or agreement of any City board, agency, department, or commission whose consent, approval, or agreement is or may be required under Applicable Law, including but not limited to the City of Philadelphia Department of Licenses and Inspections, the City of Philadelphia Historical Commission, and the City of Philadelphia Art Commission. The decisions of any City board, agency, department or commission required under Applicable Law regarding any matter arising under this Contract shall be governed solely by Applicable Law.

ARTICLE 52. MISCELLANEOUS PROVISIONS

52.1 **Entire Agreement.** This Contract, when executed, together with all other Contract Documents attached hereto or to be attached hereto, as provided for by this Contract shall contain all the agreements, conditions, understandings, undertakings, representations, covenants, promises and warranties made between the Parties hereto with respect to the subject matter hereof and supersedes all prior negotiations and proposals (either written or oral).

52.2 **Headings.** Headings and subtitles used throughout this Contract are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

52.3 **Amendments; Waiver.** This Contract may not be amended, supplemented, altered, modified or waived, in whole or in part, except by a written amendment signed by the Parties or as elsewhere provided in the Contract. Except to the extent that the Parties may have otherwise agreed in writing in an amendment, no waiver, whether express or implied, by either Party of any provision of the Contract shall be deemed: (a) to be a waiver by that Party of any provision in the Contract; or (b) to be a waiver by that Party of any breach by the other Party of its obligations under the Contract. Any forbearance by a Party in seeking a remedy for any noncompliance or breach by the other Party shall not be deemed to be a waiver of rights and remedies with respect to such noncompliance or breach.

52.4 **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.

52.5 **Order of Precedence.** If any conflicts or discrepancies should arise in the terms and conditions of this Contract or the interpretation thereof and the attached Schedules, Exhibits, and Appendices, the terms of this Contract shall control.

52.6 **Governing Law and Venue.** This Contract shall be deemed to have been made in Philadelphia, Pennsylvania. The Contract and all disputes arising under the Contract shall be governed, interpreted, construed and determined in accordance with the laws of the Commonwealth without regard to the choice of law doctrine theory. Any suit brought to enforce any of the rights and obligations under this Contract shall be brought in the state and federal court situated in Philadelphia, Pennsylvania.

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

52.8 **Waiver of Jury Trial.** The Parties hereby mutually waive any rights that either may have to request a jury trial in any proceeding at law or in equity in any court of competent jurisdiction.

52.9 **No Third Party Beneficiaries.** Nothing in the Contract, express or implied, is intended or shall be construed to confer upon or give to any Person, other than the Parties, any rights, remedies, or other benefits, including but not limited to third-party beneficiary rights, under or by reason of the Contract. The Contract shall not provide any third party with any remedy, claim, liability, reimbursement, cause of action or other right other than any such remedy, claim, etc. existing without reference to the term of or the existence of the Contract.

52.10 **Rights of the City in its Governmental Capacity Not Limited.** Nothing in this Contract shall be interpreted as limiting the rights and obligations of the City under Applicable Law in its governmental or regulatory capacity.

52.11 **Use of Site.**

- (a) Radios, headphones or other types of personal audio equipment are not permitted on the site.
- (b) Privately owned vehicles of any type are not permitted on the site. The School District is not responsible for providing parking provisions for the ESCO, their Subcontractors or their employees.
- (c) The ESCO, inclusive of their Subcontractors, is permitted only one trailer on the construction site.
- (d) The ESCO, inclusive of their Subcontractors, is to include forty (40) hours of training for School District staff on Project systems, equipment and utilities.
- (e) The use of tobacco products by visitors is prohibited in school buildings and on school grounds of the School District, and in stadiums, or bleachers, or other premises leased by, or under the control of the School District, unless visitors are in a smoking area designated for non-students where the designated area is no less than 50 feet from school buildings, stadiums, or bleachers, in accordance with Act 128 of 2000 (18 Pa.C.S.A. §6306.1) and School District of Philadelphia Board Policy No. 222. "Smoking, Tobacco Products & Paraphernalia" and Board Policy No. 316. "Use of Tobacco Products". "Tobacco products" shall mean all uses of tobacco, including cigars, cigarettes, pipes, and smokeless tobacco, as well as other substances used as smoking material.

- (f) There shall be no burning on the Project site. All materials not to be incorporated into the Work shall be removed from the Project site and properly and legally disposed of.

52.12 Publicity. Neither the School District nor the ESCO and his Subcontractors shall publicize the Contract or the Work, or attribute any comments or views about this Contract or the Work to employees or agents or officials of the other party, by press conference, press release, advertising or public relations materials without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, that nothing in this Paragraph 52.12 shall be construed to prohibit either party from making any disclosure relating to the Contract or Work that is required under federal or state securities laws or state or local election laws, or to prohibit either party from publicizing, with reasonable prior notice to the other party, the fact that the Contract has been entered into, the subject matter of the Contract, or the amount of the Contract. Except as may be required for its performance of the Contract, or as mutually agreed by the School District and the ESCO, the ESCO shall refer all press and public inquiries regarding the Project to the School District's Director of Capital Programs during the term of the Contract. At any time thereafter, the ESCO may respond to press and public inquiries regarding the Project following notice to the School District. During the term of the Contract, the ESCO shall provide reasonable assistance to the School District in public relations activities, and shall prepare appropriate information for, and when requested, attend public meetings regarding the Project.

52.13 School District Officers And Employees Not To Benefit. The ESCO shall not share with any School District officer or employee, and no School District officer or employee shall accept, any portion of the compensation paid by the School District for Work, except in accordance with School District policy and applicable law. The ESCO shall disclose to the School District with each Application for Payment submitted the name(s) of any School District officer(s) or employee(s) sharing in the compensation requested and the amount such officer or employee is to be paid. Any compensation shared by the ESCO and School District officers or employees in violation of School District policy and applicable law shall be recoverable from the ESCO as damages.

52.14 Equal Opportunity.

52.14.1 The School District is an Equal Opportunity Employer and demands no less of companies with which it does business. The School District will not do business with companies or persons who unlawfully discriminate on the basis of age, race, color, sex, sexual orientation, disability, creed, ancestry, national origin, Vietnam-era veteran status, limited English proficiency, or any other impermissible ground in their hiring, promotion, subcontracting, or procurement practices. By submitting any proposal to contract or entering into any contract with the School District, the ESCO represents and certifies that it is an Equal Opportunity Employer; conducts its business affairs without improper regard to age, race, color, sex, sexual orientation, disability, creed, ancestry, national origin, Vietnam-era veteran status, limited English proficiency, or other impermissible ground; and has not been debarred, suspended, or declared ineligible to

contract by any public or private agency or entity because of its discriminatory practices. If the ESCO has been debarred or suspended for such reason, it must submit a statement with the bid identifying the debarring or suspending entity and giving the date the debarment or suspension was or is scheduled to be lifted. The ESCO's certifications given pursuant to this Paragraph are material representations of fact upon which reliance was placed when this Contract was awarded. If it is later discovered or determined that the ESCO knowingly rendered an erroneous certification, then the School District may pursue available remedies, including termination of this Contract, suspension or debarment. The ESCO agrees to include this Subparagraph 52.14.1 of this Contract, with appropriate adjustments for the identity of the parties, in all Subcontracts that are entered into for Work on the Project to be performed under this Contract.

52.14.2 The ESCO shall not discriminate nor permit discrimination against any person because of race, color, religion, age, national origin, ancestry, creed, handicap, sexual orientation, union membership, disabled or Vietnam era veteran status, or limited English proficiency in the performance of this Contract, including, but not limited to, preparation manufacture, fabrication, installation, erection and delivery of all supplies and equipment. In the event of receipt of such evidence of such discrimination by the ESCO or its agents, employees or representatives, the School District shall have the right to terminate this Contract. In the event of the continued refusal on the part of the ESCO to comply with this anti-discrimination provision, the ESCO may be removed from the list of approved bidders of the School District. The ESCO agrees to include this Subparagraph 52.14.2 of this Contract, with appropriate adjustments for the identity of the parties, in all Subcontracts which are entered into for Work on the Project to be performed pursuant to this Contract.

52.14.3 **Non-Discrimination in Hiring.** The ESCO agrees that it will comply with the contract provisions prohibiting discrimination of the Commonwealth Procurement Code, 62 Pa.C.S.A. §3701, and the provisions of the Philadelphia Fair Practices Ordinance administered by the Human Relations Commission of the City of Philadelphia, the Pennsylvania Human Relations Act, No. 222, October 27, 1955, as amended, (43 P.S. §951 *et seq.*), Title 7 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 *et seq.*, and all pertinent regulations adopted pursuant to the foregoing in providing equal employment opportunities in connection with all Work performed by it pursuant to this Contract. The ESCO therefore agrees:

(a) That it will not discriminate nor permit discrimination by its agents, servants, any employee or applicant for employment with regard to hiring, tenure of employment, promotion, or any other terms, conditions or privileges of employment because of race, color, gender, sex, religion, creed, age, national origin, ancestry, handicap or disability and will move aggressively as is hereinafter set forth to prevent same.

(1) That in all publications or advertisements for employees to work at the job site covered by this Contract, placed by or on behalf of the ESCO, it will state that all qualified applicants will receive consideration for employment

without regard to race, color, sex, religion, creed, age, national origin, ancestry, handicap or disability.

(2) The ESCO will notify each labor union, or workers' representative from which it seeks workers of the ESCO's commitments under this Paragraph, and request that each such union or workers' representative include minority group members and women among its referrals.

(3) The ESCO will hire minority and female workers for the skilled and unskilled jobs required to perform this Contract in proportion to their availability in the relevant labor pools in the Philadelphia Metropolitan Statistical Area, or to their availability in its qualified applicant pool, whichever is greater.

(4) The ESCO will post in conspicuous places available to its employees and to applicants for employment a notice of fair practices to be provided by the Philadelphia Human Relations Commission.

(5) The ESCO will maintain a work environment free of harassment, intimidation and coercion, and will ensure that all on-site supervisory personnel are aware of and carry out the ESCO's obligation to maintain such a working environment.

(b) That it will identify in each certified payroll form submitted to the School District those of its employees who are minority group members and those who are female. As used here, "minority" means African-American, Hispanic, Asian, or Native-American. The School District shall at all times have access to the work site and to the ESCO's employment records to assure compliance with this Paragraph.

(c) That it will maintain on forms to be supplied by the School District the name, race, sex, national origin, skill or craft, address, telephone number, and source of referral of each applicant for employment under this Contract, which record shall show which applicants were hired.

(d) That in the event apprentices are hired in any skilled craft area, the ESCO will endeavor to hire equal numbers of culturally diverse male and female trainees in each skill area.

(e) That it will insert the provisions of subsections (a), (b), (c), and (d) of this Subparagraph 52.14.3 of this Contract, in all Subcontracts which are entered into by the ESCO under this Contract, as covenants to be binding upon such Subcontractors.

(f) The ESCO's agreement to meet the requirements of this Subparagraph 52.14.3 of this Contract is a material representation of fact upon which reliance was placed when this Contract was awarded. If it is later determined that the ESCO has not made good faith efforts to comply, within the School District's sole

judgment, then the School District may pursue available remedies, including suspension or debarment of the ESCO from future School District work as non-responsible.

52.14.4 **Non-Discrimination in Subcontracting.** It is the policy of the School District that business concerns owned and controlled by minority group members and women shall have full and fair opportunity to participate in performance of contracts let by the School District. Participation of minority-owned and women-owned business enterprises must be meaningful and substantial in all phases of this Contract. The ESCO shall ensure that minority-owned business enterprises (“MBEs”) and women-owned business enterprises (“WBEs”) have the maximum opportunity to participate in the performance of this engagement, and shall make a good-faith effort to achieve the goals. MBEs and WBEs are minority-owned business enterprises and women-owned business enterprises that have been certified or qualified by the School District Office of Small Business Development or have been certified by the City of Philadelphia’s current Office of Economic Opportunity (“OEO”) on OEO’s Registry of Certified Firms or former Minority Business Enterprise Council or the Southeastern Pennsylvania Transportation Authority’s DBE Program Office, or any other certifying agency designated by the School District in its discretion. A bidder’s plan to joint venture with or subcontract to MBEs and WBEs and/or to utilize MBEs and WBEs as sources of supplies, equipment, or services will be considered in evaluation of bidder responsibility. The representations and agreements in this Subparagraph 52.14.4 of this Contract are material representations of fact upon which reliance was placed when this transaction was entered into. If it is later discovered or determined that the ESCO has not made good faith efforts to comply, within the School District’s sole judgment, then the School District may pursue available remedies, including suspension or debarment of the ESCO from future School District work as non-responsible.

(a) The ESCO will consider all bids from potential MBE/WBE joint ventures or subcontractors, and document on forms to be supplied by the School District or the Project Manager, the reasons for not entering into a joint venture or subcontract with a MBE/WBE. If the reason given is that the MBE/WBE price quotation was not competitive, the ESCO agrees to identify the joint venture or subcontractor accepted and to show that the joint venture’s or subcontractor’s price quotation was for the same work or materials quoted by the MBE/WBE.

(b) Within ten (10) days of the opening of bids, with regard to each joint venture or subcontract with or agreement to purchase supplies from MBE/WBEs, the ESCO will provide the School District with a report naming the MBE/WBE, describing the joint venture or subcontract or purchase agreement, and stating the dollar value of the joint venture or subcontract or purchase agreement.

(c) Where the ESCO proposes to perform the total contract with its own work force without any joint venture or subcontracting, before the Contract is awarded, the ESCO will submit to the School District information sufficient for the School District to determine that:

(1) It is the ESCO's normal business practice to perform all parts of such contracts with its own force; and

(2) The ESCO has the capability to perform all parts of the Contract with its own force without the use of joint ventures or subcontracts.

(d) The ESCO's agreement to meet the requirements of this Subparagraph 52.14.4 of this Contract is a material representation of fact upon which reliance was placed when this Contract was awarded. If it is later determined that the ESCO has not made good faith efforts to comply, within the School District's sole judgment, then the School District may pursue available remedies, including suspension or debarment of the ESCO from future School District work as non-responsible.

(e) The ESCO's Minority/Woman Owned Business Enterprise (MWBE) Participation Plan ("MWBE Participation Plan") is attached to and hereby incorporated by reference into this Contract. The MWBE Participation Plan shall be enforceable as any other contractual term or condition of this Contract. Sanction for breach of the MWBE Participation Plan may include suspension, cancellation of this Contract and/or debarment from future contracting opportunities with the School District.

52.14.5 **Liability of Subcontractors.** Any Subcontractor of the ESCO under Subparagraphs 52.14.1, 52.14.2, 52.14.3 and 52.14.4 of this Contract shall have the same responsibility and obligations as the ESCO to comply with the provisions herein, and shall be subject to the same penalties for failure to comply as set forth herein.

52.14.6 **Penalties for Failure to Comply.**

(a) It is hereby agreed that failure to comply and demonstrate best efforts to comply with the foregoing requirements shall constitute a substantial breach of this Contract.

(b) In the event that the School District determines, after investigation, that the ESCO or Subcontractor, as the case may be, has failed to comply with any provision of this Contract, and to demonstrate best efforts to comply, the School District may, in its sole discretion, invoke the termination provisions of the Contract (Article GC-14) or move to disqualify, suspend or debar the ESCO or Subcontractor pursuant to Board Policy No. 621, a copy of which is included in the RFP or Contract or Contract Documents.

(c) The ESCO or Subcontractor, as the case may be, shall be given written notice of any determination of non-compliance and opportunity to achieve compliance within a time period to be specified in the notice.

(d) In the event the School District, after a hearing, determines to terminate this Contract, or any Subcontract entered into under this Contract, for noncompliance with and failure to demonstrate best efforts to comply with

the terms of this Contract, all obligation on the part of the School District's part to perform this Contract shall cease, save only the obligation to pay the ESCO the sums due, including the retained amounts for all articles delivered or work done, or for all articles or equipment for which the ESCO may be liable to the date of such termination.

52.15 **Preference to Employment of War Veterans.** The ESCO, his Subcontractors, or any person acting on behalf of the ESCO or Subcontractors, shall keep and comply with the provisions of the Veterans Preference Act, Act of August 1, 1975, P.L. 233, No. 92 (51 Pa. C.S.A. §7101 *et seq.*), with amendments therein, giving preference to employment of honorably discharged persons, as more specifically provided therein.

52.16 **Hiring and Conditions of Employment.** The ESCO, his Subcontractors, or any person acting on behalf of the ESCO or Subcontractor, shall abide and be bound by all laws of the Commonwealth of Pennsylvania, the City of Philadelphia and the Federal Government, which may be applicable to this Contract, relating to and regulating the hiring, firing, working hours and any and all other conditions of employment.

52.17 **Wage Rates.**

52.17.1 The current prevailing minimum wage rates, including contributions for employee benefits, for the respective crafts and classifications as determined by the Secretary of Labor and Industry of the Commonwealth of Pennsylvania ("Pennsylvania Secretary of Labor and Industry") shall be paid to all workers engaged in Work under this Contract. Workers include laborers, mechanics, skilled and semiskilled laborers and apprentices employed by the ESCO or any Subcontractor and engaged in the performance of services directly upon School District facilities, but do not include material suppliers or their employees who do not perform services at the job site. Apprentices are persons employed and working under a bona fide apprenticeship program, directly related to the particular craft involved in the construction industry and registered with and approved by the Pennsylvania Apprenticeship and Training Council and whose training and employment are in full compliance with the provisions of the Apprenticeship and Training Act (43 P.S. §90.1 *et seq.*) approved July 14, 1961 (No. 304). The ESCO and his Subcontractors shall pay at least the wage rates as determined in the decision of the Secretary of Labor and Industry to workers engaged in Work under this Contract. The ESCO and his Subcontractors shall comply with the conditions of the Pennsylvania Prevailing Wage Act (43 P.S. §165-1 *et seq.*) approved August 15, 1961 (No. 442), as amended August 9, 1963 (No. 342), and the Prevailing Regulations (34 PA Code §9.101 *et seq.*) approved May 23, 1975 issued pursuant thereto, to assure the full and proper payment of said rates.

52.17.2 All workers engaged in Work under this Contract shall be paid at least the current prevailing minimum wage rates for their particular classifications. The current prevailing minimum wages rates as determined by the Pennsylvania Secretary of Labor and Industry are included in the RFP or Contract or Contract Documents, and are incorporated by reference herein and made a part of this

Contract. These wage rates are the wage rates in effect at the time of the making of this Contract. These wage rates shall not be altered during the period this Contract is in force. There is no requirement to pay wage rates higher than those specified in this Contract, in the event that the Pennsylvania Secretary of Labor and Industry increases the prevailing minimum wage rates during the term of this Contract, unless said increases are included in the Prevailing Minimum Wage Determination.

52.17.3 No workers may be employed under this Contract, except in accordance with the classifications set forth in the decision of the Pennsylvania Secretary of Labor and Industry. In the event that additional or different classifications are necessary, the School District shall petition the Pennsylvania Secretary of Labor and Industry for review of the rates and hearings.

52.17.4 All workers employed or working under this Contract shall be paid unconditionally, at least once a week, without deduction or rebate, on any account, either directly or indirectly, except authorized deductions, the full amounts due at the time of payment, computed at the wage rates stipulated in this Contract, regardless of whether any contractual relationship exists or the nature of any contractual relationship which may be alleged to exist between the ESCO, any Subcontractor and worker. Nothing in this Contract, the Pennsylvania Prevailing Wage Act or the Prevailing Regulations shall prohibit the payment of more than the current prevailing minimum wage rates as determined by the Pennsylvania Secretary of Labor and Industry to any worker under this Contract.

52.17.5 Wages shall be paid without any deductions, except those deductions which are authorized by the Wage Payments and Collection Act (43 P.S. §260.1 *et seq.*) approved July 14, 1961 (No. 329) and the Regulations of the Department of Labor and Industry of the Commonwealth of Pennsylvania issued pursuant thereto. Employers who are not parties to a contract requiring contributions for employee benefits which the Pennsylvania Secretary of Labor and Industry has determined to be included in the current prevailing minimum wage rate shall pay the monetary equivalent thereof directly to the workers.

52.17.6 Apprentices shall be limited to such numbers as shall be in accordance with a bona fide apprenticeship program registered with and approved by the Pennsylvania Apprenticeship and Training Council. Only apprentices whose training and employment are in full compliance with the provisions of the Apprenticeship and Training Act (43 P.S. §90.1 *et seq.*) approved July 14, 1961 (No. 304) and the Rules and Regulations issued pursuant thereto shall be employed under this Contract. Any worker using the tools of a craft who does not qualify as an apprentice within the provisions herein shall be paid the rate predetermined for journeymen in that particular craft or classification.

52.17.7 Payment of compensation to workers for work performed under this Contract on lump sum basis, or a piece work system, or a price certain for the completion of a certain amount of work, or the production of a certain result

shall be deemed a violation of the Pennsylvania Prevailing Wage Act and the Prevailing Regulations, regardless of the average hourly earnings resulting there from.

52.17.8 The ESCO and his Subcontractors shall post for the duration of this Contract the wage determination decisions of the Pennsylvania Secretary of Labor and Industry, including the effective date of any changes thereof, in a prominent and easily accessible place or places at the site of the Work and at the place or places used by them to pay workers their wages. The posted notice of wage rates must contain the following information:(1) the name of this Project; (2) the name of the School District; (3) the crafts and classifications of workers listed in the Pennsylvania Secretary of Labor and Industry's current prevailing minimum wage rate determination for this Project; (4) the current prevailing minimum wage rates determined for each craft and classification and the effective date of any changes; (5) a statement advising workers that if they have been paid less than the current prevailing minimum wage rates for their job classification, or if the ESCO or Subcontractor is not complying with the Pennsylvania Prevailing Wage Act or the Prevailing Regulations in any manner whatsoever, they may file a protest in writing with the Pennsylvania Secretary of Labor and Industry within three (3) months of the date of the occurrence, objecting to the payment to the ESCO or Subcontractor to the extent of the amount or amounts due or to become due to them as wages for work performed under this Contract; and (6) a statement advising workers that any worker paid less than the wage rate specified in this Contract has a civil right of action for the difference between the wages paid and the wages stipulated in this Contract, and that this right of action must be exercised within six (6) months from the date of the occurrence.

52.17.9 The ESCO and his Subcontractors shall keep an accurate record showing the name, craft or classification, number of hours worked per day, and the actual hourly rate of wage paid, including employee benefits, to each worker employed by them in connection with this Contract. This record shall include the following information: (1) the name, address and social security number of each worker; (2) the craft, if applicable, the classification within each craft, and any other classification, including apprenticeship, at which each worker worked; (3) the number of hours in each day, specified by actual calendar date, during which each worker worked; and (4) the number of hours in each day in which each worker worked at different crafts or classifications, if such worker worked in more than one craft or classification for which different wage rates were payable. This record shall include any deductions from each worker. Time cards of employees, as well as the original signed indentures for each apprentice and the approvals of the Pennsylvania Apprenticeship and Training Council shall be kept and preserved with this record. This record shall be preserved for two (2) years from the date of final payment under this Contract. This record shall be open at all reasonable hours to the inspection of the School District and the Pennsylvania Secretary of Labor and Industry or his duly authorized representatives.

52.17.10 The ESCO and his Subcontractors shall file written statements each week, and final written statements at the conclusion of the Work on this Contract, with the School District, under oath and on forms acceptable to the Pennsylvania Secretary of Labor and Industry, certifying that all workers have been paid

wages in strict conformity with the provisions of this Contract, or if any wages remain unpaid, setting forth the amount of wages due and owing to each worker. The School District shall not make any payments to the ESCO under this Contract until it receives these statements.

52.17.11 In the event that the School District discovers that the ESCO or his Subcontractors have failed to pay the wage rates specified in this Contract to any worker, the School District shall notify the Pennsylvania Secretary of Labor and Industry, in writing, of such failure.

52.17.12 The School District shall deduct and withhold from payments due to the ESCO under this Contract any unpaid wages admitted to be due by the ESCO to his workers in his certified statements, if directed to do so by the Pennsylvania Secretary of Labor and Industry. The School District may pay these unpaid wages directly to the workers. Such payment shall discharge the ESCO's obligation to the workers to the extent of the amount of the unpaid wages.

52.17.13 The School District shall terminate the ESCO's right to proceed with his work under this Contract, if directed to do so by the Pennsylvania Secretary of Labor and Industry

52.17.14 It shall not constitute a failure to pay the prevailing minimum wage rates for the work of a particular craft or classification under this Contract when the ESCO and his Subcontractors have paid the prevailing minimum wage rates determined for the specific craft or classification, and one or more bona fide craft unions contend that the work should have been assigned to their members instead of the members of the specific craft to whom it was assigned or by whom it was performed.

52.17.15 The provisions of the Pennsylvania Prevailing Wage Act and the Prevailing Regulations are herein incorporated by reference in this Contract.

52.17.16 The provisions herein shall apply to all Work performed on this Contract by the ESCO and his Subcontractors.

52.17.17 The ESCO shall insert all of the provisions contained herein and any other provisions as may be required in each of his Subcontracts.

52.18 Reserved

52.19 Reserved

52.20 **Public Works Employment Verification.**

This Contract is covered by the Public Works Employment Verification Act, 43 P.S. §§167.1 through 167.11, which requires all Contractors and Subcontractors performing work on School District public works projects, under School District public

works contracts executed after January 1, 2013, to utilize the Federal Government's E-Verify system to ensure that all employees performing work on School District public works projects are authorized to work in the United States. All Contractors and Subcontractors performing work on School District public works projects, under School District public works contracts executed after January 1, 2013, shall comply with the requirements of the Public Works Employment Verification Act, 43 P.S. §§167.1 through 167.11, and the policy guidelines of the Department of General Services of the Commonwealth of Pennsylvania for the scope, administration and enforcement of the Public Works Employment Verification Act, 4 Pa. Code §§66.1 through 66.9.

52.20.1 **Additional Definitions.**

(a) "Contractor" shall mean the contractor that provides work under a School District public works contract.

(b) "Department" shall mean the Department of General Services of the Commonwealth of Pennsylvania.

(c) "Employee" shall mean an individual hired by the Contractor or Subcontractor after January 1, 2013 for whom the Contractor or Subcontractor is required by law to file a Form W-2 with the Internal Revenue Service.

(d) "EVP" or "EVP system" or "E-Verify system" shall mean the E-Verify Program operated by the United States Department of Homeland Security that electronically verifies employment eligibility for employees.

(e) "Form" shall mean the Public Works Employment Verification Form.

(f) "Public body" shall mean the Commonwealth of Pennsylvania, its political subdivisions, authorities created by the General Assembly of the Commonwealth and instrumentalities or agencies of the Commonwealth.

(g) "Public work" shall mean the construction, reconstruction, demolition, alteration or repair work, other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body, when the estimated cost of the total project is in excess of \$25,000. The term "Public work" does not include work performed under a manpower or rehabilitation training program.

(h) "School District public works contract" shall mean a contract for construction, reconstruction, demolition, alteration and/or repair work on a School District project that exceeds the total cost of \$25,000.

(i) "School District public works project" shall mean a School District construction, reconstruction, demolition, alteration and/or repair project that exceeds the total cost of \$25,000.

(j) "Secretary" shall mean the Secretary of General Services of the Commonwealth of Pennsylvania.

(k) "Subcontractor" shall mean the person, other than a natural person, regardless of its tier, including but not limited to a staffing agency, which performs work for the Contractor under a School District public works contract. The term "Subcontractor" shall not include persons that supply materials for the School District public works project.

(l) "Willful" shall mean action or conduct undertaken intentionally or with reckless disregard for or deliberate ignorance of the requirements and obligations established under the Public Works Employment Verification Act.

52.20.2 **General Requirements for Contractors and Subcontractors.**

(a) All Contractors and Subcontractors shall participate in the EVP system and shall utilize the EVP system to verify the employment eligibility of each new employee hired after January 1, 2013.

(b) All Contractors and Subcontractors performing work under a School District public works contract shall submit a completed Public Works Employment Verification Form to the School District to ensure compliance with the Public Works Employment Verification Act.

(c) All Contractors and Subcontractors shall maintain documentation of continued compliance with the Public Works Employment Verification Act by utilizing the EVP system for new employees hired throughout the duration of the School District public works contract.

(d) **Discrimination Prohibited.** The Contractor or Subcontractor shall not discriminate against an employee on the basis of race, ethnicity, color or national origin in conducting the verification required by the Public Works Employment Verification Act.

52.20.3 **Specific Requirements for Contractors.**

(a) As a precondition to the award and execution of a School District public works contract, the Contractor shall submit a completed Public Works Employment Verification Form to the School District. Attached is a copy of the Public Works Employment Verification Form. This form may also be downloaded at the website of the Department of General Services of the Commonwealth of Pennsylvania at www.dgs.state.pa.us at the following website link:

http://www.dgs.state.pa.us/portal/server.pt/community/construction_and_public_works/1235/act_127-2012_public_works_employment_verification/1357211 (click on "Public Works Employment Verification Form" on webpage).

The Form shall be signed by an authorized representative of the Contractor. The authorized representative of the Contractor shall have sufficient knowledge and authority to make the representations and certifications in the Form.

The completed Form shall be submitted by the Contractor with the Proposal or Contract or Contract Documents. The School District shall retain the Form submitted by the Contractor for the duration of the School District public works contract.

(b) During the duration of the School District public works contract, a new employee hired by the Contractor, regardless of whether he will be working onsite or offsite of the School District public works project, shall be verified by the Contractor within five (5) business days of his start date.

(c) All Subcontracts between the Contractor and its Subcontractors are required to contain notification of the applicability of the Public Works Employment Verification Act, information regarding the use of the EVP system, and reference to the Department's website at www.dgs.state.pa.us to obtain a copy of the Form. All Subcontracts between the Contractor and its Subcontractors shall include all of the provisions contained in Subparagraph 52.20.

52.20.4 **Specific Requirements for Subcontractors.**

(a) Before beginning either onsite or offsite work on a School District public works project, each Subcontractor shall submit a completed Public Works Employment Verification Form to the School District and the Contractor. Attached is a copy of the Public Works Employment Verification Form. This form may also be downloaded at the website of the Department of General Services of the Commonwealth of Pennsylvania at www.dgs.state.pa.us at the following website link:

http://www.dgs.state.pa.us/portal/server.pt/community/construction_and_public_works/1235/act_127-2012_public_works_employment_verification/1357211 (click on "Public Works Employment Verification Form" on webpage).

The Form shall be signed by an authorized representative of the Subcontractor. The authorized representative of the Subcontractor shall have sufficient knowledge and authority to make the representations and certifications in the Form.

The School District shall retain the Form submitted by the Subcontractor for the duration of the School District public works contract.

(b) During the duration of the School District public works contract, a new employee hired by the Subcontractor, regardless of whether he will be

working onsite or offsite of the School District public works project, shall be verified by the Subcontractor within five (5) business days of his start date.

(c) All Subcontracts between the Subcontractor and its Subcontractors are required to contain notification of the applicability of the Public Works Employment Verification Act, information regarding the use of the EVP system, and reference to the Department's website at www.dgs.state.pa.us to obtain a copy of the Form. All Subcontracts between the Subcontractor and its Subcontractors shall include all of the provisions contained in Subparagraph 52.20.

52.20.5 **Violations.**

(a) It is a violation of the Public Works Employment Verification Act for a Contractor or Subcontractor on a School District public works project to:

(1) Fail to verify the employment eligibility of a new employee hired after January 1, 2013 through the EVP system in accordance with Federal law and the Public Works Employment Verification Act.

(2) Not provide the Public Works Employment Verification Form to the School District.

(3) Make a false statement or misrepresentation with respect to completing or submitting the Public Works Employment Verification Form to the School District.

52.20.6 **Enforcement.**

(a) The Department of General Services of the Commonwealth of Pennsylvania will enforce the Public Works Employment Verification Act through investigations, audits, sanctions and civil penalties in accordance with the Department's policy guidelines.

(b) Investigations of complaints. The Department will accept, review and investigate timely and credible complaints of a violation of the Public Works Employment Verification Act that are filed on the Complaint Form posted on the Department's website at the following website link:

http://www.dgs.state.pa.us/portal/server.pt/community/construction_and_public_works/1235/act_127-2012_public_works_employment_verification/1357211 (click on "Public Works Employment Verification Complaint Form" on webpage).

A complaint must contain sufficient information to enable the Department to investigate the allegation. The School District, all Contractors and all Subcontractors on

the School District's public works project shall cooperate with the Department during the investigation of a complaint.

(c) **Audits.** The Department will conduct complaint-based and random audits of Contractors and Subcontractors performing work under a School District public works contract to ensure compliance with the Public Works Employment Verification Act. The School District, all Contractors and all Subcontractors on the School District's public works project shall cooperate with the Department during an audit.

(d) **Sanctions.** If the Department's investigation determines that the Contractor or Subcontractor failed to verify an employee through the use of the EVP system in accordance with the Public Works Employment Verification Act, the Department will issue sanctions as follows:

(1) **First violation.** The Department will issue a warning letter to the Contractor or Subcontractor detailing the violation. This letter will be posted on the Department's E-Verify website at www.dqs.state.pa.us. A violation by the Contractor or Subcontractor that occurs 10 years or more after a prior violation will be deemed to be a first violation for purposes of sanctions.

(2) **Second violation.** The Department will initiate debarment proceedings against the Contractor or Subcontractor. Once final, the Contractor or Subcontractor will be debarred from public work for 30 days. Once final, these proceedings will prevent the Contractor or Subcontractor from submitting a bid or being awarded a contract or subcontract on a public work contract in the Commonwealth of Pennsylvania (including School District public works contracts) for 30 calendar days from the date of debarment.

(3) **Third and subsequent violation.** The Department will initiate debarment proceedings against the Contractor or Subcontractor. Once final, the Contractor or Subcontractor will be debarred from public work for not less than 180 days and not more than 1 year. Once final, these proceedings will prevent the Contractor or Subcontractor from submitting a bid or being awarded a contract or subcontract on a public work contract in the Commonwealth of Pennsylvania (including School District public works contracts) for not less than 180 days and not more than 1 year from the date of debarment.

(4) **Willful violation.** If the Department investigates and forms a reasonable belief that there has been a willful violation of the Public Works Employment Verification Act, the Secretary of General Services of the Commonwealth of Pennsylvania will file a petition in Commonwealth Court seeking the Court to issue a rule to show cause why the Contractor or Subcontractor did not engage in a willful violation of the Public Works Employment Verification Act. If the Court finds that there was a willful violation, the Department will petition to have the Contractor or Subcontractor debarred from public work or public work contracts for 3 years from the date of the Court's determination.

(5) **Assessing sanctions.** Violations committed by the Contractor or Subcontractor on a School District public works project involving a single School District public works contract shall be considered a single violation despite the number of employees that are the subject of the violations.

(e) **Civil Penalties.** If the Secretary of General Services of the Commonwealth of Pennsylvania or a designee makes a written determination that the violation is for failing to submit a complete Public Works Employment Verification Form or making a false statement or misrepresentation in the Form, the Department will assess a civil penalty of not less than \$250 and not more than \$1,000 for each violation. The amount of the penalty is at the Department's discretion.

(f) **Notice and Appeal.** Sanctions or civil penalties imposed by the Department, other than violations found to be willful, are subject to the notice, appeal and other provisions of 2 Pa.C.S. (relating to administrative law and procedure).

52.20.7 **Protection from Retaliation.**

(a) It shall be unlawful for the Contractor or Subcontractor on a School District public works project to discharge, threaten or otherwise retaliate or discriminate against an employee regarding compensation or other terms or conditions of employment because the employee:

(1) Participates in an investigation, hearing or inquiry held by the Secretary or any other governmental authority under the Public Works Employment Verification Act; or

(2) Reports or makes a complaint regarding the violation of the Public Works Employment Verification Act to the Contractor or Subcontractor or to any governmental authority.

(b) An employee who suffers retaliation or discrimination in violation of the Public Works Employment Verification Act may bring an action in a court of common pleas in accordance with established civil procedures of the Commonwealth. The action must be brought within 180 days from the date the employee knew of the retaliation or discrimination.

52.20.8 **Good Faith Immunity.** The Contractor or Subcontractor that relies in good faith on EVP procedures to verify employment eligibility of new employees under the Public Works Employment Verification Act shall be immune from the sanctions authorized under the Public Works Employment Verification Act and shall have no liability to an individual who is not hired or who is discharged from employment in the event that incorrect information has been provided to the Contractor or Subcontractor. The Contractor or Subcontractor that can produce written

acknowledgment provided by an applicable Federal agency of use of EVP is considered to have acted in good faith.

52.20.9 **Contractor or Subcontractor Liability.** Nothing in the Public Works Employment Verification Act or this Subparagraph 52.20 may be construed to render the Contractor liable for the action of a Subcontractor or the Subcontractor liable for an action of another Subcontractor.

52.20.10 **Time.**

52.20.10.1 The Date of Commencement of the Work is the date of the Notice to Proceed.

52.20.10.2 The Date of Substantial Completion of the Project or designated portion thereof. Only incidental corrective work under “punch lists” and final cleaning (if required) beyond cleaning needed for the School District's full use may remain for Final Completion of the Project.

52.20.10.3 The ESCO shall begin the Work on the Commencement Date. The ESCO shall carry the Work forward expeditiously with adequate forces and shall achieve Substantial Completion and Final Completion within the time limits stated in the Contract Documents.

52.20.10.4 The ESCO shall Substantially Complete the Work of the Project within the allotted number of days from Notice to Proceed, and shall Finally Complete the Work of the entire Project within the allotted number of days, unless modified by authorized extension of time.

52.21 **Delays and Extensions of Time.**

52.21.1 Except as otherwise specifically provided in this Contract and for delays caused by the sole negligence or willful misconduct of the School District (“Compensable Delays”), the ESCO shall not be entitled to any increase in the Contract Sum or any payment or compensation of any kind from the School District or the Architect/Engineer for direct, indirect, or impact damages, including but not limited to costs of acceleration or for loss of revenue, overhead or profit, arising because of hindrance, interference, disruption, or delay from any cause whatsoever, whether such hindrance or delay be reasonable or unreasonable, foreseeable or unforeseeable, or avoidable or unavoidable. Instead, as his sole right and remedy with respect to such hindrance, interference, disruption, or delay (other than due solely to fraud or bad faith as aforescribed), the ESCO shall be entitled to extensions in the Contract Time. In the event a Compensable Delay increases ESCO’s cost of performance, ESCO shall be entitled to an equitable adjustment of the Contract Sum to compensate it for the Compensable Delay.

52.21.2 The Contract Time shall be adjusted only for Changes in the Work, School District's Right to Stop Work and Excusable Delays. In the event the ESCO requests an extension of the Contract Time, he shall furnish such justification and supporting evidence as the School District may deem necessary for a determination as to whether the ESCO is entitled to an extension of time under the provisions of this Contract. The School District, after receipt of such justification and supporting evidence, and after consultation with the Architect/Engineer, shall make its findings of fact and decision thereon in the School District's sole discretion, and shall advise the ESCO in writing thereof, and such decision of the School District may be disputed by the ESCO in accordance with the dispute resolution procedures of this Agreement. Notwithstanding the ESCO's right to dispute the decision of the School District, the ESCO agrees it will continue to prosecute and proceed with the performance of the Work vigorously, expeditiously and without delay, while any claim is pending final resolution. If the School District finds that the ESCO is entitled to an extension of the Contract Time, the School District's determination as to the total number of days' extension shall be based upon the currently approved Project Schedule and on all data relevant to the extension. Such data shall be included in the next monthly updating of the Project Schedule. The ESCO acknowledges and agrees that actual delays (due to said changes, suspension of Work or excusable delays) in activities which, according to the schedule, do not affect the Contract Time, or do not have any effect upon the Contract Time, shall not be the basis for a change therein.

52.21.3 Subject to other provisions of this Contract, the ESCO may be entitled to an extension of the Contract Time (but no increase in the Contract Sum) for delays, disruptions, interferences, or hindrances arising from unforeseeable causes beyond the control and without the fault or negligence of the ESCO or his Subcontractors ("Excusable Delays") as follows:

52.21.3.1 Labor strikes or disputes (including strikes or disputes affecting transportation), that do, in fact, directly and critically affect the progress of the Work. In addition, an extension of the Contract Time shall not be allowed if a strike or dispute applies to labor or material that the ESCO can obtain from other sources.

52.21.3.2 Acts of God or natural disaster (e.g., tornadoes, fires, hurricanes, blizzards, earthquakes, typhoons, or floods) that damage completed Work or stored materials.

52.21.3.3 The Contract Time shall not be extended due to normal inclement weather. Unless the ESCO can substantiate to the satisfaction of the School District that there was greater than normal inclement weather considering the full term of the Contract Time using a ten-year average of accumulated record mean values from climatological data compiled by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration for the locale of the Project and that such alleged greater than normal inclement weather actually delayed the Work or portions thereof which had an effect upon the Contract Time, the ESCO shall not be entitled to an extension of time. If the total accumulated number of calendar days lost due to inclement

weather, from the start of the Work until Substantial Completion exceeds the total accumulated number to be expected for the same period, the time for completion shall be extended by the number of calendar days needed to include the excess number of calendar days lost.

52.21.3.4 Acts of war or the public enemy, acts of civil disturbance; court order, change in governmental regulation; acts of the State, Federal, or Local government in its sovereign capacity (including but not limited to government's enactment of laws, statutes, ordinances, orders, rules, regulations, policies or procedures after commencement of the ESCO's work on the Project that affect or impact the ESCO's progress or performance of work on the Project), delay or failure by third parties to provide critical goods or services that the ESCO cannot obtain from other sources; and acts of another contractor in the performance of a contract with the School District relating to the Project, which in fact directly affect progress of the Work and can be so substantiated by the ESCO.

52.21.3.5 Delay in obtaining Project site access due to problems or delays in the land acquisition process that are not caused by the School District or the enactment by the State, Federal or Local government in its sovereign capacity of laws, statutes, ordinances, orders, rules, regulations, policies or procedures after commencement of the ESCO's work on the Project that affect or impact the ESCO's progress or performance of work on the Project.

52.21.3.6 Delay in obtaining Project site access due to failure or refusal of any adjoining property owner to give necessary permission for required construction work or necessary entry onto adjoining property to perform required construction work.

52.21.3.7 Delay or failure of governmental or regulatory authorities having jurisdiction over the Project and the Work to give necessary or required approvals or documents for Project site access, construction work, or remediation of known, unknown, differing, or unforeseen Project site conditions or environmental hazards or conditions (including but not limited to delay or failure attributed to the enactment by governmental or regulatory authorities of laws, statutes, ordinances, orders, rules, regulations, policies or procedures after commencement of the ESCO's work on the Project that affect or impact the ESCO's progress or performance of work on the Project).

52.21.3.8 Other delays outside of the control of ESCO and without its fault or negligence including, without limitation, delays caused solely by the negligence or willful misconduct of the School District.

52.21.4 All claims for extensions of time shall be made in writing to the School District no more than seven (7) calendar days after the beginning of the delay (or disruption, hindrance, or interference, if applicable); otherwise all such claims are waived by the ESCO. In the case of a continuous cause of delay (or disruption,

hindrance, or interference, if applicable), only one (1) written claim is necessary. The ESCO shall provide an estimate of the probable effect of such delay (or disruption, hindrance, or interference, if applicable) on the progress of the Work.

52.21.5 If no schedule or agreement is made stating the dates upon which written interpretations shall be furnished, then no claim for delay (or disruption, hindrance, or interference, if applicable) shall be allowed on account of failure to furnish such interpretations until fifteen (15) calendar days after demand is made for them, and not then unless such claim is reasonable.

52.22 Liquidated Damages.

52.22.1 Upon failure by the ESCO to achieve Substantial Completion of any ECM within the time specified in this Contract, the ESCO shall pay to the School District, as liquidated damages and not as a penalty, the sum of Five Hundred (\$500.00) per day per ECM for each consecutive calendar day of delay until such time as Substantial Completion of the Work is achieved provided that the total liquidated damages shall not exceed Three Thousand Dollars (\$3,000.00) per day.

52.22.2 In addition, the ESCO shall be as responsible for and shall pay for the cost of completion of construction of the Work, as well as for any and all additional charges, up to a maximum of Three Hundred Sixty-Five Thousand Dollars (\$365,000.00), by the Architect/Engineer and any other consultants to the School District relating to the ESCO's failure to achieve Substantial Completion on a timely basis. Any charges under this Section 52.22.2 must be documented as the direct result of ESCO's failure to achieve Substantial Completion of an ECM by the date prescribed in this Contract.

52.22.3 The ESCO and School District agrees that the amounts so fixed herein as liquidated damages are reasonable forecasts of just compensation for the harm that will be caused the School District by the ESCO's breach.

[Remainder of Page Intentionally Left Blank]

In witness whereof, the Parties, intending to be legally bound, have executed and delivered this Contract as of the day and year set forth above.

By: _____

Approved as to form:

THE SCHOOL DISTRICT OF PHILADELPHIA

Dawn Renee Chism
Attorney, The School District
of Philadelphia

By: _____
William R. Hite, Jr., Ed.D.
Superintendent