

General Notes to ISSUER:

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

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

INVESTMENT GRADE ENERGY AUDIT AGREEMENT

This Energy Audit Agreement is entered into on _____, 20____, by and between the ***Insert name of Governmental Unit (herein after called the "ISSUER")*** _____ and _____ (the Energy Service Company herein after called the "**ESCO**"). **ISSUER** and the **ESCO** are referred to herein as the "**Parties**".

WHEREAS, the **ISSUER** has issued a Request For Proposals ("RFP") to select a Qualified **ESCO** for an Energy Services Agreement (ESA); and

WHEREAS, the **ESCO** submitted a response to the RFP and participated in a competitive evaluation procedure designed to select a Qualified **ESCO**; and

WHEREAS, the **ISSUER** has accepted the **ESCO's** proposal, selected the **ESCO** to complete the project; and

WHEREAS, the **ISSUER** is responsible for the operation, payment of the utilities, management and maintenance of the buildings and/or facilities as identified in the RFP, Appendix I (collectively referred to herein as "Buildings"); and

WHEREAS, a comprehensive energy use and savings analysis (the "**Investment Grade Energy Audit**") is required to be performed for the Buildings in order to verify the feasibility of entering into an Energy Services Agreement (ESA) to provide for the installation and implementation of Energy Conservation Measures (ECMs) at the Buildings; and

WHEREAS, if the ECMs are verified to be feasible, and if the amount of energy and operational cost savings can be reasonably ascertained and guaranteed in an amount sufficient to cover all costs associated with an energy performance contracting project at the Buildings, the Parties have negotiated a mutually agreed upon final ESA under which the **ESCO** shall design, procure, implement, provide training, commission, offer maintenance services, and monitor such energy conservation measures at the Buildings;

NOW THEREFORE, the Parties agree as follows:

**ARTICLE 1
SCOPE OF INVESTMENT GRADE ENERGY AUDIT**

Pursuant to G.S. §143-64.17B the **ESCO** will perform the **Investment Grade Energy Audit** and prepare a detailed engineering and economic report (***herein after called*** the "Report") which specifically identifies the energy improvements and operational changes which are recommended to be installed or implemented at the Buildings. The Report shall contain detailed projections of energy, operational and cost savings to be obtained at the Buildings as a result of the installation of the recommended ECMs. The savings calculations must utilize assumptions, projections and baselines which best represent the true value of future energy or operational savings for the Buildings compared to the historic base period, including accurate marginal cost for each unit of savings at the time the audit is performed; documented material and labor costs that may be avoided; and calculations which account for the interactive effects of the recommended ECMs. The Report shall clearly describe how utility tariffs were used to calculate savings for all ECMs. The Report shall describe in detail the **ESCO's** plan

for installing or implementing the ECMs in the Buildings, including all anticipated costs associated with such installation and implementation. **The report shall be prepared in accordance with the Minimum Requirements Guidelines for M&V document (M&V Guidelines).**

The **ESCO's required tasks** in performing the Energy Audit and preparing the Report are the following:

A. Scope of Work

ECMs to be included in the scope of the IGA are:

Include RFP response ECMs in this section. Those ECMs that showed positive cash flow in Attachment A of the response and were included in Attachments B and C shall provide the scope of work for the IGA.

Additional ECMs to be investigated:

ECMs identified in Attachment A but were not included because preliminary evaluations indicated they would not cash flow may be included here for further investigation. Include any additional potential ECMs either the ESCO or ISSUER wish to include for investigation during the IGA.

B. Collect General Information For Each Building

(This information is to be included in Schedule A of the Report).

The **ESCO** shall collect detailed building information such as: size, age, construction type, condition and general use of each building except as provided below. The **ESCO** shall also collect and summarize building utility cost and consumption data for the most recent 36-month period. If after reasonable inquiry, the **ESCO** can demonstrate that less than 36 months of data is available, the **ESCO** with the written approval of the **ISSUER** may collect such data as is available, but in any event not less than 24 months of data. The **ESCO** shall evaluate the impact on utility cost and consumption for any energy measures currently being installed or currently contemplated to be installed by the **ISSUER** in the building which will remain separate from the Energy Services Agreement throughout the duration of the ESA.

The **ISSUER** shall furnish, or cause its energy suppliers to furnish, all available records and data concerning energy and water usage for the building for the most current 36 month period, if available, including but not necessarily limited to, utility records, occupancy information, descriptions of any changes in the structure of the building or its heating, cooling, lighting or other systems or energy requirements, descriptions of all major energy and water consuming or energy and water saving equipment used in the Facility, and description of energy management procedures presently utilized. The **ISSUER** shall also furnish a record of any energy related improvements or modifications that have been installed during the past 3 years, or are currently being installed or are currently contemplated to be installed by **ISSUER** in the Building separate from the ESA throughout the duration of that agreement. **ISSUER** shall also provide copies of drawings, equipment logs and maintenance work orders to the **ESCO** insofar as this information is readily available. The **ISSUER** shall make available any FCAP or other survey reports available for that building. The **ISSUER** shall provide the **ESCO** access to the buildings, to facility and management personnel, and key decision makers to enable **ESCO** to better understand the facility operations and organizational goals

C. Inventory Existing Systems and Equipment.

(This information is to be included in Schedule A of the Report)

The **ESCO** shall compile an inventory based on a physical inspection of the major electrical and mechanical systems at the building, that will be impacted by the ECMs to be included in the project including:

- i. Cooling systems and related equipment
- ii. Heating and heat distribution systems
- iii. Automatic temperature control systems and equipment
- iv. Air distribution systems and equipment
- v. Outdoor ventilation systems and equipment
- vi. Kitchen and associated dining room equipment, if applicable
- vii. Exhaust systems and equipment
- viii. Hot water systems
- ix. Electric motors 5 HP and above, transmission and drive systems
- x. Interior and exterior lighting
- xi. Laundry equipment, if applicable
- xii. Water consumption end uses, such as restroom fixtures, water fountains, irrigation, etc.
- xiii. Other applicable energy using systems identified in the RFP or during the performance of this audit.

The inventory shall address the following considerations:

1. The loads, proper sizing, efficiencies or hours of operation for each system (Where measurement costs, facility operating or climatic conditions necessitate, engineering estimates may be used, but for large fluctuating loads with high potential savings, appropriate measurements are required unless waived by the **ISSUER**).
2. Current operating condition for each system.
3. Remaining useful life of each system, identifying or describing the method used to determine that remaining useful life.
4. Feasible replacement systems.
5. Hazardous materials and other environmental concerns observed during the audit that could impact implementation of the measures. The ESCO shall include all information provided by the **ISSUER** concerning hazardous materials in the report.

The **ESCO** shall use data loggers and/or other measurement and recording devices and conduct interviews with building operation and maintenance staff regarding the building's system operation, occupancy patterns and problems with comfort levels or equipment reliability.

D. Establish Base Year Consumption and Reconcile with End Use Consumption Estimates.

(This information is to be included in Schedule C of the Report)

The **ESCO** shall examine the most recent 36 months of utility bills except as previously noted in Article 1 – Section A and establish Base Year consumption for electricity, fossil fuels and water by averaging; or selecting the most representative contiguous 12 months. The **ESCO** shall consult with building staff and account for any unusual or anomalous utility bills which may skew Base Year consumption from a reasonable representation.

The **ESCO** shall estimate loading, usage and/or hours of operation for all major end uses representing more than 5% in aggregate of total Facility consumption including, but not limited to:

- i. Water
- ii. Lighting

- iii. Heating
- iv. Cooling
- v. HVAC motors (fans and pumps)
- vi. Plug load
- vii. Kitchen equipment
- viii. Other equipment
- ix. Miscellaneous

Where loading or usage is highly uncertain the **ESCO** shall employ spot measurement and/or short term monitoring at its discretion, or at the request of **ISSUER**. Reasonable applications of measurement typically include variable loads that are likely candidates for conservation measures, such as cooling equipment. The annual end use estimated consumption shall be reconciled with the annual Base Year consumption to within 5% for electricity (kWh), fossil fuels and water. The contribution to electric peak demand for each end use shall also be reconciled to within 5% of the annual Base Year peak. The "miscellaneous" category shall not be more than 10% and each component shall be separately set forth. The purpose of this is to place reasonable limits on potential savings.

A meeting to review appropriate schedules including Schedules A, B, C, and D shall be held by the ESCO, ISSUER and if requested by the ISSUER, the Qualified Reviewer, prior to proceeding with preparing the rest of the IGA Report. The Utility Savings Initiative (USI) shall attend this meeting to assess conformity with statutes and the M&V guidelines. The meeting of these organizations to discuss findings should be conducted in person.

E. Develop List of Potential Energy Conservation Measures (ECMs).

(The information generated from this list should be included in Vol. 1 Schedule E if ECM to be implemented or Vol. 2 if ECM rejected)

The **ESCO** shall:

1. Identify and propose potential ECMs for installation or implementation at the building including cut sheets on proposed equipment. For non-standard ECMs provide information regarding product site installations.
2. Provide an estimate of the cost, savings and life expectancy of each proposed ECM. Prepare a Life Cycle Cost Analysis in accordance with State Construction Office guidelines as directed by the **ISSUER**.
3. At the request of the **ISSUER**, and where appropriate or required, the **ESCO** shall provide on-site "mock-ups" and demonstrations of the ECMs that are proposed to be installed at the Premises. Any additional costs shall be negotiated and the report fee in Section J shall be amended accordingly.
4. Specify operations and maintenance procedures of the building which will be affected by the installation/implementation of the proposed ECMs.
5. Provide analysis methodology, supporting calculations and assumptions used to derive baselines (e.g. lighting operating hours) and estimate savings. Provide the existing and proposed operating parameters for all affected systems and equipment, including volume of outdoor air ventilation (CFMs) lighting levels and acoustic levels.

6. Provide copies of the utility tariffs and commodity price histories used in savings calculations. Manual calculations should disclose essential data, assumptions, formulas, etc. so that a reviewer may replicate the calculations based on the data provided.
7. For savings estimates using computer simulations, the **ESCO** shall provide access to the program and all inputs and assumptions used, if requested by the **ISSUER**.
8. Provide a preliminary savings Measurement and Verification plan for each proposed ECM.
9. Provide a detailed preliminary commissioning plan for the proposed ECMs.
10. Provide detailed calculations for any rate saving proposals.
11. Provide detailed supporting calculations for any proposed maintenance, material or other operational savings. Describe annual variances in savings from year to year (e.g. lighting, warranties).
12. Estimate any environmental costs or benefits of the proposed ECMs (e.g. disposal costs, avoided emissions, water conservation, etc.). Provide emissions reductions data for NOX, CO2 and SO2. Segment emissions data for direct site emissions reductions (e.g. fossil fuels) and indirect emissions reduction data (e.g. electricity/water).
13. For all proposed ECMs, the **ESCO** shall comply with all applicable State, Federal and local codes, standards and regulations in effect at the time of this analysis.

This list shall be compiled and submitted to the ISSUER within ninety (90) days of the execution of this Agreement.

F. Select Final Recommended ECMs.

The **ESCO** shall, in consultation with the **ISSUER**, recommend specific ECMs from its preliminary compilation for installation and implementation at the Building and or Facility. Selected measures including all support documentation, calculations and product cut sheets shall be included in Volume 1 and appendices.

A meeting to review the list of potential ECMs and the selection of final ECMs to be included shall be held by the **ESCO**, **ISSUER** and if requested by the **ISSUER**, the Qualified Reviewer. **USI** will participate if requested. The meeting of these organizations to discuss findings should be conducted in person.

G. Cost and Fee Estimates.

(This information is to be included in Schedule E of the Report)

The **ESCO** shall provide detailed estimates of costs associated with the installation, implementation and commissioning of each of the ECMs proposed in the Audit including breakouts for labor, materials, and equipment. Open book pricing is required. **ESCO** will fully disclose all costs, including all costs of subcontractors and sub-tier vendors. The **ESCO** will maintain cost accounting records on authorized work performed showing actual costs for labor and materials, or other basis requiring accounting records. The **ESCO** will provide access to records and preserve them for a minimum of six years. The retention period runs from the date of payment for the relevant goods or services by the **ISSUER** or from the date of termination of the Contract, whichever is later.

Retention time shall be extended when an audit is scheduled or in progress for a period reasonably necessary to complete an audit and/or to complete any administrative and judicial litigation which may ensue. In addition, project cost data must be provided in the format included in Schedule M of the Report.

The **ESCO** shall also provide estimates of annual costs associated with sustaining the project performance including breakouts for maintenance fees, monitoring fees, and training fees.

H. Savings Estimates.

(This information is to be included in Schedule E of the Report)

The **ISSUER** has endeavored to provide the **ESCO** with sufficient general and specific guidance in this Article 1 to develop the savings estimates for the Report. In the event that questions arise as to the calculation of savings or whether certain items will be allowed as savings, the **ESCO** should seek written guidance from the **ISSUER**. The **ISSUER** reserves the right to reject items claimed as savings which are not in the **ISSUER's** utility budget line or which have been claimed contrary to the guidance given in this Agreement or contrary to written guidance given to the **ESCO**. The **ISSUER** also reserves the right to reject the **ESCO's** calculations of savings when it determines that there is another more suitable or preferable means of determining or calculating such savings.

For the purposes of completing the Cash Flow Analysis in Schedule M of the Report, the following items will be allowed as savings or in the development of savings:

- Escalation rates of 0 % for natural gas
- Escalation rates of 0 % for electricity
- Escalation rates of 0 % for oil
- Escalation rates of 0 % for steam
- Escalation rates of 0 % for water
- Escalation rates of 0 % for other fuel type (specify)
- Escalation rates of _____ % for operation and maintenance cost savings
- Escalation rates of _____ % for material/commodity cost savings
- Escalation rates of _____ % for allowable labor savings

It should be noted that the base value for each fuel and water unit will not devalue in the event of any rate decrease. The ISSUER reserves the right to impose ceiling rates for all escalations. The following items will not typically be credited as savings derived from a proposed ECM: ISSUER's in-house labor cost, ISSUER's deferred maintenance cost and offset of future ISSUER's capital costs. The ESCO may seek, in writing, permission to include such items from the ISSUER on a case-by-case basis. However, the final determination of allowable savings in each case considered shall reside with ISSUER.

A meeting to review appropriate Schedules, including Schedules E, F and G, shall be held by the ESCO, ISSUER and if requested by the ISSUER, the Qualified Reviewer, prior to proceeding with preparing the rest of the IGA Report. USI shall attend this meeting to assess conformity with statutes and the M&V guidelines. The meeting of these organizations to discuss findings should be conducted in person.

I. Report Format.

The **ESCO** shall prepare a two-volume report as follows:

Each volume should be submitted using 8 ½ " x 11" sheets of paper double sided printing and a font size no smaller than 10 point. Include a Table of Contents with tabbed with the visible titles of corresponding Schedules and Sections the pages of which should be numbered sequentially.

Volume 1 shall include the presentation of information in the following Schedules required for the ESA to the extent the information has been developed during the course of performing this audit. Schedules may be finalized during negotiations, prior to execution of the ESA.

1. **Executive Summary:** Provide an executive summary which describes the buildings, measures evaluated, analysis methodology, results and a summary table presenting the cost and savings estimates for each recommended measure. Include a summary of the recommended measures and costs using the table format in Schedule E.

2. Schedules:

- Schedule A Existing known conditions, systems and hazardous materials inventory
- Schedule B Current and Known Future Capital Projects at the Premises
- Schedule C Baseline Energy Consumption
- Schedule D Standards of Comfort
- Schedule E ECMs Cost and Savings estimates and Equipment to be installed by the **ESCO**
- Schedule F Guarantee Period Savings Measurement & Verification Calculation Formulae
- Schedule G Energy Use Adjustment Methods during Guarantee Period for Material Changes
- Schedule H Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
- Schedule I Construction and Installation including Schedule
- Schedule J **ESCO** and **ISSUER** Training Responsibilities
- Schedule K Warranties (including Equipment)
- Schedule L Maintenance Checklist and **ISSUER & ESCO** responsibilities
- Schedule M Proposed Final Project Cost & Final Project Cash Flow Analysis
- Schedule N Energy Savings Guarantee including form of Security
- Schedule O Compensation to the **ESCO**
- Schedule P Insurance and Bonds
- Schedule Q Financing Agreement
- Schedule R Loan Amortization

3. Exhibits

- Exhibit 1 Certificate of Acceptance—Investment Grade Audit Report
- Exhibit 2 Certificate of Individual ECM Acceptance
- Exhibit 3 Certificate of Beneficial Use and Acceptance / Certificate of Occupancy (issued by Authority Having Jurisdiction (AHJ))
- Exhibit 4 Certificate of Final Project Acceptance (issued by ISSUER after Certificate of Beneficial Use and Acceptance / Certificate of Occupancy is issued by AHJ)
- Exhibit 5 Certificate of ISSUER accepting responsibility for Maintenance Costs

4. **Vol 1 Appendices:** For final selected ECMs provide thorough appendices which document the data relied upon to prepare the analysis and how that data was collected.

Volume 2 shall include all of the information required in Article 1 Section E and the Sections below, and presented in the following format:

1. **Potential Energy Conservation Measures:** Include a discussion of all measures evaluated and an explanation of why a measure was not selected.
2. **Vol 2 Appendices:** Provide thorough appendices which document the data relied upon to prepare the analysis above and how that data was collected.

J. Submission of the Report.

The Report shall be completed within **90 (Ninety)** days of the date of selection of ECMs as referenced in Article 1 Section E. The not-to-exceed cost for the completed Energy Audit and Report will be _____. One electronic (single CD or thumb drive) with all information in Microsoft Office Suite products format shall be delivered to the Department of Environmental Quality Utility Savings Initiative Section.

If the results of this Audit, as described in the Report, are not: (a) within ten percent (10%) of the \$_____ guaranteed savings shown in the ESCO's proposal for the Buildings, and (b) within ten percent (10%) of the \$_____ total project cost shown in the ESCO's proposal for the Buildings, then either the **ISSUER** or the **ESCO** may elect to terminate with the project. If this event occurs, the ISSUER will not be obligated to pay the Energy Audit and Report Fee. However, if the **ISSUER** terminates the project after this Audit and Report are completed and the results are within both of the ten percent (10%) ranges listed above, then the **ISSUER** will be required to pay the **ESCO** this Audit and Report Fee, and the results of this Audit and Report shall become the property of the ISSUER. **The 10% limits only apply to those measures that were included in the RFP response (Section 5.1) and Attachments A, B, and C.**

K. Report Review.

The IGA Report in its entirety **with all Schedules** and comments shall be reviewed in a meeting by the ESCO, ISSUER, Authority Having Jurisdiction and the Qualified Reviewer prior to pursuing project financing. USI shall attend this meeting to assess conformity with statutes and the M&V guidelines. The meeting of these organizations to discuss findings should be conducted in person.

In the event either the ISSUER or ESCO requests an increase in the scope of the Report, ESCO and ISSUER shall negotiate in good faith an increase in the not-to-exceed cost of the Report and an extension of the date established in Article 1 J as appropriate.

ISSUER shall review the final Report. Following ISSUER's review, and if ISSUER finds the Report compliant with the terms of this Agreement, ISSUER will provide written notification of acceptance to ESCO (Exhibit 1). If ISSUER finds deficiencies in the Report, ISSUER shall provide ESCO with written notification of specific deficiencies within thirty (30) calendar days of receipt of the Report. If ISSUER does not provide a written notification within thirty (30) calendar days of receipt, the Report shall be deemed accepted for the purposes of Article 4, Section C. In the event of a notice of deficiencies, ESCO shall have thirty (30) calendar days to submit a response.

In the event that financing or bonding costs of the project increase after the ESCO submits the Report, ESCO and ISSUER shall negotiate in good faith adjustments necessary in scope, costs and guaranteed savings required to provide positive cash flow for the project.

L. The report in its entirety shall be submitted to the State Construction Office or the Authority Having Jurisdiction for review.

ARTICLE 2
ENERGY SERVICES AGREEMENT (ESA)

Upon **ESCO's** completion and **ISSUER's** acceptance of the Report, the parties may complete negotiations in good faith the ESA under which the **ESCO** shall design, install and implement energy conservation measures that the **Parties** have agreed to and provide certain training, maintenance and monitoring services as agreed to by the **Parties**. However, nothing in this Agreement should be construed as an obligation on any of the **Parties** to execute such an ESA. The precise terms and provisions of such an ESA shall be set forth in a separate agreement.

ARTICLE 3
PAYMENT

Payment to the **ESCO** for services performed in connection with this Agreement shall be made by the **ISSUER** in accordance with the provisions of Article 1, Section J and Article 4 contained herein.

ARTICLE 4
TERMINATION

A. By the **ESCO**:

The **ESCO** may terminate this Agreement prior to the completion of the Energy Audit and Report or subsequent to the scheduled completion of the Energy Audit and Report if:

- (i) The **ESCO** determines that it cannot guarantee a minimum savings in energy costs through the implementation of an energy performance contracting project at the Buildings and or Facilities; or
- (ii) The **ESCO** determines that even though it can guarantee a savings in energy costs, that the amount would be insufficient to cover the costs associated with performing this Audit, installing energy conservation measures and related training, maintenance and monitoring services.

In the event the **ESCO** terminates the Agreement pursuant to Article 4 A (i) or (ii) the **ISSUER** shall not be obligated to pay any amount to the **ESCO** for services performed or expenses incurred by the **ESCO** in performing the Energy Audit and preparing the Report required under this Agreement. The **ESCO** shall provide the **ISSUER** with any Audit documents (preliminary notes, reports or analysis) which have been produced or prepared prior to the effective date of the termination. The **ESCO** will return any documents or information provided by the **ISSUER**.

Termination under this article shall be effective upon the **ISSUER's** receipt of written notification from the **ESCO** stating the reason for the termination and all documents which support termination as prescribed herein.

B. By the **ISSUER**:

The **ISSUER** may terminate this Agreement:

- (i) If the **ESCO** fails to complete the Energy Audit and deliver the Report to the **ISSUER** by the date established in Article 1 J. above; and fails to request a written extension of that date from the **ISSUER**. Termination under this subsection shall be effective upon the **ESCO's**

receipt of written notification from the **ISSUER** that the deadline for submission of the Energy Audit and Report has passed. In this event, the **ISSUER** shall not be obligated to pay any amount to the **ESCO** for services performed or expenses incurred by the **ESCO** in performing the Energy Audit and preparing the Report required under this Agreement. The **ESCO** will return any documents or information provided by the **ISSUER**.

- (ii) If, prior or subsequent to the completion of the Energy Audit or Report, the **ESCO** notifies the **ISSUER** in writing that it is unable to guarantee a sufficient level of savings pursuant to Article 4 above, termination under this subsection shall be effective upon **ESCO's** receipt of written notification of termination from the **ISSUER**. In this event, the **ISSUER** shall not be obligated to pay any amount to the **ESCO** for services performed or expenses incurred by the **ESCO** in performing the Energy Audit and preparation of the Report required under this Agreement. The **ESCO** will return any documents or information provided by the **ISSUER**.
- (iii) If the **ESCO** fails to complete the Energy Audit and deliver the Report to the **ISSUER** by the date established in Article 1 J. above; and the **ISSUER** has withheld a written extension of that date, this agreement may be terminated. Termination under this subsection shall be effective upon the **ESCO's** receipt of written notification from the **ISSUER** that the deadline for submission of the Energy Audit and Report has past. The **ISSUER** shall reimburse the **ESCO** for either the actual expenses incurred or the percent of the Audit and Report completed whichever is greater but shall not exceed the amount stated in Section J. The **ESCO** shall provide the **ISSUER** with any Audit documents (preliminary notes, reports or analysis) which have been produced or prepared prior to the effective date of the termination. The **ESCO** will return any documents or information provided by the **ISSUER**. Termination under this subsection shall be effective upon the **ESCO** receipt of written notification from the **ISSUER**.
- (iv) If, prior or subsequent to the completion of the Energy Audit or Report, the **ISSUER** notifies the **ESCO** in writing that it has elected to terminate this Agreement and not enter into an ESA, the **ISSUER** shall reimburse the **ESCO** for either the actual expenses incurred or the percent of the Audit and Report completed whichever is greater but shall not exceed the amount stated in Section J, as of the effective date of the termination, the amount being determined as fair and equitable by the **ISSUER**. The **ESCO** shall provide the **ISSUER** with any Audit documents (preliminary notes, reports or analysis) which have been produced or prepared prior to the effective date of the termination. The **ESCO** will return any documents or information provided by the **ISSUER**. Termination under this subsection shall be effective upon the **ESCO** receipt of written notification from the **ISSUER**.

The **ESCO** agrees to provide the **ISSUER** with any records of expenses incurred prior to the effective date of the termination. Such documentation shall be used by the **ISSUER** to determine the extent of work completed by the **ESCO** prior to termination and shall become the property of the **ISSUER**.

C. Termination for Convenience:

Should an ESA not be finalized within 60 (sixty) days, after signing the Certificate of Acceptance, Exhibit 1, either Party may terminate this Agreement with 30 (thirty) days written notice. Termination under this subsection (C) shall be effective upon expiration of the thirty (30) day notification period unless the Parties are engaged in good faith efforts to finalize the ESA. The

Energy Audit and Report shall become the property of the **ISSUER** and the **ISSUER** shall pay the **ESCO** the Energy Audit Report Fee as provided in Article 1 (J).

If the Parties do not successfully negotiate an ESA and the IGA Report becomes the property of the **ISSUER**, the **ESCO** shall not be liable for, and **ISSUER** expressly releases **ESCO** from any liability for, any claim(s) or damages arising out of relating to any reuse or modification of any document(s) provided by **ESCO** unless such reuse or modification is authorized in writing by the **ESCO**.

If the Parties successfully negotiate and execute an ESA, no payment shall be due for the Energy Audit or Report under the terms of this Agreement. This Agreement shall automatically terminate upon the execution of an ESA by the **ESCO** and the **ISSUER** for a guaranteed energy performance contracting project at the Building and or Facilities. It is further understood that provisions for payment for the Energy Audit shall be incorporated into the ESA.

ARTICLE 5

STANDARD TERMS AND CONDITIONS

Section 1. Agreement Term

The Agreement term shall commence on _____ and end on _____, unless earlier terminated pursuant to the provisions of Article 4 above. Notwithstanding, the **ESCO** shall adhere to the deadlines set forth in Article 1 regarding the completion and submittal of the list of ECMs and the Report.

Section 2. Materials, Equipment, and Supplies

The **ESCO** shall provide or cause to be provided all facilities, materials, equipment, and supplies necessary to perform the Energy Audit and prepare the Report.

Section 3. Patent, Copyright, and Trademark Responsibility

The **ESCO** agrees that any material or design specified by the **ESCO** or supplied by the **ESCO** pursuant to this Agreement shall not knowingly infringe any patent, copyright or trademark, and the **ESCO** shall be solely responsible for securing any necessary licenses required for patented, copyrighted, or trademarked material utilized by the **ESCO** in the performance of the Energy Audit and preparation of the Report.

Section 4. Customer Access to Records

The **ISSUER** shall have the right, throughout the term of this Agreement and for a minimum of _____ years following completion of the Agreement, to inspect, audit and obtain copies of all books, records, and supporting documents which the **ESCO** is required to maintain according to the terms of this Agreement.

Section 5. Personnel

All personnel necessary for the effective performance of the Energy Audit shall be employed by the **ESCO**, and its designated subcontractors shall be qualified to perform the services required under this Agreement, and shall in all respects be subject to the rules and regulations of the **ISSUER** and **ESCO** governing staff members and employees. Neither the **ESCO** nor its, agents, subcontractors, or assigns shall be considered agents or employees of the **ISSUER**.

Section 6. Compliance with Applicable Law

In performance of its obligations pursuant to this Agreement, the **ESCO** shall comply with all applicable provisions of Federal, State, and local law. All limits or standards set forth in this Agreement to be observed in the performance required under this Agreement are minimum

requirements, and shall not affect the application of more restrictive Federal, State, or local standards applied to the performance of the Agreement.

Section 7. Waivers

No right of either party hereto shall be deemed to have been waived by non-exercise thereof, or otherwise, unless such waiver is reduced to writing and executed by the party entitled to exercise such right.

Section 8. Assignment

This Agreement may not be assigned by the **ESCO** without the prior written consent of the **ISSUER**.

Section 9. Federal Taxpayer Identification Number and Legal Status Disclosure

Under penalty of perjury, the **ESCO** certifies that - is the **ESCO**'s correct Federal Taxpayer Identification Number and that the **ESCO** is validly registered with the NC Secretary of State

Section 10. Governing Law

This Agreement shall be governed by and construed only in accordance with the laws of the State of North Carolina. In the event the parties are unable to resolve any dispute relating to this Agreement, all suits, actions, claims and causes of action relating to this Agreement shall be brought in the courts of the State of North Carolina.

Section 11. Agreement

The following documents are incorporated in, and made a part of, this Agreement:

ISSUER RFP

ESCO RFP response including Attachments A, B and C

Section 12. Project Management

All necessary and ordinary communications, submittals, approvals, requests, and notices related to Project work shall be issued or received by:

For ISSUER: _____

For ESCO: _____

Section 13. Amendments

This Agreement and Attachments referenced in Section 11 herein constitute the entire Agreement between the Parties. No amendment hereof shall be effective until and unless reduced to writing and executed by the Parties.

Section 14. E-Verify

As required by G.S. §143-48.5 (Session Law 2013-418), **ESCO** certifies that it, and each of its subcontractors performing Work under this Agreement complies with the requirements of Article 2 of Chapter 64 of the NC General Statutes, including the requirement for each employer with more than 25 employees in North Carolina to verify the work authorization of its employees through the federal E-Verify system.

Section 15. Suspension and Debarment.

The **ESCO** certifies that with regard to:

- A. DEBARMENT AND SUSPENSION - To the best of its knowledge and belief that it and its principals:
- (1) are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal, State, or local government agency;
 - (2) have not within a 3-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - (3) are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (A)(2) of this certification; and have not within a 3-year period preceding this application/proposal had one or more public transactions (Federal, State, or local) terminated for cause or default.

Section 16. Drug Free Workplace.

ESCO certifies that it will comply by:

- (1) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the ESCO's workplace and specifying the actions that will be taken against employees for violation of such prohibition;
- (2) Establishing a drug-free awareness program to inform employees about -
 - (a) The dangers of drug abuse in the workplace;
 - (b) The ESCO's policy of maintaining a drug-free workplace;
 - (c) Any available drug counseling, rehabilitation, and employee assistance programs; and
 - (d) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;
- (3) Making it a requirement that each employee to be engaged in the performance of the work under this Agreement be given a copy of the statement required by paragraph (1) above;
- (4) Notifying the employee in the statement required by paragraph (1), above, that, as a condition of employment under this Agreement, the employee will -
 - (a) Abide by the terms of the statement; and
 - (b) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;
- (5) Notifying the ISSUER within ten days after receiving notice under subparagraph (4)(b), above, from an employee or otherwise receiving actual notice of such conviction;

- (6) Taking one of the following actions, within 30 days of receiving notice under subparagraph (4)(b), above with respect to any employee who is so convicted -
 - (a) Taking appropriate personnel action against such an employee, up to and including termination; or
 - (b) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;
- (7) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (1), (2), (3), (4), (5), and (6), above.

Section 17. Jessica Lunsford Act.

The requirements of N.C.G.S. 115C-332.1 are incorporated into this Agreement and the statute's requirements are applicable to the ESCO and all contractors, subcontractors, consultants, sub-consultants and vendors in any way involved with this Agreement. As required by N.C.G.S. 115C-332.1, the ESCO and all contractors, subcontractors, consultants, sub-consultants, and vendors shall conduct prior to the start of service and annually thereafter a review of the State Sex Offender and Public Protection Registration Program, the State Sexually Violent Predator Registration Program, and the National Sex Offender Registry for all employees who will provide services under this contract that involve direct interaction with ISSUER'S students. For ESCO's convenience only, all of the required registry checks may be completed at no cost by accessing the United States Department of Justice Sex Offender Public Website at <http://www.nsopw.gov/>. Any employee of the ESCO, a contractor, subcontractor, consultant, sub-consultant, or vendor found to be registered on any of the lists identified herein shall not perform any work under this contract and shall not be permitted to enter property owned by ISSUER. Failure to comply may result in legal action and termination of the contract for default.

Section 18. Data Collection and Reporting by ESCO – Using eProject eXpress (ePX).

ESCO shall collect and report project data, at specified times, on behalf of the State and Project Owner and with approval by Owner, using eProject eXpress as the pathway into eProject Builder as provided on the LBNL website (<http://eprojectbuilder.lbl.gov>).

[Signature page follows]

ARTICLE 6
EXECUTION

IN WITNESS WHEREOF, the parties have executed this Agreement this _____ day
of _____, 20_____.

ISSUER _____

ESCO _____

By: _____

By: _____

Title: _____

Title: _____

By: _____

By: _____

Title: _____

Title: _____

By: _____

By: _____