

CITY OF SANTA FE, NEW MEXICO

**Agreement Between the Owner and Contractor
For Energy Performance Contracting**

THIS AGREEMENT is made as on the 27th day of February in the year 2019

BETWEEN the Owner:

CITY OF SANTA FE, NEW MEXICO, hereinafter referred to as the "Owner."
PO Box 909
200 Lincoln Avenue
Santa Fe, New Mexico 87501
(505)955-5932

and the Contractor :

AMERESCO, INC., hereinafter referred to as the "Contractor."
2375 E Camelback Road, Suite 400
Phoenix, AZ 85016
(480)499-9150

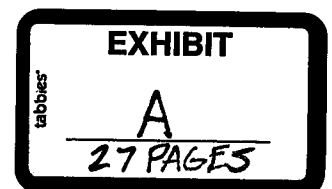
For the following Project:

CIP #646A, City of Santa Fe Energy Conservation Measures and associated work

The Owner and Contractor agree as follows.

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1. Recitals

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

WHEREAS, The Owner has been authorized to enter into an agreement for all professional services, equipment and construction for the design (as applicable), purchase and installation of energy and water cost savings measures, collectively referred to as the "Work" (as hereinafter defined); and

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

WHEREAS, The Contractor was selected after contracting for the Investment Grade Audit and Project Development Proposal (as hereinafter defined); and

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

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

WHEREAS, The Owner is authorized under the New Mexico Constitution and state law, Chapter 6, Article 23, New Mexico Statutes Annotated (NMSA) 1978, to enter into this Contract for the purposes set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and as legally bound hereby, the Owner and Contractor hereto covenant and agree that the Schedules, Exhibits and Appendices, Attachment 1 (Owner Performance Measures) attached hereto are made a part of this Agreement by reference.

2. Definitions

As indicated under State of New Mexico General Services Department Purchasing Division Statewide Price Agreement Number 15-000-14-0005759AE and including the following definitions:

- A. "Commencement Date" means the date described in Article 8 (Commencement Date);
- B. "Contract" or "Agreement" means this Energy Performance Contract and all Schedules, Exhibits, and Appendices, Attachment 1 (Owner Performance Measures) attached hereto;
- C. "Contract Sum" means the sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services related to the project;
- D. "Contractor" aka "Energy Service Company" (ESCO) means the person or entity identified as such in the Agreement and is referred to throughout the Contract Documents as if singular in number. The Contractor shall be lawfully licensed, if required in the jurisdiction where the Project is located. The Contractor shall designate in writing a representative who shall have express authority to bind the Contractor with respect to all matters under this Contract. The term "Contractor" means the Contractor or the Contractor's authorized representative.

E. "Energy and Cost Savings Guarantee" means the guarantee on Schedule A (Energy and Cost Savings Guarantee) that is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in Schedule J (Compensation to ESCO for Annual Services) and in accordance with the Savings Calculation Formula as set forth in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements);

F. "Energy and Water Cost Savings" means the savings as provided in Schedule A (Energy and Cost Savings Guarantee);

G. "Equipment" or "ECM" means the material goods enumerated in Schedule R (Equipment to be Installed by ESCO) that is now, or hereafter from time to time, attached hereto and incorporated herein by reference, together and with any and all additions, modifications, attachments, replacements and parts thereof;

H. "Event of Default" means those events described in Articles 67 (Events of Default by the Contractor) and 66 (Events of Default by the Owner) hereof;

I. "Interim Period" means the period from contract execution until the Commencement Date;

J. "Investment Grade Audit" means a study by the Contractor selected for a particular energy performance contracting project, that includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements and the utility and operations and maintenance cost savings projected to result from the recommended improvements;

K. "Professional Services" means the services of architects, archeologists, engineers, surveyors, landscape architects, medical arts practitioners, scientists, management and systems analysts, certified public accountants, registered public accountants, lawyers, psychologists, planners, researchers, construction managers and other persons or businesses providing similar professional services, which may be designated as such by a determination issued by the state purchasing agent or a central purchasing office.

L. "Project Site(s)" means the facilities of the Owner in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Project Site(s) and indicates the locations where the Contractor shall install the ECMs; the Project Sites for the initial phase of this contract are set forth on Schedule Q (Description of Project Site(s) and Schedule R (Equipment to be Installed by ESCO).

M. "Qualified Provider" means the Contractor, which is a business experienced in the design, implementation and installation of energy or water conservation measures and who meets the experience qualifications developed by the Energy, Minerals and Natural Resources Department (EMNRD) of the State of New Mexico for energy conservation measures or the Office of the State Engineer for water conservation measures;

N. "Substantial Completion" means the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that the Owner can utilize and take beneficial use of the Work for its intended use or purpose.

O. "Work" means the installation of the Equipment, materials, and performance of professional services and construction services for the project at the Owner's Project Site, as described by this Agreement and attachments.

3. Initial Information & The Contract Documents

A. The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary, and other Conditions), Drawings: as indicated herein under Schedule W (Final Design Construction Documents), Specifications: as indicated herein under Schedule W, Addenda issued prior to execution of this Agreement, other documents and Exhibits listed in this Agreement, and Modifications issued after execution of this Agreement, all of which form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties

hereto and supersedes prior negotiations, representations, or agreements, either written or oral. An enumeration of the Contract Documents, other than a Modification, appears in Schedule W.

B. In the event of a conflict between or among the Contract Documents, the following order of priority shall be:

- (1) This Agreement (Exhibit A)
- (2) Statewide Price Agreement #15-000-14-0005759 AE, Qualified Providers of Energy Performance Contracting Services (Exhibit A,1)
- (3) AIA Document A201–2017, General Conditions of the Construction Contract (Exhibit A,2)
- (4) The City of Santa Fe General Conditions (Exhibit A,3)
- (5) The City of Santa Fe Supplementary Conditions (Exhibit A,4)
- (6) Owner Performance Measures document (Attachment 1).
- (7) Provisions set forth in the Construction Documents (Schedule W, Final Design and Construction Documents)
- (8) Provisions set forth in other documents under Article 88.

C. The Contractor shall fully execute the Work described herein and in the Contract Documents. The Scope of Work includes the items listed in Schedule R (Equipment to be Installed by ESCO) and shall be carried out in accordance with the Construction Documents indicated under Schedule W (Final Design and Construction Documents), except as specifically indicated in the Construction Documents to be the responsibility of others.

4. Scope of Work

The Contractor shall:

A. Perform and complete the Work at the Owner's Project Site, as defined and described in this Agreement and the attached Schedules, Exhibits and Appendices, Attachment 1 (Owner Performance Measures);

B. Provide the Equipment, together with installation and other services as provided herein, as in Schedule R (Equipment to be Installed by ESCO) based upon the terms and conditions set forth in Schedule S (Construction and Installation Schedule);

C. Provide the Work and all related services identified in Schedule R (Equipment to be Installed by ESCO) and the services detailed in Schedule BB (ESCO's Maintenance Responsibilities) and Schedule J (Compensation to ESCO for Annual Services);

D. Supervise and direct the Work and shall be responsible for the engineering, design, and quality control; construction means, methods, techniques, sequences, and procedures; and for coordinating all portions of the Work under this Contract; and

E. Comply with all federal, state, and local government laws, codes, and regulations in effect at the time the Agreement is fully executed.

5. Compensation

A. The Owner shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work under Schedule R (Equipment to be Installed by ESCO).

B. The total amount payable to the Contractor under this Agreement shall not exceed five million, twenty four thousand, three hundred forty five dollars and zero cents (\$5,024,345.00), inclusive of New Mexico Gross Receipts Tax and subject to additions and deductions as provided in the Contract Documents and as set forth in Schedule H (Final Project Cost & Project Cash Flow Analysis). This amount is a maximum price and not a guarantee; the final price may be lower at closeout. Payment terms are described in Schedule I (Financing Agreement and Payment Schedule).

C. The Contractor shall submit detailed monthly invoices in accordance with Article 13, Purchase and Sale. Upon review of an Application for Payment, if the Owner determines that the Work covered under the accompanying Schedule of Values (Schedule L) does not meet the requirements of this Agreement, or does not accurately reflect the Work performed under the request, the Owner shall, within thirty days after receipt of the

Contractor's payment application, provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification, by the Owner, that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after receipt of the Contractor's payment application. If payment is made by mail, the payment shall be deemed tendered on the date it is postmarked.

D. Due to commodities cost fluctuation, volatility of raw materials (i.e. copper, steel, PVC, fuel, and wire insulation) required to produce and transport cable, PVC products, equipment and pipes containing steel, copper and similar products, the Contractor reserves the right to adjust material pricing of this proposal to reflect only the actual cost increases in such products that take place from the date of the project price was submitted to the Owner and the actual date a Notice to Proceed was issued by the Owner, allowing for the procurement of such materials. In the event that an "economic conditions" Change Order is required, copies of all relevant supplier pricing schedules will be provided to the Owner and the Change Order would only represent the actual cost increases to the Contractor. The Contractor will make every effort to mitigate the impact of economic conditions charges, however, if such price increases cannot be avoided, it will either result in a project price increase or a decrease in the project size.

6. Term and Effective Date

A. This Agreement shall be effective when signed by the Owner and the Contractor, whichever occurs last, and terminate on June 30, 2022 unless sooner pursuant to Article 7, Termination.

B. The Contract shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period shall be fully credited to the Owner.

7. Termination

A. Termination. This Agreement may be terminated by the Owner after the Commencement Date upon written notice delivered to the Contractor at least ten (10) days prior to the intended date of termination. Upon such termination, the Contractor's obligations hereunder, including without limitation the Energy and Cost Savings Guarantee shall also terminate. Notwithstanding the foregoing, this Agreement may be terminated upon written notice to the Contractor if the Owner is in default under Article 66 beyond notice and cure periods or if, during the term of this Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of funds or due to the Appropriations paragraph herein. This provision is not exclusive and does not waive the Owner's other legal rights and remedies caused by the contractor's default/breach of this agreement.

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

8. Commencement Date, Completion Date, Substantial Completion and Acceptance

A. The Commencement Date of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in the official Notice to Proceed issued by the Owner and accompanied by a Purchase Order to the Contractor.

1) The Commencement Date of the Work will be the date on the official Notice to Proceed (Exhibit VI) from the Owner.

B. The Contract Time shall be measured from the Commencement Date.

C. The Contractor shall achieve Substantial Completion of the entire Work not later than two hundred ninety eight (298) calendar days from the Commencement Date, subject to adjustments of this Contract Time as provided herein.

D. Liquidated damages of two hundred fifty (\$250.00) per calendar day will apply for work not completed by the Substantial Completion date.

E. The Substantial Completion Date shall be the first day of the month after the month that all schedules, including formal Punch Lists, are in final form and accepted by the Owner, and the Contractor shall have delivered a Notice to the Owner that it has installed and commenced operating all of the Equipment specified in Schedule R (Equipment to be Installed by ESCO) and in accordance with the provisions of Schedule S (Construction and Installation Schedule) and Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment); and shall have coordinated with the Third Party Commissioning Engineer hired by the Owner to begin inspection and functional testing of said installation.

F. Upon Substantial Completion of an ECM, the Contractor shall deliver to the Owner a substantial completion certificate in the form of Exhibit VIII (Certificate of Substantial Completion) with respect to such ECM. Within five business days after receipt of each Certificate of Substantial Completion, the Owner shall complete, execute and deliver to the Contractor each such Certificate of Substantial Completion. The Substantial Completion Certificate shall also include a list of items (“Punch List”) that require completion or correction, including those indicated by the Third Party Commissioning Engineer upon completion of the initial Functional Testing after Substantial Completion. Notwithstanding anything to the contrary in Articles 6 and 11 (Purchase and Sale; Commencement Date and Terms; Interim Period), the Completion Date shall not occur and the Owner shall not be required to accept the Work under this Contract unless and until all Equipment installation for the Project Site(s) is Substantially Completed by the Contractor in accordance with the terms and conditions of this Contract. The Owner shall have ten (10) business days after notification by the Contractor to inspect and accept the Equipment. The Owner reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. Final Payment shall not be issued to the Contractor until after the punch list is completed, the Contractor has satisfied any and all claims for labor and materials, the Exhibit VIII (Certificate of Final Completion) has been signed and all other project close-out documentation requirements are met in accordance with Article 13, Section D. Exhibit VIII (Certificate of Final Completion) will not be unreasonably withheld by the Owner.

G. Compensation payments due to the Contractor for on-going services under this Contract as set forth in Schedule J (Compensation to ESCO for Annual Services).

9. Performance Measures

The Contractor shall substantially perform the following Owner Performance Measures:

The Owner Performance Measures documentation is provided as Attachment 1.

10. Contractor is Qualified Provider

The Contractor is certified as a Qualified Provider by EMNRD to perform the Work, pursuant to Articles 6-23-2E and 6-23-5 NMSA 1978 and as shown by Exhibit XII (EMNRD Certification of the Contractor as Qualified Provider).

11. Investment-Grade Energy Audit Report and Project Development Proposal

The Contractor has provided the complete Investment-Grade Energy Audit Report and Project Development Proposal of the Project Site(s), as set forth in Appendix D (Investment-Grade Energy Audit and Project Proposal Contract) and dated December 4, 2018. The Investment-Grade Energy Audit Report includes all energy conservation measures agreed upon by the Owner and Contractor for implementation in the Work. The guaranteed energy savings of energy conservation measures stated in the Investment-Grade Energy Audit Report appear to be

accurately estimated and reasonable and are certified by EMNRD, as shown in Exhibit XI (EMNRD Certification of Guaranteed Energy Savings).

12. Schedules, Exhibits and Appendices

The Contractor has provided and the Owner has approved the following Schedules, Exhibits and Appendices, Attachment 1 (Owner Performance Measures) copies of which are attached hereto (or shall be as provided for under the Contract), set forth in their entirety and made a part of this Contract by reference.

A. Schedules

Savings Guarantee

Schedule A	Energy and Cost Savings Guarantee
Schedule B	Baseline Energy Consumption; Methodology to Adjust Baseline
Schedule C	Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements
Schedules D-G	Left blank for optional Schedules

Payments and Schedule

Schedule H	Final Project Cost & Project Cash Flow Analysis
Schedule I	Financing Agreement and Payment Schedule
Schedule J	Compensation to ESCO for Annual Services
Schedule K	Rebates, Incentives and Grants
Schedule L	Schedule of Values
Schedule M-P	Left blank for optional Schedules

Design and Construction Phase

Schedule Q	Description of Project Site(s)
Schedule R	Equipment to be Installed by ESCO
Schedule S	Construction and Installation Schedule
Schedule T	Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
Schedule U	Standards of Comfort
Schedule V	ESCO's Training Responsibilities
Schedule W	Final Design and Construction Documents
Schedule X-AA	Left blank for optional Schedules

Post-Construction

Schedule BB	ESCO's Maintenance Responsibilities
Schedule CC	Owner's Maintenance Responsibilities
Schedule DD	Facility Maintenance Checklist
Schedule EE-II	Left blank for optional Schedules

Administration

Schedule JJ	Alternative Dispute Resolution Procedures
Schedules KK-OO	Left blank for optional Schedules

B. Exhibits

Exhibit I	Performance Bond
Exhibit II	Labor and Material Payment Bond
Exhibit III	Certificate of Acceptance - Investment Grade Audit Report
Exhibit IV	Manufacturer's Equipment Warranties & Contractor's Warranties
Exhibit V	Certificate of Substantial Completion (AIA Document G704-2017)
Exhibit VI	Notice to Proceed
Exhibit VII	Owner procured Third Party Equipment Commissioning scope of work documentation
Exhibit VIII	Certificate of Final Completion
Exhibit IX	Contractor's Affidavit of Release of Liens (AIA Document G706A)

Exhibit X	Contractor's Affidavit of Payment of Debts and Claims (AIA Document G706)
Exhibit XI	EMNRD Certification of Guaranteed Energy Savings
Exhibit XII	EMNRD Certification of the Contractor as Qualified Provider

C. Appendices

Appendix A	Amendment #2 recorded as 17-0025 to the original Professional Services Agreement recorded as 15-0855: Services provided for development and issuance of the Investment Grade Audit and associated terms.
Appendix B	ESCO Project Development Proposal (Pre-qualification Phase; Final Selection Phase)
Appendix C	Investment-Grade Energy Audit and Project Development Contract
Appendix D	Investment-Grade Energy Audit Report

13. Purchase and Sale

A. Upon the Contractor's receipt of a Notice to Proceed, the Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

B. For each month during the construction period, the Owner shall make monthly progress payments to the Contractor based upon the percentage of the construction and equipment procurement completed at the end of each month. The Contractor shall be paid the same percentage of the Contract Sum as such percentage of completion. Following the end of each month during the construction period, the Contractor shall submit detailed monthly invoice payment application to the Owner together with a list in sufficient detail to reasonably identify construction and equipment procurement during such month. Within thirty (30) days after receipt of such invoice, the Owner shall pay or cause payment to the Contractor the amount due under such invoice.

D. Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The Contractor shall stipulate a sum of 8% of the Contract Sum inclusive of New Mexico Gross Receipts Tax as a line item on the Schedule of Values (Schedule L) for Completion of Work after issuance of the Certificate of Substantial Completion, as listed on the official Punch List and for completion and submission of all Project Close Out documentation, including (as applicable), but not limited to the documents listed below. The Certificate of Final Completion (Exhibit VIII) will be issued after acceptance of these documents by the Owner and after issuance of the final commissioning report by the Third Party Commissioning Engineer recommending final acceptance of the work.

- .1 Certificate of Liability Insurance with an expiration date no earlier than one (1) year after the Substantial Completion date.
- .2 Contractor's Affidavit of Release of Liens, Exhibit IX (AIA Document G706A)
- .3 Contractor's Affidavit of Payment of Debts and Claims, Exhibit X (AIA Document G706)
- .4 Contractor's Warranty
- .5 Manufacturer's Warranties (as applicable)
- .6 Operations and Maintenance Manual covering warranted equipment, materials requiring maintenance and including any reports or procedural documentation generated by third parties or subcontractors as part of, or necessitated by the Work.
- .7 Approved Construction Permit(s) with Construction Document set stamped by Permitting Authorities (as applicable)
- .8 As-Built Construction Document set and documentation of all other Work completed that is not included in the As-Built set
- .9 Final Inspection Report(s) from Permitting Authorities (as applicable)
- .10 Consent of Surety Company to Final Payment.
- .11 Application for Final Payment.
- .12 Lien Bond (as applicable)
- .13 Lien Discharge Fee(s) Refund (as applicable)
- .14 Certificate of Occupancy (as applicable)
- .15 New Mexico Dept. of Workforce Solutions Affidavit of Wages Paid

.16 New Mexico Dept. of Workforce Solutions Payroll Statement of Compliance

E. The Owner acknowledges that, prior to the execution of this Agreement, the Contractor conducted a detailed energy audit and prepared the Investment Grade Audit Report in anticipation of payment therefore under this Agreement. Accordingly, full payment for the work performed in connection with the Investment Grade Audit Report shall be billed in connection with the first application for payment and shall be paid in accordance with the provisions of this Agreement, except no retention shall be deducted from the payment for the Investment Grade Audit Report. The first application for payment shall also include the actual costs for the purchase of a Payment and Performance Bond and mobilization costs. Mobilization costs shall be limited to an amount not greater than 10% of the total contract value, shall be itemized, and shall be limited to those costs incurred at the Project site. Payments due to the Contractor in accordance with the provisions of this Agreement that are not paid when due, shall bear interest at a rate of twelve percent (12%) annually, or the legal prevailing interest rates in place where the project is located, whichever is lower, from the date the payment was due until paid.

14. Energy Usage Records and Data

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

15. Location and Access

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

16. Permits and Approvals

The Contractor shall obtain all necessary permits and approvals for installation of the Equipment. In no event shall the Owner, however, be responsible for payment of any permit fees. The equipment and the operation of the equipment by the Contractor shall at all times conform to all federal, state and local code requirements. The Contractor shall furnish to the Owner, copies of each permit or license required to perform the Work before the Contractor commences the portion of the work requiring such permit or license.

17. Coordination During Installation

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

18. Construction Schedule; Equipment Installation

Construction and equipment installation shall proceed in accordance with the preliminary construction schedule approved by the Owner and attached as Schedule S (Construction and Installation Schedule). Subject to the Owner's instructions to the Contractor and access to the Project Site(s), the Contractor shall use diligent efforts to install the Equipment in accordance with the schedule set forth in Schedule S subject to excusable delays that are outside of the Contractor's control, it being acknowledged by the Owner that the Contractor does not control the Project Site(s). The Contractor shall update the installation schedule during construction for any mutually agreed upon changes.

19. Systems Startup and Equipment Commissioning

The Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment) and prior to acceptance of the project by the Owner as specified in Exhibit VIII (Certificate of Final Completion). Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The Contractor shall provide notice to the Owner of the scheduled test(s) and the Owner and/or its designees shall have the right to be present at any or all such tests conducted by the Contractor and/or manufacturers of the Equipment. The Contractor shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that are observed during system commissioning procedures as specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment). The Contractor shall be responsible for correcting and/or adjusting all deficiencies in Equipment operation that are observed during system testing procedures. Prior to the Owner acceptance the Contractor shall also provide the Owner with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in Schedule R (Equipment to be Installed by ESCO). Prior to, during and after performance testing, Start-Up and Commissioning by the Contractor, and in conjunction with these tasks, as applicable, the Contractor shall fully coordinate with and assist the Third Party Commissioning Engineer hired by the Owner to complete their scope of work (as referenced herein as Exhibit VII).

20. Equipment Warranties

A. The Contractor warrants that all equipment sold and installed as part of this Contract is new, shall be materially free from defects in materials or workmanship, shall be installed properly in a good and workmanlike manner, and shall function properly for a period of one (1) year from the date of the Substantial Completion for the particular energy conservation measure, if operated and maintained in accordance with the procedures established per building. Substantial Completion with respect to an ECM does not occur until the ECM has been commissioned, accepted, and Exhibit V (Certificate of Substantial Completion) is fully executed. Any warranties that exceed contractor's one (1) year warranty shall be assigned to the Owner.

B. After the warranty period, the Contractor shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in Schedule BB (ESCO's Maintenance Responsibilities).

C. The Contractor further agrees to assign to the Owner all available manufacturer's warranties relating to the Equipment and to deliver such written warranties that shall be attached and set forth as Exhibit IV (Manufacturer's Equipment Warranties & Contractor's Warranties). During the one year warranty period, the Contractor shall pursue rights and remedies against the manufacturers under the warranties on behalf of the Owner in the event of Equipment malfunction or improper or defective function, and defects in parts, workmanship and performance. During the warranty period, the Contractor shall notify the Owner whenever defects in Equipment parts or performance occur that give rise to such rights and remedies and when those rights and remedies are exercised by the Contractor. During this one year period, the cost of any damage to the Equipment, including damage to property and equipment of the Owner or the Project Site(s), due to the Contractor's failure to pursue warranty rights under the Equipment Warranties, shall be borne solely by the Contractor.

D. All warranties, to the extent transferable, shall be transferable and extend to the Owner. The warranties shall specify that only new, not reconditioned, parts shall be used and installed when repair is necessitated by malfunction. All extended warranties shall be addressed as the property of the Owner and appropriately documented and titled.

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

F. Except as expressly set forth herein or an exhibit attached hereto, the Contractor has made and makes no representations or warranties, expressed or implied (including, without limitation, any warranties of merchantability or fitness for particular purpose) with respect to the work.

21. Standards of Comfort

During the term of this Contract, the Contractor and the Owner shall maintain, according to Schedule BB (ESCO's Maintenance Responsibilities) and Schedule CC (Owner's Maintenance Responsibilities), and operate the Equipment in a manner that provides the standards of comfort and levels of operation as described in Schedule U (Standards of Comfort).

22. Environmental Requirements, Excluded Material and Activities; Changed Site Conditions

The Owner recognizes that in connection with the installation and/or service or maintenance of Equipment at the Owner's Project Site(s), the Contractor may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof; (ii) fungus (any type of form of fungi, including mold or mildew, and mycotoxins, spores, scents or by-products produced or released by fungi); (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement; or (iv) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Article below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities." the Owner agrees that if performance of work involves any Excluded Materials and Activities, the Owner will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. In the event the Contractor discovers Hazardous or Excluded Materials, the Contractor shall immediately cease work, remove all the Contractor personnel or subcontractors from the site, and notify the Owner. The Owner shall be responsible to handle such Materials at its expense after verified in an official report after inspection by a qualified third party toxic material inspection company as provided for by the Contractor. The Contractor shall undertake no further work on the Project Site(s) except as authorized by the Owner in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Owner shall not constitute a default by the Owner. In the event of such stoppage of work by the Contractor, the time for completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by the Contractor as a result will be added by Change Order.

The Contractor shall be responsible for any hazardous or other materials, including, without limitation, those listed in this Article that are brought onto the Project Site(s) by the Contractor.

The Contractor shall give the Owner prompt written notice if the following existing conditions are encountered under performance of the Work:

- (i) sub-surface or otherwise concealed conditions at the Project Sites that differ materially from those stated in the Agreement or in representations, reports and studies made or provided by the Owner.
- (ii) Unforeseeable unknown physical conditions of an unusual nature or that differ materially from those ordinarily found to exist in connection with the performance of services substantially similar in nature to the Work performed under this Agreement, and that materially differ from those generally recognized as inherent to construction activities. The Owner and the Contractor shall jointly explore value engineering opportunities in order to overcome the cost and schedule impact of any concealed site conditions encountered, with the intention of executing an appropriate Change Order that addresses changes in the Work, adjustments in the contract amount and changes to the schedule.

23. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps

RESERVED.

24. Training by the Contractor

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

25. Equipment Service, Actions by the Contractor

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

26. Malfunctions and Emergencies

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

B. In such case that the Owner exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings. The Owner shall notify the Contractor within seventy two (72) hours upon its having actual knowledge of any emergency condition affecting the Equipment. Any telephonic notice of such conditions by the Owner shall be followed within three business days by written notice to the Contractor from the Owner. If the Owner unreasonably delays in so notifying the Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, the Contractor may charge the Owner for its loss, due to the delay, associated with the guaranteed savings under this Contract for the particular time period, provided that the Contractor is able to show the direct causal connection between the delay and the loss.

C. The Contractor shall provide a written record of all service work performed. This record shall indicate the reason for the service, description of the problem and the corrective action performed.

27. Actions by the Owner

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

28. Modification of Equipment

During the Term of this Contract, the Owner will not, without the prior written consent of the Contractor, affix or install any accessory Equipment or device on any of the Equipment if such addition changes or impairs the originally intended functions, value or use of the Equipment, without the Contractor's prior written approval, which will not be unreasonably withheld or cause delay to required maintenance, repairs or improvements.

29. Upgrade or Alteration of Equipment

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

B. All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) and provided to the Owner for approval, that will not be unreasonably withheld, provided that any replacement of the Equipment shall, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. The Contractor shall have the right (but not the obligation) to update any and all software used in connection with the Equipment in accordance with the provisions of Article 43 (the Ownership of Certain Proprietary Rights) and Schedule BB (ESCO's Maintenance Responsibilities). All replacements of and alterations or additions to the Equipment shall become part the Equipment described in Schedule R (Equipment to be Installed by ESCO) and shall be covered by the provisions and terms of Article 18 (Construction Schedule; Equipment Installation).

30. Material Change Defined

A. A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature that reasonably could be expected, in the judgment of the Owner, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) by at least 2% after adjustments for climatic variations.

B. Actions by the Owner resulting in a Material Change include, but are not limited to, the following:

- i) manner of use of the Project Site(s) by the Owner; or
- ii) hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s); or
- iii) Permanent changes in the comfort and service parameters set forth in Schedule U (Standards of Comfort); or
- iv) occupancy of the Project Site(s); or
- v) structure of the Project Site(s); or
- vi) types and quantities of equipment used at the Project Site(s) or
- vii) modification, renovation or construction at the Project Site(s); or
- viii) the Owner's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule CC (Owner's Maintenance Responsibilities); or
- ix) any other conditions other than climate affecting energy use at the Project Site(s) including but not limited to the replacement, addition or removal of energy and water consuming devices whether plug in or fixed assets,
- x) casualty or condemnation of the Project Site(s) or Equipment, or
- xi) changes in utility provider or utility rate classification, or
- xii) any other conditions other than climate affecting energy or water use at the Project Site(s).
- xiii) Modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.

31. Reported Material Changes; Notice by the Owner

The Owner shall use its best efforts to deliver to the Contractor a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) at least thirty (30) days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other

unplanned event. Notice to the Contractor of Material Changes that result because of a bona fide emergency, or other situation precluding advance notification, shall be deemed sufficient if given by the Owner within one (1) business week after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Owner to have occurred.

32. Other Adjustments

As agreed in Article 31 (Reported Material Changes; Notice by the Owner) the Owner will alert the Contractor of Material Changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, the Contractor shall work with the Owner to investigate, identify and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, the Contractor and the Owner shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). Any disputes between the Owner and the Contractor concerning any such adjustment shall be resolved in accordance with the provisions of Schedule JJ (Alternative Dispute Resolution Procedures) hereto.

33. Corrective Action; Accuracy of the Services

A. The Contractor shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Schedule U (Standards of Comfort) and the construction schedule specified in Schedule S (Construction and Installation Schedule). The Contractor shall repair and restore to its original condition any area of damage caused by the Contractor's performance under this Contract. The Owner reserves the right to review the work performed by the Contractor and to direct the Contractor to take certain corrective action if, in the opinion of the Owner, the structural integrity of the Project Site(s) or its operating system is or could be harmed. All costs associated with such corrective action to damage caused by the Contractor's performance of the work shall be borne by the Contractor.

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

34. Annual Reporting Requirements; Annual ENERGY STAR Rating

At the end of each year during the guarantee period as specified in Schedule A (Energy and Cost Savings Guarantee) and no later than ninety (90) days after receiving all utility billing and data reasonably requested by the Contractor, the Contractor shall complete and submit the data required in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Contractor shall provide an ENERGY STAR rating for each eligible facility for each year of the guarantee period if applicable.

35. Other Documents

RESERVED.

36. Energy and Cost Savings Guarantee

The Contractor has formulated and, subject to the adjustments provided for in Articles 30, 31 and 32 (Material Changes), guarantees the annual level of energy cost savings as a result of the installation and operation of the Equipment and provision of services provided for in this Contract in accordance with the methods of savings measurement and verification as set forth in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract beginning on the Commencement Date as specified in Schedule A (Savings Guarantee) and has been structured by the Contractor to cover any and all annual payments required to be made by the Owner as set forth in Schedule J (Compensation to ESCO for Annual Services), Schedule I (Financing Agreement and Payment) and necessary to procure the guarantee and all required bonds. The Energy and Cost Savings Guarantee is subject to the Owner performing its maintenance and other obligations under this Agreement.

37. Annual Review and Reimbursement/Reconciliation

A. Energy-related cost savings shall be measured and/or calculated as specified in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) and a report provided within ninety (90) days of the end of the year after the Contractor receives all utility billing and other operational data such as ECM trends logs reasonably requested by the Contractor for the previous year for each anniversary of the Commencement Date.

B. Annual savings shall exceed annual payments each and every year while this Contract is in effect. In the event the Energy and Water Cost Savings achieved during such a Guarantee Year are less than the Energy and Cost Savings Guarantee as defined in Schedule A (Savings Guarantee), the Contractor shall pay the Owner an amount equal to the deficiency. In addition, the Contractor may, upon agreement of the Owner and the Contractor, at the Contractor's sole expense, install additional ECM(s), or modifications that are mutually agreed to by the Owner in order to achieve the applicable Energy and Cost Savings Guarantee.

C. The Contractor shall remit such payments to the Owner within thirty (30) days of written notice by the Owner of such monies due. Such excess savings will be retained by the Owner and will not be allocated to shortfalls in savings in other years. In no event shall credit for excess savings be used to satisfy saving guarantees in any other year(s) of the Contract.

38. Contractor Compensation and Fees

RESERVED.

39. Billing Information Procedure

Payments due to the Contractor shall be made as specified in Article 13.

40. Payment.

Subject to the terms set forth under Articles 5 and 13, the Owner shall pay the Contractor within thirty (30) days of receipt of the Contractor's Application for Payment.

41. Effective Date of Payment Obligation

Notwithstanding the above provisions, the Owner shall not be required to begin any payments to the Contractor under this Contract for post-construction Measurement and Verification services, or any other on-going services, unless and until all equipment installation is completed by the Contractor in accordance with the provisions of Article 18 (Construction Schedule; Equipment Installation) and Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment), and accepted by the Owner as evidenced by the signed Certificate of Acceptance as set forth in Exhibit VIII (Certificate of Final Completion), and unless and until said equipment is fully and properly functioning.

42. Open Book Pricing

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

43. Ownership of Certain Proprietary Property Rights

The Owner 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 that are, or may be used in connection with the Equipment. The Contractor shall grant to the Owner a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Owner to continue to operate, maintain, and repair the Equipment in a manner that will yield guaranteed utility consumption reductions for the specified contract term. The Contractor shall not be liable for providing new versions of software or other enhancements if or unless such new versions or enhancements are necessary to achieve the Energy and Cost Savings Guarantee.

44. The Ownership of Existing Equipment

The Ownership of the equipment and materials presently existing at the Project Site(s) at the time of execution of this Contract shall remain the property of the Owner even if it is replaced or its operation made unnecessary by work performed by the Contractor pursuant to this Contract. The Contractor shall advise the Owner in writing of all equipment and materials planned for replacement at the Project Site(s) and the Owner shall, within fourteen (14) calendar days, designate in writing to the Contractor which equipment and materials will not be disposed of off-site by the Contractor. It is understood and agreed to by both Parties that the Owner shall be responsible for and designate the location and storage for any equipment and materials that will not be disposed of off-site. The Contractor shall be responsible for the disposal of all equipment and materials designated by the Owner as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

45. Damages to Equipment or Property

The Contractor shall be responsible for any damage to the Equipment or other property on the Project Site(s) caused by the Contractor or its subcontractors.

46. Liabilities

Neither party shall be liable for any special, incidental, indirect, punitive or consequential damages, arising out of or in connection with this Contract. Further, the liability of either party under this Contract shall not exceed the Contract Sum in the aggregate.

47. Appropriations

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Owner for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Owner, this Agreement shall terminate upon written notice being given by the Owner to the Contractor. The Owner's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final.

48. Third Party Beneficiaries

By entering into this Agreement, the parties do not intend to create any right, title or interest in or for the benefit of any person other than the Owner and the Contractor. No person shall claim any right, title or interest under this Agreement or seek to enforce this Agreement as a third party beneficiary of this Agreement.

49. Status of the Contractor; Responsibility for Payment of Employees and Subcontractors

A. The Contractor and its agents and employees are independent contractors performing professional services for the Owner and are not employees of the Owner. The Contractor, and its agents and employees, shall not accrue leave, retirement, insurance, bonding, use of Owner vehicles, or any other benefits afforded to employees of the Owner as a result of this Agreement.

B. The Contractor shall be solely responsible for payment of wages, salaries and benefits to any and all employees or subcontractors retained by the Contractor in the performance of the services under this Agreement.

C. The Contractor shall comply with City of Santa Fe Minimum Wage, Article 28-1-SFCC 1987, as well as any subsequent changes to such article throughout the term of this Agreement.

50. Subcontracting

The Contractor shall not subcontract any portion of the services performed under this Agreement without the prior written approval of the Owner.

51. Confidentiality

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Owner. The Contractor's systems, methods, means and methodologies of evaluating, implementing, and performing under this Agreement shall be considered confidential. When any request for disclosure of such information is made under any freedom of information law ("FOIL"), the Owner shall provide prompt notice to the Contractor as required by the New Mexico FOIL so that the Contractor may have the opportunity to object; such approval will not be reasonably withheld.

52. Products of Service – Copyright

All materials developed or acquired by the Contractor under this Agreement shall become the property of the Owner and shall be delivered to the Owner no later than the termination date of this Agreement or payment therefore. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

53. Conflict of Interest

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Agreement. The Contractor further agrees that in the performance of this Agreement no persons having any such interests shall be employed.

54. Amendment

This Agreement shall not be altered, changed or modified except by an amendment in writing executed by the parties hereto.

55. Merger

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

56. Penalties for violation of law

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

57. Non-Discrimination

During the term of this Agreement, the Contractor shall not discriminate against any employee or applicant for an employment position to be used in the performance of services by the Contractor hereunder, on the basis of ethnicity, race, age, religion, creed, color, national origin, ancestry, sex, gender, sexual orientation, physical or mental disability, medical condition, or citizenship status.

58. Applicable Law: Choice of Law: Venue

The Contractor shall abide by all applicable federal and state laws and regulations, and all ordinances, rules and regulations of the City of Santa Fe. In any action, suit or legal dispute arising from this Agreement, the Contractor agrees that the laws of the State of New Mexico shall govern. The parties agree that any action or suit arising from this Agreement shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court.

59. Insurance

A. The Contractor, at its own cost and expense, shall carry and maintain in full force and effect during the term of this Agreement, comprehensive general liability insurance covering bodily injury and property damage liability, in a form and with an insurance company acceptable to the Owner, with limits of coverage in the maximum amount which the Owner could be held liable under the New Mexico Tort Claims Act for each person injured and for each accident resulting in damage to property. Such insurance shall provide that the Owner is named as an additional insured and that the Owner is notified no less than 30 days in advance of cancellation for any reason. The Contractor shall furnish the Owner with a copy of a Certificate of Insurance as a condition prior to performing services under this Agreement.

B. The Contractor shall also obtain and maintain Workers' compensation insurance, required by law, to provide coverage for the Contractor's employees throughout the term of this Agreement. The Contractor shall provide the Owner with evidence of its compliance with such requirement.

The Contractor shall purchase and maintain insurance and provide bonds as set forth in Article 11 of AIA Document A201-2017.

Type of insurance	Limit of liability
Professional Liability	\$1,000,000 in aggregate covering negligent acts and errors and omissions in the performance of professional services
Commercial General Liability	\$1,000,000 per occurrence, \$2,000,000 general aggregate
Automobile Liability	\$500,000 combined single limit
Workers Compensation	\$100,000 each accident, \$100,000 disease, each employee
Workers	\$500,000 disease, policy limit

60. New Mexico Tort Claims Act

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

61. Records and Financial Audit

The Contractor shall maintain, throughout the term of this Agreement and for a period of three years thereafter, detailed records that indicate the date, time and nature of services rendered. These records shall be subject to inspection by the Owner, the Department of Finance and Administration, and the State Auditor. The Owner shall have the right to audit the billing both before and after payment. The Owner shall give the contractor fourteen (14) days prior notice that an inspection of records will occur and conduct the inspection during normal business hours at the Contractor's office location. Payment under this Agreement shall not foreclose the right of the Owner to recover excessive or illegal payments.

62. Indemnification

To the extent permitted by applicable law, the Contractor shall indemnify and hold harmless the Owner from any losses, damages, claims or judgements, including payments of all reasonable attorneys' fees and costs, from or to third parties on account of any suit, judgment, execution, claim, action or demand whatsoever arising from any

personal injury or property damage, solely to the extent caused by the negligence or willful misconduct of the Contractor or the Contractor's employees, agents, representatives and subcontractors in the Contractor's performance under this Agreement as well as the performance of the Contractor's employees, agents, representatives and subcontractors.

63. Invalid Term or Condition

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

64. Enforcement of Agreement and Binding Dispute Resolution

- A. A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.
- B. For any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 of AIA Document A201-2007, the method of binding dispute resolution shall be as follows: In accordance with New Mexico Public Works Mediation Act 13-4C-1 through 13-4C-11, NMSA 1978.

65. Conditions Beyond Control Of The Parties

A. Neither party shall be in default of its obligations under this Agreement (excepting the obligation to pay moneys when due) to the extent its inability to perform results from Force Majeure, as defined in sub-Article (b) of this Article 65; provided, however, that an event of Force Majeure shall not relieve a party of its obligations that arise prior to the occurrence of the event. The Contractor may be entitled to have the Work schedule extended on account of the Force Majeure. The party affected by Force Majeure shall give written notice of the occurrence giving rise to the Force Majeure to the other party within five (5) business days following the start of the occurrence. The affected party shall exercise all due diligence to overcome an event of Force Majeure causing a delay to its performance.

B. For the purposes hereof, "**Force Majeure**" means any cause or causes beyond the reasonable control of the party that, as a result thereof, is unable to perform its obligations, including, without limitation, the following: an act of God; explosion; fire; flood; drought; epidemic; earthquake; storm; riot; insurrection; blockage; war, act of terrorism or other hostilities; strike; lockout or other industrial disturbance (even if such labor difficulty was avoidable or possibly settled by acceding to the demands of the party in dispute); act or restraint of governmental authority, whether valid or invalid, and action or inaction by any such authority that causes the lapse of necessary governmental authorizations, permits, license, certificates or approvals; shortage of supplies; utility power outages; interruption or curtailment of transmission or distribution of power; material breakage of or accidents to, machinery or equipment; and any other cause or event, whether foreseen or unforeseeable that is reasonably beyond the control of the party claiming Force Majeure and that the affected party is not able to overcome by the exercise of reasonable diligence, provided that no party will be required to settle any strike, lockout or other industrial disturbance on terms that in its sole discretion are unsatisfactory.

66. Events of Default by the Owner

- A. Each of the following events or conditions shall constitute an "Event of Default" by the Owner:
 - i) any failure by the Owner to pay the Contractor any sum due for a service and maintenance period of more than ten (10) days after written notification by the Contractor that the Owner is delinquent in making payment and provided that an Event of Default by the Contractor has not occurred; or
 - ii) any other material failure by the Owner 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 notice to the Owner demanding that such failures to perform be cured or if such cure cannot be effected in thirty (30) days, the Owner shall be deemed to have cured default upon

the commencement of a cure within thirty (30) days and diligent subsequent completion thereof within sixty (60) days;

- iii) any representation or warranty furnished by the Owner in this Contract that was false or misleading in any material respect when made.
- iv) the Owner goes into receivership or makes an assignment for the benefit of creditors or a petition is filed by or against the Owner under any bankruptcy, insolvency or similar law and such petition is not dismissed within sixty (60) days.

67. Events of Default by the Contractor

- A. Each of the following events or conditions shall constitute an "Event of Default" by the Contractor:
- i) the standards of comfort and service set forth in Schedule U (Standards of Comfort) are not provided due to failure of the Contractor to properly design, and install the Equipment except that such failure, if corrected or cured within thirty (30) days after written notice by the Owner to the Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract.
 - ii) any representation or warranty furnished by the Contractor in this Contract is false or misleading in any material respect when made;
 - iii) any failure by the Contractor to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within thirty (30) days after written notice by the Owner to the Contractor demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract unless such failure cannot be completely cured within thirty days, in which case a default shall exist only if the Contractor does not commence and diligently cure such failure as soon as possible;
 - iv) any lien or encumbrance upon the equipment by any subcontractor, laborer or material vendor of the Contractor is filed and not discharged or bonded over within thirty days;
 - v) the filing of a bankruptcy petition whether by the Contractor or its creditors against the Contractor which proceeding shall not have been dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of the Contractor.
 - vi) failure by the Contractor to pay any amount due the Owner of more than ten (10) days after written notification by the Owner that the Contractor is delinquent in making payment or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in Schedule A (Energy and Cost Savings Guarantee).

68. Remedies upon Default by the Owner

If an Event of Default by the Owner occurs, the Contractor may, without a waiver of other remedies, existing in law or equity, exercise any remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by the Owner.

69. Remedies Upon Default by the Contractor

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

70. Assignment

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

71. Assignment by the Contractor

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

Owner for all of its obligations under this Contract.

72. Assignment by the Owner

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

73. Representations and Warranties

A. Each party warrants and represents to the other that:

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

74. Additional Representations of the Parties

A. The Owner hereby warrants, represents and promises that:

- i) it has provided or shall provide timely to the Contractor, all records relating to energy usage and energy-related maintenance of Project Site(s) requested by the Contractor and the information set forth therein is, and all information in other records, subsequently provided pursuant to this Contract will be true and accurate in all material respects; and
- ii) it has not entered into any leases, contracts or Contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Project Site(s) or with regard to servicing any of the energy related equipment located in the Project Site(s). the Owner shall provide the Contractor with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Project Site(s), as executed from time to time hereafter within 30 days after execution thereof.

B. The Contractor hereby warrants, represents and promises that before commencing performance of this Contract:

- i) it shall have become licensed or otherwise permitted to do business in the State of New Mexico.
- ii) it shall have provided proof and documentation of required insurance and bonds pursuant to this Contract;
- iii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- iv) it shall use qualified subcontractors who are qualified, licensed and bonded in this state to perform the work so subcontracted pursuant to the terms hereof;
- v) the Equipment shall meet or exceed the provisions set forth in Article 19 (Systems Start Up and Equipment Commissioning) and in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment).
- vi) the Equipment is or shall be compatible with all applicable existing Project Site(s) mechanical and electrical systems, subsystems, or components, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will adversely affect each other as a direct or indirect result of Equipment installation or operation;
- vii) 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.

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

Such executed bonds are incorporated herein by reference as Exhibit I (Performance Bond) and Exhibit II (Labor and Material Payment Bond). Subsequently, the Bond shall cover only the physical completion of the construction work. It is further understood that the Bond does not cover, whatsoever, any maintenance, operational and/or service requirements, promises, guarantees including performance guarantees, savings and/or efficiency guarantees, or similar type requirements, subject to the sole exception of the aforementioned one (1) year warranty from the date of physical substantial completion of the construction work covering solely defects in materials and workmanship. The Surety assumes no liability for any additional warranty, guaranty, maintenance, operational or service aspect of the contract.

76. Further Documents

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

The Owner agrees that the Contractor shall have the right to all environmental, energy, tax, financial, and electrical-related attributes, rights, credits, benefits and characteristics associated with or arising out of the transactions contemplated by this Agreement or associated with the ECMs or with the energy, capacity or other electrical savings created under this Agreement, howsoever created or recognized in the United States, any political subdivision thereof or any foreign jurisdiction (other than dollar savings realized by the Owner from reductions in the Owner's energy use or other operating costs). The Owner shall provide the Contractor all reasonable assistance in perfecting its rights to such attributes, rights, credits, benefits and characteristics including executing documents required for such purpose. Pursuant to the foregoing, to assist in the Contractor's tax compliance, upon final acceptance, an Authorized Representative of the Owner agrees to execute any documents related to Article 179D of the Internal Revenue Code. The Contractor shall be responsible for preparing these documents, all accompanying documentation and the contents therein. The Contractor shall be designated the sole Article 179D beneficiary.

77. Methods of Operation by the Owner

The parties acknowledge and agree that the Energy and Water Cost Savings on Schedule A (Energy and Cost Savings Guarantee) would not likely be achieved unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by the Owner on a regular and continuous basis.

78. The Owner's Maintenance Responsibilities

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

79. Inspection of Project Site(s)

The Owner agrees that the Contractor shall have the right once a month, with prior notice, to inspect Project Site(s) to determine if the Owner is complying, and shall have complied with its obligations as set forth in Article 78 (the Owner's Maintenance Responsibilities). For the purpose of determining the Owner's said compliance, the checklist, set forth in Schedule DD (Facility Maintenance Checklist) as completed and recorded by the Contractor during its monthly inspections, shall be used to measure and record the Owner's said compliance. The Owner shall make the Project Site(s) available to the Contractor for and during each monthly inspection, and shall have the right to witness each inspection and the Contractor's recordation on the checklist. The Owner may complete an independent checklist at the same time. The Contractor agrees to not interfere with the Owner operations during any monthly inspection.

80. Waiver Of Liens

The Contractor shall obtain and furnish to the Owner a Waiver of Liens from each vendor, material manufacturer

and laborer in the supply, installation and servicing of each piece of Equipment. Such lien waivers shall be provided to the Owner upon the Owner's request.

81. Severability

In case any one or more of the provisions contained in this Agreement or any application thereof shall be invalid, illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained herein and any other application thereof shall not in any way be affected or impaired thereby.

82. Release

The Contractor, upon acceptance of final payment of the amount due under this Agreement, releases the Owner, its officers and employees from all liabilities, claims and obligations whatsoever arising from or under this Agreement except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment. The Contractor agrees not to purport to bind the Owner to any obligation not assumed herein by the Owner unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

83. Notices

Any and all notices provided for hereunder shall be in writing and shall be deemed delivered, given and received when (i) personally delivered, or (ii) five (5) days after the same are deposited in the United States Postal Service mail, postage prepaid, certified mail, return receipt requested, or (iii) overnight delivery, signature required, addressed to the applicable party at the address indicated below for each party, or at such other address as may be designated by either party in a written notice to the other party:

OWNER: City of Santa Fe
Public Works Department, Facilities Division
P.O. Box 909
Santa Fe, NM 87504-0909

CONTRACTOR: Ameresco Inc.
2375 E. Camelback Road, Suite 400
Phoenix, AZ 85016
Attn: Robert Georgeoff

With a copy to: Ameresco, Inc.
111 Speen Street, Suite 410
Framingham, MA 01701
Attention: General Counsel

84. Non-Substitution

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

85. Authority

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

86. Change Orders

A. A Change Order is a written document, established upon a written Change Request from the Contractor, prepared and approved by the Owner and signed by both parties to this Agreement that signifies an agreement between the Contractor and the Owner for a change of the following: (i) Changes to the Work requiring an adjustment to the Contract Sum; and (ii) an adjustment in Schedule S (Construction and Installation Schedule).

B. If the Owner requests a proposal from the Contractor for a change in the Work, and subsequently elects not to proceed with the change, a Change Order shall be issued to reimburse the Contractor for any costs reasonably incurred for estimating services, design services and preparation of proposed revisions to the Agreement. No change in the Work (including design estimates) shall be performed by the Contractor until the Owner has first signed a written Change Order. The Contractor shall provide those costs prior to proceeding with the Work and the estimate shall include all related costs.

C. If the Contractor and the Owner agree to an adjustment of the Contract Sum and/or Schedule S (Construction and Installation Schedule), such an agreement shall be effective only by way of the preparation and execution of a Change Order together with the issuance of a revised Purchase Order and Notice to Proceed with the agreed upon change(s).

87. Miscellaneous Provisions

A. Where reference is made in this Agreement to a provision of AIA Document A201–2017 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

B. The Owner’s representative:

Jason M. Kluck or other authorized Public Works Project Administrator or Director
Project Administrator, Facilities Division
City of Santa Fe
2651 Siringo Road, Building E, Santa Fe, New Mexico 87505
(505) 955-5937

C. The Contractor’s representative:

Kevin Nissley, Director – Construction
2375 E. Camelback Road, suite 400
Phoenix, AZ 85016
Cell: (602) 369-3065
Office: (480) 499-9200
Fax: (480) 499-9171
Email: knissley@ameresco.com

D. Neither the Owner’s nor the Contractor’s representative shall be changed without ten days’ prior notice to the other party.

88. Scope of the Agreement

A. The Agreement represents the entire integrated agreement between the Owner and the Contractor and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the Owner and the Contractor.

B. This agreement is comprised of the documents identified in Article 12, Schedules, Exhibits and Appendices, Attachment 1 (Owner Performance Measures) and the documents identified below:

- 1) This Agreement between Owner Contractor (Exhibit A)
- 2) Owner Performance Measures document (Attachment 1).
- 3) New Mexico Statewide Price Agreement #15-000-14-0005759 AE, Qualified Providers of Energy Performance Contracting Services (Exhibit A,1)
- 4) AIA Document A201–2017, General Conditions of the Construction Contract (Exhibit A,2)
- 5) The City of Santa Fe General Conditions (Exhibit A,3)
- 6) The City of Santa Fe Supplementary Conditions (Exhibit A,4)
- 7) Contractor’s Certificate of Liability Insurance (Exhibit A,5)
- 8) Contractor’s City of Santa Fe Business License (Exhibit B)
- 9) NMDWS Wage decision documents (Exhibit C)
- 10) NMRLD/CID Contractor’s License, GB98 (Exhibit D)

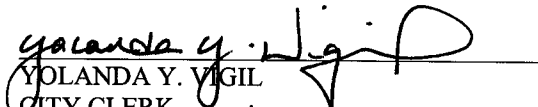
IN WITNESS WHEREOF, the parties have executed this Agreement on the date set forth below.

CITY OF SANTA FE:


ALAN WEBBER, MAYOR

DATE: 3/5/19

ATTEST:


YOLANDA Y. VIGIL
CITY CLERK
cc mtg 2/27/2019

APPROVED AS TO FORM:

 1/2/19
ERIN K. MCSHERRY, CITY ATTORNEY

CONTRACTOR:
ROBERT GEORGE OFF, VICE-PRESIDENT
AMERESCO, INC.


BY:

NM LICENSE #:90760
CRS #:01-710541-00-2
CITY BUSINESS REGISTRATION #:18-00134373

APPROVED:


MARY MCCOY, FINANCE DIRECTOR

Business Unit/Line Item
32166.572970.0119900 – EXP Genoveva Chavez Community Center, WIP Construction: \$3,885,182.00 ^{39,400.75}
32151.572970.0119900 – EXP Salvador Perez Building, WIP Construction: \$671,629.00
32157.572970.0119900 – EXP Siler Building, WIP Construction: \$425,416.00
32154.572970.0119900 – EXP Library (Southside), WIP Construction: \$42,118.00
52721-572970 - EXP BCCC CIP CONSTRUCTION: \$45,781.25