

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

Between

CITY OF SANTA FE

and

DALKIA ENERGY SOLUTIONS, LLC

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

THIS GLOBAL MANAGEMENT PERFORMANCE CONTRACT (together with the schedules and appendices attached hereto, this "Agreement") is made this _____ day of _____, 2021, ("Effective Date") by and between Dalkia Energy Solutions US, Inc. and its successors and permitted assigns ("CONTRACTOR") and the City of Santa Fe, a political subdivision of the State of New Mexico ("CLIENT"). (CONTRACTOR and CLIENT being sometimes referred to herein as a "Party" or collectively as the "Parties").

WITNESSETH

WHEREAS, CONTRACTOR is party to a Global Management Performance Contract with the City of Albuquerque, dated October 9, 2015 (the "Albuquerque GMPC");

WHEREAS, pursuant to a letter, dated January 22, 2021, CONTRACTOR confirmed its willingness to extend the pricing, terms and conditions of the Albuquerque GMPC to the City of Santa Fe;

WHEREAS, the City of Santa Fe is using the "Procurement under Existing Contracts" methodology under Section XIV(B) of the City of Santa Fe Procurement Manual 2020 for purposes of entering into this Agreement;

WHEREAS, CLIENT desires to engage CONTRACTOR to among other things: install, operate and maintain certain high-efficiency Infrastructure (as defined herein) for the purpose of reducing energy consumption, increase Energy Savings (as defined herein), improve public and traffic safety, enhance economic development, and achieve long-term operating cost reductions and other budget savings for the System (as defined herein); all of which shall be subject to the terms and conditions of this Agreement;

WHEREAS, CLIENT has an ordinance to regulate outdoor lighting in order to reduce light pollution, reduce or prevent glare, reduce or prevent light trespass, conserve energy, promote a sense of safety and security and ensure aesthetically appropriate outdoor lighting in keeping with the character of Santa Fe;

WHEREAS, CONTRACTOR provides technical, engineering, and physical infrastructure works and management performance services (to perform energy efficient, sustainable lighting system solutions on a global basis) and designs, installs and operates Artistic Lighting (as defined herein) and Smart City Instruments (as defined herein);

WHEREAS, CLIENT and CONTRACTOR seek to enter into this Agreement and set out the terms and conditions by which CONTRACTOR develop, install and construct, operate and maintain the Infrastructure and the System, develop and install Artistic Lighting and Smart City Instruments projects and provide the Works (as defined herein) and Services (as defined herein) for CLIENT; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, CLIENT and CONTRACTOR hereby covenant and agree as follows:

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ARTICLE 1: DEFINITIONS; COMMENCEMENT AND TERM

1.1 Definitions

Capitalized terms used in this Agreement and the Schedules and not otherwise defined shall have the meanings given to such terms in Schedule 1 (Definitions).

1.2 Commencement and Duration

THIS AGREEMENT SHALL NOT BECOME EFFECTIVE UNTIL EXECUTED BY BOTH PARTIES. This Agreement shall terminate fifteen (15) years after acceptance of the completed LED conversion unless terminated pursuant to Article 9 (Termination), or Article 6.2 (Appropriations), or as otherwise agreed to by the Parties.

1.3 Term Extensions

This Agreement may be extended for the period and under the circumstances that follow:

- a. Upon mutual agreement in writing by the Parties to extend the Term of this Agreement for one five (5) year period.
- b. If a Supervening Event occurs, the CONTRACTOR shall, in addition to any other rights which it may have under this Agreement, be entitled to an extension of time for the performance of its obligations hereunder, which extension shall be determined as set forth below.
 1. The CONTRACTOR shall give notice in writing to CLIENT within a reasonable time of the occurrence of a Supervening Event, but in any event not later than ten (10) Business Days after the CONTRACTOR becomes aware of the occurrence of the Supervening Event, which shall include the following: (i) a statement of the nature of the Supervening Event; (ii) details of the circumstances from which the Supervening Event arises; (iii) details of the consequences, whether direct or indirect, financial or non-financial, which such Supervening Event may have, including any estimate of the required extension of time for the performance by the CONTRACTOR of its obligations hereunder (the "Extension Estimate"); and (iv) details of any measures which the CONTRACTOR proposes to adopt to mitigate the consequences of such Supervening Event.
 2. CLIENT shall indicate whether it agrees or not with the Extension Estimate as soon as reasonably practicable and, in any event, within twenty (20) Business Days of receipt of any notice issued by the CONTRACTOR. If CLIENT does not agree with the Extension Estimate, the Parties may refer the matter for determination in accordance with the applicable dispute resolution procedure as set forth herein. If CLIENT so agrees, or any extension is settled pursuant to the dispute resolution procedure the term of the Agreement shall be extended by a period equal to such agreed/settled extension.

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ARTICLE 2: GENERAL OBLIGATIONS

2.1 Engagement. CLIENT hereby engages and CONTRACTOR hereby accepts the engagement to perform and/or to provide the Works and the Services, each in accordance with the terms and conditions of this Agreement.

2.2 Independent Contractor. CONTRACTOR shall provide the Infrastructure, Smart City Instruments and Artistic Lighting at its sole cost and expense, perform the Works and provide the Services, as an independent CONTRACTOR with exclusive control of the manner and means of performing the Works and Services in accordance with the requirements of this Agreement. CONTRACTOR has no authority to act or make any agreements or representations on behalf of CLIENT. This Agreement is not intended, and shall not be construed to create, between CLIENT and CONTRACTOR, the relationship of principal and agent, joint-venturers, copartners or any other such relationship, the existence of which is hereby expressly denied. No employee or agent of CONTRACTOR shall be, or shall be deemed to be, an employee or agent of CLIENT. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of City vehicles, or any other benefits afforded to employees of the City as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax.

2.3 Conditions Precedent. This Agreement and all obligations of the CONTRACTOR hereunder or in respect hereof are subject to and conditioned upon all necessary approvals of this Agreement and all terms and conditions hereof by CLIENT and/or applicable executive board, commission, council or other governing body or Governmental Authority with jurisdictional authority over CLIENT.

2.4 CLIENT General Obligations. The CLIENT, without cost to CONTRACTOR, shall:

- a. Designate a contact person with authority to make decisions for CLIENT regarding the Works and Services and provide CONTRACTOR with information sufficient to contact such person in an emergency;
- b. Coordinate the aspects of the Works and Services under CLIENT's sole control so as not to disrupt the performance of the Works and Services proceeding in an efficient manner;
- c. Provide CONTRACTOR reasonable and scheduled access to the System and the Smart City Instruments and Artistic Lighting project sites where Works or Services are to be performed so that Works or Services may proceed in an efficient manner;
- d. Permit CONTRACTOR to control and/or operate all Infrastructure, Artistic Lighting, Smart City Instruments, System, apparatus, and related machinery necessary to perform the Works or Services, including granting the CONTRACTOR all necessary rights and licenses therein;
- e. Furnish CONTRACTOR with all blueprints, surveys, legal descriptions and documentation, and all other available information pertinent to the Works as the same may be reasonably requested by CONTRACTOR that is in the control of the CLIENT. Such plans, blueprints, surveys and all other pertinent information, along with an executed copy of this Agreement with its schedules, shall be kept and maintained in CLIENT'S and CONTRACTOR's files from the Commencement Date until at least five (5) years after the termination of this Agreement;

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- f. Furnish or assist CONTRACTOR with all approvals, permits and consents from Governmental Authorities and others as may be required for performance of the Works and Services;
- g. Make available to CONTRACTOR any safety requirements and other policies, plans or programs that are in the CLIENT's possession and relate to the System, Smart City Instruments and Artistic Lighting and that could reasonably be determined to affect the Works or Services, as applicable;
- h. Coordinate with the local utility all needed servicing for utility owned facilities needed for System operation. Any costs therein shall be borne by CLIENT.

2.5 Confidential and Proprietary Information. Subject to Applicable Law, CLIENT acknowledges that the technical and pricing information contained in Schedule 2 and Schedule 3 and conspicuously marked therein is confidential and proprietary to CONTRACTOR and agrees not to disclose it or otherwise make it available to others unless required by Applicable Law. In the event that such disclosure is required by Applicable Law, CLIENT shall make best effort to provide timely written notice of the demand for such disclosure to CONTRACTOR and work with CONTRACTOR to limit disclosure of confidential and proprietary information.

2.6 Receipt of Title. CLIENT acknowledges that it shall receive and take title to the Infrastructure, Smart City Instruments and Artistic Lighting on the Acceptance Date for each Segment of the Works and it shall receive title to repaired or replaced System assets upon installation.

2.7 Addressing Safety Issues During Works and Services. CONTRACTOR may voluntarily address suspected health or safety issues observed, but not caused by CONTRACTOR while at a facility during the course of CONTRACTOR's performance of the Works or the Services on the System, Smart City Instruments and Artistic Lighting. In the event CONTRACTOR does address such issues by making observations, reports, and suggestions or otherwise, CLIENT shall not hold, or attempt to hold, CONTRACTOR liable or responsible on account thereof.

ARTICLE 3: WORKS PHASE

3.1 Performance of the Works

- a. Commencing no later than the Commencement Date, CONTRACTOR shall perform the Works pursuant to and in accordance with Schedule 2 (Scope of Works). The activities of CONTRACTOR related to its performance of the Works shall be limited solely to those duties and obligations set forth in Schedule 2 (Scope of Works).
- b. The Works will be performed in Segments and each Segment of the Works will be accepted independently upon completion of the Segment in accordance with the procedures set forth in Section 3.7 below. The Segments of the Works may be performed simultaneously.
- c. At the written request of either Party and under the terms of a separate Change Order and if both CONTRACTOR and CLIENT agree to the terms of the Change Order, CONTRACTOR will perform additional Works which are not detailed in this Agreement.

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3.2 CONTRACTOR's Works Phase Obligations

In furtherance of Section 3.1 above, CONTRACTOR undertakes and covenants to CLIENT that it shall:

- a. be responsible for performing the Works, which shall include constructing and installing the Infrastructure, Smart City Instruments and Artistic Lighting in a manner consistent with the work schedule set forth in Schedule 2 (Scope of Works), the Implementation Plan, Applicable Law, and Prudent Industry Practice; provided, however, that CONTRACTOR is not required to conduct safety, acceptance or other tests, install new devices or Infrastructure, Smart City Instruments and Artistic Lighting or make modifications to any part of the System unless included as a part of the Works identified in the Schedule 2 (Scope of Works);
- b. perform all Works Phase activities efficiently and with the requisite expertise, skill and competence to satisfy the requirements of the Agreement;
- c. subject to the provisions of this Agreement, comply with and assist CLIENT to ensure compliance with all Applicable Law;
- d. exercise commercially reasonable efforts not to interrupt the operation of the System during its performance of the Works. In cases where an interruption is necessary to complete any installation of Infrastructure, the CLIENT and CONTRACTOR shall make reasonable efforts to agree on the timeframe and dates of the service interruption in order to limit citizen inconvenience; and
- e. use its best efforts to not impede, impair or interrupt CLIENT's electrical service to the System during the performance of the Works; provided however, the Works Phase will cause periodic electrical service interruptions and CONTRACTOR will make a reasonable effort to notify CLIENT of any interruptions and to minimize the interruptions.
- f. require all of its subcontractors to comply with Applicable Law and carryout the subcontracted Works in accordance with Prudent Industry Practices.

3.3 CLIENT's Works Phase Obligations

In addition to all duties and obligations identified in Article 2, CLIENT undertakes and covenants to CONTRACTOR that it shall:

- a. comply with all Applicable Law;
- b. provide such reasonable assistance to and not unreasonably impede CONTRACTOR in the performance of the Works under this Agreement;
- c. perform all CLIENT responsibilities related to the Works, as the same is set forth in Schedule 2 (Scope of Works) and Schedule 5 (Acceptance Procedures); and
- d. review and check, or have an agent or contractor review and check, the Works for each Segment performed by CONTRACTOR from time to time as set forth in the Commissioning Plan and Quality Assurance Plan and provide any related comments in writing to CONTRACTOR.

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3.4 Program for the Sequence and Timing of Works; Field Inspections

- a. CONTRACTOR shall record and maintain a Works schedule program or protocol as set forth in Schedule 2 (Scope of Works) and the Implementation Plan, and such Works schedule shall detail the Segments, sequence and timing of the activities necessary for the delivery and completion of the Works. CONTRACTOR shall record, update and maintain such Works schedule documentation and make such information available to CLIENT upon request. CONTRACTOR shall make commercially reasonable efforts to proceed with the Works in accordance with the Works schedule timeframes and shall give CLIENT reasonable notice of probable events or circumstances which may materially adversely affect or materially delay the execution of the Works in accordance with the Works schedule.
- b. For the entire duration of the Works, the representatives of the CLIENT will be able to access the System, Smart City Instruments and Artistic Lighting project sites provided that they have informed the CONTRACTOR within a reasonable timeframe. CLIENT may perform such field tests as it deems necessary to verify that the Works meets the performance standards required herein. CONTRACTOR shall be permitted to witness such tests. All inspections and tests by CLIENT shall be performed in such manner as not to unnecessarily delay the Works. CLIENT shall not exercise any prerogatives of project management or of project supervision when on the work sites.

3.5 Time for Completion of the Works

The expected date of completion of all of the Works shall be 6 months from the Commencement Date (hereinafter the "Expected Completion Date").

3.6 Extension of Time

Notwithstanding Section 3.5, CONTRACTOR shall be entitled to a reasonable extension of time for the completion of the Works beyond the Expected Completion Date, equal to but not greater than the period of delay, if and to the extent that completion is or will be delayed by any of the following:

- a. a Change Order; or
- b. any CLIENT failure to perform a Material Obligation under this Agreement; or
- c. any Supervening Event; or
- d. any delay, restriction or prevention of CONTRACTOR from performing the Works caused by or attributable to the CLIENT, its employees or agents, or the CLIENT's other contractors; or
- e. any delay, restriction or prevention of CONTRACTOR from performing the Works caused by or attributable to any relevant Governmental Authority, other than the CLIENT, from which a consent is necessary for execution of the Works provided CONTRACTOR has diligently, steadfastly and without delay pursued such consent in good faith.

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If CONTRACTOR incurs or is likely to incur loss and/or expense as a result of an extension of time pursuant to subsection (a), (b) and (d) above, then Contractor and Client shall discuss how to mitigate the actual losses and expenses and shall work in good faith to share the responsibility for costs associated with unanticipated extensions of time. CONTRACTOR's actual loss or expenses may include overhead, additional System operation and maintenance costs or expenses and other losses or costs incurred, which such agreed to amounts shall be set forth in the immediately succeeding monthly invoice issued to CLIENT in accordance with the terms and conditions contained in Schedule 4 (Payment Mechanism).

If CONTRACTOR incurs losses and expenses as a result of an extension of time pursuant subsection (c) and (e) above, then subject to CONTRACTOR taking all reasonable steps to mitigate the losses and expenses, the CLIENT and CONTRACTOR shall enter into negotiations to equitably allocate the losses and expenses between the Parties, unless agreed to otherwise in writing. If CLIENT and CONTRACTOR do not agree on an equitable allocation, the Parties may refer the matter for determination in accordance with the applicable dispute resolution procedure as set forth herein.

3.7 Acceptance

The Acceptance Date for each Segment of the Works shall occur when:

- a. a Segment of the Works is complete, in accordance with Schedule 5 (Acceptance Procedures), the start-up and commissioning thereof is complete, and the Infrastructure, Smart City Instruments and Artistic Lighting (if applicable) included in the Segment of the Works, as detailed in Schedule 2 (Scope of Works), may be utilized for their intended use;
- b. CONTRACTOR shall have delivered to CLIENT, lien waivers, sworn statements, guarantees, full releases, discharges or other evidence reasonably satisfactory to CLIENT that there are no liens, claims, or notices in respect thereof pending, filed, or threatened against CLIENT, CONTRACTOR, or the Infrastructure, Smart City Instruments and Artistic Lighting whatsoever in respect to that Segment of the Works. CONTRACTOR may, if any subcontractor refuses to furnish a release, discharge or receipt in full, furnish a bond satisfactory to CLIENT to indemnify the CLIENT against any such lien;
- c. CONTRACTOR shall have delivered all certificates of inspection or approval in respect of the Segment of the Works to the extent required under Applicable Law from any Governmental Authority; and
- d. CLIENT has issued a Certificate of Acceptance for the Segment of the Works in accordance with Schedule 5 (Acceptance Procedures).

3.8 Title to Infrastructure, Smart City Instruments and Artistic Lighting

- a. Upon Acceptance for each Segment of the Works, (1) legal title to and ownership of the upgraded Infrastructure, Smart City Instruments and Artistic Lighting therein shall transfer to CLIENT free and clear of any and all liens, claims, or other encumbrances and (2) the CLIENT shall have all duties and responsibilities for the payment of Services Payments.
- b. All materials developed or acquired by the Contractor for the City under this Agreement shall become the property of the City and shall be delivered to the City no later than the termination date of this Agreement. 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.

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c. Notwithstanding Section 3.8(a) above, if any Software Products are installed or otherwise used to operate the System, Smart City Instruments or Artistic Lighting or provided to CLIENT under this Agreement, any such Software Products shall remain CONTRACTOR property, including the Intellectual Property conceived or developed by CONTRACTOR in the Software Products. All CONTRACTOR Pre-existing Intellectual Property that may be included in the Infrastructure, Smart City Instruments, Artistic Lighting, Works or the Services provided to CLIENT under this Agreement shall also remain CONTRACTOR's property. Any Software Products provided to CLIENT are for Permitted Users' use and only for the purposes disclosed to CONTRACTOR. CONTRACTOR hereby grants CLIENT a royalty-free (once payments due under this Agreement are paid to CONTRACTOR), non-transferable, nonexclusive license for the Term to use any CONTRACTOR's Intellectual Property solely as incorporated into the Infrastructure, Smart City Instruments and Artistic Lighting and CONTRACTOR's Intellectual Property as incorporated into any Software Products provided to CLIENT under this Agreement. Under such license, to the extent allowable by Applicable Law, Permitted Users shall have a right to:

1. Use, in object code form only, the Software Products included in the Works and/or Services, if any;
2. Make and retain archival and emergency copies of such Software Products except if the Software Product is embedded in the System, Smart City Instruments or Artistic Lighting; and,
3. Use all such Software Products; provided however, the Software Products shall not be used or relied upon by any parties other than Permitted Users, and such use shall be limited to the particular project and location for which the Software Products are provided or used relative to the System, Smart City Instruments or Artistic Lighting.

All Software Products provided to CLIENT are for Permitted Users' use only for the purposes disclosed to CONTRACTOR, and CLIENT shall not transfer them to others or use them or permit them to be used for any extension of the Works or Services or any other project or purpose, without CONTRACTOR's express written consent, to the extent allowable by Applicable Law.

d. In the event Contractor (a) ceases to do business or ceases to support the Project, or (b) fails to make adequate provision for continued support of the Software that Contractor develops or provides to CLIENT, or (c) if Contractor Defaults hereunder, or (d) if this Agreement is terminated, Contractor will, within a one hundred and eighty (180) day period, make all of the following items available to CLIENT: (i) the latest available Source Code and documentation related to the Software that Contractor develops or provides according to the SOW; (ii) the Source Code and compiler/utilities necessary to maintain CLIENT'S system; and, (iii) Contractor's related documentation for Software developed by third parties to the extent Contractor is authorized to disclose such Software to CLIENT. In any of the above circumstances (a), (b), (c) or (d), Contractor will, by virtue of this Section, grant CLIENT an automatic, uncontested and unlimited right to use, modify and copy the Software, the Source Code and all of their related documentation.

3.9 Workmanship Warranty

Except as otherwise expressly provided herein, CONTRACTOR warrants that all work performed during the Works Phase is in compliance with the terms of the Agreement and will be free from workmanship defects for a period of one (1) year from the Acceptance Date of the Final Segment of the Works. Should any defects develop during the warranty period, CONTRACTOR shall remedy the defects at no expense to the CLIENT, provided that CLIENT gives CONTRACTOR written notice of any such defect promptly after discovery.

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3.10 Manufacturer Warranty

CONTRACTOR hereby transfers to CLIENT all transferable warranties and remedies provided to the CONTRACTOR by any manufacturer(s) or suppliers of the Infrastructure, Smart City Instruments and Artistic Lighting. CLIENT hereby grants the CONTRACTOR the authority and the right to, on behalf of the CLIENT, exercise all the CLIENT's rights and remedies under all transferable warranties during the Term.

ARTICLE 4: SERVICES PHASE

4.1 Performance of Services after Acceptance

No later than the Acceptance Date of the Final Segment of the Works, or such other date agreed to in writing between the Parties, CONTRACTOR shall commence performance of the Services Phase, consisting of those activities set forth in Schedule 3 (Scope of Services), including, but not limited to, the operation, maintenance, and management of the System and provide such Smart City Instrument and Artistic Lighting services set forth therein.

4.2 Performance of Commitments of the CONTRACTOR

CONTRACTOR commits to achieving the Energy Savings and operation and maintenance Services objectives described in Schedule 3 (Scope of Services), and commits to performing the Services in accordance with the Key Performance Indicators ("KPI") outlined in Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services) (hereinafter the "Services Performance Objectives").

4.3 CONTRACTOR's Services Phase Obligations

In furtherance of Sections 4.1 and 4.2 above, CONTRACTOR undertakes and covenants to CLIENT that it shall:

- a. be responsible for performing the Services in a manner to achieve the Services Performance Objectives consistent with Schedule 3 (Scope of Services), Applicable Law, and Prudent Industry Practice.
- b. not impede, impair or interrupt CLIENT's utilization of the System or achievement of any Energy Savings, except with the express written consent of CLIENT when necessary for additional construction or maintenance, which consent will not be unreasonably withheld.

4.4 CLIENT's Services Phase Obligations

In addition to all duties and obligations identified in Article 2, CLIENT undertakes and covenants to CONTRACTOR that during the performance of the Services it shall:

- a. be obligated to compensate CONTRACTOR for the performance of the Services pursuant to and in accordance with the terms and conditions established in Schedule 4 (Payment Mechanism) and any other amounts due hereunder by the required due date(s) established therein;
- b. to the provisions of this Agreement, comply with Applicable Law;

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- c. provide such reasonable assistance to and not unreasonably impede CONTRACTOR in the performance of the Services under this Agreement; and
- d. perform all CLIENT responsibilities related to the Services.

ARTICLE 5: ENERGY SAVINGS PERFORMANCE ASSURANCE

5.1 System Baseline and Performance Baseline

- a. CONTRACTOR and CLIENT agree that the System Baseline data results set forth in Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services), is a reasonably accurate reflection of the System's equipment, operation, business use and energy usage as of the Effective Date, and that such System Baseline data will be the basis on which all future energy use will be compared in order to determine the Annual Realized Savings. The System Baseline data will be confirmed upon completion of the inventory at the conclusion of the conversion.
- b. CONTRACTOR and CLIENT agree that the Performance Baseline set forth in Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services) will represent the new operating and/or equipment profile of the System resulting from the installation of the Infrastructure and implementation of the Services.
- c. Notwithstanding any provision of this Agreement, no later than thirty (30) days prior to the Acceptance Date of the Final Segment of the Works, CONTRACTOR shall conduct an audit and inventory of the operational performance of the System. If additional Energy Savings are recognized after the audit and inventory, CONTRACTOR shall integrate and use all resulting data to calculate and revise the Performance Baseline accordingly.

5.2 Performance Guarantee and Measurement

- a. Commencing on the Acceptance Date of the Final Segment of the Works, the Annual Realized Savings calculated at the end of each Annual Period will be no less than the Guaranteed Annual Savings for the corresponding Annual Period (hereinafter the "Performance Guarantee"). The measurement and verification calculation methodology for determining the Energy Savings shall be established in the M&V Plan, in accordance with Section 2.9 of Schedule 2 (Scope of Works).
- b. Except as otherwise provided, Guaranteed Annual Savings will be calculated as the System Baseline for each Annual Period as units of energy (kWh) minus the Performance Baseline for each month of each annual phase, assuming that the Performance Baseline has been maintained, as set forth in Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services).
- c. A Performance Guarantee Period savings reconciliation as identified in Section 1.2 of Appendix 3A of Schedule 3 will be performed by CONTRACTOR at the end of each Annual Period.
- d. Prior to the beginning of the Performance Guarantee Period, CONTRACTOR will have inspected all portions of the System and reported any deficiencies to CLIENT which are outside of the scope of the Works and which will impact Energy Savings of the System. To the extent that the deficiencies are not remedied by CLIENT prior to the Acceptance Date of the Final Segment of the Works, the adverse effect(s) on the ability of the System to attain the necessary Guaranteed Annual Savings shall be factored into the Annual Performance Report and, if necessary, the Performance Guarantee shall be adjusted accordingly.

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5.3 Material Change

- a. As part of CONTRACTOR's performance of the Services, CLIENT and CONTRACTOR shall review the Performance Baseline and the Energy Savings data derived from the inventory and monitor the System in order to determine if a Material Change has occurred. If a Material Change has occurred, the Parties will determine what, if any, adjustments to the Performance Baseline and Services Performance Objectives are required by such Material Change. Any disputes between CLIENT and CONTRACTOR concerning any such adjustment shall be resolved in accordance with the applicable dispute resolution procedure as set forth herein.
- b. If any portion of the System or Infrastructure, or related facilities or substructure that supports or may affect the System or Infrastructure, is materially altered or moved by any person (including the CLIENT) other than CONTRACTOR or a person authorized by CONTRACTOR, CONTRACTOR reserves the right to perform a reacceptance test on, or if necessary, a re-commissioning of the System or Infrastructure in order to determine if a Material Change has occurred. If the Parties agree that a Material Change has occurred after the reacceptance testing or re-commissioning, CLIENT agrees to pay reasonable costs on a time and materials basis for such testing.

5.4 Additional Provisions

Except as otherwise provided, CONTRACTOR payments to CLIENT for Savings Shortfalls in accordance with Sections 1.1 and 1.2 of Appendix 3A of Schedule 3, if any, are the sole remedy of CLIENT under this Performance Guarantee contemplated in this Agreement. The Contractor will provide a bond, letter of credit or other financial guarantee acceptable to the Client as a security for performance of this Guarantee.

- a. This provision shall not in any way effect the CLIENT'S warranty rights set forth herein.
- b. As a mutual goal of the Parties is to maximize Energy Savings, If CONTRACTOR determines it can correct a Savings Shortfall through an operational improvement at no expense or material inconvenience to the CLIENT and without future operational expenses and without compromising lighting performance, then the Parties shall in good faith work to effectuate the operational improvement. Any disputes between CLIENT and CONTRACTOR concerning the implementation of such operational improvements shall be resolved in accordance with the applicable dispute resolution procedure as set forth herein.
- c. The Guaranteed Annual Savings are dependent upon and are subject to the express condition that the CLIENT does not intentionally and knowingly prevent, impede or obstruct the CONTRACTOR from operating and maintaining the System within a five percent (5%) variance from the Performance Baseline.
- d. CONTRACTOR will have no liability or obligation to continue providing the Services or to guarantee Energy Savings under the Performance Guarantee in the event that CLIENT unreasonably impairs CONTRACTOR's access to any part of the System where Services are to be performed.

ARTICLE 6: COMPENSATION; GENERAL OBLIGATION

6.1 Compensation

CLIENT shall pay CONTRACTOR for performance of the Works and Services as provided in Schedule 4 (Payment Mechanism), as the same may be modified from time to time in accordance with this Agreement.

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6.2 Appropriations

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

6.3 General Obligation

Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the City finds that the goods or services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action.

Upon certification by the City that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. Payment shall be made by ACH. However, the City shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

6.4 Special Limited Obligation; Revenue Fund; Energy Savings Pledged Revenues - deleted

ARTICLE 7: INSURANCE; LIMITATION OF LIABILITY; BONDING

7.1 CONTRACTOR Insurance

If the services contemplated under this Agreement will be performed on or in City facilities or property, Contractor shall, at its sole cost and expense, maintain in force during the entire term of this Agreement or for such additional time as set forth herein, the following insurance coverage(s), naming the City as additional insured.

- a. Workers' Compensation Insurance with statutory limits, and Employer's Liability insurance with limits of not less than \$1,000,000 per accident or disease. The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the City, its directors, officials, officers, employees, agents, and volunteers.
- b. Commercial General Liability Insurance which shall be written on an occurrence basis and be at least as broad as the latest version of ISO form CG 00 01 with limits of not less than \$1,000,000 per occurrence and \$2,000,000 in the aggregate for claims against bodily injury, personal and advertising injury, and property damage, including a \$2,000,000 aggregate for products-completed operations. Such policy shall include Broad Form Contractual Liability coverage and shall be endorsed to include the City, its, directors, officials, officers, employees, agents, and volunteers as additional insureds on all primary and excess policies for ongoing and completed operations performed by, or behalf of Contractor. Such additional insured coverage shall be as broad as that provided by ISO form CG 20 10 (ongoing operations) and CG 20 37 (completed operations).

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- c. Business Automobile Liability insurance which shall be as broad as ISO form CA 00 01 covering bodily injury and property damage with a combined single limit of not less than \$1,000,000 per accident for all owned, non-owned, and hired automobiles used in connection with the services or operations to be performed under this Agreement. The policy shall be endorsed to include the City, its, directors, officials, officers, employees, agents, and volunteers as additional insureds.
- d. Professional Liability insurance (Errors & Omissions) with limits of not less than \$1,000,000 per claim and \$2,000,000 in the aggregate.
- e. Subcontractors/Subconsultants. Contractor shall ensure that all subcontractors performing work on behalf of Contractor pursuant to this Contract shall be covered under Contractor's insurance or maintain insurance subject to the same terms and conditions as set forth herein for Contractor. Contractor shall not allow subcontractors to work if subcontractors have less than the level of coverage required by the City from Contractor under this Contract. It is the obligation of Contractor to provide notice of the insurance requirements to every subcontractor and to receive proof of insurance prior to allowing any subcontractor to begin work. Such proof of insurance must be maintained by Contractor through the entirety of this Contract for inspection by City representative(s) at any reasonable time.
- f. Additional Insurance Requirements.
 - 1. Acceptability of Insurers. Unless otherwise reviewed and accepted by the City, all required insurance must be placed with insurers with a current A.M. Best rating of not less than A- VII and be admitted to do business in California, or approved by the Surplus Lines Association.
 - 2. Verification of Coverage. Contractor shall furnish the City with Certificates of Insurance and applicable endorsements effecting coverage required by this Agreement on forms satisfactory to the City. The certificates of insurance shall be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements must be received by the City before work commences. Acceptance of Contractor's Certificates of Insurance does not relieve Contractor of the insurance requirements, nor decrease the liability of Contractor under this Agreement. It is Contractor's responsibility to ensure its compliance with these insurance requirements. Any actual or alleged failure on the part of the City to obtain proof of insurance required under this Agreement shall not in any way be construed to be a waiver of any right or remedy of the City, in this or any regard.
 - 3. Primary and Noncontributory. The insurance required to be maintained by Contractor shall primary and any insurance or self-insurance maintained by the City shall be excess only, and not be required to contribute with it.
 - 4. Umbrella or Excess Insurance. Any Umbrella or Excess insurance shall also apply on a primary and noncontributory basis for the benefit of the City, before the City's own primary insurance or self-insurance shall be called upon to protect it as a Named Insured.
 - 5. Waiver of Subrogation. Contractor shall obtain waiver of subrogation endorsements stating that Contractor and its insurers waive any and all rights of recovery against the City, its directors, officials, officers, employees, agents, and volunteers. Contractor shall pay all damages and costs arising out of Contractor's failure to provide a waiver of subrogation from its insurers.

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6. Broader Coverage and Limits. The insurance requirements under this Agreement shall be the greater of (1) the minimum coverage and limits specified in this Agreement, or (2) the broader coverage and maximum limits of coverage of any insurance policy or proceeds available to the Named Insured. It is agreed that these insurance requirements shall not in any way act to reduce coverage that is broader or that includes higher limits than the minimums required herein. No representation is made that the minimum insurance requirements of this Agreement are sufficient to cover the obligations of Contractor hereunder.
7. Severability of Interest (Cross Liability). A severability of interest provision must apply for the additional insureds, ensuring that Contractor's insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the policy's(ies') limits.
8. Notices; Cancellation or Reduction of Coverage. At least fifteen (15) days prior to the expiration of any policy required to be maintained under this Agreement, evidence showing that such insurance coverage has been renewed or extended shall be filed with the City. If such coverage is canceled or materially reduced, Contractor shall, within ten (10) days after receipt of written notice of such cancellation or reduction of coverage, file with the City evidence of insurance showing that the required insurance has been reinstated or has been provided through another insurance company or companies. In the event any policy of insurance required under this Contract does not comply with these specifications or is canceled and not replaced, the City has the right but not the duty to obtain the insurance it deems necessary and any premium paid by the City will be promptly reimbursed by Contractor or the City may withhold amounts sufficient to pay premium from Contractor payments. In the alternative, the City may suspend or terminate this Agreement. No policy required to be maintained by Contractor shall be canceled and not replaced with equivalent coverage without thirty (30) days prior written notice to the City, unless cancellation is due to the non-payment of premium, in which case, ten (10) days prior written notice shall be provided.

7.2 Limitation of Liability

Each Party assumes full responsibility and liability of its own actions, including all claims, demands, liabilities, suits, damages, costs and expenses arising out of or caused by its own acts or the acts of its respective directors, officers, members, shareholders, agents and employees to the extent such claims, demands, liability, suits, damages, costs and expenses arise out of this Agreement and are (a) attributable to bodily injury, sickness, disease or death or to injury to or destruction of tangible property, (b) the result of a Party's gross negligence or willful misconduct, (c) the result of a Party's violation of Applicable Law. Nothing herein is intended to serve as a waiver of sovereign immunity, nor shall anything herein be construed as consent by either Party to be sued by any third party for any cause or matter related to this Agreement. The Parties assume no liability for the actions or omission of the other's agents, representatives, employees, contractors or subcontractors.

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7.3 Bonding

Prior to the Commencement Date and through the Acceptance Date of the Final Segment of the Works, CONTRACTOR shall secure a surety bond(s) in the amount of compensation defined in the Payment Terms each as a security for the faithful performance of the Works Phase of the Project and for the payment of all labor and materials therein. These bonds must be furnished to CLIENT within thirty (30) days of the Commencement Date. The aforementioned surety bonds for the Works shall expire and automatically be released, without request from CONTRACTOR, one (1) year from the date of CLIENT's execution of a Certificate of Acceptance of the Final Segment of the Works.

Bonds to be provided:

1. A performance bond satisfactory to the City, executed by a surety company authorized to do business in this state and said surety to be approved in federal circular 570 as published by the United States treasury department or the state board of finance or the local governing authority, in an amount equal to one hundred percent of the price specified in the contract; and
2. A payment bond satisfactory to the City, executed by a surety company authorized to do business in this state and said surety to be approved in federal circular 570 as published by the United States treasury department or the state board of finance or the local governing authority, in an amount equal to one hundred percent of the price specified in the contract, for the protection of all persons supplying labor and material to the contractor or its subcontractors for the performance of the work provided for in the contract.

A subcontractor shall provide a performance and payment bond on a public works building project if the subcontractor's contract for work to be performed on a project is one hundred twenty-five thousand dollars (\$125,000) or more.

Notwithstanding anything to the contrary herein, the surety bonds described in this Section 7.3 shall have no obligations therein and the surety of those surety bonds shall have no obligations hereunder with regard to CONTRACTOR's obligations under Article 5 above.

ARTICLE 8: HAZARDOUS MATERIALS AND PROVISIONS

8.1 The Works and Services may require installation or removal of System assets, Infrastructure, Smart City Instruments and Artistic Lighting that may contain de minimus amounts of hazardous materials and the identification, handling, storage, removal, and transportation of hazardous materials expressly identified in the Implementation Plan ("Hazardous Materials Within Scope"). CONTRACTOR shall properly install, handle, remove and transport such Hazardous Materials Within Scope. Where pursuant to the Works or Services, CONTRACTOR is to remove Hazardous Materials Within Scope, CONTRACTOR shall properly handle, remove and transport such Hazardous Materials Within Scope to a collection point located at an authorized disposal facility.

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8.2 Except for Hazardous Materials Within Scope, the Works or Services does not include directly or indirectly performing or arranging for the detection, testing, handling, storage, removal, treatment, transportation, disposal, monitoring, abatement or remediation of any contamination of any part of the System, Smart City Instruments or Artistic Lighting project site at which Works or Services is performed and any part of the System, Smart City Instruments or Artistic Lighting project site where soil or groundwater is contaminated by petroleum or petroleum products (collectively called "Oil"), asbestos, PCBs or hazardous, toxic, radioactive or infectious substances, including any substances regulated under Resource Conservation and Recovery Act (RCRA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or any other Applicable Law (collectively called "Hazardous Materials"), including without limitation: ionization smoke detectors, ballasts, mercury bulb thermostats, used oil, contaminated filters, contaminated absorbents, and refrigerant. CONTRACTOR will notify CLIENT immediately if it discovers or reasonably suspects the presence of any previously undisclosed Oil or Hazardous Material. The discovery or reasonable suspicion of Hazardous Materials or hazardous conditions at any part of the System, Smart City Instruments or Artistic Lighting project site where CONTRACTOR is to perform Works or Services, or of contamination of any part of the System, Smart City Instruments or Artistic Lighting project site by Oil or Hazardous Materials not previously identified shall entitle CONTRACTOR to suspend the Works or Services in the contaminated area immediately, subject to mutual agreement of terms and conditions applicable to any further Works or Services, or to terminate the Works or Services in the contaminated area and to be paid for Works or Services previously performed.

ARTICLE 9: TERMINATION

9.1 Termination Events

a. NON-DEFAULT TERMINATION

1. Voluntary. Either Party may terminate this Agreement without cause by serving one hundred eighty (180) days prior written notice on the other Party.
2. Supervening Event. Either Party may terminate this Agreement at its sole discretion if a Supervening Event has occurred and is continuing for a period of ninety (90) consecutive days or one hundred eighty (180) days in aggregate in any Annual Period by serving the non-terminating Party one hundred eighty (180) days prior written notice. CLIENT shall be obligated to make all Works Payments and Service Payments up to the termination date.
3. Change in Law. In the event that that CONTRACTOR is prevented from performing its obligations under the Agreement due to a Change in Law that cannot be remedied, CONTRACTOR may terminate this Agreement by serving one hundred eighty (180) days prior written notice to the CLIENT. CLIENT shall be obligated to make all Works Payments and Service Payments up to the termination date.

b. TERMINATION BY THE CLIENT FOR CONTRACTOR'S DEFAULT

CLIENT may terminate this Agreement by thirty (30) days written notice to CONTRACTOR upon the occurrence of an Event of Default by CONTRACTOR. An Event of Default occurs with respect to CONTRACTOR when:

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1. Failure to Perform: Beyond any grace or notice period CONTRACTOR fails to provide all or a substantial part of the Works or Services in accordance with this Agreement, other than:
 - i. a failure to meet the Performance Guarantee or other Services Performance Objectives or Works Performance Objectives, the sole remedies for which are set forth in Schedule 4 (Payment Mechanism), in Schedule 2 (Scope of Works) and Schedule 3 (Scope of Services); or
 - ii. where such failure is a consequence of a breach by CLIENT of its obligations under this Agreement; or
 - iii. where such failure is a consequence of CLIENT's failure to comply with any of the provisions of the Schedules except in the event of an emergency (where CLIENT's notice is not required), in which case CONTRACTOR shall immediately and with due diligence proceed to completion any cure or remedy of a breach.

In respect of all other failures which are capable of remedy, CLIENT shall provide written notice to the CONTRACTOR giving reasonable particulars of the failure, whereby CONTRACTOR shall upon receipt of notice have thirty (30) days to undertake and diligently proceed to remedy such failure. For the purpose of this Section 9.1 (b) failure shall be considered capable of remedy if CONTRACTOR can comply with the provision in question in all respects other than as to the time of performance; or

2. Insolvency

Without prejudice to any other right or remedy it may have, CLIENT may terminate this Agreement immediately by notice given in writing to CONTRACTOR if upon the dissolution or liquidation of CONTRACTOR or the filing by CONTRACTOR of a voluntary petition in bankruptcy, or failure by CONTRACTOR promptly to cause to be lifted any execution, garnishment or attachment of such consequence as will impair CLIENT's ability to carry on its obligations hereunder, or the entry of any order or decree granting relief in any involuntary case commenced against CONTRACTOR under any present or future federal bankruptcy act or any similar federal or state law, or a petition for such an order or decree shall be filed in any court and such petition or answer shall not be discharged or denied within ninety (90) days after the filing thereof, or if CONTRACTOR shall admit in writing its inability to pay its debts generally as they become due, or a receiver, trustee or liquidator of CONTRACTOR shall be appointed in any proceeding brought against CONTRACTOR and shall not be discharged within ninety (90) days after such appointment or if CONTRACTOR shall consent to or acquiesce in such appointment, or assignment by CONTRACTOR for the benefit of its creditors, or the entry by CONTRACTOR into an agreement of composition with its creditors, or a bankruptcy, insolvency or similar proceeding shall be otherwise initiated by or against CONTRACTOR under any applicable bankruptcy, reorganization or analogous law as now or hereafter in effect and if initiated against CONTRACTOR shall remain undismissed (subject to no further appeal) for a period of ninety (90) days; or

3. Indictment

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 City funds or due to the Appropriations article herein.

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Except as otherwise allowed or provided under this Agreement, the sole liability upon termination shall be to pay for acceptable work performed prior to the Contractor's receipt of the notice of termination, if the City is the terminating party, or the Contractor's sending of the notice of termination, if the Contractor is the terminating party; provided, however, that a notice of termination shall not nullify or otherwise affect either party's liability for pre-termination defaults under or breaches of this Agreement or as otherwise agreed by the Parties. The Contractor shall submit an invoice for such work within thirty (30) days of receiving or sending the notice of termination. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE CLIENT'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

TERMINATION MANAGEMENT

Except as otherwise agreed by the parties, immediately upon receipt by either the City or 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 City; 2) comply with all directives issued by the City in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the City shall direct for the protection, preservation, retention or transfer of all property titled to the City 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 City upon termination and shall be submitted to the City as soon as practicable.

c. TERMINATION BY CONTRACTOR FOR CLIENT'S DEFAULT

CONTRACTOR may terminate this Agreement by written notice to CLIENT in accordance with sections above and due to the occurrence of an Event of Default by CLIENT. An Event of Default with respect to CLIENT shall occur upon any one of the following:

1. CLIENT fails to pay any Works Payment when due; or
2. CLIENT fails to pay any Services Payment when due; provided however, CLIENT shall not be in default hereunder if it fails to pay any Services Payment amount as result of Service Payment setoff pursuant to Section 4.1.1 (e) of Appendix 3A of Schedule 3; or
3. Failure of CLIENT to observe and perform any covenant, condition or agreement on its part required to be observed or performed by this Agreement (other than as provided in clause (a) or (b) above), for a period of thirty (30) days after written notice specifying such failure and requesting that it be remedied is given to CLIENT by CONTRACTOR, unless CONTRACTOR shall agree in writing to an extension of such time prior to its expiration; provided that, if the failure stated in the notice cannot be corrected within the applicable period, CONTRACTOR will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by CLIENT within the applicable period and diligently pursued until the default is corrected; or
4. CLIENT consistently and purposefully fails to allow reasonable access to the System, Smart City Instruments or Artistic Lighting; or
5. Any representation or warranty made by CLIENT in connection with this Agreement shall prove to be untrue in any material respect on the date as of which it was made; or

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6. The dissolution or liquidation of the CLIENT or the filing by CLIENT of a voluntary petition in bankruptcy, or failure by CLIENT promptly to cause to be lifted any execution, garnishment or attachment of such consequence as will impair CLIENT'S ability to carry on its obligations hereunder, or the entry of any order or decree granting relief in any involuntary case commenced against CLIENT under any present or future federal bankruptcy act or any similar federal or state law, or a petition for such an order or decree shall be filed in any court and such petition or answer shall not be discharged or denied within ninety (90) days after the filing thereof, or if CLIENT shall admit in writing its inability to pay its debts generally as they become due, or a receiver, trustee or liquidator of CLIENT shall be appointed in any proceeding brought against CLIENT and shall not be discharged within ninety (90) days after such appointment or if CLIENT shall consent to or acquiesce in such appointment, or assignment by CLIENT for the benefit of its creditors, or the entry by CLIENT into an agreement of composition with its creditors, or a bankruptcy, insolvency or similar proceeding shall be otherwise initiated by or against CLIENT under any applicable bankruptcy, reorganization or analogous law as now or hereafter in effect and if initiated against CLIENT shall remain undismissed (subject to no further appeal) for a period of ninety (90) days.

9.2 Provisions Governing Any Termination

a. Continued Effect - No Waiver

Any waiver by either Party of a breach of any provision of this Agreement shall not be considered as a waiver of any subsequent breach of the same or any other provisions. Any waiver by either Party of a breach of any provisions shall in no way relieve either Party of any of its responsibilities, duties or obligations under this Agreement, nor shall it constitute a waiver or relinquishment either Party's rights.

9.3 Compensation on Termination

- a. if CLIENT or CONTRACTOR terminates this Agreement in accordance with Section 9.1 (a) above, or if CONTRACTOR terminates this Agreement pursuant to Section 9.1 (c) above, then the Termination Payment shall be:
1. any outstanding Works Payments or Service Payments; plus
 2. other amounts owed to CONTRACTOR under this Agreement, including payment for Works performed prior to the Acceptance, taking due account of any payments already made; plus
- b. if CLIENT terminates this Agreement in accordance with Section 9.1 (b) above then the Termination Payment shall be:
1. any outstanding Works Payments or Service Payments, as applicable, plus other amounts owed to CONTRACTOR under this Agreement, including Works performed prior to Acceptance, taking due account of any payments already made; plus
 2. payments in respect, if any, by CONTRACTOR and all other accrued costs and expenses, including amounts spent on spare equipment.

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9.4 Additional Termination Remedy Provisions

- a. CONTRACTOR may take whatever action Applicable Law or in equity as may be necessary or desirable to collect the payments and other amounts then due and thereafter to become due or to enforce performance and observance of any obligation, agreement or covenant of CLIENT under this Agreement;
- b. Upon an Event of Default by CLIENT, with or without terminating this Agreement, CONTRACTOR may by written notice require CLIENT, at CLIENT's expense, to promptly return any or all of such Infrastructure, Smart City Instruments and Artistic Lighting to the possession of CONTRACTOR at such place within the United States as CONTRACTOR shall specify, or sell or lease such Infrastructure, Smart City Instruments and Artistic Lighting or, for the account of CLIENT, sublease such Infrastructure, Smart City Instruments and Artistic Lighting, continuing to hold CLIENT liable for the difference between (i) the amounts payable by CLIENT hereunder, and (ii) the net proceeds of any such sale, leasing or subleasing (after deducting all expenses of CONTRACTOR in exercising its remedies hereunder, including without limitation all expenses of taking possession, storing, reconditioning and selling or leasing such Infrastructure, Smart City Instruments and Artistic Lighting and all brokerage, auctioneer's and attorney's fees). CLIENT's obligation to remove and return any Infrastructure, Smart City Instruments and/or Artistic Lighting to CONTRACTOR is subject to (i) Applicable Law and (ii) CLIENT's option, at CLIENT's expense, to resolve within 180 days of notice of such termination any public safety requirements related to the return of such assets.
- c. No remedy herein conferred upon or reserved to a Party is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing under Applicable Law or in equity or by statute. No delay or omission to exercise any right or power accruing upon any default hereunder shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.
- d. In the event any agreement or covenant contained in this Agreement should be breached by a Party and thereafter waived by the other Party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.
- e. The Parties agree that the formulations of damages described in this Article 9, are fair and reasonable approximations of the damages each Party would incur upon a termination based on an Event of Default and are not intended to be, nor should they be interpreted to result in, a penalty.
- f. The defaulting Party shall reimburse the other Party for all reasonable costs (including all applicable taxes and all legal or professional services) properly incurred by the other Party in exercising its rights and remedies hereunder, including any relevant increased administrative expenses.

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ARTICLE 10: ASSIGNMENT

CONTRACTOR may, upon prior written consent by CLIENT (not to be unreasonably withheld), transfer, assign, mortgage, charge or dispose of any rights under this Agreement or otherwise delegate any of its rights and/or obligations hereunder; provided that if CONTRACTOR makes such transfer, assignment or takes such other action pursuant to this Article 10, CONTRACTOR acknowledges and agrees that it shall remain liable to CLIENT in relation to all of its obligations under this Agreement unless CLIENT approves the assignee's assumption of all of CONTRACTOR's rights, obligations and liabilities under this Agreement in writing. CLIENT agrees to execute all notices, consents or other documents as may be reasonably required to facilitate such action. CLIENT may not, without the prior written consent of CONTRACTOR, transfer, assign, mortgage, charge or dispose of any of its rights under this Agreement or otherwise delegate any of its obligations under it.

ARTICLE 11: FINANCING - deleted

ARTICLE 12: REPRESENTATIONS AND WARRANTIES

12.1 CONTRACTOR represents, warrants and covenants to the CLIENT that:

- a. It has all requisite corporate power to enter into this Agreement, and that its execution hereof has been duly authorized and does not and will not constitute a breach or violation of any of CONTRACTOR's organizational documents, any Applicable Law, or any agreements with third parties;
- b. It has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the Agreement;
- c. This Agreement is the legal, valid and binding obligation of CONTRACTOR, in accordance with its terms, and all requirements have been met and procedures have been followed by CONTRACTOR to ensure the enforceability of the Agreement;
- d. To CONTRACTOR's best knowledge, there is no pending or threatened, suit, action, litigation or proceeding against or affecting CONTRACTOR that affects the validity or enforceability of this Agreement; and,
- e. It is duly authorized to do business in all locations where the Works and Services are to be performed.
- f. CONTRACTOR has consulted with its legal counsel and is relying on the advice of its counsel concerning all legal issues related to this Agreement, and is not relying on CLIENT in this regard.
- g. Neither of the execution or delivery of this Agreement, the consummation of the transactions herein contemplated or compliance with the terms and provisions hereof will conflict with or result in a breach of, or require any consent under, the organizational documents of CONTRACTOR, or any Applicable Law or regulation, or any order, writ, injunction or decree of any court, or any agreement or instrument to which CONTRACTOR is a party or by which it is bound or to which it is subject, or constitute a default under any such agreement or instrument.
- h. The information provided by CONTRACTOR to CLIENT relating to this Agreement and the Project is true, correct and complete, to the best of the CONTRACTOR's knowledge, in every material respect and contains no untrue statement of material fact or omits no material fact necessary to make the statements contained therein not misleading.

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12.2 CLIENT represents, warrants and covenants to CONTRACTOR that:

- a. It is a political subdivision of the State of New Mexico and has all requisite corporate power and/or statutory authority to enter into this Agreement, and that its execution hereof has been duly authorized and does not and will not constitute a breach or violation of any Applicable Law, or any agreements with third parties;
- b. Acknowledging CLIENT's rights herein to terminate this Agreement for convenience, the CLIENT has done and will continue to do all things necessary to preserve and keep in full force and effect its existence and the Agreement;
- c. This Agreement is the legal, valid and binding obligation of CLIENT, in accordance with its terms, and all requirements have been met and procedures have been followed by CLIENT to ensure the enforceability of the Agreement;
- d. To CLIENT's best knowledge, there is no pending or threatened, suit, action, litigation or proceeding against or affecting CLIENT that affects the validity or enforceability of this Agreement; and,
- e. CLIENT has consulted with its legal counsel and is relying on the advice of its counsel concerning all legal issues related to this Agreement, and is not relying on CONTRACTOR in this regard.
- f. CLIENT is not in violation of any Applicable Law promulgated or judgment entered by any federal, State, local or governmental authority that individually or in the aggregate, would affect its performance of any obligations under this Agreement.
- g. CLIENT is the holder of all federal, State, local or other governmental consents, licenses, permits, or other authorizations required to permit it to operate or conduct its business now and as contemplated by this Agreement.
- h. Neither of the execution or delivery of this Agreement, the consummation of the transactions herein contemplated or compliance with the terms and provisions hereof will conflict with or result in a breach of, or require any consent under, the organizational documents of CLIENT, or any Applicable Law or regulation, or any order, writ, injunction or decree of any court, or any agreement or instrument to which CLIENT is a party or by which it is bound or to which it is subject, or constitute a default under any such agreement or instrument.
- i. CLIENT intends to continue to use the System in a manner similar to its present use of such System.
- j. The System will be used by CLIENT only for the purpose of performing essential governmental or proprietary functions of CLIENT consistent with the permissible scope of CLIENT's authority,
- k. The information provided by CLIENT to CONTRACTOR relating to this Agreement and the Project is true, correct and complete, to the best of the CLIENT's knowledge, in every material respect and contains no untrue statement of material fact or omits no material fact necessary to make the statements contained therein not misleading.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

ARTICLE 13: DISPUTE RESOLUTION

13.1 In the event of any dispute, claim, question or disagreement arising from or relating to this Agreement or breach thereof, the aggrieved Party shall promptly provide written notification of the dispute, claim, question or disagreement to the other Party within thirty (30) days of the dispute, claim, question or disagreement. The Parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement, including seeking the intervention and opinion of an expert. To this effect, the Parties shall consult and negotiate with each other in good faith and recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both Parties. If they do not reach such solution within a period of thirty (30) days of the notice, then, upon notice by either Party to the other, all disputes, claims, questions or differences shall be submitted to mediation pursuant to the Public Works Mediation Act, NMSA 1978, secs. 13-4C-1 through 13-4C-11.

13.2 Notwithstanding any dispute that CONTRACTOR may have undertaken or be involved with, whether pursuant to this Article 13 or otherwise, and regardless of the basis thereof or grounds therefor, CONTRACTOR agrees that it will, for so long as this Agreement has not been terminated, diligently perform the Works and Services in accordance with the terms of this Agreement, provided that CLIENT pays all undisputed amounts invoiced and at the times required as set forth herein pursuant to the terms and provisions of the Agreement and otherwise performs its obligations in accordance with the terms of this Agreement.

13.3 Notwithstanding any dispute that CLIENT may have undertaken or be involved with, whether pursuant to this Article 13 or otherwise, and regardless of the basis thereof or grounds therefor, CLIENT agrees that it will, for so long as this Agreement has not been terminated, pay all undisputed amounts invoiced and at the times required pursuant to the terms and provisions of the Agreement and otherwise perform its obligations in accordance with the terms of this Agreement.

13.4 If a Party fails to pay any such amounts as described in Sections 13.2 and 13.3 above, the dispute resolution procedure under this Article 13 shall not apply and the Parties may proceed to enforce any rights and remedies under Article 9 above.

ARTICLE 14: AUDITS AND INSPECTIONS

At any time during normal business hours and as often as the CLIENT may deem necessary, there shall be made available to the CLIENT for examination all of the CONTRACTOR's records with respect to all matters covered by this Agreement. The CONTRACTOR shall permit the CLIENT to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment and other data relating to all matters covered by this Agreement. The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of five (5) years from the date of payment for the work under this Agreement. The records shall be subject to inspection by the City. The City shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the City to recover excessive or illegal payments.

ARTICLE 15: MISCELLANEOUS PROVISIONS

15.1 **Subcontractors.** CONTRACTOR may use subcontractors in the performance of the Works or Services, provided however that no such subcontract shall relieve the primary Contractor from its obligations and liabilities under this Agreement, nor shall any subcontract obligate direct payment from the City.

15.2 **Construction and Venue.** This Agreement and the construction and enforceability thereof shall be interpreted under and governed by the laws of the State of New Mexico, irrespective of its choice of law provisions, and venue shall only be in Santa Fe County, New Mexico.

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15.3 Change in Law. If CONTRACTOR suffers (or will suffer) delay and/ or incurs additional costs as a result of a Change of Law, then The CONTRACTOR must deliver a notice to CLIENT identifying the Change of Law and the impact of that Change of Law. Upon receiving notice, CLIENT and CONTRACTOR will proceed in good faith to negotiate an adjustment to the contract price and/or extension of time. If mutual consent is not reached, either Party may seek relief under Article 13 above. If CONTRACTOR is prevented from performing its obligations under the Agreement, but would be able to proceed if an amendment or Change Order were made to the Agreement, then the CONTRACTOR should submit a notice to CLIENT stating such. However, in the event that that CONTRACTOR is prevented from performing its obligations under the Agreement and this cannot be remedied by an amendment or Change Order, then CONTRACTOR may give notice of termination pursuant to Section 9.1 (a) (3) above. If a Change of Law occurs, CONTRACTOR is obliged to take all reasonable steps to mitigate the adverse impact of such Change of Law upon the Agreement.

15.4 Gross Inequity. Any gross proven inequity that may result in severe economic conditions not contemplated by the Parties at the time of the execution of this Agreement may be corrected by mutual consent; provided however that any gross proven inequity shall not in any way apply to, alter or affect the CLIENT's obligation to make Works Payments hereunder when due. Each Party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in affecting a settlement.

15.5 Prevailing Wage. As applicable, CONTRACTOR shall insure compliance with the New Mexico Public Works Minimum Wage Act and any other binding prevailing wage determinations

15.6 Non-substitution. In the event of termination of this due to the non-appropriations of funds, CLIENT agrees, to the extent permitted by Applicable Law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by CONTRACTOR under the terms of this Agreement for a period of three-hundred sixty-five (365) days following such termination of this Agreement due to non-appropriations.

15.7 Representatives. CLIENT Representative and CONTRACTOR Representative (collectively "Authorized Representatives") are the following designees:

CLIENT Representative

Name: Ms. Regina Wheeler
Title: Public Works Director
Address: 500 Market Station
Santa Fe, NM 87501

Phone: 505-690-4197

CONTRACTOR Representative

Name: Kevin Kaye
Title: Director of Operations
Address: 4000 Vassar Drive NE, Albuquerque, NM 87107

Phone: 860-384-3024

CLIENT and CONTRACTOR may change its Authorized Representative by giving written notice to the other. CLIENT Representative and CONTRACTOR Representative is the person authorized to make decisions on behalf of the CLIENT and CONTRACTOR, respectively, under the terms of this Agreement.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

15.8 Notice. Without prejudice to any other method of giving notice, all communications provided for or permitted hereunder shall be in writing and delivered to the addressee by prepaid private courier or sent by telecopy or other direct written electronic means (provided that a written record is kept in respect of any such electronic communication), to the applicable address and to the attention of the officer of the addressee as follows:

To CLIENT:

City of Santa Fe

Attention: Regina Wheeler, Public Works Director
500 Market Station
Santa Fe, NM 87507

Phone: 505-690-4197

To CONTRACTOR:

Dalkia Energy Solutions, LLC

Attention: Kevin Kaye, Director of Operations
4000 Vassar Drive NE
Albuquerque, NM 87107

Phone: 860-384-3024

Any notice or other communication made by personal delivery, telecopy or other direct written electronic means on a Business Day shall be deemed to have been given, received and made on such Business Day so long as it is actually received prior to 5:00 p.m. (Mountain Standard time) on such Business Day, and otherwise shall be deemed to have been made on the next following Business Day (any such notice given, received or made on a day which is not a Business Day shall be deemed to have been made on the next following Business Day).

15.9 Accounting and Tax Representations. CONTRACTOR makes no representation or warranty with respect to CLIENT's treatment of any federal or state tax laws, any applicable accounting treatment or conventions or the assessment of any rating agency in connection with this Agreement, the project documents or any Infrastructure, Smart City Instruments and Artistic Lighting.

15.10 Provision of Information and Action. Parties agree to provide such information, execute and deliver any instruments and documents, and to take such other actions as may be necessary or reasonably requested by the other Party that are not inconsistent with the provisions of this Agreement and that do not involve the assumptions of obligations other than those provided for in this Agreement, in order to give full effect to this Agreement and to carry out the intent of this Agreement.

15.11 Expenses. Except to the extent otherwise provided herein, each Party hereto shall be responsible for their own fees, expenses and disbursements (including, without limitation, legal fees and disbursements) in connection with the preparation, execution, delivery and/or performance under this Agreement and all other documents and instruments associated with any of the same.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

15.12 Assent. CONTRACTOR's performance of the Works and Services is expressly conditioned on the Parties assenting to all of the terms of this Agreement, notwithstanding any different or additional terms contained in any writing at any time submitted or to be submitted by a Party to the other Party relating to the Works or Services, even if signed by the Parties, unless the written statement expressly indicates that such terms supersede the terms of this Agreement.

15.13 Waiver. The failure of CONTRACTOR or CLIENT to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either Party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of CONTRACTOR or CLIENT.

15.14 Severability. If any provision of the Agreement becomes or is found to be illegal or unenforceable for any reason, such provision may be modified to the extent necessary to make this Agreement legal and enforceable. If such provision cannot be so modified, it shall be severed from this Agreement and the remainder of this Agreement shall remain in full force and effect.

15.15 Entire Agreement. This Agreement, when executed, together with all Schedules, Implementation Plan and other project documents in this Agreement, shall constitute the entire agreement between the Parties with respect to the subject matter hereof and this Agreement may not be amended or modified except by a written agreement signed by the Parties hereto. This Agreement supersedes all prior and contemporaneous negotiations, statements, representations, agreements, letters of intent, awards, or proposals, either written or oral relative to the same.

15.16 Arm's Length Negotiation. The Parties hereto acknowledge and agree that this Agreement has been negotiated at arm's length and among the Parties equally sophisticated and knowledgeable as to the subject matter of this Agreement. Each party has conferred, or has had the opportunity to confer, with their respective legal counsel. Accordingly, in the event any claim is made relating to any conflict, omission, or ambiguity in this Agreement, no presumption, burden of proof, or persuasion shall be implied by virtue of the fact that this Agreement was drafted by or at the request of a particular party or its legal counsel.

15.17 Counterparts. This Agreement may be executed in several counterparts, each of which, when so executed, shall be deemed to be an original and which counterparts taken together shall constitute one and the same Agreement. This Agreement may be executed by facsimile or electronic mail in portable document format ("pdf") and any signature contained hereon by facsimile or electronic mail in pdf shall be deemed to be equivalent to an original signature for all purposes.

15.18 Conflict of Interest; Governmental Conduct Act.

- a. The Contractor represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement.
- b. The Contractor further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

- c. Contractor's representations and warranties in Paragraphs A and B of this Article 13 are material representations of fact upon which the City relied when this Agreement was entered into by the parties. Contractor shall provide immediate written notice to the City if, at any time during the term of this Agreement, Contractor learns that Contractor's representations and warranties in Paragraphs A and B of this Article 13 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances. If it is later determined that Contractor's representations and warranties in Paragraphs A and B of this Article 13 were erroneous on the effective date of this Agreement or have become erroneous by reason of new or changed circumstances, in addition to other remedies available to the City and notwithstanding anything in the Agreement to the contrary, the City may immediately terminate the Agreement.
- d. All terms defined in the Governmental Conduct Act have the same meaning in this section.

15.19 Amendment.

- a. This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto and all other required signatories.
- b. If the City proposes an amendment to the Agreement to unilaterally reduce funding due to budget or other considerations, the Contractor shall, within thirty (30) days of receipt of the proposed Amendment, have the option to terminate the Agreement, pursuant to the termination provisions as set forth herein, or to agree to the reduced funding.

15.20 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.

15.21 Penalties for violation of law.

The Procurement Code, Sections 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.

15.22 Equal Opportunity Compliance.

The Contractor agrees to abide by all federal and state laws and rules and regulations, and Santa Fe City Code, pertaining to equal employment opportunity. In accordance with all such laws of the State of New Mexico, the Contractor assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this Agreement. If Contractor is found not to be in compliance with these requirements during the life of this Agreement, Contractor agrees to take appropriate steps to correct these deficiencies.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

15.23. Applicable Law.

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be in accordance with article 15.2 of this agreement. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

15.24. Workers Compensation.

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

15.25. New Mexico Tort Claims Act

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

15.26. 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.

15.27 Enforcement of Agreement.

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.

15.28 Authority.

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

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date of the signature by the required approval authorities below.

CITY OF SANTA FE:



ALAN WEBBER, MAYOR

DATE: Mar 22, 2021

CONTRACTOR: DALKIA ENERGY SOLUTIONS, LLC



LEE VARDAKAS, CEO

DATE: 3/18/2021

CRS # 03-526533-00-7
Registration # 6168566

ATTEST:



Kristine Mihelcic (Mar 22, 2021 18:06 MDT)

KRISTINE BUSTOS MIHELICIC, CITY CLERK ~~GC~~

GB MTG 02/24/2021

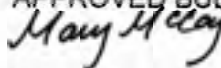
CITY ATTORNEY'S OFFICE:



Marcos Martinez (Mar 22, 2021 18:06 MDT)

SENIOR ASSISTANT CITY ATTORNEY

APPROVED BUDGET:



MARY MCCOY, FINANCE DIRECTOR

Funding Sources: TBD 
AL

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

SCHEDULE 1: DEFINITIONS

The following terms shall for all purposes have the meanings stated herein, unless the context otherwise specifies or requires, or unless otherwise defined in the Agreement:

"Acceptance" means the conditions contained in Section 3.7 have been completed and CLIENT has signed, or is deemed to have signed and delivered, a Certificate of Acceptance.

"Acceptance Date" means the date on which Acceptance has occurred or been completed for each Segment of the Works.

"Annual Performance Report" means the document prepared by CONTRACTOR and submitted to the CLIENT, which identifies the results achieved (KPIs) for the applicable Annual Period.

"Annual Period" means an annual period beginning on the Commencement Date or on any anniversary date thereafter.

"Annual Realized Savings" means the actual Energy Savings achieved by the System during an Annual Period derived from the sum of the measured and verified savings plus any Stipulated Savings.

"Applicable Law" means any Laws in force in the State of New Mexico where the System is located, or that is otherwise binding on a Party or those for whom, at law, they are responsible.

"Artistic Lighting" means the artistic lighting projects and equipment and infrastructure required to be provided by the CONTRACTOR as described in accordance with Schedule 2 (Scope of Works).

"Authorized Representative" means collectively CLIENT Representative and CONTRACTOR Representative.

"Business Day" means any calendar day other than a Saturday, Sunday or federal holiday in the United States, except that in the event that an obligation to be performed under this Agreement falls due on a day other than a Business Day, the obligation shall be deemed due on the next Business Day thereafter.

"Calendar of Execution" refers to the calendar detailed in the Implementation Plan.

"Certificate of Acceptance" means a written non-recourse certificate of acceptance in the form substantially similar to the certificate of acceptance attached hereto in Schedule 5.

"Change in Law" means the coming into effect or repeal (without re-enactment or consolidation) in the state or commonwealth or the United States of any Law, or any amendment or variation of any Applicable Law, including any judgment of a relevant court of law which changes binding precedent in the state or commonwealth, in each case after the date of this Agreement which has a material adverse effect on a Party's ability to perform under this Agreement, provided that a Change in Law shall not apply to any Party's obligation to pay hereunder when due.

"Change Order" means modification of the Works pursuant to Schedule 2 (Scope of Works).

"Charter" means the Charter of the City of Santa Fe adopted by the voters of the City of Santa Fe, New Mexico, at a Special Municipal Election held on December 9, 1997; amended by the voters of the City of Santa Fe at a Regular Municipal Election held on March 4, 2008; amended by the voters of the City of Santa Fe at a Regular Municipal Election held on March 4, 2014; amended by the voters of the City of Santa Fe at a General Election held on November 6, 2018; and amended by the Governing Body on March 11, 2020.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

"CLIENT" means City of Santa Fe, a political subdivision of the State of New Mexico.

"CLIENT Representative" means the person identified to CONTRACTOR by CLIENT as the person authorized to make decisions on behalf of CLIENT, as further set forth in Section 15.7 of the Main Body of the Agreement.

"CMMS" refers to a Centralized Maintenance Management Software, which is a data and tracking system for asset data, installation and repair data, maintenance data, energy consumption data and other System data.

"Commencement Date" shall mean the date that the Client issues a Purchase Order.

"Commissioning and Quality Assurance Plan" means the plan for commissioning the Infrastructure during the Works Phase.

"CONTRACTOR" means Dalkia Energy Solutions US, Inc. and its successor and assigns.

"CONTRACTOR Pre-existing Intellectual Property" means any Intellectual Property: (i) that has been conceived or developed by an employee or subcontractor of CONTRACTOR before CONTRACTOR performs any Works or Services under this Agreement; (ii) that is conceived or developed by such employee or subcontractor at any time wholly independently of CONTRACTOR performing the Works under this Agreement; or, (iii) if developed while performing the Works under this Agreement, where the development of Intellectual Property for the benefit of the CLIENT is not expressly identified as part of the Works. CONTRACTOR Pre-existing Property is included in all reports, notes, calculations, data, drawings, estimates, specifications, manuals, documents, all computer programs, codes and computerized materials prepared by or for CONTRACTOR.

"CONTRACTOR Representative" means the person identified to CLIENT by CONTRACTOR as the person authorized to make decisions on behalf of CONTRACTOR, as further set forth in Section 15. 7 in the Main Body of the Agreement.

"Constant Energy Rate" means an energy rate of \$0.0561839 per kWh, as the customer owned metered lighting rate as described in Section B of Public Service Company of New Mexico Electric Service, 15th Revised Rate No. 20, Canceling 14th Revised Rate No. 20, incorporated in the Implementation Plan. The Constant Energy Rate shall be reviewed and revised every five years in accordance with any changes in the Public Service Company of New Mexico Electric Service rate.

"Contingency Deadline" shall be thirty (30) days after the Effective Date of this Agreement.

"Damage Amount" refers to the annual damage amount covered under the Service Payments for Repairs as identified in Section 2.3.2 of Schedule 3.

"Day(s)" shall mean calendar day.

"Demobilization Costs" shall mean all activities and costs for transportation of personnel, equipment and supplies from the site; disassembly, removal, and site cleanup of offices, buildings, and other facilities; all reasonable costs associated early termination incurred by CONTRACTOR with its subcontractors, vendors, providers; reasonable ongoing lease costs or lease termination costs for vehicles, warehouse space, office space and other leased items for this Agreement; accrued costs and expenses, including amounts spent on equipment and inventory. CONTRACTOR shall take all reasonable steps to mitigate demobilization costs and expenses upon termination of the agreement.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

"Energy Savings" means all reductions in energy or utility consumption, a changed utility rate classification, a combination thereof, or other savings contemplated herein derived from installation of the Infrastructure and performance of the Services, in accordance with Schedule 3 (Scope of Services). Energy Savings are measured and expressed in kilowatt hours (kWh).

"Equipment" means installed physical street light equipment, which includes luminaires and smart controls, that is required to be provided by CONTRACTOR as part of Schedule 2 (Scope and Works).

"Event of Default" refers to the terms of Event of Default prescribed in Section 9.1 (b) and (c) in the Main Body of the Agreement.

"Existing System" refers to the non-upgraded portions of the System during the Works.

"Extension Estimate" refers to the definition found in Section 1.3 (b) (1) in the Main Body of the Agreement.

"Final Segment of the Works" means the last Segment of the Works which upon completion and acceptance completes the CONTRACTOR's obligations under the Works Phase of this Agreement.

"Governmental Authority" means any federal, provincial, territorial, regional, municipal or local governmental authority, quasi-governmental authority, court, government or self-regulatory organization, commission, board, tribunal, organization, or any regulatory, administrative or other agency, or any political or other subdivision, department, or branch of any of the foregoing, having legal jurisdiction in any way over the Project, any aspect of the performance of this Agreement or any of the other project documents, in each case to the extent it has or performs legislative, judicial, regulatory, administrative or other functions within its jurisdiction.

"Guaranteed Annual Savings" are the Energy Savings that CONTRACTOR guarantees will be achieved in an Annual Period of the Performance Guarantee Period, as identified in the Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services).

"Hazardous Materials Within Scope" refers to those materials listed in the Implementation Plan.

"IESNA Guide for Photometric Measurement of Roadway Lighting Installations" means the ANSI/IES RP-8-14, ISBN# 978-0-87995-299-0, published by the Illuminating Engineering Society of North America, 2014.

"Implementation Plan" refers to the documented steps that will be taken by the Contractor and the Client to successfully achieve implementation pursuits, including but not limited to works phase sequence and timeline, products specifications, measurement and verification process.

"Infrastructure" means the Equipment and other physical street light infrastructure which includes street light poles, arms, wiring, foundations and other related infrastructure and equipment that is part of the System, Client-owned, and that is required to be installed by CONTRACTOR as part of Schedule 2 (Scope of Works).

"Intellectual Property Rights" or "Intellectual Property" means all trade secrets, patents and patent applications, trademarks (whether registered or unregistered and including any goodwill acquired in such trade marks), services marks, trade names, internet domain names, copyrights (including rights in computer software), moral rights, database rights, design rights, rights in know-how, rights in inventions (whether patentable or not) including, but not limited to, any and all renewals or extensions thereof, and all other proprietary rights (whether registered or unregistered, and any application for the foregoing), and all other equivalent or similar rights which may subsist anywhere in the world, including, but not limited to, any and all renewals or extensions thereof.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

"IPMVP" means the International Performance Measurement and Verification Protocol, Volume 1, EVO 10000-1.2007 as prepared by the Efficiency Valuation Organization.

"KPI" means Key Performance Indicator.

"Lamp" means apparatus designed as the source of light.

"Law" means any applicable constitution, charter, act, statute, law (including common law), ordinance, code, rule, regulation, judgment, decree, writ, order, permit, approval, or the like, as any of the foregoing may change from time to time, of any federal, state or local government or any agency, department, authority, court, political subdivision or other instrumentality thereof.

"kW" and "kWh" means kilowatt and kilowatt hour, respectively.

"Main Body" refers to Articles 1-15 in the main body of the Agreement above.

"Material Change" means a measurable deviation in the Performance Baseline and/or lighting performance metrics that is not caused by CONTRACTOR such that there is an adverse impact on the Annual Realized Savings which results or will result in a Savings Shortfall. A Material Change includes, but is not limited to: (a) changes in the manner of use of the System, (b) changes in the hours of operation of System, (c) changes in the quantities and types of materials used in the System, (d) modification, renovation or construction at or around the System, (e) any significant damage to the System caused by Supervening Event, or (f) any substantially changed condition affecting the energy use in the System.

"Material Obligation" means an obligation under this Agreement that is significant, as opposed to trivial, the breach of which would deprive the other Party of benefits it would have received under this Agreement, and includes any obligation the breach, waiver or modification thereof could (a) have an adverse effect on any Works Payment or Termination Payment (including the amount and due date thereof), or (b) impair the originally intended value, function or use of the Infrastructure, Smart City Instruments or Artistic Lighting.

"Measurement and Verification Plan" or "M&V Plan" shall mean the measurement and verification plan described in Section 2.9 of Schedule 2.

"Non-Upgraded System Assets" shall mean System components that are not upgraded or replaced during the Works Phase. Any component of the Non-Upgraded System Assets that is replaced pursuant to Section 2.3.2 of Schedule 3 shall be treated as Infrastructure for the remainder Services Phase.

"Normal Wear and Tear" means damage that naturally and inevitably occurs as a result of normal wear or aging.

"Oil" means petroleum or petroleum products.

"Operating Center" shall mean the operating center as described in Section 2.6.3 of Schedule 2 and Section 2.6 of Schedule 3.

"Operations and Maintenance" or "O&M" shall mean the operation, maintenance, monitoring, management, repair and replacement of the System during the Services Phase.

"Parties" means the CLIENT and CONTRACTOR.

GLOBAL MANAGEMENT PERFORMANCE CONTRACT

"Performance Assurance Reconciliation" is the process of ascertaining whether the System is performing at the level necessary to achieve the Guaranteed Annual Savings for an Annual Period.

"Penalties Cap" means the maximum cumulative amount of all Savings Shortfall payments and O&M penalty amounts the CONTRACTOR is obligated to make to the CLIENT, as more particularly described in Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services).

"Performance Baseline" means the operating profile of the System after all Works have been completed and Infrastructure installed, based on parameters described in the Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services), which is relied upon by CONTRACTOR for the calculation of Guaranteed Annual Savings as provided in the Appendix 3A (Services Performance Objectives and Penalties) to Schedule 3 (Scope of Services).

"Performance Guarantee" means CONTRACTOR's guarantee that the Annual Realized Savings calculated at the end of each Annual Period will be no less than the Guaranteed Annual Savings for the corresponding Annual Period.

"Performance Guarantee Period" means the timeframe from the Acceptance Date of the Final Segment of the Works until the termination of this Agreement.

"Permitted Users" means the CLIENT, its employees and authorized agents.

"Project" means Works and Services provided in the Agreement.

"Prudent Industry Practice" means those practices, methods, equipment, specifications and standards of safety and performance, as the same may be changed from time to time, as are generally used in the installation and operation and maintenance of street light systems, which in the exercise of reasonable judgment and in light of the facts known at the time the decision was made, are considered good, safe and prudent.

"Repair(s)" means repairs of outages, malfunctions, damages or deteriorations to the Non-Upgraded System Assets or repairs made to the System caused by accidents, acts of vandalism or acts of God.

"Savings Excess" means the Annual Realized Savings less the Guaranteed Annual Savings for the Annual Period resulting in an amount greater than zero.

"Savings Shortfall" means the Annual Realized Savings less the Guaranteed Annual Savings for the Annual Period resulting in an amount less than zero.

"Schedule(s)" refers to the Schedules 1 through 6 herein.

"Schedule and Breakdown of the Works" refers to the schedule detailed in the Implementation Plan.

"Scheduled Maintenance" refers to proactive maintenance provisions identified in Section 2.3.1 of Schedule 3.

"Segment(s)" means collective labor, Infrastructure, Smart City Instruments, Artistic Lighting and related services to be performed by or on behalf of CONTRACTOR for each segment of the Works, as further identified and described in Schedule 2 (Scope of Works).

"Services" means those services to be provided by CONTRACTOR as described in Article 4 and Schedule 3 (Scope of Services).

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"Service(s) Payment" means payments for the operation and maintenance of System during the Works Phase pursuant to Section 2.3 of Schedule 2 and the operation, maintenance, management, repair and replacement of the System, Smart City Instruments and Artistic Lighting services during the Services Phase.

"Services Performance Objectives" shall mean the Service Phase KPIs or performance objectives, descriptions and metrics that are subject to penalties as described in Schedule 3.

"Service(s) Phase" refers to the phase in the Agreement in which Services are performed after Acceptance Date of the Final Segment of Works.

"Smart City Instruments" refers to the physical nodes, instruments and equipment used in smart city and safety applications as required to be provided by the CONTRACTOR as described in accordance with Schedule 2 (Scope of Works)

"Software Product" means any software that is owned or licensed by CONTRACTOR or its affiliates and that is either separately deliverable for use in the Infrastructure, Smart City Instruments or Artistic Lighting or for use in a computer system owned by the CLIENT or delivered as firmware embedded in the Infrastructure, Smart City Instruments or Artistic Lighting.

"State" means the State of New Mexico.

"Stipulated Savings" are a sub-category of Guaranteed Annual Savings that do not require post-FIM implementation measurement and verification because they are agreed upon by the Parties based upon representations made to CONTRACTOR by the CLIENT and through the application of generally accepted analytical formulae. As such, Stipulated Savings are agreed upon in advance by the Parties and cannot be changed. When used as a methodology for representing a FIM's energy savings, such methodology is not recognized as a measurement and verification methodology under IPMVP. Therefore, where the IPMVP measurement methodologies are required, a methodology other than Stipulated Savings must be used to calculate energy savings.

"Supervening Event" means any of the following to the extent, in each case, it has a material adverse effect on CONTRACTOR's ability to perform its obligations under this Agreement: (a) any civil disobedience or dissent, including measures taken or threatened to be taken after the date hereof by one or more persons protesting or demonstrating against the realization of all or part of the Project, including the execution of the Works and the performance of the services hereunder; (b) fire, explosion, lightning, storm, tempest (including, but not limited to, an ice storm), hurricane, tornado, flood or any other natural disaster, ionizing radiation, earthquake, riot, theft, vandalism or civil commotion or any declared State of Emergency at the Federal, State or local level; (c) failure by any utility supplier, any Governmental Authority or other similar entity to provide the requisite approvals, permits, and consents or requisite access or make the requisite repairs required for the performance of the Works and Services; (d) instability and/or unavailability of the power grid; (e) irreparable disruption of the economy or solvency of the Agreement that is no fault of CONTRACTOR; (f) blockade or embargo; (g) strikes, lockouts, or other labor-related disputes affecting the System, the construction sector or maintenance of infrastructure sector or a significant part thereof; (h) war, civil war, armed conflict, terrorism, acts of foreign enemies or hostilities; (i) third party bid protest, or (j) nuclear, radioactive, chemical or biological contamination of the System, Smart City Instruments and Artistic Lighting or any real or personal property adjacent thereto that prevents the CONTRACTOR from performing a material part of its obligations under this Agreement.

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"System" means the street light system owned, maintained or controlled by CLIENT which is located within the limits of the city of Santa Fe, New Mexico and where the Works and Services will be performed, and which is used primarily to illuminate a road, street, highway or interstate freeway and includes the street light system's physical infrastructure and equipment: luminaires, photocells, street light poles, arms, wiring, pole foundations; more specifically, the System refers to the street lights owned or controlled by CLIENT as identified in the inventory provided by the CLIENT to the Contractor. The System specifically excludes Smart City Instruments and Artistic Lighting and any utility owned street lights.

"System Baseline" means the measurements of System taken as part of the Inventory, and the System operating practices in effect on the Agreement Effective Date, as set forth in Appendix 3A (Services Performance Objectives and Penalties) in Schedule 3 (Scope of Services).

"Technical Watch Committee" means a committee created at CLIENT's request to ensure ongoing technical monitoring and advancements in streetlighting and to remain informed about changes in standards and regulations. The Technical Watch Committee will consist of an equal number of representatives from CLIENT and from CONTRACTOR and shall meet at the end of each year at the request of CLIENT.

"Technological Advancements" shall mean advances in lighting technology that occur subsequent to the execution of this Agreement that will improve the performance of the System.

"Term" means the fixed duration of this Agreement as identified in Section 1.2 of the Main Body of the Agreement.

"Termination Payment" means the sum paid in consequence of the termination of this Agreement in accordance with Article 9 in the Main Body of the Agreement.

"Unit Prices" means the lists provided in the Implementation Plan.

"Unscheduled Maintenance" means the repair of outages or malfunctions that are caused by Normal Wear and Tear of the Infrastructure or outages that are a result of defective infrastructure.

"Work(s)" means collective labor, Infrastructure, Smart City Instruments, Artistic Lighting and related services for all Segments to be performed by or on behalf of CONTRACTOR in the Works Phase, as further identified and described in Schedule 2 (Scope of Works).

"Work(s) Amount" means principal amount of the project for this Agreement. Works Amount does not include interests on the principal or any Service Payment amounts.

"Work(s) Payment" means payments for Works performed during the Works Phase, specifically excluding the operation and maintenance of the System during the Works Phase.

"Work(s) Performance Objectives" shall mean the KPIs or performance objectives, descriptions and metrics that are subject to penalties as described in Schedule 2.

"Work(s) Phase" shall mean the phase of the Agreement in which the Works are performed.

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SCHEDULE 2: SCOPE OF WORKS

ARTICLE 1: DESCRIPTION OF THE SYSTEM, ARTISTIC LIGHTING AND SMART CITY INSTRUMENTS

a. System Layout

The layout of CLIENT's System is described in the Implementation Plan as the information received by CONTRACTOR from CLIENT about the current streetlight system. CONTRACTOR shall upgrade the Infrastructure of the System during the Works as set forth in the Implementation Plan. The scope of the System may be amended for the installation of additional street lights in the System.

b. System Data Inventory

CLIENT'S street light assets that make up the System are set forth in the Implementation Plan. Assets vary in size (wattage), type (HPS, MV, etc.), and style (Cobra, post top, wall pack, etc.). The System assets are property of the CLIENT and/or CLIENT has the requisite rights to upgrade, operate and maintain the assets. CLIENT'S street light assets subject to this Agreement do not include any utility-owned street lights.

c. Artistic Lighting

Artistic Lighting may be requested by CLIENT at any time during the project. Technical specifications and drawing will be incorporated into the Implementation Plan accordingly.

d. Smart City Instruments

Smart City Instruments shall be installed on CLIENT'S System. The Smart City Instrument installation may include street light control nodes, Wi-Fi hotspots, and additional smart city instruments. Technical specifications and drawing will be incorporated into the Implementation Plan accordingly.

Smart City Credit

In addition to other obligations of the Contractor, Contractor will provide an annual "credit" of Twenty Thousand dollars (\$20,000.00) worth of materials and installation of Smart City infrastructure, or other infrastructure as agreed by the Parties. Installation costs will be determined in accordance with the Implementation Plan. Material costs will be determined in accordance with the Implementation Plan. This Smart City infrastructure "credit" will be available annually on the anniversary of the implementation of the Services phase. This "credit" may only be used for infrastructure and may not be used as an offset to any payment due to Contractor.

e. Deferred Maintenance

During the Works phase, Contractor will implement Deferred Maintenance Work up to the amount of Eighty-Five Thousand Four Hundred and Seventeen Dollars and no Cents (\$85,417.00) plus applicable Gross Receipts Tax in the amount of \$7,209.19. This Work will be prioritized by Client in consultation with Contractor. Costs of Work will be determined in accordance with the Implementation Plan. Work will be accepted by Client as set forth in Article 3 Section 3.7.

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ARTICLE 2: GENERAL SCOPE OF WORKS

2.1 General Principles

The Works, as described herein and in the Implementation Plan, shall be performed by CONTRACTOR in conformity with current standards, Applicable Laws and regulations, and in accordance with the prescriptions of this Schedule and associated appendices. Except as otherwise expressly provided herein, CONTRACTOR shall provide all items necessary for the performance of the Works.

2.2 Interim Period

The Interim Period shall be the period between the Agreement's Effective Date and the Commencement Date. During the Interim Period, CONTRACTOR may perform any preparatory work and operations needed to mobilize for the Works, which may include, but is not limited to, the following:

- a. Movement to, placement and set-up on project site of personnel, equipment, supplies and accessory items;
- b. Establishment of offices, buildings and other needed facilities as well as utility work and connections needed for these facilities;
- c. Scheduling details, coordination and any other work and expense appropriate prior to the start of Works under Agreement.

The Client shall not be responsible for costs incurred until a Purchase Order has been issued.

2.3 Operation and Maintenance System

- a. Commencing after the Acceptance Date of the Final Segment of the Works, CONTRACTOR will operate and maintain the Existing System that has not been upgraded and that is part of the scope of Works.

2.4 Works: Project Upgrade

CONTRACTOR shall perform the installation of the Infrastructure, Smart City Instruments and Artistic Lighting in accordance with the Implementation Plan.

2.4.1 Modifications to Calendar of Execution and Schedule of Works

CLIENT may request adaptations and modifications to the work schedule set forth in the Implementation Plan, provided that the request is made in writing and made no later than thirty (30) days before the submission of the required authorizations and applicable approvals. Notwithstanding the foregoing, for any adaptation and modifications to the work schedules for urban redevelopment or city-owned projects, CLIENT shall request any modifications at least sixty (60) days prior to the submission of the required authorizations.

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Upon CLIENT's request, CONTRACTOR shall study and define the technical, economic and financial impacts of the scheduling adaptations and modifications and provide the CLIENT with a proposal for CLIENT'S requests. Any scheduling adaptations or modifications must be agreed to in writing by both Parties and any financial or other consequences related to any requested scheduling adaptations or modifications that are subsequently implemented will be borne by CLIENT. If a change of the schedule requested by CLIENT directly causes a delay in the acceptance of any Segment, the direct or indirect consequences, including costs, will be borne by CLIENT.

2.4.2 Conditions of Execution of the Works and Safety Program

Conditions of Execution of the Works. Prior to starting the Works, CONTRACTOR will obtain all requisite information and authorizations and fulfill all administrative requirements necessary for the performance of the Works. CONTRACTOR shall provide CLIENT an organizational plan of the Works to be performed, indicating the access requirements and installation requirements for the worksites and any plans to limit the impacts on the surrounding areas.

Safety Program. CONTRACTOR will make a commercially reasonable effort to ensure safety at the worksites and their surroundings areas for the entire duration of the Works in accordance with all Applicable Law. In carrying out its responsibilities herein, CONTRACTOR shall (a) protect the lives and health of persons performing the Work and other persons who may be affected by the Work and shall erect and maintain all necessary safeguards for such safety and protection; (b) prevent damage and theft to materials, supplies, and equipment whether on worksites or stored off worksites; and (c) prevent damage to other property at worksites or adjacent thereto. CONTRACTOR shall provide CLIENT with a safety plan within thirty (30) days from Commencement Date.

2.4.3 Progress Reports; Status Meetings

Progress Reports. CONTRACTOR shall periodically, but at least monthly, provide CLIENT progress reports pertaining to the Works detailing all ongoing tasks and the progress made with respect to the Calendar of Execution and the Schedule and Breakdown of the Works.

Status Meetings. Status meetings during the Works Phase will be held on a bi-weekly basis, and may be attended by Authorized Representatives and all persons designated by CLIENT and CONTRACTOR. Meeting times and frequency will be modified upon CONTRACTOR or CLIENT mutual agreement. Meeting minutes shall be recorded by CONTRACTOR for each meeting.

2.4.4 Project Commissioning and Acceptance

Project Commissioning. The Commissioning and Quality Assurance Plan in the Implementation Plan establishes procedures for commissioning each Segment of the Works. Upon completion of a Segment of the Works, CONTRACTOR, in concert with CLIENT, shall conduct a thorough and systematic performance test of each element of the completed Segment of the Works per the terms of the plan. CONTRACTOR shall correct or adjust any deficiencies in accordance with Schedule 5 and the Commissioning and Quality Assurance Plan.

Acceptance. Acceptance of Work or Segment of Work shall be in accordance with the procedures established in Section 3.7 of the Main Body of the Agreement and Schedule 5.

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2.5 Modification of the Works

2.5.1 Change Orders

Changes. The Contractor may only make changes or revisions within the Scope of Work as defined in the Implementation Plan after receipt of written approval by the City Manager or his/her designee. Such change may only be made to Tasks or Sub-Task as defined in the Scope of Work. Under no circumstance shall such change affect the:

- a. Deliverable requirements, as outlined in the Scope of Work;
- b. Due date of any Deliverable, as outlined in the Scope of Work;
- c. Compensation of any Deliverable, as outlined in the Scope of Work;
- d. Agreement compensation, as outlined in Article 2; or
- e. Agreement termination, as outlined in Article 4.

Change Request Process. In the event that circumstances warrant a change to accomplish the Scope of Work as described above, a Change Request shall be submitted that meets the following criteria:

- a. The Project Manager shall draft a written Change Request for review and approval by the City Manager to include:
 1. the name of the person requesting the change;
 2. a summary of the required change;
 3. the start date for the change;
 4. the reason and necessity for change;
 5. the elements to be altered; and
 6. the impact of the change.
- b. The City Manager shall provide a written decision on the Change Request to the Contractor within a maximum of ten (10) Business Days of receipt of the Change Request. All decisions made by the City Manager are final. Change Requests, once approved, become a part of the Agreement and become binding as a part of the original Agreement.

The Change Order shall constitute full and final settlement of all claims arising from or related to any Work either covered or affected by the Change Order or related to the events.

2.6 Monitoring of the Works

2.6.1 CMMS: Real-Time Monitoring of Works

Throughout the Works Phase, CONTRACTOR will implement its Computerized Maintenance Management System ("CMMS"), to monitor the progress of the Works. The CONTRACTOR will use CMMS to measure the timeline of the upgrades and monitor its crews on a real-time basis. All Infrastructure and Artistic Lighting installations and repairs made to the System, including poles and fixture types, drivers, LED kit, etc., will be updated in CMMS to reflect new field conditions. Built-in work order schedules will be entered into CMMS to ensure that the proper equipment and materials are on the trucks before they leave the facility.

CLIENT shall have a real-time access to CMMS to monitor the status of the streetlight asset upgrade.

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2.6.2 Construction Monitoring

CONTRACTOR shall perform checks at the end of each workday to ensure that all work performed is functioning as intended.

2.6.3 Operating Center

Within ten (10) days of the Commencement Date, an Operating Center will be established which shall have the requisite personnel, technology and equipment to monitor the indicators (CMMS reports), System alerts for a holistic status of the System, Smart City Instruments and Artistic Lighting installations.

The Operating Center shall be equipped to analyze problems, communicate with site technicians and supervisors, track issues through resolutions, and escalate problems when appropriate. For emergencies or disasters, the Operating Center shall have established procedures in place to immediately contact the correct team and respond appropriately.

Responsibilities of Operating Center personnel will include:

- Streetlight monitoring
- Emergency response
- Repairs and upgrade monitoring
- Communication and reporting between the field teams, headquarters, and the CLIENT
- CMMS administration (database updates and treatment of the work orders)

2.7 Waste Management and Recycling during the Work Phase

During the Works Phase, recycling management processes will be integrated throughout CONTRACTOR's day- to-day operation (ISO 9001-14001). CONTRACTOR shall procure and/or maintain the appropriate recycling and disposal facilities.

2.8 Project and Performance Baseline Inventory

Pursuant to Section 5.1 of the Main Body of the Agreement, prior to the Acceptance Date of the Final Segment of the Works, CONTRACTOR shall conduct an audit and inventory of the operational performance of the System after all the Infrastructure is installed. If additional Energy Savings are recognized after the audit and inventory, CONTRACTOR shall integrate and use all resulting data to calculate and revise the Performance Baseline and adjust Section 1.1 of Appendix 3A "Services Performance Objectives and Penalties" of Schedule 3, accordingly.

2.9 Measurement and Verification Plan: Energy Savings

Within sixty (60) days of the Commencement Date, CONTRACTOR shall provide CLIENT with a written Measurement and Verification Plan (M&V Plan), which shall be based on the International Performance Measurement and Verification Protocol (IPMVP). The M&V Plan shall provide the CLIENT with an accurate assessment of Energy Savings for an Annual Period and identify any Savings Excess or Savings Shortfall for the corresponding Annual Period in accordance Performance Assurance Reconciliation of Appendix 3A of Schedule 3 below.

ARTICLE 3: TECHNICAL SCOPE OF WORKS

The technical Scope of Works is detailed in the Implementation Plan.

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ARTICLE 4: TECHNICAL SPECIFICATIONS AND DRAWINGS

The Works shall be performed in accordance with the technical specifications and drawing set forth in the Implementation Plan.

APPENDIX 2A TO SCHEDULE 2 - Works Performance Objectives and Penalties

The Works Performance Objectives and Penalties are set forth below. Section 1 details the Key Performance Indicators (KPIs) that will be measured and evaluated during the Works Phase and serve as CONTRACTOR's performance metrics for the Works Phase. Section 1 details each KPI that will be measured and provides the respective formula used during the Agreement to measure the Works KPIs. Section 2, below, provides a quick reference table that details the Works KPIs and commitments. Section 3, below, depicts the penalties calculations applied for each KPI should CONTRACTOR not satisfy its respective commitments.

1. Works Phase Commitments

1.1 Starting Date of Works (Ksd)

Contract start date will commence when Dalkia receives the Notice to Proceed from the City of Santa Fe.

1.2 Commissioning (Kc)

Within nine (9) months of the Commencement Date, CONTRACTOR commits to submitting the certificate of substantial completion for the Final Segment of the Works, pursuant to the Commissioning and Quality Assurance Plan.

1.3 Recycling/Disposal (Kr)

CONTRACTOR shall recycle or properly dispose of the Lamps, housing and miscellaneous electronics of the existing fixtures. CONTRACTOR commits to achieving a 90% recycling rate, which shall be measured in accordance with the below KPI formula (Kr). Per the below formula, one (1) Lamp and associated housing and one (1) miscellaneous electronics per street light shall equal one (1) set of materials for the terms of this KPI. This commitment will be measured at the completion of the Works Phase and be based on CONTRACTOR's disposal records.

$$Kr = \frac{R}{S}$$

With S = number of upgraded street lights
R = number of sets of materials recycled/properly disposed

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2. KPI Table

Category	Sub-category	Designation	Commitment	Unit	Periodicity
Construction	Operation and Maintenance	Ksd - Starting date	Commence Operation and Maintenance of System on or before Commencement Date	Business Day	Once
	Construction	Kc - Commissioning	15 months after Commencement of Works Phase for the Final Segment of the Works	Month	Once
	Kr – Recycling/ Disposal rate	Kr - Recycling/ Disposal rate	90%	% of recycled/disposed sources	Once

3. Performance Penalties for Works Phase

3.1 General

Works Phase penalties shall be identified, documented and agreed to by CLIENT and CONTRACTOR at the respective status meetings. Upon receipt of CLIENT's penalty notification, CONTRACTOR shall have ten (10) days to notify CLIENT in writing whether the CONTRACTOR disputes any penalty. If CONTRACTOR disputes a penalty notification, then CONTRACTOR and CLIENT shall set a meeting within twenty (20) days to review the penalty claim. Notwithstanding the foregoing, the CONTRACTOR shall timely notify the CLIENT of any KPI penalties CONTRACTOR identifies.

Non-compliance with the Works Performance Objectives will result in the application of below penalties, except where the non-compliance was caused by, wholly or partially, a Supervening Event, or delays in the start of the Works or delays in installation or commissioning of Infrastructure, Smart City Instruments or Artistic Lighting that were caused by actions not attributable to CONTRACTOR.

The payments for penalties, if any, are the sole remedy of CLIENT under the Works Performance Objectives of this Schedule. Any penalties under the Works Performance Objectives shall be deducted from the Service Payments until satisfied.

3.2 Works Phase Penalties

If CONTRACTOR does not comply with its commitments set forth above for the respective KPIs, the following penalties shall apply:

Delay in starting the Works (Ksd) = \$ 1,000.00 per Business Day, until effective starting date.

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Delay in commissioning (Kc) =

- From 1 to 30 calendar days = 0.5 % of the non-commissioned Works Amount
- From 31 to 60 calendar days = 1 % of the non-commissioned Works Amount
- More than 61 calendar days = 2% of the non-commissioned Works Amount

The penalties for a delay in commissioning (Kc) are not cumulative. For example, the total penalty assessed for a delay in commissioning of 45 days would be 1 % of the Works Amount.

Recycling (Kr)

Penalties for noncompliance of the recycling rate (Kr) for the total amount of Lamps and miscellaneous electronics =

80 % \leq Kr < 90 % = Penalties of \$ 3,000.00

70 % \leq Kr < 80 % = Penalties of \$ 5,000.00

Kr < 70 % = Penalties of \$10,000.00

The penalties for a recycling (Kr) are not cumulative. For example, the total penalty assessed for a recycling rate of 75% would be \$5,000.00.

SCHEDULE 3: SCOPE OF SERVICES

Performance of Services after Acceptance ("Services Phase")

No later than the Acceptance Date of the Final Segment of the Works, or such other date agreed to in writing between the Parties, CONTRACTOR shall commence performance of the Services Phase. During the Services Phase, CONTRACTOR shall be responsible for ensuring the technical operation and maintenance of the System to achieve Energy Savings and Services objectives. CONTRACTOR shall also render such Smart City Instrument and Artistic Lighting services as described herein.

ARTICLE 1: SYSTEM ENERGY SAVINGS

The following sections of this Article 1 identify and detail the programs that serve to measure, reconcile and optimize Energy Savings.

1.1 Performance Guarantee: Performance Assurance Reconciliation

The Energy Savings commitments, specifically the Performance Guarantee as described in Article 5 in the Main Body of the Agreement (Performance Guarantee), shall be measured and reconciled annually pursuant Performance Assurance reconciliation process set forth in Section 1.1 and 1.2 of Appendix 3A "Services Performance Objectives and Penalties" of this Schedule. An Annual Performance Report will be issued upon completion of reconciliation detailing any Savings Shortfall or Saving Excess. The Contractor will provide a bond, letter of credit or other financial guarantee acceptable to the Client as a security for performance of this guarantee.

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1.2 Measurement and Verification of the Energy Savings

During the Services Phase, CONTRACTOR shall implement the M&V Plan to measure, verify and reconcile Annual Realized Savings as part of the Performance Assurance reconciliation. Annual Period measurement and verification results shall be detailed in the Annual Performance Report.

Commencing on the Acceptance Date of Final Segment of the Works, CONTRACTOR shall provide CLIENT with read-only access to real-time System measurement and verification data in CMMS used to measure, verify and reconcile Annual Realized Savings.

ARTICLE 2: SYSTEM OPERATION AND MAINTENANCE

The following sections of this Article 2 detail the scope of the System's Operations and Maintenance program that will be implemented during the Services Phase. The first two sections set forth the System's asset inventory and analysis program. The third and fourth sections set forth the maintenance and repair program for the System's assets and response measures instituted during emergencies. The fifth, sixth and seventh sections depict the monitoring program for the System: CMMS, Operating Center. The final section details the recycling program for the System that will be instituted throughout the Services Phase.

2.1 Photometric Analysis

Each Annual Period CONTRACTOR shall randomly measure 1% of the System's Infrastructure to assess the System's lighting performance compliance with the IESNA Guide for Photometric Measurement of Roadway Lighting Installations. The results of the photometric analysis will be included in the Annual Performance Report and will be the basis for the KPI commitments for lighting performance (Kip).

2.2 Inventory of the assets

Throughout the Services Phase, CONTRACTOR shall maintain a continuous inventory of the System's assets in CMMS. CONTRACTOR shall deliver to CLIENT an audit report of the inventory for the System in each Annual Performance Report. The inventory report shall include:

1. A summary description of the System; and
2. A summary of the condition of System and its conformity to the applicable standards and procedures established in the Schedule 2 (Scope of Works).

2.3 Maintenance and Repairs

CONTRACTOR shall operate and maintain the System's lighting performance and malfunctions in accordance with below provisions and the response times and monitoring commitments defined in Appendix 3A, "Services Performance Objectives and Penalties" to this Schedule.

The Operation and Maintenance of the System is split into two categories:

- Scheduled and Unscheduled Maintenance pertains to CONTRACTOR's proactive maintenance and/or restoration of the Infrastructure to its proper functioning status.
- Repair(s) pertains to CONTRACTOR's repairs rendered necessary by the history of the System (including but not limited to repair and replacement of Non-Upgraded System Assets) and/or unforeseen events (including, but not limited to, abnormal use, vandalism and accidents).

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2.3.1 Scheduled and Unscheduled Maintenance

Scheduled Maintenance, CONTRACTOR's Scheduled Maintenance program is designed to optimize the lighting performance and reduce the outage rate through proactive monitoring of the System. As part of its Scheduled Maintenance program, CONTRACTOR shall perform preventative maintenance on the System as set forth below.

- Complete audit of the assets at the beginning of Services Phase to identify general asset conditions for preventive maintenance planning.
- Cleaning of the fixtures as needed.
- Use of the CMMS and other advanced tools for predicting issues, scheduling preventive maintenance, and maintaining asset inventory and stock management.

Unscheduled Maintenance. Unscheduled Maintenance refers to CONTRACTOR's obligations to maintenance and repair any Infrastructure outages and malfunctions that are caused by Normal Wear and Tear of the Infrastructure or caused by defective Infrastructure. Unscheduled Maintenance will also include outages caused by Normal Wear and Tear to System assets that have been upgraded in accordance with Section 2.3.2 below. Unscheduled Maintenance does not include repairing outages caused by deterioration (i.e. abnormal wear or aging), accidents, acts of vandalism or acts of god.

All Scheduled Maintenance and Unscheduled Maintenance activities are covered under the monthly Services Payment amounts during the Service Phase.

2.3.2 Repairs

CONTRACTOR shall make the necessary Repairs for System outages, System malfunctions and damages to the System that are caused by the Normal Wear and Tear of Non-Upgraded System Assets or caused by deterioration (i.e. abnormal wear or aging), accidents, acts of vandalism or acts of God.

The cost of the Repairs made to the System shall be based on the list of Unit Prices for the category "Current Maintenance", as set forth in the Implementation Plan. CONTRACTOR shall submit to CLIENT, for written approval, a work order that includes the cost provisions of each Repair within ten (10) days of the reported outage, malfunction or damage. In the absence of written approval from CLIENT to perform the Repairs within fifteen (15) Business Days following receipt of CONTRACTOR's costs provisions and work order, all related KPIs and their associated penalties shall be temporarily suspended and unenforceable and CONTRACTOR shall not be obligated to make any such Repairs until receipt of CLIENT written authorization.

Any costs for Repairs shall be separately billed or surcharged and paid by CLIENT. If the CLIENT lacks other available funds to pay for the Repairs above the Damage Amount, CONTRACTOR shall not be obligated to make any such Repairs and all related KPIs and their associated penalties shall be temporarily suspended and unenforceable until such other funds are made available.

CLIENT acknowledges that it shall receive and take title to any repaired or replaced parts of the System described under this Section upon completion of installation, inspection and acceptance.

2.3.3 Incident Report

In cases of System damage, outage or malfunction caused by a third party or act of God, CONTRACTOR shall administratively manage the matter as follows.

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Once the damage, outage or malfunction is observed or reported, CONTRACTOR shall:

- secure the concerned part of the System;
- make reasonable efforts to identify the third party at fault, if any;
- make reasonable efforts to collect information and document the incident (driver information, contact information, police report number, etc.);
- assist, if applicable, with assessment activities.

CONTRACTOR shall generate a report of each incident and provide it to CLIENT.

2.4 Emergency Response

As part of the Services Payment, CONTRACTOR shall maintain on-call field personnel who are operational 24 hours per day, 365 days per year. On-call technicians shall have the authority to take initiatives and make decisions in emergency situations. On-call technicians shall have all necessary tools and plans (keys, operating diagrams, city on-call numbers, etc.) at their disposal to make the conditions safe and/or re-establish the System elements within the response times defined in Appendix 3A, "Services Performance Objectives and Penalties" to this Schedule.

Emergency response scenarios include:

- Those caused by outside influences, presenting an immediate danger to the public, such as a vehicle striking a pole or downed wires;
- Those caused by faulty System elements, such as a faulty cable or bad splice causing a mass outage; and
- Those that would not normally be deemed an emergency but for extenuating circumstances, such as a "light out" in an already under-lit area or a missing base door on a pole in close proximity to a school or day care center.

In the event of the first type of emergency, such as a pole down, CONTRACTOR shall secure the area, the extent of the damage shall be surveyed, and a report shall be generated recommending the next course of action. The appropriate action will then be placed on the schedule for Repairs.

In the event of the second type of emergency, such as faulty System equipment or infrastructure, CONTRACTOR shall visit the site immediately to do a visual inspection of the area. His/her observations shall then be relayed to the appropriate teams in order to expedite the Repair or Unscheduled Maintenance.

In the event of the third type of emergency, a CONTRACTOR shall direct a team to the site to affect immediate Repairs or Unscheduled Maintenance actions.

In each case, if the damage is due to a third party or act of God, CONTRACTOR shall take pictures and generate a report that includes all of the pertinent information (driver information, contact information, police report number, etc.) in accordance with Section 2.3.3 of this Schedule. The report shall be sent to CLIENT.

2.5 Centralized Maintenance Management Software (CMMS)

During the Services Phase, CONTRACTOR will use its Computerized Maintenance Management System ("CMMS"), to monitor the entire scope of the System and Artistic Lighting installations. CLIENT shall have access to CMMS database, which shall be updated on a real-time basis.

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CMMS shall provide the following:

- The System asset data (database, cartography, condition of the System assets, photo, description of Artistic Lighting sites)
- The current maintenance data (tickets, work orders, feedback, response time)
- The rate energy consumptions data (wattage, control)

The CONTRACTOR will provide Client access to the CMMS records during the contract and upon contract termination will coordinate with CLIENT to allow continued access to the system or the data in the system.

2.5.1 CMMS: Daily Work Schedules

Throughout the Services Phase, CONTRACTOR shall implement CMMS in order to organize each team's daily work. CONTRACTOR shall implement the following process to prioritize and execute work schedules in response to outage reports:

- Step 1: An outage is reported by any source (Operating Center, CLIENT, etc.);
- Step 2: CONTRACTOR's management team prioritizes the reported outage and distributes it to the appropriate maintenance team using CMMS's advanced prioritization functionalities;
- Step 3: CMMS electronically sends work order to maintenance team;
- Step 4: The maintenance team completes repair / maintenance work and submits completion report to the central CMMS server;
- Step 5: The management team checks the job and automatically updates the CMMS asset database.

All actions shall be recorded and stored in the CMMS, establishing a record of maintenance for each asset and a detailed history of each work order.

2.5.2 CMMS: Performance Monitoring

During the Services Phase, CONTRACTOR will use CMMS to measure the timeline of the maintenance and repairs as well as the performance of the System. All System changes, including poles and fixture types and/or LED kits, shall be updated in CMMS on a regular basis to reflect the new field conditions.

2.6 Operating Center

CONTRACTOR shall continue to operate throughout the Services Phase the Operating Center established in the Works Phase.

Responsibilities of Operating Center personnel shall continue to include:

- Streetlight monitoring
- Emergency response
- Repairs and upgrades monitoring
- Communication and reporting between the field teams, headquarters, and the CLIENT

2.7 Waste Management and Recycling

Recycling management processes shall be integrated throughout CONTRACTOR's day- to-day operation (ISO 9001-14001). CONTRACTOR shall procure and/or maintain the appropriate recycling and disposal facilities.

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ARTICLE 3: SERVICES PHASE SYSTEM REPORTS

3.1 Monthly Reports

CONTRACTOR shall provide a monthly report of the operations and maintenance activities for the preceding month, including the KPI values, within seven (7) Business Days after the conclusion of each calendar month.

3.2 System Annual Performance Report

CONTRACTOR shall provide an Annual Performance Report of the System's operating results for each Annual Period, which shall detail the achieved Energy Savings and the Services objectives of the System. The Annual Performance Report will be provided to CLIENT for review and acceptance within thirty (30) days after the close of each Annual Period.

ARTICLE 4: SMART CITY INSTRUMENTS AND ARTISTIC LIGHTING OPERATION AND MAINTENANCE

CONTRACTOR shall maintain the Artistic Lighting Installations and Smart City Instruments in a fully operable and functional condition throughout the Services Phase. Any repairs or replacement of Artistic Lighting installations and Smart City Instruments shall be authorized in writing by the CLIENT and separately billed or surcharged to CLIENT on a time and materials basis and paid by CLIENT. If the CLIENT does not have other available funds to pay for the repair or replacement of Artistic Lighting installation and Smart City Instruments, CONTRACTOR shall not be obligated to make such repairs and all related KPIs and their associated penalties shall be temporarily suspended and unenforceable until such other funds are made available.

Any maintenance activities performed on the Artistic Lighting Installations and Smart City Instruments shall be included in the monthly report described above.

ARTICLE 5: SERVICES PHASE PENALTIES, SITE VISITS AND STATUS MEETINGS

5.1 Penalties

In fulfilling its obligations as detailed hereunder, CONTRACTOR shall be subject to the Services Performance Objectives, as defined in Appendix 3A of this Schedule, "Services Performance Objectives and Penalties ". In the interest of both Parties, penalty metrics based on performance indicators are established in Appendix 3A of this Schedule as basis to measure the Services Performance Objectives.

Non-compliance with the Services Performance Objectives shall result in the application of penalties, as defined in the Appendix 3A of this Schedule, except where the non-compliance was caused by, wholly or partially, a Supervening Event or accidents, acts of vandalism or malfunction of the System due to actions not attributable to CONTRACTOR.

The penalties, if any, are the sole remedy of the CLIENT under the Services Performance Objectives of this Schedule, except as provided for in Section 4.1.1 (e) of Appendix 3A.

5.2 Site Visits

Upon request and within a reasonable timeframe, the CLIENT Representative or his designee will be afforded the opportunity to visit and inspect the System during the Services Phase. A report summarizing the inspection will be provided to the CLIENT by the CONTRACTOR following the CLIENT'S inspection.

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5.3 Status Meetings

Status meetings during the Services Phase will be held on a bi-weekly basis, and may be attended by all persons designated by the CLIENT and the CONTRACTOR. Meeting times and frequency will be modified upon CONTRACTOR or CLIENT mutual agreement. CONTRACTOR shall record and provide the CLIENT with the meeting minutes for each meeting.

ARTICLE 6: TECHNICAL MONITORING COMMITTEE; TECHNICAL ADVANCEMENTS

6.1 Technical Monitoring Committee

The CONTRACTOR commits to ensure ongoing technical monitoring in order to allow the CLIENT to benefit from Technological Advancements and to remain informed about changes in standards and regulations.

A Technical Watch Committee shall be created for this purpose. The Technical Watch Committee shall consist of an equal number of representatives from the CLIENT and from the CONTRACTOR and shall meet at the end of each Annual Period. The agenda of the meetings shall be established by the CONTRACTOR with the CLIENT's input. The purpose of these meetings shall be to inform the CLIENT about:

- potential Technological Advancements and their impact on the execution of the Agreement; and
- potential changes in any standards and regulations and about their impact on the performance of the Agreement.

6.2 Installation of Technological Advancements

CONTRACTOR shall develop a technical and financial analysis for any Technological Advancements the CLIENT requests implemented. The technical and financial analysis shall include a draft implementation and cost schedule for the installation of the Technological Advancements, as well as identify impacts the installation will have on the operating and maintenance costs of the System. Any installation of Technological Advancements shall be agreed to in writing by the Parties. The cost of the installation of any Technological Advancements will be entirely borne by the CLIENT.

The installation of Technological Advancements may have a positive or negative impact on Energy Savings and the costs of Services. Any adjustments whether in the form of savings or increased costs will be reflected in the Services Payments. If the installation of Technological Advancements causes a Material Change in the System, then the Performance Guarantee shall be adjusted in accordance with Article 5 of the Main Body of this Agreement.

ARTICLE 7: ADDITIONAL STREET LIGHTS, ARTISTIC LIGHTING AND SMART CITY PROJECTS

7.1 Addition of Street Lights to System

Upon mutual written agreement executed by both the Parties, CLIENT may request and CONTRACTOR will install and/or provide Services for additional street lights that were not part of the System on the Acceptance Date. CLIENT will provide official documents detailing the number and the nature of the additional street lights, and all other related documentation and drawings. The remuneration for the construction and installation of any additional street lights shall be agreed to by the Parties and shall be separately billed or surcharged to the CLIENT. Adjustments to the Service Payments for Services rendered for any additional street lights will be made in accordance with Section 1.1.2 of Schedule 4.

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Any additional street lights integrated into the System after the Acceptance Date will be considered a Material Change to the System. The Parties shall modify the Performance Baseline and Services Performance Measures Objectives to account for the Material Change without resulting in a Savings Shortfall or penalties.

7.2 Additional Artistic Lighting and Smart City Projects

Upon mutual written agreement that is executed by both Parties, CLIENT and CONTRACTOR may modify this Agreement for the provision of additional artistic lighting projects and/or smart city installations to be provided during the Services Phase. The modification shall specify the agreed upon terms and conditions for any additional artistic lighting projects and/or smart city installations.

7.3 Additional Funding Sources

By execution of this Agreement, the CLIENT, without any further approvals needed, has been duly authorized by its respective authorities to use (but is not required to use) additional savings and additional funding sources derived herein and from ancillary engagements to fund the construction and maintenance of additional street lights, artistic lighting and smart city projects.

APPENDIX 3A TO SCHEDULE 3 - Services Performance Objectives and Penalties

The Services Performance Objectives and Penalties for the System are detailed below. Sections 1 and 2 describe the System's Key Performance Indicators (KPIs) that will be measured and evaluated during the Services Phase and serve as CONTRACTOR's performance metrics for the System during the Services Phase. Sections 1 and 2 below describe each KPI that will be measured and provide the respective formula used during the Agreement to calculate the KPIs. Section 3, below, details CONTRACTOR's commitments for each KPI, which will be measured in accordance with Section 1 and 2. Section 4, below, depicts the penalties applied to each commitment.

The below KPIs apply only to the System. The below KPIs do not apply to the Artistic Lighting installations or Smart City Instruments.

1. Energy Savings: System Performance Guarantee KPI

1.1 System Guaranteed Annual Savings (Ke)

Guaranteed Annual Savings reflects the annual savings in kWh that CONTRACTOR commits to under the Performance Guarantee. Guaranteed Annual Savings is the difference in kWh between the System Baseline and the Performance Baseline over an Annual Period. CONTRACTOR commits to achieving the Guaranteed Annual Savings during the Performance Guarantee Period. The Guaranteed Annual Savings commitment is reconciled through the calculation of the Annual Realized Savings for an Annual Period and comparing that result to the Guaranteed Annual Savings for the corresponding Annual Period, pursuant Section 1.2 of this Appendix 3A, below.

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In accordance with the M&V Plan, CONTRACTOR shall calculate Annual Realized Savings by taking the difference in kWh between the actual energy consumption of the System and the System Baseline for the respective Annual Period. The commitment in terms of Guaranteed Annual Savings is set forth below:

The KPI associated to the Guaranteed Annual Savings (K_e) is calculated as follow:

$$K_e = K_{sb} - K_{pb}$$

Where:

$K_e = 2,234,042$ kWh per Annual Period
 $K_{sb} = 3,955,572$ kWh per Annual Period
 $K_{pb} = 1,721,530$ kWh per Annual Period

And

$$K_{sb} = K_{sb \text{ metered}} + K_{sb \text{ unmetered}}$$

Where:

K_{sb} = System Baseline: Total consumption in kWh for an Annual Period prior to Works, the sum of metered and unmetered lights.

$K_{sb \text{ metered}}$ = Total measured kWh usage of metered street lights in the System Baseline for an Annual Period, as measured and billed by Public Service Company of New Mexico

$K_{sb \text{ unmetered}}$ = Total expected kWh usage of unmetered street lights in the System Baseline for an Annual period, as defined by the corresponding "Monthly kWh Usage" (multiplied by 12) in the Implementation Plan for each streetlight in the inventory.

And

$$K_{pb} = K_{pb \text{ metered}} + K_{pb \text{ unmetered}}$$

Where:

K_{pb} = Performance Baseline: Total consumption in kWh for Annual Period after completion of Works, the sum of metered and unmetered lights.

$K_{pb \text{ metered}}$ = Total measured kWh usage of metered street lights in Performance Baseline for an Annual Period, as measured and billed by Public Service Company of New Mexico.

$K_{pb \text{ unmetered}}$ = Total expected kWh usage of unmetered street lights in the Performance Baseline for an Annual period, as defined by the corresponding "Monthly kWh Usage" (multiplied by 12) defined in PNM Rate 20 for each streetlight in the to-date CMMS defined inventory.

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1.2 Performance Assurance Reconciliation

A Performance Guarantee Period savings reconciliation will be performed at the end of each Annual Period as follows unless otherwise agreed:

- a. At the conclusion of each Annual Period, CONTRACTOR will calculate the System's Annual Realized Savings and compare the result to the Guaranteed Annual Savings for the corresponding Annual Period.
 - I. Should the Annual Realized Savings be greater than the Guaranteed Annual Savings for the corresponding Annual Period, a Savings Excess shall be recorded accordingly and be available for other work under this agreement.
 - II. Should the Annual Realized Savings be less than the Guaranteed Annual Savings, a Savings Shortfall shall be recorded and paid in accordance with the terms below and Section 4.1.2 of this Appendix 3A.
- b. Within sixty (60) days following issuance and acceptance by CLIENT of the Annual Performance Report for the corresponding Annual Period, CONTRACTOR shall pay to CLIENT the Savings Shortfall, if any, identified in the Annual Performance Report and shall have fulfilled its obligations under the Performance Guarantee for the applicable Annual Period and the Shortfall Payment being then equal to the Guaranteed Annual Savings for the applicable Annual Period.
- c. The payments and credits based on Savings Shortfalls, if any, are the sole remedy of CLIENT under this Performance Guarantee; provided, however, if the Penalties Cap is exceeded, CLIENT shall have the right to terminate the Agreement pursuant to Section 9.1 (b) (1) of the Main Body of the Agreement.

2. System Operations and Maintenance KPIs

CONTRACTOR will operate and maintain the System throughout the Services Phase of the Agreement, subject to the penalties for the below KPIs.

2.1 Accuracy of CMMS Database (Km)

During Services Phase, CONTRACTOR will implement its CMMS software to monitor the assets. Through the software, CLIENT will be able to monitor CONTRACTOR's performance objectives (KPIs) and CONTRACTOR'S contractual commitments. The KPI for the accuracy of the CMMS database reflects CONTRACTOR's commitment to providing accurate and timely data inputs for System monitoring. CONTRACTOR commits to a 97% accuracy rate for a given month. The following formula shall be used to calculate the Accuracy of CMMS Database (Km):

$$Km = 1 - \frac{D}{S}$$

With:

D =	Number of major discrepancies in CMMS CLIENT has notified CONTRACTOR of during the respective month (except additional assets or changes CLIENT has not communicated to CONTRACTOR)
S =	Number of street lights existing in the inventory during the month

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2.2 Outage rate (Ko)

CONTRACTOR will measure the number of street light outages that occur each month. This KPI measures the Scheduled Maintenance program's efficiency in proactively servicing the System to prevent outages.

CONTRACTOR commits to a less than 2% outage rate for existing inventory for the respective month. The KPI associated with the monthly outage rate is calculated as follows:

$$Ko = \frac{P}{S}$$

With:

P =	Number of outages during the month
S =	Number of street lights existing in the inventory during the month

Notwithstanding the foregoing, outages caused by CLIENT or third-party actions, whether construction or otherwise, accidents, vandalism, or CLIENT's decision to turnoff or shutdown the System or any part thereof for any reason will not be included in the outage rate measurement.

2.3 Availability of the Assets (Ka)

The KPI for the availability of the assets (Ka) measures the average percentage of time that the System is operating on a monthly basis. For this KPI, CONTRACTOR reviews each street light individually to calculate the number of days that each street light is operating and functioning within the respective month. The KPI associated with the monthly availability of the assets is calculated as follow:

$$Ka = \frac{\sum_i^N (\frac{d_i}{D_m})}{N}$$

With:

N =	The number of fixtures existing in the inventory for the month (i.e. the total number of street lights less accepted or scheduled outages)
D _m =	Days in the given month
d _i =	Days that the given fixture (i) was out during the month
Ka =	The average amount of time all fixtures were out each month (calculated on an individual basis)

The operational or functional status of streetlight for the terms of calculating this KPI does not include malfunctions or operational issues caused by CLIENT or third-party actions, whether construction or otherwise, accidents, vandalism, or CLIENT'S decision to turnoff or shutdown the System or any part thereof for any reason.

CONTRACTOR commits to Ka meets or exceeds 98%.

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2.4 Self-detection (Ks)

Self-detection of outages reflects CONTRACTOR's commitment to proactively monitor the System. Through its self-detection program, CONTRACTOR monitors the System in order to proactively locate and repair outages. CONTRACTOR commits that it will self-detect at least 75% of the outages inputted into CMMS in a given month. The KPI associated for the monthly self-detection rate is calculated as follow:

$$Ks = \frac{NOC}{P}$$

With:

NOC =	Number of outages CONTRACTOR detects in a month
P =	Total number of inputted outages in a month (which includes CLIENT's and third party reported detections)

2.5 Emergency Response time / Delay of Unscheduled Maintenance or Repairs

Under the below subsections, CONTRACTOR commits to intervene in cases of outages, malfunctions or damages to the System in order to:

- Secure the installation in emergencies, if necessary
- Proceed with the repairs within the response times

Notwithstanding anything herein, if CONTRACTOR is required to obtain approval from CLIENT or permit for maintenance of traffic (MOT) or if the malfunction or outage is inaccessible due to no fault of CONTRACTOR or if materials need to be procured, CONTRACTOR shall diligently work to obtain the requisite approval, permits, access and/or materials and shall be allotted a reasonable amount additional time to meet the KPI commitments set forth below.

2.5.1 Emergency Response time (Kt)

In cases of System outage, malfunction or damage that are a public safety concern as set forth in Section 2.4 of Schedule 3, CONTRACTOR commits to respond to the outage, malfunction or damage within three (3) hours of the detection or notice. CONTRACTOR commits to be at the location of the outage, malfunction or damage and to commence the necessary actions to secure the site within the stated timeframe. The KPI associated with the emergency response time (Kt) is calculated as follow:

- From the detection of the street light outage or damage that is a public safety concern by CONTRACTOR or receipt of an email/fax/call from authorized person(s) (CLIENT, police, firemen, or other persons designated by CLIENT and CONTRACTOR is on notice of)
- And shall continue until CONTRACTOR is onsite to secure the installation.

This KPI is calculated only for the cases where the installation must be secured in CONTRACTOR's professional judgment. If simultaneous street light outages or damages occur that are of a public safety concern, Kt penalty metric shall only apply to the first received report. CONTRACTOR shall respond to subsequent reported emergencies in order of priority and/or receipt.

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2.5.2 Delay of Unscheduled Maintenance or Repairs (Kd1, Kd2, Kd3)

Kd₁ and Kd₂ In cases of street light outages caused by or related to the Equipment malfunction only, CONTRACTOR commits to repair the outage within the timeframes described below for Kd₁ and Kd₂. The metrics used to determine compliance with delay of Unscheduled Maintenance or Repairs for Kd₁ and Kd₂ shall be calculated as follows:

- From the detection of the Equipment malfunction by CONTRACTOR or receipt of an email/fax/call from authorized person(s) (CLIENT or other persons designated by the CLIENT and CONTRACTOR is on notice of)
- And shall continue until CONTRACTOR repairs outage.

Commitments for the Delay of Unscheduled Maintenance or Repairs for Kd₁ and Kd₂ are as follows:

- The KPI for Kd₁ shall apply for single street light outage or malfunction. CONTRACTOR commits to repair a single outage or malfunction within 5 business days of detection or notice.
- The KPI for Kd₂ shall apply when more than three (3) street lights in a row are out or malfunctioning. CONTRACTOR commits to repair such outages within 2 business days of detection or notice.

Kd₃ In cases of street light outages caused by or related to damage to the poles, arms or foundations, CONTRACTOR commits to repair the outage within the timeframes described below for Kd₃. The metrics used to determine compliance with delay of Unscheduled Maintenance or Repairs commitments for Kd₃ shall be calculated as follows:

- From the detection of the outage by the CONTRACTOR or receipt of an email/fax/call from authorized person(s) (CLIENT or other persons designated by the CLIENT and CONTRACTOR is on notice of)
- And shall continue until CONTRACTOR repairs outage.

Commitments for the Delay of Unscheduled Maintenance or Repairs for Kd₃ is as follows:

- For KPI for Kd₃, CONTRACTOR commits to repair the outage within 6 weeks.

2.6 Monthly Reports (Kg)

CONTRACTOR shall provide a monthly report of its operations and maintenance activities for the preceding month, including the KPI values, within seven (7) Business Days after the conclusion of each calendar month.

2.7 Lighting Performance (Kip)

During the Services Phase, CONTRACTOR shall randomly measure 1 % System's Infrastructure each Annual Period to assess the System's lighting performance compliance with the IESNA Guide for Photometric Measurement of Roadway Lighting Installations. CONTRACTOR will measure the lighting performance of the sampled lights to determine compliance with the illuminance standards set forth in the IESNA Guide for Photometric Measurement of Roadway Lighting Installations for the respective roadway.

CONTRACTOR commits to achieving 100% compliance for lighting performance in the sampled street lights, considering the space-to-mounting ratio is between 3 and 5. Calculations to determine compliance with lighting performance commitment shall be based on the below formula:

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The KPI associated with the lighting performance is calculated as follow:

Considering: $3 \leq \frac{S}{MH} \leq 5$

$$Klp = \frac{I + (E_{avg} / E_{min})}{I_0 + (E_{avg0} / E_{min0})}$$

With:

S/MH =	Spacing-to-mounting height ratio, ratio of the distance between luminaires centers, along the center line of the street, to the mounting height above the roadway
I =	Average measured illuminance (Lux)
I ₀ =	IES reference value for the considered type of configuration (see tab below)
E _{avg} =	Minimum maintained average horizontal illuminance at pavement
E _{avg0} =	IES reference value for the minimum maintained average horizontal illuminance at pavement (see tab below)
E _{min} =	Minimum maintained horizontal illuminance at pavement
E _{min0} =	IES reference value for the minimum maintained horizontal illuminance at pavement (see tab below)

Road Type	Average Illuminance Level	Eavg0/ Emin0
Urban Local	7	6
Collector	9	4
Major	13	3
Freeway B	6	3

As budget allows, Client will prioritize addition of light fixtures. If directed, Contractor will install additional fixtures pursuant to Schedule 3 Article 7.1.

2.8 Average Installed Wattage (Kw)

The average installed wattage (Kw) reflects the total wattage of the System upon completion of the Works. Maintenance of the averaged installed wattage at a consistent rate throughout Agreement plays an important role in maintaining Energy Savings and lighting performance. The average installed wattage metric reflects CONTRACTOR's commitment to repairing and/or replacing street lights with infrastructure that is consistent with the System's wattage output after Acceptance. CONTRACTOR's commitment for average installed wattage (Kw) is 96 Watts which shall be measured in accordance with the below KPI formula Kw. The KPI Kw shall be calculated on an annual basis and included in the Annual Performance Report.

$$Kw = \frac{W}{S}$$

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With:

W =	Total Wattage after Acceptance of Works
S =	Number of street lights taken into account during the Annual Period

3. KPI Table

Category	Sub-Category	Designation	Commitment	Unit	Periodicity
Energy	Consumptions	Ke - Guaranteed Annual Savings	2,234,042	kWh	Each Annual Period
Operations & Maintenance	Operations & Maintenance	Km - Accuracy of CMMS database	97%	% of assets	Monthly
	Maintenance	Ko - Outage rate	Less than 2%	% of assets	Monthly
	Maintenance	Ka - Availability of the assets	More than 98%	% of assets	Monthly
	Operations	Ks - Self-detection	More than 75%	% of tickets	Monthly
	Operations	Kt - Emergency Response time	3 hours	Hour	Per Occurrence
	Operations	Kd ₁ - Delay of Unscheduled Maintenance or Repairs- single SL*	5 business days	Business Day	Per Occurrence
	Operations	Kd ₂ - Delay of Unscheduled Maintenance or Repairs - more than 3 SL* in a row	2 business days	Business Day	Per Occurrence
	Operations	Kd ₃ - Delay of Unscheduled Maintenance or Repairs - Poles, Arms and Foundation	6 Weeks	Business Week	Per Occurrence
	Operations	Kq - Monthly Report	one report	Report	Monthly
	Operations	Kip - Lighting Performance	100 %	% of IES standard values	Each Annual Period
	Operations	Kw - Average Installed Wattage	99 W	W	Each Annual Period

*SL = Street Light

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4. Performance Penalties

4.1 Penalties

4.1.1 General Conditions

- a. CMMS. CMMS shall be platform used to verify compliance with Operation and Maintenance commitments for the penalties hereunder (except for the KPI for lighting performance which will be reconciled in a separate report).
- b. Savings Shortfalls. Any Saving Shortfalls will be reconciled on an annual basis in accordance with the terms and conditions of Section 1.1 and 1.2 of this Appendix 3A.
- c. O&M Penalties: Notice. If CLIENT observes any delay, lack of performance or other failures of CONTRACTOR to achieve its KPI commitments which are not then properly documented and reflected in CMMS or in the lighting performance report, CLIENT shall notify CONTRACTOR at the next status meeting of the observed occurrence or deficiency. Upon receipt of the notification, CONTRACTOR shall have ten (10) Business Days to notify CLIENT in writing whether CONTRACTOR disputes CLIENT's claim. If CONTRACTOR disputes the penalty notification, then CONTRACTOR and CLIENT shall set a meeting within twenty (20) days to review CLIENT's penalty claim. If CONTRACTOR does not dispute the claim, CONTRACTOR shall reduce the CLIENT's next monthly invoice by the appropriate penalty amount. Notwithstanding the foregoing, the CONTRACTOR shall timely notify the CLIENT of any KPI penalties CONTRACTOR identifies.
- d. Application of O&M Penalties. The penalties apply on the monthly Services Payments only. No penalties will apply on Works Payments.
- e. Service Payment Setoff. If CONTRACTOR incurs monthly KPI penalties that amount to more than seventy-five percent (75%) of the amount of the monthly Service Payment in three (3) consecutive months, then CLIENT, without being in default hereunder, has the right to withhold or setoff the next month's Service Payment and every months' Service Payment thereafter until CONTRACTOR's monthly penalties for a subsequent month are less than seventy-five percent (75%) of the amount for that subsequent month's Services Payment amount. CLIENT shall be obligated to pay the CONTRACTOR any setoff or withheld Service Payment amount, less any penalties, upon a subsequent month's penalty amount being less than seventy-five percent (75%) of that month's Service Payment amount.
- f. Penalties Cap. The Parties agree that cumulative amount of all Savings Shortfall and O&M penalty payments made to CLIENT or deducted from the Services Payments under the terms of this Agreement shall not exceed \$100,000.00 ("Penalties Cap"). CONTRACTOR shall have no obligation to pay or deduct any penalties or shortfall amounts above the Penalties Cap. Notwithstanding Section 9.1 (b) (1) (i) in the Main Body of the Agreement, CLIENT shall have the right to terminate the Agreement pursuant to Section 9.1 (b) (1) in the Main Body of the Agreement, subject to the applicable Termination Payment, if cumulative amount of all Savings Shortfall and O&M penalty payments equals or exceeds Penalties Cap.

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- g. Supervening Event: CLIENT Breach of Obligation. All penalties stated herein under the Services Phase and the enforcement thereof shall be suspended during any Supervening Event or during any duration CLIENT is in breach of its obligations under this Agreement. The penalties will not be reinstituted until the cause of the event has been resolved and the System has been restored to its pre-event condition and/or CLIENT has cured any breach.

4.1.2 Energy: Savings Shortfall

If CONTRACTOR doesn't reach its commitments for an Annual Period for K_e , then a Savings Shortfall occurs and CONTRACTOR will reimburse the balance to CLIENT as described below and in accordance with the "Performance Assurance Reconciliation" described in Section 1 of this Appendix 3A.

KPI	KPI Value	Penalty Value (PE)
Guaranteed Annual Savings (K_e)	$K_{eY} \geq K_e$	$-1.0 \times AES$

With:

$K_e =$	Contractual reference (see Section 3 above, KPI) (Guaranteed Annual Savings)
$K_{eY} =$	Real value of the considered Annual Period (Annual Realized Savings)
$AES =$	Difference between the expected and real kWh ($K_{eY} - K_e$) consumed multiplied by the Constant Energy Rate.

4.1.3 Operations and Maintenance

For each following KPI below, if CONTRACTOR fails to reach its commitments, the associated coefficient or amount will be applied to or deducted from the next month's Services Payment.

Monthly Measured O&M KPIs

KPI	KPI's Value	Penalties Coefficient (P_m)
Accuracy of CMMS Database (K_m)	$95\% \leq K_{mM} < 99\%$	0.99
	$90\% \leq K_{mM} < 95\%$	0.95
	$80\% \leq K_{mM} < 90\%$	0.90
	$70\% \leq K_{mM} < 80\%$	0.75
	$K_{mM} < 70\%$	0.60
KPI	KPI's Value	Penalties Coefficient (P_o)
Outage Rate (K_o)	$4\% \geq K_{oM} > 2\%$	0.97
	$6\% \geq K_{oM} > 4\%$	0.90
	$8\% \geq K_{oM} > 6\%$	0.75
	$K_{oM} > 8\%$	0.60
KPI	KPI's Value	Penalties Coefficient (P_a)
Availability of Assets (K_a)	$99\% \leq K_{aM} < 99.5\%$	0.97
	$94\% \leq K_{aM} < 99\%$	0.90
	$90\% \leq K_{aM} < 94\%$	0.75
	$K_{aM} < 90\%$	0.60
KPI	KPI's Value	Penalties Coefficient (P_s)
Self-Detection (K_s)	$70\% \leq K_{sM} < 75\%$	0.99
	$60\% \leq K_{sM} < 70\%$	0.95
	$50\% \leq K_{sM} < 60\%$	0.80
	$K_{sM} < 50\%$	0.60

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With:

KmM =	Value of the considered month
Pm =	Penalties coefficient applied on the corresponding monthly Services Payment
KoM =	Value of the considered month
Po =	Penalties coefficient applied on the corresponding monthly Services Payment
KaM =	Value of the considered month
Pa =	Penalties coefficient applied on the corresponding monthly Services Payment
KsM =	Value of the considered month
Ps =	Penalties coefficient applied on the corresponding monthly Services Payment

- Emergency Response Time (Kt): If CONTRACTOR fails to meet the designated Response times, Kt, in accordance with the terms of the Agreement, then CONTRACTOR shall be penalized \$100.00 per hour for every hour CONTRACTOR's response time exceeds the established metric.
- Delay of Unscheduled Maintenance or Repairs--single street light (Kd1): If CONTRACTOR fails to meet the designated Unscheduled Maintenance or Repairs times under Kd1, then CONTRACTOR shall be penalized \$100.00 per Business Day, until outage, malfunction or damage has been fixed.
- Delay of Unscheduled Maintenance or Repairs-more than 3 street lights in a row (Kd2): If CONTRACTOR fails to meet the designated Unscheduled Maintenance or Repairs times under Kd2 then CONTRACTOR shall be penalized \$20.00 per hour, until outage, malfunction or damage has been fixed.
- Delay of Unscheduled Maintenance or Repairs-Poles, Arms and foundations (Kd3): If CONTRACTOR fails to meet the designated Unscheduled Maintenance or Repairs times under Kd3 then CONTRACTOR shall be penalized \$100.00 per Business Day, until outage, malfunction or damage has been fixed.
- Monthly Report (Kq): If there is a delay in CONTRACTOR's submission the operation and maintenance monthly report, then CONTRACTOR shall be penalized \$15.00 per Business Day, until the delivery of the report.

Annually Measured O&M KP/s

CONTRACTOR shall measure Kip and Kw once each Annual Period. If CONTRACTOR fails to reach its commitments for Kip in an Annual Period, then a penalty coefficient will be applied as set forth below.

KPI	KPI's Value	Penalties Coefficient (Pip)
Lighting Performance (Kip)	$90\% \leq Kip_y < 100\%$	0.99**
	$80\% \leq Kip_y < 90\%$	0.95**
	$70\% \leq Kip_y < 80\%$	0.85**
	$60\% \leq Kip_y < 70\%$	0.75**
	$Kip_y < 60\%$	0.60**

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With:

Kip_y =	Value of the considered Annual Period
Pip =	Penalties coefficient applied on each corresponding monthly Services Payment thereafter until the Lighting Performance deficiency is corrected. **If the Lighting Performance deficiency is not related to CONTRACTOR's design or implementation of the Works (e.g. insufficient tree trimming, caused by third-party action, etc.), then the above penalty shall not apply. CONTRACTOR and CLIENT will jointly perform a new Lighting Performance measurement upon mitigation of deficiency.

If CONTRACTOR fails to reach its commitments for Kw in an Annual Period, then a penalty coefficient will be applied as described set forth below.

KPI	KPI's Value	Penalties Coefficient (Pw)
Average Installed Wattage (Kw)	$Kw < KwY < 1.01 \times Kw$	0.99
	$1.01 \times Kw < KwY \leq 1.03 \times Kw$	0.97
	$1.03 \times Kw < KwY \leq 1.05 \times K$	0.90
	$1.05 \times Kw < KwY \leq 1.10 \times K$	0.80
	$1.10 \times Kw < KwY$	0.60

With:

Kw =	Contractual reference (see Section 3 above, KPI)
KwY =	Real value of the considered Annual Period
Pw =	Incentive coefficient applied on the preceding Annual Period's Services amount

4.2 Incentives - deleted

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SCHEDULE 4: PAYMENT MECHANISM

1. Compensation

- a. The City shall pay to the Contractor in full payment for services satisfactorily performed as described below:

1. LED Street Light Conversion:

The City shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work for the LED Street Light Conversion at the rate established by the Implementation Plan⁷) in an amount not to exceed Two Million Five Hundred Forty-Three Thousand One Hundred and Ninety-Five Dollars (\$2,543,195.00), excluding gross receipt tax. The New Mexico gross receipts tax levied on the amounts payable under this Agreement totaling (\$214,582.10) shall be paid by the City to the Contractor. **The total amount payable to the Contractor under this paragraph of this Agreement, including gross receipts tax and expenses, shall not exceed (\$2,757,777.10).** This amount is a maximum and not a guarantee that the work assigned to be performed by Contractor under this Agreement shall equal the amount stated herein. The parties do not intend for the Contractor to continue to provide services without compensation when the total compensation amount is reached. Contractor is responsible for notifying the City when the services provided under this Agreement reach the total compensation amount. In no event will the Contractor be paid for services provided in excess of the total compensation amount without this Agreement being amended in writing prior to those services in excess of the total compensation amount being provided.

2. Routine Street Light Maintenance:

The City shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work for Routine Street Light Maintenance (As Detailed in the Implementation Plan "A-3") the amount of One Hundred Seventy-Nine Thousand Seventy-Four Dollars and Sixty Cents (\$179,074) per fiscal year excluding gross receipt tax. The New Mexico gross receipts tax levied on the amounts payable under this Agreement per fiscal year (\$15,109.42) shall be paid by the City to the Contractor. The amount due shall be paid monthly in twelve equal payments. **The total amount payable to the Contractor under this paragraph of this Agreement, including gross receipts tax and expenses, shall not exceed (\$194,184.02) per fiscal year.** This amount is based upon 3,499 street lights in the Santa Fe system. These amounts may be adjusted to account for current inflation rates based on the Consumer Price Index (CPI) as established by the Bureau of Economic Analysis (BEA) of the United States Department of Commerce or increase or decrease in street light numbers. Any adjustments can be performed administratively at the time a Purchase Order is opened and/or amended and does not necessitate amendment to this agreement.

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3. Payment is subject to availability of funds pursuant to the Appropriations Paragraph in this agreement and to any negotiations between the parties from year to year pursuant to Scope of Work, and to approval by the City. All invoices MUST BE received by the City no later than thirty (30) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

Contractor must submit a detailed statement accounting for all services performed and expenses incurred. If the City finds that the services are not acceptable, within thirty days after the date of receipt of written notice from the Contractor that payment is requested, it shall provide the Contractor a letter of exception explaining the defect or objection to the services, and outlining steps the Contractor may take to provide remedial action. Upon certification by the City that the services have been received and accepted, payment shall be tendered to the Contractor within thirty days after the date of acceptance. Payment shall be made by ACH. However, the City shall not incur late charges, interest, or penalties for failure to make payment within the time specified herein.

1.1 Price Adjustments to Service Payments: CPI

Price adjustments will be made in accordance with the percentage change in the U.S. Department of Labor Consumer Price Index (CPI) for the Santa Fe area. The price adjustment rate will be determined by comparing the percentage difference between the CPI in effect for the base year six-month average (January through June 2017) and each January through June six month average thereafter. The percentage difference between those two CPI issues will be the price adjustment rate for the Services Payments, Unit Prices and other applicable pricing. The price adjustment rate shall be determined at the beginning of each Annual Period and applied thereafter.

1.2 Adjustment to Services Payments for Additional Street Lights

A fixed price of \$5.00 per additional street light (with smart control) per month will be applied on Services Payments for each additional streetlight receiving Services pursuant to Article 7 of Schedule 3. Section 1.1.1 above shall apply to any adjustments to Services Payments for Services rendered to additional street lights.

2. Non-recourse Limitation; Unconditional Payment Obligation.

CLIENT'S acceptance of Works and Acceptance of any Segment of the Works is non-recourse and final. After the Acceptance of each Segment of the Works, the obligations of CLIENT to make Works Payments under this Agreement for the accepted Segments of the Works and to perform and observe the other covenants and agreements contained in this Agreement shall be absolute and unconditional in all events without abatement, diminution, deduction, set-off or defense, for any reason whatsoever.

3. Adjustments for Performance.

Penalties apply on the Services Payments only, in accordance with Schedule 2 and Schedule 3. Notwithstanding the foregoing, any Savings Shortfalls or Savings Excess will be accounted for in accordance with Appendix 3A to Schedule 3.

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4. Services Payment and Works Payment Schedule

Price: As consideration of CONTRACTOR's performance of the Works and the Services as described in Schedule 2 (Technical Scope and Works) and Schedule 3 (Scope of Services), CLIENT shall pay to CONTRACTOR the amounts identified below which shall be invoiced on a monthly basis beginning on the Acceptance Date for the corresponding Segment of the Works for the Works Payments, and on Commencement Date for the Services Payments.

If the Acceptance of any Segment of the Works is delayed, the payment schedule for the Works Payments and Services Payments will be adjusted accordingly.

5. Payments.

CLIENT agrees it will make all amounts payable by CLIENT under or with respect to this Agreement within thirty (30) days of receipt of the invoice by electronic funds transfer of immediately available funds as directed in writing by CONTRACTOR.

CLIENT shall pay CONTRACTOR a charge on any payment not paid on the date such payment is due at the rate of six percent (6.00%) per annum or the maximum amount permitted by law, whichever is less, from such date.

If CLIENT disagrees with any portion of an invoice, it shall notify CONTRACTOR in writing of the amount in dispute and the reason for its disagreement within twenty-one (21) days of receipt of the invoice, and shall pay the portion not in dispute. If CLIENT fails to pay CONTRACTOR within thirty (30) days after receipt of an invoice, the CLIENT shall pay interest to CONTRACTOR beginning on the twenty-second day after payment was due, computed at rate per annum as set forth above.

SCHEDULE 5: ACCEPTANCE PROCEDURES

Project Commissioning

CONTRACTOR shall implement the Commissioning and Quality Assurance Plan in partnership with the CLIENT during the Works Phase. CONTRACTOR shall implement a rolling Works commissioning process. As quickly as lights are being installed, CONTRACTOR shall work with the CLIENT to get them certified and approved. This will be repeatable and fair for both Parties and allows the project to proceed with the utmost quality and speed.

Acceptance Procedures

In accordance with the Commissioning and Quality Assurance Plan, when CONTRACTOR believes that all, or an independent, definable phase or portion, of a Segment of the Works is substantially complete, CONTRACTOR will submit a certificate of substantial completion to CLIENT which shall be subject to the following:

- a. If CLIENT concurs that the described Segment of the Works as performed is substantially complete, CLIENT will accept that Segment of the Works by signing a Certificate of Acceptance and returning it to CONTRACTOR;
- b. If CLIENT does not concur that the Segment of the Works is substantially complete, then CLIENT shall notify CONTRACTOR within five (5) Business Days of any discrepancies;

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- c. To the extent CONTRACTOR does not dispute the discrepancies raised by CLIENT, CONTRACTOR shall correct the Works to conform to the description of the Work set forth herein, and resubmit the certificate of substantial completion to CLIENT;
- d. If CONTRACTOR disagrees with the discrepancies raised by CLIENT, CONTRACTORS shall notify CLIENT of a dispute and such dispute shall be resolved in accordance with the dispute resolution provisions of the Agreement;
- e. If the CLIENT Representative does not deliver written notice to CONTRACTORS within ten (10) Business Days of receiving the certificate of substantial completion, in the mutual interests of the Project proceeding in a timely manner, the Parties shall immediately refer the matter for determination in accordance with the applicable dispute resolution procedure as set forth herein.

To the extent that any Segment requires multiple certificates of substantial completion, the final non-recourse Certificate of Acceptance for each Segment shall determine the date on which the Acceptance Date of that Segment of the Works is achieved.

Certificate of Acceptance

The Final Segment of the Works has been measured against its acceptance criteria and deemed substantially complete, and is therefore formally accepted by the City of Santa Fe.

CITY OF SANTA FE

NAME AND TITLE

DATE: _____