

## ENERGY AND CONSTRUCTION SERVICES CONTRACT

This Energy and Construction Services Contract (this "Contract") is entered into as of [Insert Date and Year] (the "Effective Date") by and between Schneider Electric Buildings Americas, Inc. ("ESCO") and **Customer** **Legal Name Here [Include State]** ("Customer").

Commented [ML1]: TBD collaboratively with the district

### ARTICLE 1 – DEFINITIONS

- 1.1. "Actual Savings" means the total savings realized or stipulated to by Customer, as determined using the procedures for measurement of savings set forth in Schedule D and Schedule E.
- 1.2. "Change Order" means a written document executed by both parties for purposes of modifying the Scope of Work, the Contract Price, the Contract Time, and/or the Performance Guarantee.
- 1.3. "Contract Documents" means, collectively, this Contract and all schedules, exhibits, and other documents attached hereto or expressly incorporated by reference herein or therein, each as the same may be amended, modified or supplemented from time to time by Change Orders or other written amendments executed in accordance with the terms and conditions of this Contract, including without limitation each of the following documents:

Schedule A: Scope of Work  
Schedule B: Performance Assurance Support Services Plan  
Schedule C: Performance Guarantee  
Schedule D: Measurement & Verification ("M&V") Plan  
Schedule E: Customer Responsibilities for Performance Guarantee

The Contract Documents are hereby made part of the Contract as if set forth in full herein and are intended to include all items necessary for ESCO's proper execution and completion of the Work.

- 1.4. "Date of Commencement" means the date on which ESCO receives payment of the Project Development Costs.
- 1.5. "Deliverables" means the Products, Software, documents, and services provided under this Contract, together with the information and technologies included therewith.
- 1.6. "Excess Savings" means the amount (if any) by which Actual Savings exceed the Guaranteed Cumulative Savings to date, including any Actual Savings achieved prior to the Savings Guarantee Commencement Date.
- 1.7. "Final Completion" means that Substantial Completion of the Project has been achieved and all Punch List Items have been completed.
- 1.8. "Guaranteed Annual Savings" means the amount of savings guaranteed by ESCO for a given Guarantee Year, as set forth in Schedule C.
- 1.9. "Guaranteed Cumulative Savings" means, with respect to the entire Performance Period or any other specified period, the total amount of savings guaranteed by ESCO for such period, as set forth in Schedule C.
- 1.10. "Guarantee Year" means any twelve (12) month period that begins on the Savings Guarantee Commencement Date or any anniversary thereof and that occurs during the Performance Period.
- 1.11. "Notice" means written notice delivered in accordance with Section 11.1.

- 1.12. "PASS Fee" means the annual dollar amount to be paid by Customer under the PASS Plan.
- 1.13. "PASS Plan" means the Performance Assurance Support Services Plan set forth in Schedule B.
- 1.14. "PASS Services" means the services to be provided by ESCO under the PASS Plan.
- 1.15. "Performance Guarantee" means ESCO's guarantee to Customer as set forth in Schedule C, as supplemented and/or modified by the terms and conditions of the Contract Documents applicable thereto.
- 1.16. "Performance Period" has the meaning set forth in Schedule C.
- 1.17. "Project" means the materials, equipment, labor, services and improvements to the Project Site(s) to be provided by ESCO in accordance with and subject to the terms and conditions of this Contract, as set forth in the Scope of Work. For the avoidance of doubt, the Scope of Work shall represent the entirety of the intended and agreed upon scope of the Project.
- 1.18. "Project Development Costs" means all costs and expenses incurred by ESCO in connection with designing, developing, or engineering the Project, along with costs and expenses incurred by ESCO for procurement of equipment, materials, bonds, and other project start-up and mobilization expenses.
- 1.19. "Project Site(s)" means the facilities of the Customer on or at which Work is to be performed, as identified in the Scope of Work.
- 1.20. "Savings Guarantee Commencement Date" means the first day of the Customer's first utility billing period following ESCO's issuance of Project Substantial Completion Letter, unless the parties agree in writing to a different Savings Guarantee Commencement Date.
- 1.21. "Scope of Work" means Schedule A and the contents thereof.
- 1.22. "State" means the State of **XXX**.
- 1.23. "Substantial Completion" (as used with respect to the Project as a whole or any discrete portion(s) of the Work, as appropriate) means the point at which such Work is sufficiently implemented in accordance with the Contract Documents so as to be operational, ready for use by Customer, and fully complete except for minor adjustments and/or corrections ("Punch List Items").
- 1.24. "Substantial Completion Letter" means a letter notifying Customer that Substantial Completion has been achieved with respect to the portion of the Work described therein.
- 1.25. "Warranty Period" means one (1) year from the date set forth in the applicable Substantial Completion Letter, unless a different period is stated in the Scope of Work.
- 1.26. "Work" means the services required to be performed by ESCO pursuant to the Scope of Work, whether completed or partially completed, and all materials, equipment, labor and services required to be provided in order for ESCO to perform such services in accordance with the Contract Documents. Work may refer to the whole or parts of the Scope of Work.

## ARTICLE 2 – CONTRACT PRICE AND PAYMENT

- 2.1. Contract Price. The total of all payments to be made to ESCO pursuant to this Contract, excluding PASS Fee(s) for Renewal Terms of the PASS Plan, shall be **\$(CONTRACT PRICE)** (the “Contract Price”).
- 2.2. Schedule of Values. ESCO will develop a schedule that delineates the items to be completed pursuant to the Scope of Work and apportions the Contract Price among such items (“Schedule of Values”) and shall endeavor to provide such Schedule of Values to Customer within thirty (30) business days of the Date of Commencement. Within ten (10) business days of receipt, Customer shall review the Schedule of Values and shall advise ESCO if Customer identifies any items requiring correction or clarification.
- 2.3. Payment of Project Development Costs. Within thirty (30) days of the Effective Date, Customer shall make payment to ESCO for the Project Development Costs, as defined above.
- 2.4. Invoicing and Payment. ESCO shall invoice Customer monthly for progress payments based on the completion to date of items delineated on the Schedule of Values. Amounts invoiced must be paid or disputed by written Notice within thirty (35) days of the applicable invoice date, or as otherwise required pursuant to applicable law. If ESCO has not received payment of all undisputed amounts within thirty (30) days of the applicable invoice date, then a late penalty equal to one percent (1%) or the late penalty imposed by applicable law will be applied to the overdue amounts each month until paid. Final Payment shall be paid in accordance with Section 6.4 (Final Payment).
- 2.5. Payment of PASS Fees. The PASS Fee for the Initial Term of the PASS Plan is included in the Contract Price. After the Initial Term, the PASS Fee for each Renewal Term shall be paid within thirty (30) days of the commencement of such Renewal Term. If ESCO has not received payment of all undisputed amounts within thirty (30) days of the applicable invoice date, then a late penalty equal to one percent (1%) or the late penalty imposed by applicable law will be applied to the overdue amounts each month until paid.
- 2.6. Withholding of Payment. Upon providing written Notice of a payment dispute pursuant to Section 2.4, Customer may withhold payment of amounts otherwise due hereunder (i) if ESCO repeatedly or materially fails, refuses or neglects to fulfill its obligations under this Contract or the Contract Documents, Customer has provided written Notice of default to ESCO detailing the alleged failure, refusal, or neglect, and the failure, refusal, or neglect has not yet been cured.
- 2.7. Taxes. ESCO and Customer agree to take all necessary measures to comply with all tax laws and regulations that apply to this Contract. ESCO shall be responsible for and pay when due all taxes for which ESCO is liable by reason of the performance of this Contract. Customer shall be responsible for and pay when due all taxes, if any, for which Customer is liable by reason of the performance of this Contract.

### ARTICLE 3 – ESCO'S PERFORMANCE OF THE WORK

- 3.1. Standard of Performance. ESCO shall supervise and direct the Work using such degree of care, skill and attention as is reasonably expected of professionals providing similar services within the State under similar circumstances (such circumstances to include, for example, conditions present at the Project Site(s) and any financial or other constraints applicable to the Project). ESCO shall be solely responsible for coordinating and/or performing all portions of the Work and shall have control over the means, methods, techniques, sequences and procedures used in the performance of the Work, unless the Contract Documents give other specific instructions concerning these matters. All construction documents that are required to be prepared by ESCO in connection with the Work shall be prepared by qualified personnel and shall be in accordance with applicable codes, regulations, and laws. The ESCO shall remain responsible for all Work performed, whether performed by the ESCO or its Subcontractors.
- 3.2. Labor and Materials. Unless otherwise provided in the Contract Documents, ESCO shall provide and pay for all labor, materials, tools, equipment, machinery, and transportation necessary for the proper execution and completion of the Work. In the event a significant delay in acquiring materials or equipment or a significant increase in the price of materials or equipment occurs during the performance of the Contract by no fault of ESCO, the parties shall in good faith negotiate such changes (if any) as the parties deem equitable and appropriate under the circumstances and shall memorialize any agreed changes in a Change Order.
- 3.3. Licenses and Compliance with Law. ESCO currently has or shall timely obtain, and shall maintain, all such licenses, permits, qualifications and approvals as it is legally required to hold for performance of the Work. ESCO shall comply with all applicable laws and regulations bearing ESCO's performance of the Work.
- 3.4. Regular Working Hours. ESCO will use commercially reasonable efforts to minimize disturbances to Customer's operations while performing the Work.
- 3.5. Safety. ESCO shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to, (1) employees performing the Work and other persons who may be affected thereby, (2) the Work and materials and equipment to be incorporated therein, and (3) other property at the Project Site(s) or adjacent thereto.
- 3.6. Clean-Up. ESCO shall keep the Project Site(s) free from accumulation of waste materials and rubbish caused by its performance of the Work. Upon completion of the Work, ESCO shall remove from the Project Site(s) all waste materials and rubbish caused by its performance of the Work, all of ESCO's tools, equipment, machinery, and any surplus materials.
- 3.7. Employees.
  - 3.7.1. Responsibility for Employees. ESCO is responsible for the supervision, direction, and control of its employees performing Work on the Project. ESCO shall pay all wages, salaries, and other amounts due its employees in compliance with applicable law.
  - 3.7.2. No Unlawful Discrimination. ESCO represents and warrants that it is an equal opportunity employer and agrees that it shall not discriminate in violation of any applicable federal, state, or other law, rule or regulation, including, but not limited, to discrimination against any employee or applicant for employment on account of such person's race, religion, color, national origin, ancestry, sex, or age.

- 3.8. Subcontractors. A “Subcontractor” is a person or entity that has a written contract with ESCO to perform a portion of the Work at the Project Site(s) (such written contract, a “Subcontract”).
- 3.8.1. Use of Subcontractors. ESCO may use one or more Subcontractors to perform portions of the Work. If requested in writing by Customer, ESCO shall furnish in writing to Customer the names of the Subcontractors to whom ESCO plans to award Work.
- 3.8.2. ESCO's Responsibility for Subcontractors. ESCO shall remain ultimately responsible for the performance of its obligations under this Contract and shall be responsible for the acts and omissions of its Subcontractors (and any persons and entities employed by such Subcontractors) in their performance of the Work.
- 3.8.3. Subcontracts. Each Subcontract shall be consistent with the terms and conditions of this Contract and shall require the Subcontractor, to the extent applicable to the scope, quality, character, and manner of the Work to be performed by the Subcontractor, to be bound to ESCO by the terms of the Contract Documents and to assume all the obligations and responsibilities that ESCO assumes toward Customer thereunder. No Subcontractor is intended to be or shall be deemed a third-party beneficiary of this Contract.
- 3.8.4. Payment of Subcontractors. ESCO shall timely pay each of its Subcontractors in accordance with their respective Subcontracts and in compliance with applicable law.
- 3.9. Unforeseen Conditions. “Unforeseen Conditions” means and includes any subsurface, concealed, latent or other physical conditions, including without limitation the presence of hazardous materials, that differ materially from those conditions contemplated in the Contract Documents or known by ESCO. In the event ESCO encounters Unforeseen Conditions that impact the Project, ESCO shall inform Customer of such conditions promptly and before such conditions are further disturbed. To the extent ESCO incurs additional costs or delays as a result of Unforeseen Conditions, the parties shall execute a Change Order reflecting an equitable adjustment to the Contract Price, the Contract Time, and/or the Scope of Work, as appropriate.
- 3.10. Hazardous Materials.
- 3.10.1. Exclusion for Hazardous Materials. The Work to be performed by ESCO pursuant to this Contract, and the compensation to be paid to ESCO hereunder, expressly excludes any Work of any nature associated or connected with the identification, abatement, cleanup, control or removal of environmentally hazardous materials, unless and except to the extent Schedule A of this Contract provides otherwise. As used herein, “hazardous materials” shall be understood to include, but not be limited to, asbestos, lead, polychlorinated biphenyls (PCBs), mold, petroleum products, and any other material or substance known to have adverse health risks. Customer agrees that all duties and obligations in connection with any hazardous materials located at the Project Site(s) or affecting the Work are strictly the responsibility of Customer, unless and except to the extent ESCO expressly assumes such duties and obligations pursuant to Schedule A. Customer will provide any hazardous materials testing documentation and reports, and information from previous sources or vendors used in hazardous materials testing. Customer warrants and represents that, to the best of Customer’s knowledge, there are no hazardous materials at the Project Site(s) that will or would reasonably be expected to affect, be affected by, come in contact with, or otherwise impact or interfere with the Work, unless and except to the extent Schedule A provides otherwise.

- 3.10.2. Responsibilities Upon Encounter. If, in performing or preparing to perform the Work, ESCO encounters or has reason to suspect the presence of hazardous materials of a different type or in a different amount or location than described in Schedule A, ESCO is authorized to immediately cease any and all Work that may be affected thereby, and ESCO will promptly notify Customer of the conditions discovered. Should ESCO stop Work because of the discovery or suspicion of hazardous materials, the time for performance of ESCO's Work or service will be extended to cover the period required for abatement, cleanup, or removal of the hazardous materials. ESCO will not be held responsible for any claims, damages, costs, or expenses of any kind associated with the period during which ESCO has stopped Work as a result of hazardous materials. If appropriate, ESCO will be entitled to an equitable adjustment of the Contract Price for any increased costs or other charges incurred by ESCO in connection with the exercise of its rights under this paragraph. Unless and except to the extent ESCO expressly assumes any such responsibilities pursuant to Schedule A, Customer will be responsible for taking all necessary steps to correct, abate, clean up, or control hazardous materials in accordance with all applicable statutes and regulations. Customer specifically agrees, to the extent allowed by State law, to indemnify and to hold ESCO, its officers, agents and employees harmless from and against any and all claims, demands, damages, or causes of action in any way arising out of the release of hazardous materials into the air, soil, or any water system or water course, or any actions taken in connection with same, or any failure to act.
- 3.11. Ownership and Use. The Work and the PASS Services may include the sale to Customer of materials, goods, equipment and/or other tangible personal property ("Products"). Except as otherwise set forth in the Contract Documents, any Products that are included in the Work shall be owned by Customer upon Customer's full payment of the invoice covering such Products. The Work and the PASS Services may also involve the licensing of software or software-as-a-service products, subscriptions and/or other digital content ("Software") to Customer. Except as otherwise set forth in the Contract Documents, ESCO grants Customer a limited, personal and non-exclusive license to use Software that is included in the Work and/or PASS Services, subject to Customer's timely payment of the Contract Price and/or PASS Fees, as applicable, and subject to ESCO's and/or its supplier's standard license agreement(s) for such Software, the terms and conditions of which are hereby incorporated by reference. ESCO shall be under no obligation to provide updates or revisions to such Software except to the extent expressly provided in the Contract Documents. Notwithstanding the foregoing, nothing in the Contract Documents shall be deemed or construed to result in the Customer acquiring any ownership interest or rights in any intellectual property of ESCO or any third parties.
- 3.12. Infringement. ESCO shall pay all royalties and license fees required for the manufacture, sale and/or use of the designs, processes, devices, and other Products and Software provided by ESCO pursuant to the Contract Documents ("IP Products"). ESCO shall defend Customer from suits or claims for infringement of patent rights caused by the manufacture, sale and/or use of any such IP Products and shall hold Customer harmless from loss on account thereof. In the event any IP Product is found to infringe a third party's intellectual property rights, ESCO shall, at its expense and at its sole option, either: (i) procure the right for Customer to continue using such IP Product, (ii) modify such IP Product to render it non-infringing (provided such modification does not materially degrade the performance, functioning or operation of the IP Product), (iii) replace such IP Product with functionally equivalent, compatible, non-infringing IP Product, or (iv) refund or credit the amount paid for the infringing IP Product. Notwithstanding the foregoing, ESCO's obligations hereunder shall not apply to the extent (1) the alleged infringement is based upon or caused by ESCO's IP Products being modified or combined with any other design, process, device, material, Product or Software without ESCO's prior written approval, or (2) ESCO provided the allegedly infringing IP Product subject to specific requirements of Customer, unless ESCO knew of the alleged infringement and failed to inform Customer.

3.13. Warranty. ESCO warrants to Customer that, for the applicable Warranty Period: (i) the Work to be performed hereunder will conform to the requirements of the Contract Documents and will be performed in accordance with applicable industry standards, (ii) any Products manufactured by ESCO and sold hereunder will be free of defects in workmanship and material, and (iii) any Software licensed hereunder will perform its essential functions (however, for the avoidance of doubt, ESCO does not warrant that the Software will operate uninterrupted or error-free, nor does ESCO warrant that the Software will meet any compatibility requirements not specified in the Scope of Work). Work, Products and/or Software that fail to comply with such standards may be deemed defective. If any Work, Product, and/or Software is proven to be defective within the Warranty Period, ESCO shall re-perform such defective Work, repair or replace such defective Product, and/or update or replace such defective Software, as ESCO deems appropriate. The foregoing warranties do not apply to the extent any Work, Product or Software has been: (i) subject to abuse, misuse, neglect, or accident, (ii) subject to improper operation, maintenance, storage or repair, (iii) subject to damage caused by circumstances beyond ESCO's control, or (iv) manufactured, programmed, installed, modified, or repaired other than by ESCO, on ESCO's behalf, or with ESCO's prior written approval. If a defect is found not to be ESCO's responsibility, standard rates for repair, replacement and/or labor shall apply. With respect to Products not manufactured by ESCO, ESCO will pass on any warranties provided to ESCO by its supplier(s). NOTWITHSTANDING ANYTHING TO THE CONTRARY, THE WARRANTIES AND REMEDIES SET FORTH IN THIS SECTION 3.13 (WARRANTY) ARE EXCLUSIVE AND IN LIEU OF ALL OTHER EXPRESS AND IMPLIED WARRANTIES AND REMEDIES, INCLUDING ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND ALL WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE.

#### ARTICLE 4 – CUSTOMER'S ROLE AND RESPONSIBILITIES

- 4.1. Cooperation Generally. Customer acknowledges and agrees that timely and proper performance of the Work is dependent on Customer's full and prompt cooperation in reviewing documentation and submittals, issuing approvals, attending meetings, providing facility access (including, without limitation and as appropriate, by providing sufficient keys, access cards, and/or escort services to facilitate timely execution of Work at multiple locations with multiple trades), relocating personnel, furniture, and equipment, and taking such other actions as may be reasonably requested by ESCO in furtherance of ESCO's performance of the Work.
- 4.2. Submittals. Within fifteen (15) business days of receiving any design, construction or other ESCO submittals, Customer shall review such documentation to confirm acceptance and consistency with the Contract Documents as applicable, and promptly advise ESCO of any issues or questions that are identified.
- 4.3. Project Meetings. Customer shall ensure that the appropriate Customer representatives attend Project meetings coordinated by ESCO. At ESCO's request, Customer shall provide commercially reasonable cooperation and assistance in scheduling and coordinating Project meetings.
- 4.4. Filings and Permits. Except for permits and fees that are to be obtained and paid for by ESCO as expressly stated in the Scope of Work, Customer shall make all such filings as are required by the State or other government authorities in connection with the Work and shall obtain and pay for all permits, approvals, inspections, easements, assessments and charges as are required for the use, occupancy or modification of the real property or structures at and around the Project Site(s), including (without limitation) inspections for concrete and/or earthen compaction, where applicable.
- 4.5. Repairs. Except to the extent the Scope of Work specifically contemplates the repair or replacement by ESCO of any existing system, equipment or other property, all such systems, equipment and other property are assumed to be in normal working order, and any defect(s) in the same that could adversely impact the Work or the energy and efficiency savings expected to be generated thereby shall be promptly repaired or replaced by Customer.

- 4.6. Customer Information. Customer agrees that it has provided and shall continue to provide ESCO with all such information, documentation, access, knowledge and history as is available to Customer and as is relevant to ESCO's timely and successful completion of the Project and performance of its other obligations under the Contract, including, without limitation, the following:
- 4.6.1. Drawings, Specifications and Surveys. Customer shall provide ESCO with copies of or access to (i) all such working drawings, specifications, surveys and "As-Built" drawings as it may have relating to the Project Site(s), to the Work, and/or to work being performed by other companies at the Project Site(s), and (ii) all such surveys as it may have describing the physical characteristics, legal boundaries and restrictions, and/or utility locations at and around the Project Site(s). All drawings, specifications, and surveys furnished to ESCO by Customer are and shall remain the property of Customer.
  - 4.6.2. Energy Usage Data. Customer shall make available to ESCO, on a monthly basis or as ESCO may otherwise request, copies of all energy bills, energy usage data, and all other such documentation maintained by Customer.
  - 4.6.3. Facilities Information. At ESCO's request, Customer shall promptly provide information and documentation relating to Customer's facilities, systems, and equipment and to its maintenance and operations practices. Customer has disclosed or will disclose as promptly as possible upon learning of, all known or suspected deficiencies, defects and malfunctions of or affecting its facilities, systems or equipment and/or any components thereof, as well as any conditions of the Project Site(s) that should be considered in planning and executing the Work. To facilitate the exchange of relevant facilities information, Customer shall provide ESCO with access to Customer's key facilities personnel and, at ESCO's reasonable request, shall designate a Customer representative to ensure the timely and correct transfer of information requested by ESCO.
- 4.7. Operations. Customer shall operate all Work installed under this Contract in accordance with the manufacturer's recommendations and the manuals supplied to Customer by ESCO. Customer agrees to protect the Work and operating conditions thereof, and Customer shall promptly notify ESCO in the event of any malfunction in the operation of the Work. Except in the case of emergency, Customer shall not remove, move, turn off or otherwise significantly alter the operation of any Work performed hereunder without ESCO's prior written approval, which approval shall not be unreasonably withheld. Upon receipt of such approval, Customer shall closely follow any instructions provided by ESCO in connection with the same. If, due to an emergency, it is not reasonable to obtain ESCO's approval prior to taking action, Customer shall protect the Work from damage or loss and shall notify ESCO of all actions taken as soon as reasonably possible thereafter. For purposes of this Section, a significant alteration would include, without limitation, any alteration that might cause a reduction in the level of energy or efficiency savings generated by the Work and/or any alteration to any measurement and verification system installed in connection with the Work.



#### 4.8. Cybersecurity.

- 4.8.1. Definitions. For purposes of Section 4.8 (Cybersecurity) only: (i) "Cyber Threat" means any circumstance with the potential to adversely impact Customer's Systems or that may result in any unauthorized access, acquisition, loss, misuse, destruction, disclosure, and/or modification of the Systems, including through malware, hacking, or similar attacks, (ii) "Patch" means an Update that fixes a vulnerability in a Deliverable, (iii) "Systems" means Customer's computer network, systems, machines, and data, and (iv) "Update" means software that contains a correction of errors in a Deliverable and/or minor enhancements or improvements for a Deliverable but does not contain significant new features.
- 4.8.2. Customer's Obligations for Its Systems. Customer is solely responsible for the implementation and maintenance of a comprehensive security program that contains reasonable and appropriate security measures and safeguards to protect its Systems against Cyber Threats, including those Systems on which it runs the Deliverables. Without limiting the foregoing, Customer shall at a minimum:
- (a) have qualified personnel with appropriate expertise in cybersecurity maintain Customer's security program and regularly monitor cyber intelligence feeds and security advisories applicable to Customer's Systems or Customer's industry;
  - (b) promptly update or patch its Systems or implement other appropriate measures based on any reported Cyber Threats and in compliance with any security notifications or bulletins, whether publicly disclosed on ESCO's security notification webpage at <https://www.se.com/ww/en/work/support/cybersecurity/security-notifications.jsp> or otherwise provided to Customer;
  - (c) regularly monitor its Systems for possible Cyber Threats;
  - (d) regularly conduct vulnerability scanning, penetration testing, intrusion scanning, and other cybersecurity testing on its Systems; and
  - (e) meet the recommendations of ESCO's Recommended Cybersecurity Best Practices, available at <https://www.se.com/us/en/download/document/7EN52-0390/> and then-current industry standards.
- 4.8.3. Customer's Use of the Deliverables. ESCO may release Updates and Patches for its Deliverables from time to time. Customer shall promptly install any Updates and Patches for such Deliverables as soon as they are available in accordance with ESCO's installation instructions and using the latest version of the Deliverables, where applicable. Customer understands that failing to promptly and properly install Updates or Patches for the Deliverables may result in the Deliverables or Customer's Systems becoming vulnerable to certain Cyber Threats or result in impaired functionality, and ESCO shall not be liable or responsible for any losses or damages that may result.
- 4.8.4. Identification of Cyber Threats. If Customer identifies or otherwise becomes aware of any vulnerabilities or other Cyber Threats relating to the Deliverables for which ESCO has not released a Patch, Customer shall promptly notify ESCO of such vulnerability or other Cyber Threat(s) via the ESCO Report a Vulnerability page (<https://www.se.com/ww/en/work/support/cybersecurity/report-a-vulnerability.jsp#Customers>) and further provide ESCO with any reasonably requested information relating to such vulnerability (collectively, "Feedback"). ESCO shall have a non-exclusive, perpetual and irrevocable right to use, display, reproduce, modify, and distribute the Feedback (including any confidential information or intellectual property contained therein) in whole or part, including to analyze and fix the vulnerability, to create Patches or Updates for its customers, and to otherwise modify its Deliverables, in any manner without restrictions, and without any obligation of attribution or compensation to Customer; provided, however, ESCO shall not publicly disclose Customer's name in connection with such use or the Feedback (unless Customer consents otherwise). By submitting Feedback, Customer represents and warrants to ESCO that Customer has all necessary rights in and to such Feedback and all information it contains, including to grant the rights to ESCO described herein, and that such Feedback

does not infringe any proprietary or other rights of third parties or contain any unlawful information.

- 4.9. **Export Control.** The Deliverables provided by ESCO under this Contract may contain components and/or technologies from the United States of America (“US”), the European Union (“EU”) and/or other nations. Customer acknowledges and agrees that the supply, assignment and/or usage of Deliverables under this Contract must fully comply with applicable US, EU and/ or other national or international export control laws and regulations (“Export Laws”). Unless applicable export licenses have been obtained from the relevant authority and ESCO has approved, the Deliverables shall not (i) be exported and/or re-exported to any destination or party restricted by applicable Export Laws; or (ii) be used for those purposes or fields restricted by any Export Laws. Customer also agrees that the Deliverables will not be used either directly or indirectly in any rocket systems, unmanned air vehicles, nuclear weapons delivery systems, and/or in any design, development, production or use of or related to weapons (which may include, without limitation, chemical, biological or nuclear weapons). ESCO shall be excused from performing any obligations under this Contract that would, in ESCO’s judgment, violate any Export Laws or expose ESCO to a risk of liability thereunder.

#### **ARTICLE 5 – CONTRACT TIME**

- 5.1. **Contract Time.** ESCO projects that it will take [XXX] days from the Date of Commencement to achieve Substantial Completion of the Project (as the same may be adjusted from time to time in accordance with the Contract Documents, the “Contract Time”).
- 5.2. **Excusable Delay.** If ESCO’s performance of the Work is at any point delayed or obstructed by circumstances beyond ESCO’s reasonable control (including, without limitation, acts or omissions of Customer, epidemic, pandemic, quarantine restrictions, changes in applicable law, labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties, unusually severe shortages in the available supply of and/or unusually severe increases in the cost of materials or equipment needed for performance of the Work, or delays of common carriers) then the parties agree to execute a Change Order allowing for an equitable extension of time for performance of ESCO’s Work to cover such delay.

#### **ARTICLE 6 – COMPLETION AND FINAL PAYMENT**

- 6.1. **Substantial Completion of Work.** ESCO will issue Customer one or more Substantial Completion Letters upon achieving Substantial Completion of discrete portion(s) of the Work. Customer shall provide ESCO with written Notice within seven (7) days of ESCO’s issuance of a Substantial Completion Letter if Customer disputes the assertion that ESCO has achieved Substantial Completion of the applicable Work, and such Notice shall explain the basis for Customer’s dispute and the portion of the applicable Work to which it pertains. The parties shall meet promptly following Customer’s issuance of any such Notice of dispute and shall in good faith attempt to resolve the dispute and align on a path forward (i.e. any corrections or adjustments to be made to the Work, Scope of Work, or Project schedule, etc.). Unless timely disputed by Customer, the date on which ESCO issues any such Substantial Completion Letter shall be the “Date of Substantial Completion” with respect to the applicable Work.
- 6.2. **Substantial Completion of the Project.** ESCO will issue Customer a Substantial Completion Letter upon achieving Substantial Completion of the Project (the “Project Substantial Completion Letter”). Promptly following ESCO’s delivery of a Project Substantial Completion Letter, the parties shall schedule a walk-through to compile a list of Punch List Items that remain to be completed, if any.
- 6.3. **Final Completion of the Project.** When all Punch-List Items have been completed, ESCO shall inform Customer that the applicable Work is ready for inspection and shall provide an invoice for the outstanding balance of the Contract Price along with a conditional release of all liens arising out of the Contract. Promptly following Customer’s receipt thereof, the parties shall conduct a final

walk-through and, upon confirming at the walk-through that all of the agreed Punch-List Items have been completed, Customer shall execute an acknowledgment stating that Final Completion has been achieved as of the date set forth therein (the "Project Completion Date").

- 6.4. Final Payment. Payment of the final invoice amount ("Final Payment") shall be due within thirty (30) days of the Project Completion Date. The making of Final Payment shall constitute a waiver of claims by the Customer except those arising from: (a) unsettled liens, security interests, or encumbrances arising out of the Contract; (b) the failure of the Work to comply with the requirements of the Contract Documents; or (c) the terms and conditions of warranties expressly provided in the Contract Documents. Upon receipt of Final Payment, ESCO shall deliver an unconditional and final release of all liens arising out of the Contract.

#### **ARTICLE 7 – CHANGES**

- 7.1. Change Request. Customer may request changes to the Scope of Work by submitting a description of the requested changes to ESCO in writing. In response to any such request, ESCO shall provide Customer a written proposal (the "Change Proposal") that describes, in reasonable detail, the proposed changes to the Scope of Work and any corresponding adjustments that would need to be made to the Contract Time, the Contract Price and/or the Performance Guarantee, as applicable. ESCO may also submit a Change Proposal to Customer in the event that this Contract authorizes or requires the parties to negotiate and/or execute a Change Order or in the event that ESCO otherwise wishes to request a Change Order in good faith, in which case such Change Proposal shall describe, in reasonable detail, any proposed changes to the Scope of Work, the Contract Time, the Contract Price and/or the Performance Guarantee, along with the contractual, legal or other basis for requesting such changes.
- 7.2. Change Order Process. Within five (5) business days following receipt of the Change Proposal, the parties shall meet and confer, acting reasonably and in good faith, to negotiate a mutually acceptable Change Order in accordance with the principles set forth herein. Promptly following agreement on the terms and conditions of the Change Order, the parties shall execute the same. If the parties do not agree upon the terms and conditions of the Change Order and the proposed change relates to circumstances in which a party is entitled to a Change Order under this Contract, then either party may submit the matter to dispute resolution pursuant to Section 11.6 (Disputes and Choice of Law).
- 7.3. Customer Delays. In the event of any failure by Customer to timely fulfill its obligations under Article 4 (Customer's Role and Responsibilities) or in the event of any other delay or Work stoppage due to the acts or omissions of Customer or Customer's agents, the Contract Time shall be equitably adjusted to reflect such period of interruption and the Contract Price shall be equitably adjusted to cover reasonable costs incurred by ESCO due to the delay or Work stoppage, including, without limitation, any demobilization and remobilization costs. ESCO will use commercially reasonable efforts to mitigate such costs.

#### **ARTICLE 8 – SUSPENSION AND TERMINATION**

- 8.1. Non-Appropriation. If Customer is a governmental entity, any applicable State or local law entitling Customer to terminate the Contract due to insufficient appropriation of funds is hereby incorporated in this Section 8.1 by reference. In the event of a termination pursuant to this Section 8.1, Customer shall provide ESCO written Notice of termination as soon as is reasonably possible, and in no event later than the effective date of termination.

- 8.2. ESCO Default. Customer may terminate the Contract or suspend the performance of Work by providing written Notice to ESCO if: (i) ESCO repeatedly or materially fails, refuses or neglects to fulfill its obligations under this Contract or the Contract Documents, (ii) Customer has provided written Notice of default to ESCO detailing the alleged failure, refusal, or neglect, and (iii) within thirty (30) days of ESCO's receipt of such written Notice, ESCO has neither cured nor commenced and diligently continued efforts to cure such default.
- 8.3. Customer Default. ESCO may terminate the Contract or suspend the performance of Work or PASS Services, as applicable, by providing written Notice to Customer if: (i) Customer repeatedly or materially fails, refuses or neglects to fulfill its obligations under this Contract or the Contract Documents or fails to make any payment(s) to ESCO as and when due hereunder, (ii) ESCO has provided written Notice of default to Customer detailing the alleged failure, refusal, neglect, or payment default, and (iii) within thirty (30) days of Customer's receipt of such written Notice, Customer has neither cured nor commenced and diligently continued efforts to cure such default.
- 8.4. Prolonged Stoppage of Work. ESCO may terminate the Contract by providing seven (7) days' written Notice to Customer if: (i) Work is stopped due to an act, omission, or request of Customer, other than pursuant to Section 8.2 (ESCO Default), (ii) the Work stoppage is not due to Contractor's negligence, misconduct, or breach of the Contract, and (iii) the Work stoppage is for more than ninety (90) consecutive days or for more than one hundred twenty (120) aggregate days.
- 8.5. Insolvency. Either party may terminate the Contract by providing written Notice to the other party if the other party: (i) becomes insolvent, (ii) is generally unable to pay, or fails to pay, its debts as they become due, (iii) files, or has filed against it, a petition for voluntary or involuntary bankruptcy or pursuant to any other insolvency law, (iv) makes or seeks to make a general assignment for the benefit of its creditors, or (v) applies for, or consents to, the appointment of a trustee, receiver or custodian for a substantial part of its property or business.
- 8.6. Payment upon Termination. In the event of any termination other than a termination for cause by Customer pursuant to Section 8.2 (ESCO Default), Customer shall compensate ESCO: (i) in accordance with the Schedule of Values for Work performed and in progress prior to the effective date of termination, and (ii) for reasonable costs and damages incurred by reason of the termination, such as demobilization costs, termination fees, and restocking fees.
- 8.7. Effect of Termination. Subject to Section 11.7 (Survival; Statute of Limitations), termination of any of the Contract Documents shall release ESCO of all remaining obligations under all the Contract Documents as of the effective date of such termination.
- 8.8. Other Remedies. Any remedies provided for in this Article 8 shall not be exclusive of any additional remedies available to a party pursuant to this Contract, in equity or in the law. Nothing in this Contract shall be deemed or construed as a waiver by either party of any rights it may have with respect to a wrongful termination by the other party.

#### **ARTICLE 9 – INDEMNIFICATION AND ESCO LIABILITY**

- 9.1. Indemnity. ESCO shall, at its own cost and expense, indemnify, defend and hold harmless Customer and Customer's officers, directors, employees and agents ("Indemnified Parties") from and against all damages, penalties, losses, costs and expenses (including reasonable attorneys' fees) arising out of any third-party claim for personal injury or tangible property damage, but only to the extent caused by the negligence or misconduct of ESCO or any of ESCO's agents (including Subcontractors of any tier) in connection with this Contract, and provided that the Indemnified Parties (i) give ESCO prompt written notice of any such claim, and (ii) provide such cooperation and information as ESCO may reasonably require in the defense or handling of any such claim. ESCO shall not be responsible for any settlement or consent to judgment made by or on behalf of an Indemnified Party without ESCO's prior written consent.

9.2. Limitations of Liability.

- 9.2.1. In no event shall either party or its officers, directors, affiliates, or employees be liable for any form of indirect, special, consequential, or punitive damages, whether such damages arise in contract or tort, and irrespective of fault, negligence or strict liability or whether such party has been advised in advance of the possibility of such damages.
- 9.2.2. The remedies of Customer set forth in the Contract are exclusive unless stated otherwise and ESCO's total liability with respect to damages arising out of this Contract shall not exceed the Contract Price. However, the foregoing sentence shall not limit ESCO's liability with respect to (i) damages caused by ESCO's gross negligence or intentional misconduct, (ii) third-party claims for personal injury or tangible property damage to the extent caused by ESCO's negligence or misconduct, or (iii) any other claims or damages for which ESCO's liability cannot be limited pursuant to applicable law.
- 9.2.3. The provisions of this Section 9.2 apply only to the extent permitted by the Constitution and laws of the State and shall supersede any contrary provisions of the Contract Documents.

**ARTICLE 10 – INSURANCE AND BONDS**

- 10.1. Required Insurance. ESCO shall, at its own cost and expense, maintain in effect the following policies of insurance (each a "Policy", and collectively the "Policies") for the applicable period(s) set forth in Section 10.2:
- 10.1.1. Commercial General Liability Insurance. A policy of commercial general liability insurance, written on an "occurrence" basis, with a liability limit of two million dollars (\$2,000,000) per occurrence ("General Liability Policy").
- 10.1.2. Automobile Liability Insurance. A policy of automobile liability insurance, written on an "occurrence" basis, with a combined single limit of one million dollars (\$1,000,000) per accident for bodily injury and property damage ("Auto Liability Policy"). The Auto Liability Policy must include coverage for owned, hired and non-owned automobiles.
- 10.1.3. Workers' Compensation and Employer's Liability Insurance. Workers' compensation insurance as required by State law, and employer's liability insurance, written on an "occurrence" basis, with a liability limit of two million dollars (\$2,000,000).
- 10.1.4. Professional Liability Insurance. Professional liability insurance, written on a claims-made (and reported) basis, with a liability limit of two million dollars (\$2,000,000) per claim ("Professional Liability Policy").
- 10.2. Duration of Insurance. The Policies shall be procured by ESCO prior to ESCO's commencement of the Project and, except for the Professional Liability Policy, shall be maintained in effect for at least one year following the earlier of the Project Completion Date or termination of this Contract. ESCO shall maintain the Professional Liability Policy in effect for at least three years following the earlier of the Project Completion Date or termination of this Contract.
- 10.3. Insurer Rating Standards. The insurance policies required pursuant to this Article must be issued by one or more insurers that are (i) licensed to do business in the State and (ii) have an A.M. Best Company rating of not less than "A-" and a financial size category of not less than "VII."

- 10.4. Additional Insureds. At Customer's request, ESCO shall include Customer and Customer's directors, officers, employees, and agents as additional insureds on ESCO's General Liability Policy and Auto Liability Policy. The additional insured endorsements will be on ESCO's most current versions of ISO Form CG 2010 and ISO Form CG 2037 or their substantial equivalents.
- 10.5. Waiver of Subrogation. Each of the General Liability Policy and the Auto Liability Policy shall provide a waiver of transfer of rights of recovery in favor of Customer.
- 10.6. ESCO Insurance is Primary. The General Liability Policy and the Auto Liability Policy shall be endorsed to provide that they are primary and non-contributory.
- 10.7. Premiums, Deductibles and Self-Insured Retentions. ESCO shall be solely responsible for paying deductibles and self-insured retentions applicable to the Policies.
- 10.8. Evidence of Coverage. At Customer's request, ESCO shall provide to Customer a duly authorized and executed certificate of insurance evidencing that the required Policies and endorsements are in effect (each a "Certificate of Insurance").
- 10.9. Notice of Change in Policies. ESCO shall notify Customer within thirty (30) days of its receipt of written notice from an applicable insurer that a Policy will expire without renewal or will be canceled, terminated, or materially reduced in coverage.
- 10.10. Review of Coverage. Customer's failure to identify any non-compliance with the requirements of this Article shall not be deemed as a waiver of such requirements.
- 10.11. Subcontractor Insurance. ESCO shall require each Subcontractor to maintain such levels and types of insurance coverage as are appropriate for the Work to be performed by such Subcontractor.
- 10.12. Bonds. If required in the Contract Documents, and upon Customer's request and expense, ESCO shall provide payment and performance bonds for 100% of the Contract Price to secure the faithful performance of the Work and to ensure the satisfaction of ESCO's payment obligations to its Subcontractors and suppliers related to the Work. Notwithstanding any provision to the contrary herein, any payment and performance bonds associated with this Contract guarantee only the performance of the installation portion of the Contract and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings guarantees, (2) any support or maintenance service agreement, or (3) any other guarantees or warranties with terms beyond one (1) year in duration from Substantial Completion Date.

**ARTICLE 11 – MISCELLANEOUS**

11.1. Notices. All written Notices required to be delivered pursuant to the Contract must be in writing and addressed to the other party at its address set forth below (or to such other address as the receiving party may designate from time to time by providing written notice to the other party in accordance with this Section). All Notices must be delivered by personal delivery, nationally recognized overnight courier or certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Contract, a Notice is effective only (a) on receipt by the receiving party, and (b) if the party giving the Notice has complied with the requirements of this Section.

(a) If to ESCO, to:

Schneider Electric Buildings Americas, Inc.  
1650 W. Crosby Rd.  
Carrollton, TX 75006  
Attention: Corey Newby  
E-mail: corey.newby@se.com

with copies to:

Schneider Electric Legal Department  
70 Mechanic Street  
Foxboro, MA 02035  
Attention: Time-Sensitive Legal Notice for SEBA

(b) If to the Customer, to:

XXXXXXXXXXXXXXXXXXXXX  
XXXXXXXXXXXXXXXXXXXXX  
Attention: XXXXXXXXXXXXXXXXXXXXXXXX  
E-mail: XXXXXXXX@XXXXXXXXXXXX.XXX

11.2. Relationship of Parties. Nothing in this Contract creates any agency, joint venture, partnership or other form of joint enterprise, employment, or fiduciary relationship between the parties. ESCO is an independent contractor pursuant to this Contract. Neither party has any express or implied right or authority to assume or create any obligations on behalf of or in the name of the other party or to bind the other party to any contract, agreement, or undertaking with any third party.

11.3. Public Statements. Customer acknowledges that ESCO may provide information pertaining to this Project and this Contract when responding to requests for proposals, requests for qualifications, requests for references, and other requests from prospective customers and/or government agencies. However, ESCO will not disclose Customer information that has been marked confidential without Customer's prior written consent.

11.4. Ethics and Compliance with Law. Each party shall comply in all respects with all applicable legal requirements governing the duties, obligations, and business practices of that party. Neither party shall take any action in violation of any applicable legal requirement that could result in liability being imposed on the other party. In the event Customer has concerns related to ESCO's ethics or any potential violations of ESCO's Trust Charter (code of conduct), Customer is welcome to make use of ESCO's Trust Line. The Trust Line is a confidential channel through which customers can ask questions and raise concerns. Reports can be made using the following link: <https://secure.ethicspoint.eu/domain/media/en/gui/104677/index.html>.

- 11.5. Applicable Law Deemed Included. Each and every provision required by applicable law to be included in this Contract is hereby deemed to be so included, and this Contract shall be construed and enforced as if all such provisions are so included. If, for any reason, any provision required by any applicable law is not expressly included herein, or is not correctly included herein, then, upon request of either Customer or ESCO, the parties shall amend this Contract to include or incorporate, or to correctly include or incorporate, such provision.

Without limiting the generality of the foregoing, the following provisions are hereby included at Customer's direction, to the extent legally required:

11.5.1. [To the extent Customer is funding the Project or a portion of the Project with a Federal award, the "Contract Provisions for Non-Federal Entity Contracts Under Federal Awards" set forth under Appendix II to Part 200 of Title 2 of the Code of Federal Regulations are hereby incorporated in this Agreement and shall apply to such portion of the Project as if set forth in full herein.]<sup>1</sup>

11.5.2. [Insert if applicable.]<sup>2</sup>

11.5.3. [Not applicable]<sup>3</sup>

- 11.6. Disputes and Choice of Law. To the extent allowed by applicable law, the parties shall attempt to resolve any controversy or claim arising out of or relating to this Contract or an alleged breach hereof by mediation under the Construction Industry Mediation Procedures of the American Arbitration Association. If within 30 days after service of a written demand for mediation, the mediation does not result in settlement of the dispute, then any unresolved controversy or claim shall be settled by arbitration administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The Contract shall be governed by the laws of the State, and any litigation or arbitration proceeding shall take place in the county in which the Project is located.
- 11.7. Survival; Statute of Limitations. The obligations and rights of the parties under this Contract that by their nature would continue beyond expiration, termination, or cancellation of this Contract (including, without limitation, the warranties, indemnification obligations, limitation of liability, effect of suspension or termination, payment upon termination, and ownership and property rights) shall survive any such expiration, termination, or cancellation. For the avoidance of doubt, ESCO's obligations regarding the Performance Guarantee shall not continue beyond the expiration, termination, or cancellation of this Contract or the PASS Plan. As between Customer and ESCO, any applicable statute of limitation shall commence to run and any alleged cause of action shall be deemed to have accrued (1) not later than the Project Completion Date for acts or failures to act occurring prior to the Project Completion Date, or (2) not later than the date of the relevant act or failure to act by either party for acts or failures to act occurring after the Project Completion Date.
- 11.8. Entire Agreement. This Contract, inclusive of the Contract Documents, constitutes the sole and entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous written and verbal understandings, agreements, representations, warranties, and covenants with respect to such subject matter.

<sup>1</sup> **TEMPLATE INSTRUCTIONS:** Include this provision if the Customer is using any federal funding. Otherwise, delete.

<sup>2</sup> **TEMPLATE INSTRUCTIONS:** This is where any state-specific legally mandated provisions should be added or referenced if applicable. If not applicable, delete.

<sup>3</sup> **TEMPLATE INSTRUCTIONS:** If either federal funding or state-specific legal requirements are listed above, delete this. If there is no federal funding and no state-specific legal requirements, keep.



- 11.9. Further Assurances. Upon either party's reasonable request, the other shall execute and deliver all such further documents and instruments, and take all such further acts, as are necessary to give full effect to this Contract and applicable legal requirements.
- 11.10. Amendment and Modification. No amendment to or modification of this Contract is effective unless it is in writing and signed by an authorized representative of each party.
- 11.11. Waiver. No waiver under this Contract is effective unless it is in writing and signed by an authorized representative of the party waiving its right. Any waiver authorized on one occasion is effective only in that instance and only for the purpose stated and does not operate as a waiver on any future occasion.
- 11.12. Assignment. Customer may not assign any of its rights or delegate any of its obligations under this Contract without the prior written consent of ESCO. ESCO may assign its rights and delegate its obligations to any affiliate or to any person acquiring all or substantially all of ESCO's assets. Any purported assignment or delegation in violation of this Section is null and void. No assignment or delegation relieves the assigning or delegating party of any of its obligations under this Contract.
- 11.13. Third-Party Beneficiaries. This Contract benefits solely the parties to this Contract and their respective permitted successors and assigns, and nothing in this Contract confers on any other person any express or implied legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Contract.
- 11.14. Interpretation. Unless the context otherwise requires, references in this Contract: (i) to articles, sections, exhibits, schedules, and attachments mean the articles and sections of, and exhibits, schedules, and attachments attached to, this Contract; (ii) to an agreement, instrument, or other document means such agreement, instrument, or other document as amended, supplemented and modified from time to time to the extent permitted by the provisions thereof; and (iii) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Contract is the result of negotiations between, and has been reviewed by, the parties and their respective legal counsel. This Contract shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted.
- 11.15. Headings. The headings in this Contract are for convenience only and do not affect the interpretation of this Contract.
- 11.16. Severability. If any term or provision of this Contract is deemed invalid, illegal, or unenforceable pursuant to applicable law, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Contract or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon a determination that any term or provision is invalid, illegal, or unenforceable, the court may modify this Contract to affect the original intent of the parties to the greatest extent possible.
- 11.17. Counterparts. This Contract may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Contract delivered by facsimile, e-mail or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Contract.

11.18. Due Authority of Signatories. Each party represents and warrants that this Contract constitutes the legal, valid, binding, and enforceable obligation of such party, and that neither the execution nor performance of this Contract constitutes a breach of any agreement that such party has with any third party or violates any law, rule, regulation, or legal duty applicable to such party. Each party further represents and warrants that the execution of this Contract is within such party's legal powers, and that each individual executing this Contract on behalf of such party is duly authorized to do so by all necessary and appropriate action and does so with full legal authority.

[Signature Page Follows]

***IN WITNESS WHEREOF***, each of the parties has caused this Energy and Construction Services Contract to be executed as of the Effective Date by its duly authorized representative below.

**Customer Legal Name Here  
[Include State]**

**Schneider Electric Buildings  
Americas, Inc.**

By: \_\_\_\_\_  
(Signature)

By: \_\_\_\_\_  
(Signature)

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**SCHEDULE A  
SCOPE OF WORK**

Customer hereby acknowledges and agrees that the scope of work shall be limited to, and ESCO shall only perform, the following:

Scope of Work Description: (Attach additional pages as necessary)

**SCHEDULE B  
PERFORMANCE ASSURANCE SUPPORT SERVICES PLAN**

**A. TERM AND TERMINATION:**

The PASS Plan described in this Schedule B will commence on the Savings Guarantee Commencement Date and will continue for an initial term of [ ] year(s) (the "Initial Term"). Upon expiration of the Initial Term and upon commencement of each Guarantee Year thereafter, the PASS Plan will automatically renew for additional one-year periods (each, a "Renewal Term") unless Customer terminates the PASS Plan by giving ESCO written Notice of termination at least thirty (30) days prior to the end of the then-current term.

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN ANY CONTRACT DOCUMENT, IN THE EVENT THE PASS PLAN EXPIRES OR IS CANCELED OR TERMINATED BY CUSTOMER FOR ANY REASON, THE PERFORMANCE GUARANTEE SET FORTH IN SCHEDULE C OF THE CONTRACT SHALL BE DEEMED TO HAVE BEEN SATISFIED AND FULFILLED AS OF THE EFFECTIVE DATE OF EXPIRATION, CANCELLATION OR TERMINATION OF THE PASS PLAN, AND ESCO SHALL HAVE NO FURTHER OBLIGATIONS OR LIABILITIES ASSOCIATED WITH SUCH PERFORMANCE GUARANTEE.

**B. SERVICE SCOPE:**

**1. Initial Term:**

- a. **Year 1 PASS Services.** ESCO shall provide the following PASS Services during the first year of the Initial Term of the PASS Plan:

[REGIONAL PASS MANAGER TO INSERT]

- b. **Year 2 PASS Services.** ESCO shall provide the following PASS Services during the second year of the Initial Term of the PASS Plan:

[REGIONAL PASS MANAGER TO INSERT]

- c. **PASS Fee.** The PASS Fee for the Initial Term is included in the Contract Price.

**2. Renewal Terms:**

a. **Renewal of Existing PASS Plan:**

- i. **PASS Services:** Unless Customer terminates the PASS Plan pursuant to Section A above or selects a change in the PASS Plan pursuant to Section (B)(2)(b) below, the first Renewal Term shall include the PASS Services listed below, and each Renewal Term thereafter shall include the same PASS Services included with the PASS Plan in the immediately prior term.

[REGIONAL PASS MANAGER TO INSERT]

ii. **PASS Fee.** Unless Customer terminates the PASS Plan pursuant to Section A above or selects a change in the PASS Plan pursuant to Section (B)(2)(b) below, the PASS Fee for the first Renewal Term shall be \$[REDACTED], and such PASS Fee shall be adjusted upwards for each Renewal Term thereafter in accordance with the increase in Consumer Price Index ("CPI").

b. **Change in Pass Plan for Renewal Term.** Approximately 90 days prior to the end of the then-current Renewal Term, ESCO and Customer will meet to discuss recommended and/or requested changes in the PASS Services for the upcoming Renewal Term. Any agreed changes to the PASS Plan will be documented in writing and signed by both parties at least thirty days prior to the end of the then-current term, and such changes shall take effect upon commencement of the upcoming Renewal Term.

**C. PAYMENT:**

As described in Article 2 of the Contract, the PASS Fee for the Initial Term of the PASS Plan is included in the Contract Price. After the Initial Term, the PASS Fee for each Renewal Term shall be paid within thirty (30) days of the commencement of such Renewal Term. If ESCO has not received payment of all undisputed amounts within thirty (30) days of the applicable invoice date, then a late penalty equal to one percent (1%) or the late penalty imposed by applicable law will be applied to the overdue amounts each month until paid.

**D. OTHER:**

1. **Third-Party Licenses or Services.** If applicable, insert a table or list of any third-party licenses or services that are critical to the Guarantee/PASS, specify whether they are SE or Customer's responsibility, and if appropriate state that PASS/Guarantee will terminate if Customer fails to maintain those third-party licenses/subscriptions through the Performance Period.]

**SCHEDULE C  
PERFORMANCE GUARANTEE**

Subject to the terms and conditions of this Schedule C and the other Contract Documents, ESCO hereby provides the Performance Guarantee described below.

**TERM:**

The Performance Guarantee shall commence on the Savings Guarantee Commencement Date and shall continue in effect for a period of [ ] years thereafter, unless sooner terminated in accordance with the Contract Documents (the "Performance Period").

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN ANY CONTRACT DOCUMENT, IN THE EVENT THE CONTRACT OR THE PASS PLAN EXPIRES OR IS CANCELED OR TERMINATED FOR ANY REASON, THE PERFORMANCE GUARANTEE SET FORTH IN THIS SCHEDULE C SHALL BE DEEMED TO HAVE BEEN SATISFIED AND FULFILLED AS OF THE EFFECTIVE DATE OF SUCH EXPIRATION, CANCELLATION OR TERMINATION, AND ESCO SHALL HAVE NO FURTHER OBLIGATIONS OR LIABILITIES ASSOCIATED WITH SUCH PERFORMANCE GUARANTEE.

**SAVINGS RECONCILIATION:**

Customer shall send ESCO all utility and energy data as is required by Schedule E. Within sixty (60) days of receipt of such information for the previous Guarantee Year, ESCO will determine the Actual Savings for such Guarantee Year using the M&V procedures set forth in Schedule D (such determination, the "Guaranteed Savings Reconciliation").

**GUARANTEE AND SHORTFALL:**

In the event the Actual Savings for a Guarantee Year are less than the Guaranteed Annual Savings set forth in the table below for such Guarantee Year, ESCO will pay Customer the difference between the Guaranteed Annual Savings and the Actual Savings for such Guarantee Year, less any Excess Savings ("Savings Shortfall") within thirty (30) days of completing that year's Guaranteed Savings Reconciliation.

Except as set forth in this Performance Guarantee, ESCO makes no express or implied representations, warranties, guarantees or covenants concerning the potential energy efficiency or cost savings benefits of the Work, and payment by ESCO for any Savings Shortfall(s) in accordance with this Performance Guarantee shall be Customer's sole and exclusive remedy for any alleged energy efficiency or cost savings deficiencies.

Year	Measured Savings	Non-Measured Savings	Guaranteed Annual Savings	Guaranteed Cumulative Savings
0				
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				

13				
14				
15				
16				
17				
18				
19				
20				
Total				



**SCHEDULE D  
MEASUREMENT & VERIFICATION PLAN**

**SCHEDULE E  
CUSTOMER RESPONSIBILITIES FOR PERFORMANCE GUARANTEE**