

**MINUTES**  
**GEO. L. SMITH II GEORGIA WORLD CONGRESS CENTER AUTHORITY**  
**BOARD OF GOVERNORS SPECIAL CALLED MEETING**  
**AUTHORITY CONFERENCE ROOM**  
**and via TEAMS TELECONFERENCE**  
**Tuesday, April 30, 2026**  
**1:00 p.m.**

**The following eleven out of fifteen Board members were in attendance:**

Omar Ali (TEAMS)	Aaron McWhorter (TEAMS)
Natasha Bell (TEAMS)	Bill Russell (TEAMS)
Maxine Burton, Treasurer (TEAMS)	Bill Rice (TEAMS)
Brian Daniel, Chair (Presiding) (TEAMS)	Doug Tollett, Vice Chair (TEAMS)
Glenn Hicks (TEAMS)	Dexter Warrior, Secretary (TEAMS)
Rachel Little (TEAMS)	

*Chair Brian Daniel called the meeting to order at 1:00 p.m.*

*A motion to approve the April 28, 2026, Board of Governors meeting minutes was made by Bill Russell, seconded by Glenn Hicks, and unanimously approved.*

**AUTHORITY BUSINESS**

**RESOLUTION REGARDING TRANE U.S., INC. GUARANTEED ENERGY SAVINGS PERFORMANCE PHASE II AGREEMENT**

Stacey Church, the GWCCA Chief Operating Officer, Janet Finlayson, the GWCCA Chief Finance Officer, and Pargen Robertson, the GWCCA Chief Legal Officer, presented an update.

*A motion to approve the Resolution regarding Trane U.S., Inc. Guaranteed Energy Savings Performance Phase II Agreement, a copy of which is attached as Exhibit A, was made by Glenn Hicks, seconded by Maxine Burton, and unanimously was approved.*

Chair Brian Daniel adjourned the meeting at 1:12 p.m.

RESPECTFULLY SUBMITTED:

APPROVED:

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James Pargen Robertson, Jr., Chief Legal Officer

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Dexter Warrior, Secretary

EXHIBIT A

The Resolution regarding Trane U.S., Inc. Agreement follows this page.  
(80 pages)

**A RESOLUTION  
OF  
THE GEO. L. SMITH II GEORGIA WORLD CONGRESS CENTER AUTHORITY  
IN RESPECT OF  
THE DEPARTMENT OF ECONOMIC DEVELOPMENT AND THE  
GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT, INSTALLMENT  
PURCHASE AGREEMENT AND  
ESCROW AGREEMENT**

WHEREAS, the Geo. L. Smith II Georgia World Congress Center Authority (the “Authority”) operates the convention and tradeshow facility known as the Geo. L. Smith II Georgia World Congress Center (the “Center”); and

WHEREAS, by an Agreement between the Authority and the Department of Economic Development (the “Department”), dated April 8, 1974, as amended, the Authority manages and operates the Center for the Department; and

WHEREAS, pursuant to O.C.G.A. § 10-9-4(a), the general purpose of the Authority is to acquire, construct, equip, maintain, and operate the project, including but not limited to the Georgia World Congress Center, in whole or in part, directly or under contract with the Department of Economic Development or others, and engage in such other activities as it deems appropriate to promote trade shows, conventions, and political, musical, educational, entertainment, recreational, athletic, or other events and related tourism within the state so as to promote the use of the project and the use of the industrial, agricultural, educational, historical, cultural, recreational, commercial, and natural resources of the State of Georgia by those using the project or visiting the state or who may use the project or visit this state; and

WHEREAS, pursuant to O.C.G.A. §10-9-4(b)(5), the Authority has the power to acquire, by purchase, gift, lease, or otherwise and to own, hold, improve, and use real and personal property of every kind and character, or any interest therein, for its corporate purposes; and

WHEREAS, pursuant to O.C.G.A. §10-9-4(b)(6), the Authority has the power to make all contracts and to execute all instruments necessary or convenient to its purposes; and

WHEREAS, pursuant to O.C.G.A. §10-9-4(b)(12) and (13), the Authority shall have the power to exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and the laws of the State of Georgia and to do all things necessary or convenient to carry out the powers expressly given in Chapter 9 of Title 10 of the Official Code of Georgia Annotated; and

WHEREAS, pursuant to O.C.G.A. §10-9-7 the management of the business and affairs of the Authority shall be vested in the Board of Governors; and

WHEREAS, pursuant to O.C.G.A. § 10-9-15(a), the Authority is required to operate the project so as to ensure its maximum use, and in connection with and incident to the operation of the project the Authority may engage in such activities as it deems appropriate to promote trade shows,

conventions, and tourism within the state so as to promote the use of the project and the use of the industrial, agricultural, educational, historical, cultural, recreational, and natural resources of the State of Georgia by those using or visiting the project; and

WHEREAS, in accordance with the provisions of Chapter 37 of Title 50 of the Official Code of Georgia Annotated and subject to the procedure, terms and conditions identified in that Chapter, governmental units may incur debt for the purpose of entering into certain guaranteed energy savings performance contracts (“GESPC(s)”) with qualified energy service providers for terms not to exceed twenty (20) years for energy efficiency or conservation improvement projects that generate guaranteed energy and operational cost savings or enhanced revenues; and

WHEREAS, on April 5, 2024, the Authority submitted to the Georgia Environmental Finance Authority (“GEFA”) an application to enter into a GESPC in respect of such projects; and

WHEREAS, on July 2, 2024, the Authority issued a Request for Expression of Interest (“RFEOI”) to all pre-qualified Energy Service Providers; and

WHEREAS, on July 12, 2024, the Authority received Expressions of Interest in respect to its RFEOI from nine pre-qualified Energy Service Providers; and

WHEREAS, on May 1, 2024, the Georgia State Financing and Investment Commission (“GSFIC”) approved the Authority’s GESPC application authorizing the pursuit of an Energy Performance Contract of up to \$25,738,289; and

WHEREAS, on Jun 23, 2025, GSFIC approved the Authority’s GESPC application essentially to revise its earlier application and authorize the pursuit of an Energy Performance Contract of up to \$36,900,000; and

WHEREAS, on July 3, 2024, following an evaluation and ranking of responses by the Authority’s Selection Committee pursuant to GEFA guidelines, notice of eligibility was given to eight pre-qualified Energy Service Providers; and

WHEREAS, on July 16, 2024, a Request for Proposals (“RFP”) was issued to the pre-qualified Energy Service Providers to whom notices of eligibility had been provided; and

WHEREAS, six (6) proposals responding to the RFP were received on August 5, 2024 and subsequently interviews with pre-qualified Energy Service Providers were held; and

WHEREAS, an Investment Grade Audit was conducted by Trane U.S., Inc. and a report was issued on March 20, 2026; and

WHEREAS, Trane U.S., Inc. has demonstrated that it has the expertise, experience, resources and capacity successfully and effectively to undertake the obligations which would be required under the GESPC; and

WHEREAS, the Board of Governors has determined that a true and very real need exists for the acquisition of property the (“Property”) described in the Installment Purchase Agreement; and

**Guaranteed Energy Savings Performance Contract Resolution**

**April 30, 2026**

**PAGE [2]**

WHEREAS, the Authority has determined that the improvements as described will be useful for and beneficial to the operation of the Center and are in the public interest.

NOW, THEREFORE, BE IT RESOLVED by the Board of Governors of the Geo. L. Smith II Georgia World Congress Center Authority that the Authority does hereby request that the Board of Economic Development and the Department of Economic Development execute with Trane U.S., Inc. the Guaranteed Energy Savings Performance Contract substantially in the form attached as Exhibit A.

BE IT FURTHER RESOLVED that the Authority does hereby request that the Board of Economic Development and the Department of Economic Development execute with Trane U.S., Inc. the Installment Purchase Agreement substantially in the form attached as Exhibit B.

BE IT FURTHER RESOLVED that the Authority does hereby request that the Board of Economic Development and the Department of Economic Development is authorized to execute with Trane U.S., Inc. and the Escrow Agent the Escrow Agreement substantially in the form attached hereto as Exhibit C.

BE IT FURTHER RESOLVED that the Chief Executive Officer is authorized to take any and all actions, to execute and deliver any and all documents, agreements, certificates and instruments, and to take any and all steps deemed by the Chief Executive Officer to be necessary and proper to effectuate the intent and purpose of this Resolution.

ADOPTED this 30<sup>th</sup> day of April 2026.

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Brian Daniel, Chair, Board of Governors  
Geo. L. Smith II Georgia World Congress Center Authority

Attest: \_\_\_\_\_  
Crystal Lowe, Assistant Secretary

{Authority Seal}

**EXHIBIT A**

*[insert draft of Guaranteed Energy Savings Performance Contract]*

GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT

BY AND BETWEEN

GEORGIA DEPARTMENT OF ECONOMIC DEVELOPMENT

AND

Trane U.S. Inc.

Project #[PROJECT NUMBER]

SPECIMEN

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## **GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT**

This Guaranteed Energy Savings Performance Contract (“Agreement”) is made and entered into by and between Owner (“Owner”) and Trane U.S. Inc. (“ESP”) under seal to provide energy conservation measures and related services to Owner’s premises, as more fully described in the Contract Documents.

### **ARTICLE 1. DEFINITIONS**

Unless otherwise provided herein, the following terms<sup>1</sup> shall be defined as follows:

- 1.1** “Acceptance of the Work” shall mean a time when ESP’s performance of the entire scope of the ECM Installation Work is complete in strict conformance with the Contract Documents, in accordance with Section 13.1.
- 1.2** “Act” shall mean the Guaranteed Energy Savings Performance Contracting Act, O.C.G.A. §§ 50-37-1 through 50-37-8, as may be amended from time to time.
- 1.3** “Agreement,” as used in the GESPC, shall mean the Guaranteed Energy Savings Performance Contract, or GESPC.
- 1.4** “Annual Review” shall mean the annual review, reconciliation, and verification of the Verified Savings in accordance with Section 5.2 and Schedule M (Methods of Savings Measurement and Verification).
- 1.5** “Audit” shall mean the Investment Grade Energy Audit performed by ESP pursuant to O.C.G.A. § 50-37-3(e), in accordance with the Audit Agreement.
- 1.6** “Audit Agreement” shall mean the Investment Grade Energy Audit Agreement pursuant to which, and in accordance with which, an ESP shall conduct the Audit.
- 1.7** “Audit Report” shall mean the report that ESP is required to produce pursuant to the Audit Agreement and which shall include a summary of ESP’s recommendations for ECMs resulting from the Audit.
- 1.8** “Authority” shall mean the Georgia Environmental Finance Authority.
- 1.9** “Base Period” shall mean the period of time during for which ESP shall examine consumption and usage of electricity, fossil fuels, water, and other applicable utilities for the purpose of developing an appropriate Baseline.
- 1.10** “Baseline” shall mean a base year (or other period agreed to by Owner) of consumption and usage data that is representative of the Base Period, established by agreement in the GESPC, and which is used to calculate Verified Savings in accordance with the GESPC. The Baseline shall be set forth in Schedule E (Baseline).

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<sup>1</sup> Definitions followed by a “\*” indicates that the defined term is not used within this document but may be used in other related documents.

- 1.11** “Change Order” shall mean a written order to ESP executed by the authorized representative of Owner, issued after execution of the GESPC, authorizing a change in the Contract Documents, which may include, without limitation, a change in the Work; an adjustment in ECM Installation Payments or ECM Continuing Services Payments, or Baseline; or a change in dates required for Substantial Completion, Final Completion, ECM Installation Deadlines, or any other deadline hereunder, or any combination thereof, in accordance with Article 9 of the GESPC.
- 1.12** “Contract Amendment” shall mean a written agreement that has been executed by Owner and ESP, in accordance with Article 9 of the GESPC.
- 1.13** “Contract Documents” shall consist of the documents identified in Section 8.1 that form the GESPC, as may be amended from time to time.
- 1.14** “Contract Time for Verified Savings” shall mean the period of time beginning on the date Guaranteed Savings shall begin, as provided in Schedule B (Guaranteed Savings), and ending at the end of the fiscal year that is 18 years thereafter.
- 1.15** “Contract Time for Work” shall mean the period of time beginning on the date that the ECM Installation Work under the GESPC is permitted to proceed, through the date established for Final Completion.
- 1.16** “ECM” shall mean energy conservation measures, as defined in the Act, that (i) are identified in Schedule A (Energy Conservation Measures and Other Work), (ii) are installed in accordance with the GESPC, and (iii) constitute capital expenditures for federal income tax purposes.
- 1.17** “ECM Acceptance Notice” shall mean the written notice issued or executed by Owner with respect to one or more ECMs that initiates the measurement and verification of Verified Savings associated with such ECMs as provided in Section 2.2. Issuance or execution of each ECM Acceptance Notice shall constitute the date of “final acceptance,” as set forth in O.C.G.A. § 50-37-4(b), with respect to each ECM. Issuance or execution of an ECM Acceptance Notice (i) shall not result in a waiver of any rights of Owner and (ii) shall not relieve ESP of any obligations hereunder, including but not limited to the obligations to correct defective, deficient, and non-conforming work.
- 1.18** “ECM Continuing Services” shall mean annual services provided pursuant to the GESPC, including but not limited to commissioning, training, operation, maintenance, monitoring, repairs, replacements, and adjustments, measurement and verification, and the Annual Review.
- 1.19** “ECM Continuing Services Payments” shall mean compensation for ECM Continuing Services provided pursuant to this Agreement and Schedule C-2 (ECM Continuing Services Payments). ECM Continuing Services Payments may be determined with reference to the date Owner issues or executes one or more ECM Acceptance Notices.
- 1.20** “ECM Installation Deadline” shall mean the date set forth in Schedule J (Project Installation Schedule) by which an ECM shall be installed or implemented. The absence of one or more ECM Installation Deadlines shall not have any effect on the date required to achieve Substantial Completion and Final Completion.

- 1.21** “ECM Installation Payments” shall mean compensation for ECM Installation Work provided pursuant to this Agreement and Schedule C-1 (ECM Installation Payments).
- 1.22** “ECM Installation Work” shall mean work associated with the design, procurement, fabrication, construction, installation, and testing of ECMs provided pursuant to the GESPC.
- 1.23** “ECM Modification” shall mean the modification or replacement of ECMs, installation of additional ECMs, revisions to procedures for the operation of ECMs, or implementation of other procedures at the Premises, in accordance with Section 3.5 of the GESPC.
- 1.24** “ECM Submittal Schedule” shall mean a schedule identifying the dates for submission of all ECM Submittals as set forth in the GESPC.
- 1.25** “ESP” shall mean the Energy Services Provider entering into this GESPC.
- 1.26** “Event of Default” shall have the meaning set forth in Sections 10.4 with respect to Owner and 10.5 with respect to ESP.
- 1.27** “Event of Force Majeure” shall have the meaning set forth in Section 14.4.
- 1.28** “Final Completion” shall mean that stage in the progression of the Work under the GESPC when ESP has fully performed the Work, including but not limited to the ECMs, in strict accordance with the Contract Documents, except for the warranty obligations and such other obligations that, as permitted by the GESPC, extend beyond Final Completion of the Work.
- 1.29** “Fiscal Year” (whether or not such term is capitalized) shall mean the fiscal year adopted by the State of Georgia. If a period of time begins on a date that is not the first day of the State of Georgia’s fiscal year, then the first fiscal year for such period of time shall be shortened so as to end on the day before the first day of the State of Georgia’s next fiscal year. If a period of time ends on a date that is not the last day of the State of Georgia’s fiscal year, then the last fiscal year for such period of time shall be shortened so as to end on the day the period of time ends.
- 1.30** “Guaranteed Energy Savings Performance Contract” or “GESPC” shall mean the contract for the evaluation, recommendation, and implementation of one or more ECMs, and associated guaranty of Guaranteed Savings, in accordance with the Act and as more fully set forth in the terms of the GESPC.
- 1.31** “Guaranteed Savings” shall mean the level of energy savings, operational cost savings, and revenue enhancements identified in Schedule B (Guaranteed Savings) for each fiscal year. Schedule B shall state Guaranteed Savings must begin either: (i) with reference to a fixed date or (ii) in accordance with O.C.G.A. § 50-37-3(f), with reference to the date Owner issues or executes one or more ECM Acceptance Notices. If Schedule B identifies Guaranteed Savings with reference to the date Owner issues or executes one or more ECM Acceptance Notices (Option (ii)), then Schedule J (Project Installation Schedule) shall also provide an ECM Installation Deadline for each such ECM.
- 1.32** “Industry Engineering Standards” shall mean

- (a) Life cycle costing;
- (b) The R.S. Means-estimated costing method developed by the R.S. Means Company;
- (c) Historical data;
- (d) Manufacturer's data;
- (e) American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) standards;
- (f) International Performance Measurement and Verification Protocol; and
- (g) Other applicable technical performance standards established by nationally recognized standards authorities, but only if Owner specifically consents in writing to the use of such standard.

- 1.33** "Material Change" shall mean any change in or to the Premises after Acceptance of the Work, not covered by Schedule K (Current and Known Future Capital Projects at the Premises) of the GESPC, whether structural, operational or otherwise in nature, that results in an increase or decrease in Verified Savings by at least 15%, in the aggregate, after adjustments to account for variables that are not, in whole or in part, within ESP's control. A change is not a Material Change if it results, in whole or in part, from ESP's failure to perform any obligation in accordance with the Contract Documents, including but not limited to defective or deficient installation of ECMs and Work, failure to perform or properly perform maintenance, repairs, replacements, or other tasks under Section 4.1, or failure to perform or properly perform any duty in connection with the Audit. A change is not a Material Change if it results, in whole or in part, from malfunction or nonperformance of an ECM.
- 1.34** "Owner" shall mean the State Agency entering into this GESPC.
- 1.35** "Premises" shall mean the facilities listed in Schedule D (Premises) of the GESPC.
- 1.36** "Project" shall mean the design and installation of ECMs, operation and maintenance of ECMs, and all other Work and services required under a GESPC.
- 1.37** "Project Installation Schedule" shall mean the schedule for ECM Installation Work contained in Schedule J (Project Installation Schedule) of the GESPC.
- 1.38** "Substantial Completion" shall mean that stage in the progression of the Work under the GESPC when the Work is sufficiently complete in accordance with the Contract Documents that Owner can take beneficial use and occupancy of the Work, Project, and Premises, including but not limited to ECMs, and can utilize the Work, Project, and Premises for their intended purpose. Partial use or occupancy of the Project shall not result in the Project being deemed substantially complete, and such partial use or occupancy shall not be evidence of Substantial Completion.
- 1.39** "Verified Savings" shall mean actual energy savings, operational cost savings, and revenue enhancements realized with reference to the Baseline set forth in Schedule E (Baseline) of the

GESPC, and determined in accordance with the methods and procedures in Schedule M (Methods of Savings Measurement and Verification) of the GESPC, in accordance with Section 5.2 of the GESPC. Verified Savings shall result solely from ECMs installed or performed by ESP in accordance with the GESPC. Schedule E shall identify the Baseline with reference to fiscal years. Schedule E shall identify the Baseline in the same manner as Schedule B (Guaranteed Savings) identifies Guaranteed Savings (i.e., either (i) with reference to a fixed date or (ii) based on issuance or execution of ECM Acceptance Notices).

- 1.40** “Work” shall mean all work and services required or implied by, or reasonably inferable from, the GESPC and Contract Documents, including but not limited to (i) ECM Installation Work identified in Schedule A (Energy Conservation Measures and Other Work) and installed in or on the Premises listed in Schedule D (Premises) of the GESPC, in accordance with Section 3.1 of the GESPC.
- 1.41** “Hazardous Material” shall mean any pollutant, contaminant, toxic or hazardous substance, material or waste, any dangerous, potentially dangerous, noxious, flammable, explosive, reactive or radioactive substance, material or waste, urea formaldehyde, asbestos, asbestos-containing materials (“ACM’s”), polychlorinated biphenyl (“PCB”), mold, fungus, bacteria, microbial growth, or other contaminates or airborne biological agents, and any other substance, the manufacture, preparation, production, generation, use, maintenance, treatment, storage, transport, disposal, handling, or ownership of which is regulated, restricted, or prohibited, by any federal, state, or local statute, law, ordinance, code, rule or regulation now or at any time hereafter in effect, and as may be amended from time to time, including but not limited to, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.), the Clean Air Act (42 U.S.C. §§ 7401 et seq.), the Toxic Substances Control Act, as amended (15 U.S.C. §§ 2601 et seq.), and the Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.).
- 1.42** “ECM Warranties” shall mean the written warranties specified in Schedule P (Warranties) and Exhibit III (Equipment Warranties).

## **ARTICLE 2. THE PROJECT**

### **2.1 Energy Conservation Measures**

ESP shall design, procure, fabricate, construct, install, commission, and test the ECMs specified in Schedule A (Energy Conservation Measures and Other Work) with respect to the Premises. ESP shall perform all activities and provide all materials, supplies, tools, and equipment necessary to install and operate the ECMs, as provided for in the Contract Documents including Schedule A, and perform all other Work with minimal interference with Owner’s operations.

### **2.2 Measurement and Verification**

ESP shall measure and verify the Verified Savings resulting from the ECMs in accordance with the Methods of Savings Measurement and Verification set forth in Schedule M (Methods of Savings Measurement and Verification). At a minimum, the methods identified in Schedule M shall comply with the 2016 version of the International Performance Measurement and Verification Protocol or other Industry Engineering Standard (as such term is defined in the Act), but only if Owner consents to such other Industry Engineering Standard.

Without diminishing ESP's obligation, Owner may hire a competent third party to measure and verify Verified Savings in accordance with this Agreement. If the Verified Savings determined by the third party differ from the amount determined by ESP, then Owner and ESP shall attempt to agree on the appropriate level of Verified Savings. If Owner and ESP agree on the appropriate Verified Savings, they shall execute a Contract Amendment in accordance with Article 9.

If Owner and ESP are unable to mutually agree on the appropriate level of Verified Savings for a particular fiscal year, then Verified Savings shall be determined by a third party as provided in this Section. Within five (5) days of Owner's request, ESP shall provide Owner with a list of at least five (5) third parties that are independent of ESP and all of its affiliates, and who are qualified to determine the appropriate level of Verified Savings. Owner may select a third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to determine the appropriate level of Verified Savings. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, Owner shall have the right to select the third party to determine the appropriate level of Verified Savings in its sole discretion. The third party selected pursuant to this Section shall be hired by Owner. The findings and report, if any, of such third party shall be provided to ESP.

### **2.3 Annual Energy Savings Guaranty and Bonds**

ESP shall guarantee annual Guaranteed Savings as set forth in Article 5, shall provide a surety instrument to secure such guaranty as set forth in Article 5, and shall provide performance and payment bonds as set forth in Article 6.

### **2.4 Commissioning**

ESP shall conduct a thorough and systematic performance test of each element and total system of the installed ECMs in accordance with Schedule N (Systems Startup and Commissioning of ECMs). ESP shall provide advance written notice of at least ten (10) business days to Owner of the scheduled tests. Owner shall have the right to designate representatives to be present at any or all such tests including representatives of the manufacturers of the ECMs. ESP shall demonstrate that each ECM (and each element thereof) complies with the requirements of the Contract Documents. At no additional cost to Owner, ESP shall correct or adjust all deficiencies in the operation of the ECMs as necessary to bring each ECM into compliance with the Contract Documents.

### **2.5 Training, Maintenance, Monitoring, and Other Work**

In accordance with Article 4, ESP shall provide training described in Schedule I (ESP Training Responsibilities), and any operation, maintenance, monitoring and related services described in Schedule F (ESP Maintenance Responsibilities), and all other services and Work specified in the Contract Documents.

### **ARTICLE 3. ENERGY CONSERVATION MEASURES**

#### **3.1 Performance of the Work**

ESP shall perform or cause to be performed the Work in strict accordance with the Contract Documents. The Work shall also include whatever is done by or required of ESP to perform and complete its duties under the Contract Documents, as provided for in the Contract Documents including Schedule A, including but not limited to the following: the provision or furnishing of labor, supervision, services, materials, supplies, equipment, fixtures, appliances, facilities, tools, transportation, storage, power, permits and licenses required, and fuel, heat, light, cooling and all other utilities as required by this Agreement.

Notwithstanding the preceding sentence, Owner shall provide power, fuel, heat, cooling, or other utilities at no cost to ESP. If Owner provides such utilities, ESP shall indemnify, hold harmless, and defend Owner against any damages, losses, or expenses arising from ESP's use of Owner's facilities or utilities at the Premises.

No later than (120) days after execution of this Agreement, ESP shall provide detailed drawings and specifications concerning the ECMs and associated equipment and materials, and all impacted areas of the Premises, for Owner's review and comment. Such documents shall become the property of Owner without restriction. ESP shall make such reasonable modifications to the drawings and specifications as Owner may require. Upon Owner's approval of the drawings and specifications, ESP shall proceed to provide ECM Submittals as set forth in Section 3.4. Owner's approval of any drawings, specifications, or submittals shall not be evidence that such documents, and associated Work pursuant thereto, conform to the requirements of the Contract Documents, nor shall such approval relieve or diminish in any way ESP's obligation to comply with the Contract Documents.

#### **3.2 ESP's Responsibility for the Work**

**3.3** ESP shall perform all Work strictly in conformance with the Contract Documents. Compliance with the Contract Documents shall be and remain the responsibility of ESP. Owner or its representatives and consultants may review, inspect, and test the Work from time to time. Any review, approval, testing, or acceptance of, or payment for, any or all of the Work shall not relieve ESP of its responsibility for the Work and compliance with the Contract Documents. Standards of the Work

ESP shall assure that all of the Work is accomplished in a workmanlike manner and in compliance with the Contract Documents and that all services which require the exercise of professional skills or judgment shall be accomplished by professionals qualified and competent in the applicable discipline and appropriately licensed in the State of Georgia, if required by law. All Contract Documents which are required to be prepared by ESP shall be in accordance with all applicable codes, standards and regulations, and shall be prepared by qualified personnel. Where required by law, Contract Documents shall bear the stamp or seal of architects or engineers licensed in the State of Georgia.

#### **3.4 ECM Submittal Process**

### **3.4.1 Coordination With Owner**

ESP recognizes that some or all of Owner's Premises are currently in use and operation and that ESP must coordinate with Owner to minimize any interference. Among other means, ESP will use the submittal process described in Section 3.4 as a means of minimizing interference. ESP recognizes that delays are to be expected from coordination required by this Section 3.4.1, and from Owner's review and approval of ECM Submittals. Accordingly, ESP shall not assert, and hereby waives, any claim for reasonable delays resulting from coordination of Work and Owner's review and approval of ECM Submittals. In its sole discretion, Owner may designate representatives or retain consultants, including architects and engineers, to consult with and advise ESP regarding the Work or ECM Submittals on Owner's behalf. Such representatives shall not, however, have authority to bind Owner for purposes of Change Orders or other Contract Amendments, unless Owner specifically consents in writing. The provisions of Article 9 shall govern such Change Orders and Contract Amendments. ESP shall at all times provide access to the Work to Owner and its representatives and consultants. ESP agrees to comply with any reasonable demands of such representatives and consultants.

### **3.4.2 ECM Submittals**

ESP shall submit to Owner all shop drawings, product data, samples, mock-ups, and other submittals related to each ECM ("ECM Submittals") for Owner's review in accordance with Section 3.4. ECM Submittals must be provided to Owner within such time as to not delay the Work and Project Installation Schedule.

ECM Submittals do not constitute Contract Documents. Their purpose is merely to demonstrate the manner in which ESP intends to implement the Work in conformance with information received from the Contract Documents. ESP shall not install any ECM unless and until an ECM Submittal specifically covering such ECM shall have been approved in writing by Owner. Approval of an ECM Submittal, however, shall not be evidence that the ECM Submittal and associated Work pursuant thereto conforms to the requirements of the Contract Documents, nor shall such approval relieve or diminish in any way ESP's obligation to comply with the Contract Documents.

### **3.4.3 Informational Requirements of ECM Submittals**

ECM Submittals shall provide sufficient detail to allow Owner to complete its review and shall, at a minimum, include:

- (a) submittal date and revision dates;
- (b) project number and title;
- (c) the ECM or its component covered by the submittal;
- (d) names of ESP and any applicable subcontractors, manufacturers, suppliers, and dealers;
- (e) identity of product or material with models or products to be used and specifically each and every option that is to be included (options, features, models and other information not

pertinent to this Project and its application shall be fully and clearly marked out of the submittal);

- (f) relation to adjacent structure or material;
- (g) clearly identified field dimensions;
- (h) drawings and specifications page and number (if applicable);
- (i) applicable standards, such as ASTM or ANSI, that the ECM Submittal satisfies;
- (j) identification of any applicable Change Order or Contract Amendment that relates to the ECM;
- (k) stamp or seal of the preparer of the ECM Submittal and ESP's certification that it has reviewed and approved the submittal as to its accuracy and compliance with the provisions of the Contract Documents;
- (l) shop drawings, product data, and, where appropriate or reasonably required, product samples; and
- (m) if a mock-up or demonstration occurred, the date when and location where same occurred, and Owner representatives who were present.

At the request of Owner, and where appropriate or reasonably required, ESP shall provide on-site mock-ups and demonstrations of the ECMs at the Premises which shall also be construed as ECM Submittals under the provisions of this Section, but only to the extent that Owner provides a written verification that mock-up was reviewed. As with written ECM Submittals, any written verification of mock-ups shall not be evidence that the mock-up and associated Work pursuant thereto conforms to the requirements of the Contract Documents, nor shall such approval relieve or diminish in any way ESP's obligation to comply with the Contract Documents.

#### **3.4.4 Project Schedule and ECM Submittal Schedule**

Within (30) days of commencing the Work, ESP shall submit to Owner for its information ESP's schedule for completing the Work in accordance with the Project Installation Schedule and by the date set forth herein for Substantial Completion and Final Completion. If required herein, the Project Installation Schedule shall incorporate and reflect each ECM Installation Deadline, which shall not be changed without Owner's written approval. In case of delays expressly requested by Owner to accommodate the needs of Owner's convention and tradeshow operational schedule, except to the extent not previously disclosed and accounted for in the Project Installation Schedule under Section 12.3, the parties shall collaborate reasonably to adjust the Project Installation Schedule as necessary, but in all cases, subject to Section 14.4. Additionally, within (60) days of commencing the Work, ESP shall submit to Owner an ECM Submittal Schedule. Each of these schedules required herein shall be revised no less frequently than every two weeks (unless the parties otherwise agree in writing) and shall be revised to reflect conditions encountered from time-to-time and shall be related to the entire Project. Each such revision shall be furnished to Owner. The schedules, and all revisions, shall be in such form, and shall contain such detail, as Owner may reasonably require. The

schedules shall specifically account for Owner's continued use and occupation of the Premises. THE PARTIES SPECIFICALLY AGREE THAT ANY FLOAT CONTAINED IN THE SCHEDULES SHALL BELONG TO THE PROJECT AND IN NO EVENT SHALL ESP MAKE CLAIM FOR ANY ALLEGED DELAY, ACCELERATION, OR EARLY COMPLETION SO LONG AS THE PROJECT IS COMPLETED WITHIN THE CONTRACT TIME FOR WORK. Strict compliance with the requirements of this Section is a condition precedent for payment to ESP, and failure by ESP to strictly comply with said requirements shall constitute a material breach of this Agreement.

ESP shall continuously maintain at the site, for the benefit of Owner, one record copy of this Agreement and other Contract Documents marked to record on a current basis changes, selections, and modifications made during construction. Additionally, ESP shall maintain at the site for the benefit of Owner the approved ECM Submittals.

#### **3.4.5 Review and Approval of ECM Submittals**

Within twenty (20) business days after receipt, Owner shall complete its review of the submittals or revised submittals and provide written approval or, if the submittal or revised submittal has not been approved, written explanation as to the reason therefor. ESP shall submit to Owner a revised submittal within seven (7) business days after receipt of Owner's rejection. ESP may not commence any of the Work which requires the submittals without written approval by Owner, approval shall not be unreasonably withheld, conditioned, or delayed.

Owner may reject submittals, among other reasons, on the basis that the Work associated with such submittal (i) might constitute or create a hazard to the Premises or to persons or property, (ii) does not comply with the Contract Documents, or (iii) would result in delay in scheduled completion of the Work.

#### **3.5 ECMs Modifications**

ESP may request Owner's permission to implement an ECM Modification. To request an ECM Modification, ESP shall submit a written request that identifies (i) the requested ECM Modification; (ii) the ECMs to be modified; (iii) the requested change in ECM Installation Payments, if any; and (iv) the requested adjustments, if any, to the Baseline set forth in Schedule E (Baseline) arising from ECM Modifications. ESP shall represent and warrant to Owner that (i) the ECM Modification does not result in modifying the standards of comfort and service set forth in Schedule H (Operating Parameters for ECMs/Standards of Comfort & Service) without the express written approval of Owner; (ii) the ECM Modification is necessary to enable ESP to achieve the Guaranteed Savings; (iii) any costs incurred due to any ECM Modification shall be the sole responsibility of ESP; (iv) any ECM Modification that is a replacement of an ECM shall be new and have equal or better potential to reduce energy consumption at the Premises than the ECM being replaced; (v) ESP shall update any and all software to be used in connection with the affected ECMs; and (vi) any ECM Modifications shall become the property of Owner. ESP shall provide all necessary backup analysis and documentation to support its request for ECM Modification.

If Owner consents to the requested ECM Modification, the parties will enter a Contract Amendment or follow the Change Order procedures and comply with Article 9, except that Section 9.2.2 shall not apply because the change in ECM Installation Payments (if any) shall be agreed upon when the ECM Modification is approved by Owner. Owner has no obligation to accept the requested ECM Modifications.

All ECM Modifications approved by Owner under this Section shall become part of the ECMs described in Schedule A (Energy Conservation Measures and Other Work) and shall become the property of Owner. Unless specifically provided in a Contract Amendment or Change Order, no ECM Modification shall relieve or diminish ESP's obligation to achieve the Guaranteed Savings specified in Schedule B (Guaranteed Savings). This Section shall not affect the limitation of Owner's payment obligations in Section 7.5.

### 3.6 ECM Malfunction

During the term of this Agreement, Owner shall use its best efforts to notify ESP or its designee within three (3) business days after Owner receives actual knowledge of the occurrence of a material malfunction in the operation of the ECMs or any pre-existing energy-related equipment, but only if Owner reasonably believes that such malfunction may lead to a Material Change. Such a material malfunction in the operation of an ECM shall not be deemed a Material Change unless such malfunction is caused by Owner's failure to maintain such ECM in accordance with this Agreement, in which case Section 12.4(h) may apply solely to the extent such malfunction is caused by Owner. Except to the extent Section 12.4(h) applies, Owner shall have no obligation to modify the Baseline to account for any material malfunction in the operation of an ECM.

### 3.7 Supervision

ESP shall employ and maintain at the Project site only competent supervisory personnel. Absent written instruction from ESP to the contrary, the superintendent shall be deemed ESP's authorized representative at the site and shall be authorized to receive and accept any and all communications from Owner.

Key supervisory personnel assigned by ESP to this Project are as follows:

<u>Name</u>	<u>Function</u>	<u>Email and Mobile Phone Number</u>
Michal Banik	Lead Project Manager	(205) 718-3560 Michal.banik@trane.com
Kevin Mccall	Project Manager	(470) 714-5289 Kevin.McCall@tranetechnologies.com
Thomas Brown	Project Executive	(404) 772-7876 <a href="mailto:Thomasq.brown@trane.com">Thomasq.brown@trane.com</a>
Matt Broome	Contracting Manager	(770) 375-1993 Matt.broome@trane.com

So long as the individuals named above remain actively employed or retained by ESP, they shall perform the functions indicated next to their names unless Owner agrees to the contrary in writing. In the event one or more individuals not listed above subsequently assumes one or more of those functions listed above, ESP shall be bound by the provisions of this Section 3.7 as though such individuals had been listed above.

### **3.8 Restoring and Cleaning the Site and the Project**

On a daily basis, ESP shall keep the Premises clean so as not to interfere with the operations of Owner. Upon Final Completion of the Work, ESP shall thoroughly clean the Premises and the Project and remove all waste, together with all of ESP's property therefrom. Upon Owner's issuance or execution of an ECM Acceptance Notice, ESP shall thoroughly clean the portion of the Premises and the Project affected by such ECM Installation Work and shall remove all waste, together with all of ESP's property therefrom.

ESP shall ensure that all Work does not damage the existing conditions of the Premises. If ESP causes any damage to such existing conditions, ESP shall be obligated to repair and restore such conditions to their condition as it existed before the damage, unless otherwise provided in a Change Order or Contract Amendment.

### **3.9 Means, Methods, Techniques, Sequences, Procedures and Safety**

As long as ESP complies with the Contract Documents, ESP is fully responsible for, and shall have control over, all construction means, methods, techniques, sequences, procedures and safety, and shall coordinate all portions of the Work required by the Contract Documents.

### **3.10 Indemnity**

To the fullest extent permitted by law, ESP shall indemnify, hold harmless, and defend Owner and its agents, the State of Georgia and its departments, agencies, and instrumentalities, and all of their respective officers, members, employees, and directors from and against third-party liability, claims, damages, losses and expenses, including attorney fees, arising out of the performance of the Work, or loss of use resulting therefrom, bodily injury or death, or damage to tangible property, but only to the extent caused in whole or in part by breach of contract or by the negligent or wrongful acts or omissions, of ESP, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such liability, claim, damage, loss, or expense is caused in part by a party indemnified hereunder. Notwithstanding any obligation of ESP under the Contract Documents to indemnify, defend, or hold harmless Owner or any related party listed above, ESP shall not be required to indemnify, hold harmless, or defend Owner or any related party listed above from liability, claims, damages, losses and expenses, to the extent caused solely by the negligent, reckless, intentional, or wrongful act, conduct, or omission of the Owner or of the employees, concessionaires or contractors of the Owner. Notwithstanding anything to the contrary, nothing in the Contract Documents imposes any obligation on ESP to indemnify, defend, or hold harmless to the extent prohibited by O.C.G.A. §. 13-8-2.

In the event the ESP is required to indemnify the Owner, ESP shall pay for representation for Owner upon the request of the Attorney General for the State of Georgia, who shall have sole discretion in

determining said counsel and in appointing said counsel as a Special Assistant Attorney General. Any settlement of a claim for indemnity shall be reviewed and approved by the Attorney General. To the extent any settlement amounts or awards are awarded to Owner, Owner shall be entitled to receive and retain all such settlement amounts and all amounts awarded as damages, profits or otherwise in connection with such suits.

If claims are asserted against any person or entity indemnified under this Section 3.10 by an employee of ESP, a subcontractor, any one directly or indirectly employed by them or anyone, the indemnification obligation under this Section 3.10 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for ESP or a subcontractor under workers' compensation acts, disability benefit acts, or other employee benefit acts.

If and to the extent claims, damages, losses, and expenses covered by this Section are paid by the State Tort Claims Trust Fund, the State Authority Liability Trust Fund, the State Employee Broad Form Liability Fund, the State Insurance and Hazard Reserve Fund, and other self-insured funds established and maintained by the State of Georgia Department of Administrative Services Risk Management Division, then ESP agrees to reimburse such funds for the amount paid out by such funds.

#### **ARTICLE 4. OPERATING, MAINTENANCE, MONITORING, TRAINING, AND RELATED TASKS**

##### **4.1 ESP's Operating, Maintenance, Monitoring, and Related Tasks**

ESP shall be responsible for providing the operating, maintenance, monitoring, commissioning, and other services to the ECMs as set forth in Schedule F (ESP Maintenance Responsibilities). ESP acknowledges that its obligation to identify all tasks and costs associated with operating, maintenance, monitoring, commissioning, repairs, replacements, adjustments, and other related services to the ECMs is of paramount importance. In addition to those tasks set forth in Schedule F, if any task related to operating, maintenance, monitoring, commissioning, repairs, replacements, adjustments, and other related services required for any ECM was not identified by ESP and allocated to ESP in Schedule F, or to Owner in Schedule G (Owner Maintenance Responsibilities), before execution of this Agreement or prior Owner's final approval of the ECM design under Section 3.1, then ESP shall perform such task without additional fees or increase in compensation. ESP's failure to identify such tasks before execution of this Agreement or prior to Owner's final approval of the ECM design under Section 3.1, shall result in a waiver by ESP of any right to assert that failure to perform such tasks resulted in a Material Change.

In its sole and complete discretion, however, Owner may negotiate and agree to pay ESP to perform any tasks identified in this Section that were not allocated to ESP in Schedule F, or Owner in Schedule G, before execution of this Agreement. Owner's election to make such payments shall not result in (i) an obligation to make payments for such tasks in the future or any other tasks at any time, or (ii) a waiver of Owner's rights, and ESP's obligations, under this Section. Further, ESP shall not assert Owner's election to make such payments as a basis to claim that the failure to perform such tasks resulted in a Material Change.

All replacements of, and alterations or additions to, the ECMs shall become part of the ECMs and shall become the property of Owner. Any replacements of and alterations or additions made by ESP to Owner's pre-existing equipment, or equipment acquired by Owner, shall become part of said equipment and be owned by Owner. All costs associated with the performance of this Section 4.1, including but not limited

to all services, labor, equipment, materials, and parts, shall be deemed compensated by the ECM Continuing Services Payments pursuant to Schedule C-2 (ECM Continuing Services Payments).

#### **4.2 Owner's Operating, Maintenance, Monitoring, and Related Tasks**

Owner shall be responsible for providing operating, maintenance, monitoring, and other related tasks related to the ECMs as set forth in Schedule G (Owner Maintenance Responsibilities). If Owner moves, modifies, removes, adjusts, alters, or changes the ECMs, or any part thereof, during the Contract Time For Guaranteed Savings, and if such modification results in a Material Change, then the provisions of Sections 12.4, 12.5, and 12.6 shall apply. Such provisions shall not apply, however, if Owner makes any such modification with prior written direction or approval from ESP, which shall not be unreasonably withheld, or if Owner makes such modification in the event of an occurrence reasonably deemed by Owner to constitute a bona fide emergency.

ESP shall provide any information, analysis, and guidance requested by Owner to assist Owner in fulfilling its obligations under Schedule G. Owner shall be permitted to rely on such information, analysis, and guidance. ESP waives any right to assert Owner's failure to comply with this Section to the extent such failure is caused, in whole or in part, by Owner's reliance on such information, analysis, and guidance.

Unless ESP is responsible for such tasks, Owner shall use its best efforts to maintain the Premises in good repair and to protect and preserve the ECMs in good repair and condition in accordance with the manufacturers' recommendations that are provided to Owner by ESP and to maintain the operating conditions of all mechanical systems and energy related systems located at the Premises. ESP shall notify Owner in writing of any improper operation, maintenance, monitoring, repairs, replacements, and adjustments as soon as ESP has knowledge of same.

#### **4.3 Training by ESP**

ESP shall conduct the training program described in Schedule I (ESP Training Responsibilities) hereto.

#### **4.4 Owner's Right to Self-Perform**

Owner may elect to self-perform, or hire a third party to perform, any or all ECM Continuing Services, except the performance of the Annual Review, as long as such services are performed in conformance with the requirements of Schedule F (ESP Maintenance Responsibilities). Owner shall provide sixty (60) days' advance written notice to ESP of its election. ESP shall cease performing such services upon the date set forth therein.

Upon the effective date of the election provided by this Section, Owner's obligations to pay ECM Continuing Services Payments associated with such services shall cease. In determining the amount of ECM Continuing Services Payments associated with such discontinued services, Owner may rely on any documentation provided by ESP, including but not limited to Schedule C-2 (ECM Continuing Services Payments) and documents provided in connection with the Audit, in determining the ECM Continuing Services Payments associated with the discontinued services.

An election under this Section is not, and shall not be deemed, a termination, breach, or default of this Agreement. Nothing in this Section shall affect Owner's right to hire a third party to perform the Annual Review in accordance with Section 10.3. Except as provided in this Section, ESP's obligations hereunder shall continue and this Agreement shall remain in full force and effect.

## **ARTICLE 5. ANNUAL ENERGY SAVINGS GUARANTY**

### **5.1 Annual Energy Savings Guaranty**

ESP guarantees that the Verified Savings will equal or exceed the Guaranteed Savings each fiscal year during the Contract Time for Verified Savings. In addition, ESP guarantees that the total dollar value of Verified Savings, established as provided in Schedule M (Methods of Savings Measurement and Verification) (subject to the stipulated utility rates and cost escalators), will equal or exceed the sum of all ECM Installation Payments and ECM Continuing Services Payments, as amended by Change Orders or Contract Amendments (if any).

ESP shall furnish to Owner an energy savings guarantee bond, a bank letter of credit, or other surety instrument acceptable to Owner, and under seal of the surety, in an amount equal to the dollar value of Guaranteed Savings for the Contract Time for Verified Savings. As Verified Savings are realized each fiscal year during the Contract Time for Verified Savings, and only if such Verified Savings exceed Guaranteed Savings for such fiscal year, the value of the energy savings guarantee bond, bank letter of credit, or other surety instrument may decrease proportionately in a reasonable amount determined by Owner. The surety instrument provided for under this Section shall not be subject to Chapter 10 of Title 13 of the O.C.G.A., and specifically shall not be subject to the one-year period of limitations set forth in O.C.G.A. § 13-10-42. The surety instrument shall provide that Owner may commence legal actions on the surety instrument at any time during, and no less than two years after, the Contract Time for Verified Savings has ended.

### **5.2 Annual Review and Guaranty Payment**

Within (90) business days following the close of each fiscal year during the Contract Time for Verified Savings, ESP shall (1) perform an Annual Review of the Verified Savings in accordance with the methods and procedures in Schedule M (Methods of Savings Measurement and Verification), and (2) provide a written report of the Annual Review to Owner. If Verified Savings do not equal or exceed the Guaranteed Savings for such fiscal year, then in accordance with ESP's guaranty obligations of Section 5.1, ESP will pay Owner the difference between (i) the Guaranteed Savings and (ii) the Verified Savings, upon converting such amounts to dollar values in accordance with Schedule M. Such payment shall be made to Owner not later than the date that the written report of the Annual Review is due.

Owner may dispute the findings of the Annual Review and the amount due Owner under this Section at any time. Without limitation, Owner may elect the option provided by Section 2.2 to hire an independent third-party to determine the Verified Savings. Owner's receipt and deposit of any payment due under this Section shall not affect Owner's right to dispute the findings of the Annual Review or the amount due Owner under this Section.

Any excess of Verified Savings over Guaranteed Savings in a fiscal year shall not be used to offset deficiencies of Verified Savings in comparison to Guaranteed Savings in other fiscal years.

## **ARTICLE 6. SURETY BONDS AND INSURANCE**

### **6.1 Payment and Performance Bonds**

ESP shall furnish to Owner, as soon as practicable following the execution hereof and prior to commencement of any Work, separate performance and payment bonds. Each bond shall have a penal sum in an amount set forth in Schedule O (Insurance and Bonds / Savings Guarantee Security), but not less than the total ECM Installation Payments, and shall secure all of ESP's obligations under this Agreement and the Contract Documents, except for those obligations secured by the surety instrument identified in Section 5.1.

Each bond furnished by ESP shall incorporate by reference the terms of this Agreement as fully as though they were set forth verbatim in such bonds. In the event that ECM Installation Payments are increased by Change Order or Contract Amendment, the penal sum of both the performance bond and the payment bond shall be deemed increased by like amount. The performance and payment bonds furnished by ESP shall be in a form suitable to Owner, shall comply with the provisions of O.C.G.A. Title 13, Chapter 10 (O.C.G.A. §§ 13-10-1 through 13-10-65), except the period of limitation thereof, and shall be executed by a surety or sureties reasonably suitable to Owner. Notwithstanding anything to the contrary herein, the performance bond provided by ESP shall provide a period of limitation for filing suit no earlier than two (2) years from completion of the Project and Acceptance of the Work.

### **6.2 ESP Insurance Requirement**

ESP shall purchase, maintain, and provide evidence of insurance coverage of the types, in the amounts, and for the periods specified in Schedule O (Insurance and Bonds / Savings Guarantee Security). Prior to the commencement of any Work on the Project, ESP shall submit to Owner all certificates of insurance evidencing the insurance coverage required in Schedule O.

ESP may not commence performance of the Work or other services under this Agreement until Owner has received and approved in writing the certificates of insurance, but the absence of such approval shall not constitute a waiver of ESP's obligations under this Section 6.2.

Without prejudice to Owner's other remedies, including but not limited to those identified in Article 10, Owner shall have the right to stop the Work until evidence of the required coverage is provided. ESP shall require all subcontractors performing any portion of the Work to carry the insurance required in Schedule O (Insurance and Bonds / Savings Guarantee Security) and ESP may, at its option, provide the coverage for any or all subcontractors, and, if so, the evidence of insurance submitted shall so stipulate. ESP and each of its subcontractors agree that each insurer shall waive its rights of subrogation against Owner, and Owner may require an endorsement documenting said waiver of subrogation. The insurance requirements hereof are for the sole benefit of Owner and any party indemnified under Section 3.10. Except as expressly provided herein, there are no third-party beneficiaries of the insurance requirements hereof.

ESP shall timely renew the required insurance as necessary to keep such coverage in effect for the periods specified in Schedule O and shall supply Owner, not less than thirty (30) days prior to any expiration or renewal dates for such insurance policies, with evidence of all required insurance, including updated replacement certificates of insurance and amendatory riders or endorsements that clearly evidence the continuation of all required coverage.

ESP understands and agrees that any insurance protection furnished by ESP hereunder shall in no way limit its responsibility to indemnify and save harmless Owner under the provisions of this Agreement.

## **ARTICLE 7. PAYMENT OBLIGATIONS**

### **7.1 Owner's Payment Obligations**

Payments to ESP shall only include (1) ECM Installation Payments and (2) ECM Continuing Services Payments. Such payments include all compensation and amounts to be paid by Owner for all Work, services, and benefits provided by ESP pursuant to, or in any way related to, this Agreement. Payments to ESP shall be made in conformity with and subject to the provisions of this Article 7 and Schedules C-1 (ECM Installation Payments) and C-2 (ECM Continuing Services Payments).

As a condition precedent to the interim and final ECM Installation Payments, ESP shall provide Owner (i) if required by Owner, an interim or final lien waiver as set forth in O.C.G.A. § 44-14-366, and (ii) a sworn written statement in conformance with the provisions of O.C.G.A. § 44-14-361.2(a)(2) that the agreed price or reasonable value of all labor, services, or materials in connection with this Agreement have been paid.

In the event that Owner makes an election under Section 4.4 (Owner's Right to Self-Perform), Owner's payment obligations for ECM Continuing Services Payments shall be adjusted as set forth in Section 4.4.

Payments to ESP hereunder may be made directly by Owner or by the Escrow Agent in accordance with the Escrow Agreement, dated the date hereof, among Owner, ESP, and the Escrow Agent. To the extent funds are paid to ESP from the Escrow Agent, such payments shall be deemed payments under this Agreement as if Owner paid such amount directly to ESP.

### **7.2 ECM Installation Payments**

#### **7.2.1 Schedule of Values for ECM Installation Payments**

Within (30) calendar days following the beginning of the Contract Time for Work, ESP shall submit to Owner a schedule of values allocating the total ECM Installation Payments among the various portions of the ECM Installation Work in proportion to the pro rata cost associated with such portions. The schedule of values shall be prepared in conformity with Exhibit IV (Schedule of Values) and with such detail, and supported by such data, as Owner may require to substantiate its accuracy. ESP shall not imbalance the schedule of values or artificially inflate any portion thereof. The violation of this paragraph by ESP shall constitute a material breach of this Agreement.

By reviewing the schedule of values, Owner does not approve or verify its accuracy. If at any time Owner determines that the schedule of values is not accurate or does not properly allocate the total ECM Installation Payments, then Owner in its sole discretion may require ESP to modify the schedule of values.

The schedule of values, as modified by Owner, shall be used as the basis for ESP's applications for payment, as set forth in this Article 7.

### 7.2.2 ECM Installation Payments and Procedures

Based upon applications for payment in conformity with this Agreement, Owner shall pay, or authorize the Escrow Agent to pay, the ECM Installation Payments to ESP as set forth in this Section. Each application for payment shall be based on the most recent schedule of values submitted by ESP and, if applicable, as modified by Owner.

Applications for payment must show the percentage of completion of each portion of the ECM Installation Work as of the end of the period covered by the application for payment. The period covered by each application for payment shall be one calendar month ending on the last day of the month. Provided that an application for payment is received by Owner not later than the (10<sup>th</sup>) day of a month, Owner shall pay, or authorize the Escrow Agent to pay, ESP not later than the last day of the month. If an application for payment is received by Owner after the date in the preceding sentence, Owner shall pay, or authorize the Escrow Agent to pay, ESP no later than (20) days after Owner receives the application for payment.

Subject to other provisions of the Agreement, the amount of each individual ECM Installation Payment shall be computed as follows:

- (n) Take that portion of the total ECM Installation Payments properly allocable to completed ECM Installation Work, as determined by multiplying the percentage of completion of each portion of the ECM Installation Work by the share of the total ECM Installation Payments allocated to that portion in the schedule of values.
- (o) Subtract the amounts for retainage or otherwise withheld pursuant to Section 7.2.3.
- (p) Subtract the aggregate of previous ECM Installation Payments.
- (q) Subtract amounts, if any, withheld by Owner pursuant to any provision of this Agreement or applicable law.
- (r) Subtract amounts, if any, which are not properly payable to ESP under any provision of this Agreement or applicable law.

### 7.2.3 Retainage

As retainage, Owner may retain up to 5 percent of the ECM Installation Payments in each application for payment submitted before and until Substantial Completion. Owner may in its sole discretion reduce the percentage, but any such reduction will not affect its right to subsequently resume withholding retainage.

Within (30) days after receipt of ESPs first application for payment on or after Substantial Completion of the ECM Installation Work, Owner shall pay, or authorize the Escrow Agent to pay, retainage withheld, if any, less two hundred percent (200%) of the reasonable costs for completing all incomplete Work, correcting and bringing into conformance all defective and nonconforming Work, and handling all outstanding or threatened claims.

Within (30) days after receipt of ESPs final application for payment on or after Final Completion of the ECM Installation Work, Owner shall pay, or authorize the Escrow Agent to pay, retainage and other amounts withheld from the ECM Installation Payments.

Notwithstanding anything to the contrary in this Article 7, Owner's release of retainage and other amounts withheld pursuant to this Section is subject to all other restrictions, limitations, and conditions of Owner's payment obligation under this Agreement. Notwithstanding anything to the contrary in this Article 7, Owner's right to withhold retainage and other amounts specified in this Section is in addition to and without prejudice to Owner's right to withhold payments under other provisions of this Agreement or at law.

### **7.3 Withholding ECM Installation Payments**

Owner may decline to make ECM Installation Payments to ESP, and may demand the return of some or all ECM Installation Payments previously paid to ESP, to remedy any deficiency, in each case upon written notice to ESP setting forth the reasons thereof and providing ESP with an amount of time to remedy any deficiency, because of:

- (a) Intentionally Removed;
- (b) Intentionally Removed;
- (c) defective Work not remedied by ESP nor, in the opinion of Owner, likely to be remedied by ESP;
- (d) persistent failure to carry out the Work in accordance with the Contract Documents;
- (e) claims of third parties against Owner or Owner's property;
- (f) failure by ESP to pay subcontractors or others in a prompt and proper fashion;
- (g) evidence that the balance of the Work cannot be completed in accordance with the Contract Documents for the unpaid balance of the ECM Installation Payments;
- (h) evidence that the Work will not be completed in the time required for Substantial Completion or Final Completion;
- (i) damage to Owner or a third party to whom Owner is, or may be, liable; or
- (j) the occurrence of an Event of Default.

In the event that Owner makes written demand upon ESP for amounts previously paid by Owner as provided by this Section 7.3, ESP shall comply with such demand within ten (10) business days.

### **7.4 Withholding ECM Continuing Services Payments**

Owner may decline to make ECM Continuing Services Payments, and may demand the return of some or all ECM Continuing Services Payments previously paid to ESP, to remedy any deficiency, in each

case upon written notice to ESP setting forth the reasons thereof and providing ESP with an amount of time to remedy any deficiency, because of:

- (a) the failure of ESP to achieve sufficient Verified Savings (subject to any changes in required Guaranteed Savings in accordance with Section 14.4) to equal or exceed the amount payable in each fiscal year after Acceptance of the Work;
- (b) amounts due to Owner under the Annual Energy Savings Guaranty in Article 5;
- (c) defective Work not remedied by ESP nor, in the opinion of Owner, likely to be remedied by ESP;
- (d) claims of third parties against Owner or Owner's property;
- (e) failure by ESP to pay subcontractors or others in a prompt and proper fashion;
- (f) persistent failure to carry out the Work in accordance with the Contract Documents;
- (g) damage to Owner or a third party to whom Owner is, or may be, liable; or
- (h) the occurrence of an Event of Default.

Notwithstanding any claims asserted by Owner, Owner agrees that any amounts withheld under this Section 7.3 or 7.4 shall be released to ESP promptly upon resolution of the specific claim(s) identified above. In the event that Owner makes written demand upon ESP for amounts previously paid by Owner as provided by this Section 7.4, ESP shall comply with such demand within ten (10) business days.

#### **7.5 Limitations of Owner's Payment Obligations**

Owner's payment obligations are additionally subject to all restrictions and limitations imposed by law, including but not limited to those listed in O.C.G.A. §§ 50-37-2(5), and Article 15.

### **ARTICLE 8. CONTRACT DOCUMENTS**

#### **8.1 Contract Documents**

The Contract Documents consist of the following:

- (i) this Agreement and, to the extent consistent with this Agreement, the schedules attached hereto and identified in Section 8.2;
- (j) written Change Orders or Contract Amendments that have been executed in accordance with Article 9;
- (a) drawings and specifications provided by ESP or on ESP's behalf, but only if approved in writing by Owner and only to the extent such documents are consistent with this Agreement; and

(b) the following documents:


Documents not listed in this Section 8.1 are not Contract Documents and do not form part of this Agreement.

**8.2 Schedules and Exhibits**

The following schedules, to the extent not inconsistent with this Agreement, are incorporated into this Agreement.

Schedule A	Energy Conservation Measures and Other Work
Schedule B	Guaranteed Savings
Schedule C-1	ECM Installation Payments
Schedule C-2	ECM Continuing Services Payments
Schedule D	Premises
Schedule E	Baseline
Schedule F	ESP Maintenance Responsibilities
Schedule G	Owner Maintenance Responsibilities
Schedule H	Operating Parameters for ECMs/Standards of Comfort & Service
Schedule I	ESP Training Responsibilities
Schedule J	Project Installation Schedule
Schedule K	Current and Known Future Capital Projects at the Premises
Schedule L	Pre-Installation Equipment Inventory

Schedule M	Methods of Savings Measurement and Verification
Schedule N	Systems Startup and Commissioning of ECMs
Schedule O	Insurance and Bonds / Savings Guarantee Security
Schedule P	Warranties
Schedule Q	Proposed Project Cost Form; Form of Implementation Cost by Energy Conservation Measure; Form of First Year Estimated Annual Cost Savings by ECM
Schedule R	GEFA Annual Reporting Requirements

The following Exhibits shall be used as provided in this Agreement.

Exhibit I	Performance Bond/Payment Bond
Exhibit II	Certification of Acceptance
Exhibit III	Equipment Warranties
Exhibit IV	Schedule of Values

If required by Section 15.7, the following Appendix is incorporated herein by reference:

Appendix A	Application of Certain Labor Standards
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### 8.3 Entire Agreement

This Agreement, together with the other Contract Documents, constitutes the entire and exclusive agreement between Owner and ESP with reference to the Project. Specifically, but without limitation, this Agreement supersedes the Audit, the Audit Agreement, any bid documents, ESP's Proposal and related documents, and all prior written or oral communications, representations and negotiations, if any, between Owner and ESP. Notwithstanding the preceding sentence, Owner's rights arising from the Audit Agreement shall not be affected by this Section.

### 8.4 No Privity with Others

Except as provided in Section 8.5, nothing contained in this Agreement shall create, or be interpreted to create, privity or any other contractual agreement between Owner and any person or entity other than ESP.

## **8.5 Successors and Assigns**

Owner and ESP bind themselves, their successors, assigns, and legal representatives to the other party hereto and to successors, assigns and legal representatives of such other party in respect to covenants, agreements, and obligations contained in this Agreement. Owner may assign this Agreement, and any and all rights and obligations hereunder, but shall provide notice to ESP before such assignment. ESP shall not assign this Agreement without written consent of Owner. Any attempted assignment without the consent of Owner shall be void and of no force or effect.

## **8.6 Ownership of Contract Documents**

The Contract Documents, and each of them, shall remain the property of Owner. ESP shall have the right to keep one record set of the Contract Documents upon completion of the Project; provided, however, that in no event shall ESP use, or permit to be used, any or all of such Contract Documents on other projects without Owner's prior written authorization.

## **8.7 Ownership of Certain Property Rights**

Owner shall acquire no ownership interest in any software, formulas, patterns, devices, secret inventions or processes, or copyright, patents, and other intellectual and proprietary rights or similar items of property which are or may become used in connection with the ECMs. ESP shall grant to Owner a perpetual, irrevocable, royalty-free license of any and all software or other intellectual property rights necessary for Owner to continue to own, operate, maintain, and repair the ECMs in a manner that will maximize Verified Savings beyond the expiration of this Agreement. ESP shall indemnify and hold harmless Owner for any claims by third persons arising from Owner's use of such software or other intellectual property, but only to the extent caused by ESP's breach of contract, negligent or wrongful act or omission, or the infringement of any third-party intellectual property right by ESP's software or intellectual property as provided and used in accordance with this Agreement. This indemnity obligation does not extend to claims arising solely as a result of Owner's addition to, or modification of, the ECMs or such software or other intellectual property, except where (i) ESP recommended the addition or modification, (ii) such addition or modification was incorporated into a Contract Amendment or Change Order, (iii) the addition or modification is contained in design documents or ECM Submittals provided to Owner, or (iv) ESP has knowledge of such addition or modification but fails to inform Owner that such addition or modification violates or may violate a third party's intellectual property rights.

## **8.8 Intent and Interpretation**

**8.8.1** The parties intend that this Agreement shall comply with all applicable laws and regulations, including but not limited to the Act, and any applicable rules, regulations, and policies prescribed by the director of the Georgia Environmental Finance Authority, in effect as of the date of execution of this Agreement. ESP shall comply with, and shall contractually require its subcontractors and suppliers to comply with, all applicable requirements under O.C.G.A. § 13-10-91 (registration and participation in the Federal Work Authorization Program, as such term is defined in O.C.G.A. § 13-10-90).

**8.8.2** The intent of this Agreement is to require complete, correct, and timely execution of the Work and realization of the Guaranteed Savings. Any Work that may be required or implied by, or

inferred from, the Contract Documents, or any one or more of them, as necessary to produce the intended result shall be provided by ESP for the sum of ECM Installation Payments and ECM Continuing Services Payments.

- 8.8.3** This Agreement is intended to be an integral whole and shall be interpreted as internally consistent. What is required by any one Contract Document shall be considered as required by this Agreement.
- 8.8.4** When a word, term or phrase is used in this Agreement, it shall be interpreted or construed, first, as defined herein; second, if not defined, according to its generally-accepted meaning in the construction industry; and third, if there is no generally-accepted meaning in the construction industry, according to its common and customary usage.
- 8.8.5** The words "include," "includes," or "including," as used in this Agreement, shall be deemed to be followed by the phrase, "without limitation."
- 8.8.6** The specification herein of any act, failure, refusal, omission, event, occurrence, or condition as constituting a material breach of this Agreement shall not imply that any other, non-specified act, failure, refusal, omission, event, occurrence, or condition shall be deemed not to constitute a material breach of this Agreement.
- 8.8.7** Words or terms used as nouns in this Agreement shall be inclusive of their singular and plural forms, unless the context of their usage clearly requires a contrary meaning.
- 8.8.8** ESP shall have a continuing duty to read, carefully study, and compare each of the Contract Documents and any documents provided by Owner and shall give written notice to Owner of any inconsistency, ambiguity, error, or omission which ESP may discover with respect to such documents before proceeding with the affected Work. The issuance or the express or implied approval by Owner of such documents shall not relieve ESP of the continuing duties imposed hereby, nor shall any such approval be evidence of ESP's compliance with the Contract Documents. If Owner provides, directly or indirectly, documents for the Project, including any drawings or specifications, OWNER MAKES NO REPRESENTATION OR WARRANTY OF ANY NATURE WHATSOEVER TO ESP CONCERNING SUCH DOCUMENTS. By the execution hereof, ESP acknowledges and represents that it has received, reviewed and carefully examined such Owner-provided documents; has found them to be complete, accurate, adequate, consistent, coordinated and sufficient for construction; and that ESP has not, does not, and will not rely upon any representations or warranties by Owner concerning such documents because Owner has made no such representations or warranties.
- 8.8.9** In the event that ESP fails to properly prepare or review the Contract Documents or commences the Work without properly preparing or reviewing such documents, ESP shall remove all non-conforming Work resulting from the conflict or portion thereof, and reinstall it as directed at no additional cost to Owner.
- 8.8.10** Neither the organization of any of the Contract Documents into divisions, sections, paragraphs, articles, or other categories, nor the organization or arrangement of the Design

and Drawings, shall control ESP in dividing the Work or in establishing the extent or scope of the Work to be performed by subcontractors.

## **8.9 Hierarchy of Contract Documents**

**8.9.1** In the event of any conflict, discrepancy, or inconsistency among any of the Contract Documents, the following hierarchy shall control: (a) as between figures given on drawings and the scaled measurements, the figures shall govern; (b) as between large-scale drawings and small-scale drawings, the large-scale drawings shall govern; (c) as between drawings and specifications, the requirements of the specifications shall govern; and (d) as between this Agreement and the drawings and specifications, the requirements of this Agreement shall govern. Notwithstanding such hierarchy, the highest and most stringent standard will apply. As set forth hereinabove, any and all conflicts, discrepancies, or inconsistencies shall be immediately reported to Owner in writing by ESP.

**8.9.2** In the event of any conflict, discrepancy, or inconsistency between the Contract Documents and the Audit Report, its accompanying schedules, exhibits, or appendices, the Contract Documents shall govern. Notwithstanding such hierarchy, the highest and most stringent standard will apply. As set forth hereinabove, any and all conflicts, discrepancies, or inconsistencies shall be immediately reported to Owner in writing by ESP.

## **8.10 Governing Law**

This Agreement shall be governed by the laws of the State of Georgia. ESP hereby consents to personal jurisdiction and venue of any dispute, action, or suit in the Superior Court of Fulton County, Georgia, which Court shall have exclusive jurisdiction of same. Except as otherwise provided herein, at the sole discretion of Owner, ESP agrees that any claim or dispute between the parties shall first be submitted to mediation. The cost of such mediation shall be shared equally by the parties.

## **ARTICLE 9. CHANGE ORDERS AND CONTRACT AMENDMENTS**

### **9.1 Changes Permitted**

**9.1.1** Changes in the Work within the general scope of this Agreement, consisting of additions, deletions, revisions, or any combination thereof, may be ordered by Owner, without invalidating this Agreement, by Change Order.

**9.1.2** Changes in the Work shall be performed under applicable provisions of this Agreement, and ESP shall proceed promptly with such changes.

**9.1.3** If Owner directs a change in the Work pursuant to this Article 9 which results in an increase in ECM Installation Payments, as provided in Section 9.2, then Owner shall specify in the Change Order whether such increase will be paid by the Escrow Agent or directly by Owner.

### **9.2 Change Order Procedures**

- 9.2.1** Any change in ECM Installation Payments and Baseline adjustments resulting from a Change Order shall be determined as follows: (a) by mutual agreement between Owner and ESP as evidenced by (1) the change in ECM Installation Payments and adjustments to the Baseline being set forth in the Change Order, together with any conditions or requirements related thereto, and (2) ESP's execution of the Change Order, or (b) if no mutual agreement occurs between Owner and ESP, then, as provided in Section 9.2.2 and Section 9.2.3 below.
- 9.2.2** If no mutual agreement occurs between Owner and ESP as provided in Section 9.2.1 above, then the change in ECM Installation Payments, if any, shall then be determined on the basis of the reasonable expenditures or savings arising from performing, deleting, or revising the Work attributable to the change, including, in the case of an increase or decrease in ECM Installation Payments, a reasonable allowance for direct job site overhead and profit in the total amount of 25%. In such case, ESP shall present, in such form and with such content as Owner requires, an itemized accounting of such expenditures or savings, plus appropriate supporting data for inclusion in a Change Order. The reasonable direct costs allowed hereunder shall solely include direct job costs and shall not include consequential damages of any kind or nature, nor any home office overhead (except to the extent included in the mark-up specifically provided hereinabove), loss of profit, loss of efficiency or productivity, loss of bonding capacity, loss of use of capital, or similar items of alleged cost, loss, damage, or expense.
- 9.2.3** If no mutual agreement occurs between Owner and ESP as provided in Section 9.2.1 above, then the adjustment to the Baseline, if any, arising solely from such change shall then be determined by a competent third party that is acceptable to both Owner and ESP. If Owner and ESP are unable to mutually agree on the third party identified in this Section, ESP shall, within five (5) days of Owner's request, provide Owner with a list of at least five (5) third parties that are independent of ESP and all of its affiliates, and who are qualified to determine the appropriate effect of the change on the Baseline. Owner may select a third party from such list. If Owner does not select a third party from such list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to make the determination. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, Owner shall, in its sole discretion, have the right to select the third party to make the determination. The findings of the third party selected pursuant to this Section regarding the Baseline adjustment, if any, shall be conclusive.
- 9.2.4** Unless otherwise specified in a Change Order, any increase or decrease in the ECM Installation Payments resulting from such Change Order, and as determined in accordance with Section 9.2, shall be applied directly to the portion of the Work to which such Change Order relates.
- 9.2.5** Any change in ECM Continuing Services Payments resulting from a Change Order shall be determined as follows: (a) by mutual agreement between Owner and ESP, or (b) if no mutual agreement occurs between Owner and ESP, then, as provided in Section 9.2.6 below. Notwithstanding the foregoing, no change in compensation will result from the situation described in Section 4.1 (ESP's failure to identify necessary services).

**9.2.6** If no mutual agreement occurs between Owner and ESP as provided in Section 9.2.5 above, then the change in ECM Continuing Services Payments, if any, shall then be determined on the basis of the reasonable expenditures or savings arising from performing, deleting, or revising the Work attributable to the change, including, in the case of an increase or decrease in ECM Continuing Services Payments, a reasonable allowance for direct job site overhead and profit not to exceed the combined amount of 25%.

**9.2.7** Any change in ECM Installation Payments or ECM Continuing Services Payments shall be subject to the limitations set forth in Article 7.

**9.2.8** If any proposed change impacts the time necessary to complete the Work, then such change shall be identified and proposed by ESP in writing to Owner. If Owner agrees to such change, it shall be reflected in the Change Order. If no adjustment to time is included in the Change Order, then the Contract Time For Work (including the date for Substantial Completion and Final Completion) and any other deadline hereunder shall remain unchanged. If Owner does not agree with ESP's proposed change in Contract Time For Work, then upon written direction from Owner, ESP shall proceed with the Work, as modified by Change Order, and shall follow all procedures and requirements under Section 14.4 to seek a time extension.

### **9.3** Contract Amendments

Except as provided by Change Order in accordance with this Article, this Agreement may be modified only by a Contract Amendment.

### **9.4** Effect of Executed Change Order or Contract Amendment

This Agreement, the ECM Installation Payments and ECM Continuing Services Payments, and the Project Installation Schedule may be changed only by Change Order or by Contract Amendment as provided in this Article 9. The execution of a Change Order or Contract Amendment by ESP shall constitute conclusive evidence of ESP's agreement to the changes in the Work, this Agreement as thus amended, the ECM Installation Payments or ECM Continuing Services Payments, and the Project Installation Schedule, as applicable. ESP, by executing the Change Order or Contract Amendment, waives and forever releases any claim against Owner for additional time or compensation for matters relating to or arising out of or resulting from the Work included within or affected by the executed Change Order or Contract Amendment.

Notwithstanding any other provision herein to the contrary, Owner's payment obligations under this Agreement shall be limited as provided in Section 7.5.

### **9.5** Notice to Surety; Consent

ESP shall notify and obtain the consent and approval of ESP's surety with reference to all Change Orders or Contract Amendments if such notice, consent, or approval is required by ESP's surety or by law. ESP's execution of the Change Order or Contract Amendment shall constitute ESP's warranty to Owner that the surety has been notified of and consents to such Change Order or Contract Amendment, and the surety shall be conclusively deemed to have been notified of such Change Order or Contract Amendment and to have expressly consented thereto.

**ARTICLE 10. PROJECT INSTALLATION SCHEDULE, CONTRACT TIME FOR WORK, TERMINATION, AND EVENTS OF DEFAULT**

**10.1 Project Installation Schedule; Contract Time for Work**

**10.1.1** ESP shall perform all Work in accordance with the Project Installation Schedule. ESP shall commence the Work INSERT DATE OR "NOTICE TO PROCEED ISSUED BY OWNER" and shall achieve Substantial Completion no later than TIME PERIOD OR DATE CERTAIN and shall achieve Final Completion no later than TIME PERIOD OR DATE CERTAIN.

**10.1.2** ESP shall pay Owner the sum of six thousand dollars (\$6,000.00) per day for each and every calendar day of unexcused delay in achieving Substantial Completion beyond the date set forth herein for Substantial Completion of the Work. Only those events identified in Section 14.4 shall be deemed an excused delay, and ESP shall not be responsible for liquidated damages during an excused delay hereunder, and shall ESP not be deemed in default to the extent caused by an excused delay under Section 14.4 hereof. Any sums due and payable hereunder by ESP shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by Owner, estimated at or before the time of executing this Agreement. When Owner reasonably believes that Substantial Completion will be inexcusably delayed, Owner shall be entitled, but not required, to withhold from any amounts otherwise due ESP an amount then believed by Owner to be adequate to recover liquidated damages applicable to such delays. If and when ESP overcomes the delay in achieving Substantial Completion, or any part thereof, for which Owner has withheld payment, Owner shall promptly release to ESP those funds withheld, but no longer applicable, as liquidated damages. Provided, however, that ESP shall not be liable for liquidated damages under this Section 10.1.2 when the delay proximately was caused by any wrongful act or omission of Owner. The liquidated damages set forth herein shall be Owner's sole and exclusive remedy for any delay by ESP hereunder, subject to Owner's right to terminate this Agreement pursuant to Section 10.5, in which case Owner shall have its remedies pursuant to Section 10.6.

**10.1.3** ESP shall pay Owner the sum of three thousand five hundred dollars (\$3,500.00) per day for each and every calendar day of unexcused delay in achieving Final Completion beyond the date set forth herein for Final Completion of the Work. Only those events identified in Section 14.4 shall be deemed an excused delay and ESP shall not be responsible for liquidated damages during an excused delay hereunder, and shall ESP not be deemed in default to the extent caused by an excused delay under Section 14.4 hereof. Any sums due and payable hereunder by ESP shall be payable, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by Owner, estimated at or before the time of executing this Agreement. When Owner reasonably believes that Final Completion will be inexcusably delayed, Owner shall be entitled, but not required, to withhold from any amounts otherwise due ESP an amount then believed by Owner to be adequate to recover liquidated damages applicable to such delays. If and when ESP overcomes the delay in achieving Final Completion, or any part thereof, for which Owner has withheld payment, Owner shall promptly release to ESP those funds withheld, but no longer applicable, as liquidated damages. Provided, however, that ESP shall not be liable for liquidated damages under this Section 10.1.3 when the delay proximately was caused by any wrongful act or omission of Owner. The

liquidated damages set forth herein shall be Owner's sole and exclusive remedy for any delay by ESP hereunder, subject to Owner's right to terminate this Agreement pursuant to Section 10.5, in which case Owner shall have its remedies pursuant to Section 10.6.

**10.1.4** All limitations of time set forth in the Contract Documents are of the essence of this Agreement.

## **10.2 Contract Termination**

### **10.2.1 Termination by Owner for Cause**

Owner may terminate this Agreement if any of the following occur: (i) an Event of Default occurs for which no cure period is provided; (ii) ESP fails to cure any Event of Default in accordance with, and within the time specified in, this Article, (iii) ESP fails to cause the Work to be prosecuted in a timely manner, (iv) ESP fails to cause defective or nonconforming Work to be timely corrected, (v) ESP fails to make prompt payment to subcontractors or suppliers, (vi) ESP fails to obey any law, ordinance, rule, regulation, or order of any public authority having jurisdiction, or (vii) ESP fails to properly perform any material obligation it has under any of the Contract Documents. Owner may terminate this Agreement for any reason permitted by Georgia law, including but not limited to the Act; provided that the specific notice and ESP's right to cure set forth in Section 10.6 (if any) shall apply. Termination under this Section shall be by written notice to ESP and shall be without prejudice to any other right or remedy of Owner. ESP's obligations under this Agreement shall continue as provided in Section 10.3.

Owner may take possession of the site and of all the Work and materials thereon and may finish the Project by whatever reasonable methods it deems expedient. Nothing herein shall require Owner to complete the Work. In the event of a termination under this Section, ESP hereby assigns to Owner all outstanding subcontracts and purchase orders, such assignment to be effective after termination of this Agreement and Owner's written acceptance of said assignment. In the event of a termination under this Section, ESP shall not be entitled to receive any payment on amounts otherwise due under this Agreement until the Work on the Project is finally complete. Owner shall be entitled to offset any amount due ESP by all damages, losses, cost, and reasonable expense incurred to complete the Work. If the reasonable cost to complete the Work exceeds the unused balance of the ECM Installation Payments, Owner shall be entitled to a return of such amount from ESP. ESP shall return such amount within twenty (20) days upon Owner's request. The remedies specified herein are in addition to, and without prejudice to, other remedies available to Owner.

### **10.2.2 Termination by Owner for Convenience**

Owner may, by written notice, and for any reason whatsoever, terminate this Agreement for convenience. ESP shall, unless Owner directs otherwise, terminate outstanding orders and subcontracts and other agreements relating to this Agreement and settle the liabilities and claims arising out of the termination of such orders, subcontracts, and agreements. ESP shall transfer, assign, and deliver title to Owner of all completed or partially completed work, materials, fixtures, equipment to be incorporated in the Work, and rights arising from subcontracts and agreements that ESP has in connection with the terminated Work.

#### **10.2.2.1 Before Acceptance of the Work**

If, at any time before Acceptance of the Work, Owner terminates this Agreement under Section 10.2.2, then ESP shall be paid its actual direct costs in the performance of the Work, including a reasonable allowance for direct job site overhead and profit in the total amount of 24.78%. As a condition precedent to recovery under this Section, ESP shall submit to Owner within a reasonable amount of time specified in the termination notice, in such form and with such content as Owner reasonably requires, an itemized accounting of such expenditures, plus supporting data as may be reasonably requested to substantiate its accuracy. ESP shall ensure that the accounting incorporates any and all available discounts and reimbursements received from suppliers, subcontractors, and others. ESP's recovery shall not include any costs that ESP could have avoided but for (i) ESP's failure to timely and adequately cancel orders and terminate subcontracts and agreements, (ii) ESP's failure to perform or properly perform any obligation under this Agreement, or (iii) ESP's procurement or installation of defective, deficient, or non-conforming Work, including but not limited to ECMs.

The direct costs allowed hereunder shall solely include direct job costs incurred in the proper performance of Work that complies with the Contract Documents. Such costs are limited to the following:

- (a) direct jobsite costs for labor, equipment, and materials supplied in connection with Work, but only if such Work has been properly completed and supplied in accordance with the Contract Documents;
- (b) cancellation fees for materials or equipment to be supplied for conforming Work, but only if such fees arise from written agreements, including change orders, that preexisted the termination notice;
- (c) permit and engineering fees, and premiums for bonds required by the Contract Documents, but only to the extent such amounts are allocable to Work performed properly;
- (d) except as otherwise provided in this Section, general conditions costs associated with Work properly performed that are contemporaneously documented at the time such costs are incurred; and
- (e) in Owner's sole discretion, other direct costs incurred in the proper performance of Work, but only if such costs are contemporaneously documented at the time such costs are incurred.

Direct costs allowed hereunder shall not include consequential damages of any kind or nature, any home office overhead or loss of profit (except to the extent included in the mark-up specifically provided hereinabove), anticipated profit, loss of efficiency or productivity, loss of bonding capacity, loss of use of capital, or similar items of cost, loss, damage, or expense.

Notwithstanding anything to the contrary in this Section, ESP shall not be entitled to an amount in excess of the lesser of: (i) the portion of the ECM Installation Payments that equals the percentage of ECM Installation Work completed on the date such termination becomes effective, or (ii) total ECM Installation Payments reduced by the amount of payments previously made. ESP shall not be entitled to any duplication of payment. Owner's right to withhold or demand the return of any or all payments, as set forth in Sections 7.3 and 7.4, made before or after termination shall not be affected by termination. The remedies provided in this Section are without prejudice to other remedies available to Owner hereunder or otherwise available at

law, including but not limited to the right to setoff and recoupment arising from any and all damages, losses, and expenses incurred by Owner.

Acceptance of payment by ESP pursuant to this Section shall constitute a waiver of all claims by ESP against Owner under, arising from, or related to this Agreement, and shall be ESP's exclusive remedy in connection with this Agreement.

#### **10.2.2.2** During Contract Time for Verified Savings

If, at any time during the Contract Time for Verified Savings, Owner terminates this Agreement under Section 10.2.2, ESP shall be paid, on a pro rata basis, the ECM Continuing Services Payments for such fiscal year up to and including the date such termination becomes effective. The total sum to be paid ESP under this Section shall not exceed the total ECM Continuing Services Payments for such fiscal year, and shall in no event include duplication of payment, or anticipated profit or consequential damages of any kind or nature. Owner's right to withhold or demand the return of any or all payments, as set forth in Sections 7.3 and 7.4, made before or after termination shall not be affected by termination.

#### **10.2.3** Termination by ESP

Owner shall persistently or repeatedly fail to remediate any Event of Default for a period of sixty (60) days after receiving written notice from ESP of its intent to terminate hereunder, then ESP may, by written notice to Owner, terminate this Agreement. ESP's recovery shall be limited as provided in Article 14.

### **10.3** Survival of Obligations

Notwithstanding anything to the contrary in this Agreement, all obligations arising under the Annual Energy Savings Guaranty under Article 5 for ECMs that have received an ECM Acceptance Notice shall survive termination of this Agreement under any section and in any circumstance, except a termination under Section 10.2.2 or 10.2.3, but in the case of a termination Section 10.2.3, the Annual Energy Savings Guaranty will survive termination upon cure of any default. ESP's obligations to correct defective, deficient, and non-conforming work shall survive any termination of this Agreement. No termination of this Agreement shall adversely affect Owner's rights under the performance and payment bonds provided by ESP.

Within thirty (30) days after termination, except a termination pursuant to Section 10.2.2, or 10.2.3, but in the case of a termination Section 10.2.3, the Annual Energy Savings Guaranty will survive termination upon cure of any default. Owner shall hire a third party that is acceptable to ESP, which acceptance shall not be unreasonably withheld, to perform the Annual Review in accordance with Section 5.2. If Owner and ESP are unable to mutually agree on the third party, ESP shall, within five (5) days of Owner's request, provide Owner with a list of at least five (5) third parties that are independent of ESP and all of its affiliates, and who are qualified to perform the Annual Review. Owner may select a third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will, within ten (10) days of their selection by Owner and ESP, collectively select another independent third party to perform the Annual Review. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, Owner shall have the right to select the third party to perform the Annual Review in its sole discretion. The findings of the Annual Review performed by the third party selected pursuant to this Section shall be conclusive for purposes of this Agreement.

#### 10.4 Events of Default by Owner

Each of the following events or conditions shall constitute an "Event of Default" by Owner:

- (a) Except as otherwise provided by this Agreement, any failure to make payments to ESP in accordance with the provisions of Article 7 and Schedules C-1 (ECM Installation Payments) and C-2 (ECM Continuing Services Payments), as amended in accordance with this Agreement, more than thirty (30) days after written notification by ESP that Owner is delinquent in making such payment, provided that ESP is not in default in its performance under the terms of this Agreement. The notice provided in this paragraph shall be a condition precedent to the occurrence of an Event of Default by Owner; or
- (b) Any other material failure by Owner to perform or comply with the terms and conditions of this Agreement, including breach of any material covenant contained herein, unless such failure is corrected or cured within thirty (30) days after written notice to Owner demanding that such failure to perform be cured, in which case no Event of Default shall be deemed to occur for all purposes under this Agreement. The notice provided in this paragraph shall be a condition precedent to the occurrence of an Event of Default by Owner.

#### 10.5 Events of Default by ESP

Each of the following events or conditions (subject to the cure periods (if any) set forth in Section 10.6) shall constitute an "Event of Default" by ESP:

- (c) ESP's failure to perform the Work in accordance with the provisions of this Agreement and within the time specified by this Agreement;
- (d) Failure of ESP to perform its material obligations in accordance with the terms of this Agreement, including failure to provide sufficient personnel, equipment, or material to ensure the performance required and failure to meet the Project Installation Schedule provided for in Schedule J (Project Installation Schedule);
- (e) ESP's failure to correct the deficient or nonconforming Work or services within the time required hereunder;
- (f) Failure by ESP to pay any amount owing to Owner due to ESP's failure to achieve Guaranteed Savings with respect to any fiscal year or to perform any other obligation under the Annual Energy Savings Guaranty in Article 5;
- (g) The standards of comfort and service set forth in Schedule H (Operating Parameters for ECMs/Standards of Comfort & Service) are not provided due to failure of ESP to properly design, install, maintain, repair or adjust the ECMs, except that such failure shall be deemed cured if corrected or cured within (15) business days after written notice to ESP demanding that such failure be cured;

- (h) The filing of any lien or encumbrance upon Owner's property or property located at the Premises, or any claim against a payment bond by any subcontractor, laborer, materialman, or other creditor of ESP;
- (i) Any material misrepresentation, whether negligent or willful and whether in the inducement or in the performance, made by ESP to Owner or a third party;
- (j) Any failure by ESP to materially perform or comply with the terms and conditions of this Agreement, including material breach of any covenant contained herein except that such failure, if corrected or cured within the applicable cure period (if any), shall be deemed cured for purpose of this Agreement;
- (k) Default under any other agreement ESP may presently have or may enter into with Owner during the term of this Agreement, which was not remedied following the expiration of the applicable cure period (if any) set forth therein ;
- (l) Any change in ownership or control of ESP without the prior approval of Owner, which shall not be unreasonably withheld ;
- (m) The filing of a bankruptcy petition whether by ESP or its creditors against ESP which proceeding shall not have been stayed or dismissed within ninety (90) days of its filing, or an involuntary assignment for the benefit of creditors or the liquidation or insolvency of ESP;
- (n) ESP's failure to obey laws, ordinances, rules, regulations, or orders of any public authority having jurisdiction of the Work or the GESPC; or
- (o) ESP's failure to purchase, maintain, or provide evidence of insurance coverage required under Section 6.2 herein.

#### **10.6 Remedies upon Default by ESP**

The occurrence of any Event of Default described in Section 10.5(g) through (m) shall constitute an immediate default. Owner may declare ESP in default if any other Event of Default listed above which ESP has not cured within the time specified herein, or if no time is specified, within thirty days after receipt of written notice identifying such Event of Default; provided however, that if the Event of Default cannot reasonably be corrected within thirty (30) calendar days, ESP shall have not more than an additional sixty (60) calendar days, unless otherwise agreed to by the parties, to cure such Event of Default provided ESP uses all commercially reasonable efforts to cure such Event of Default as soon as possible, and provided further that ESP diligently commences curing such Event of Default within such thirty (30) calendar day period. If a particular type of Event of Default occurs more than three times during the term of this Agreement, Owner shall have the option, in its sole discretion, to treat an additional Event of Default as an immediate default for which ESP shall have no right to correct or cure.

Written notification of the Event of Default (subject to the cure periods, if any, set forth above), and Owner's termination of this Agreement, shall be provided to ESP, and such decisions shall be effective upon ESP's receipt of such notice. Upon the giving of a termination notice as provided herein, ESP must

discontinue any services, unless otherwise directed in the notice, and deliver all documents and materials accumulated in the performance of this Agreement.

Upon any termination by Owner, Owner may invoke any or all of the following remedies, without limitation:

- (a) The right to take over and complete the Work, or any part thereof;
- (b) The right to immediately terminate this Agreement as to any or all of the Work or other services yet to be performed by ESP;
- (c) The right of specific performance, injunctive relief, or any other appropriate equitable remedy;
- (d) The right to money damages;
- (e) The right to withhold or recover all or any part of ESP's compensation hereunder; or
- (f) Any other right or remedy provided by law or equity.

All of Owner's remedies are cumulative and without prejudice to any other remedy existing now or hereafter, at law, in equity or otherwise. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power nor shall it be construed as a waiver of any Event of Default or acquiescence therein, and every such right and power may be exercised from time to time and as often as may be deemed expedient.

#### **10.7 Right to Offset and Recover**

Any damages or additional costs incurred by Owner arising from any Event of Default, termination of this Agreement, or otherwise resulting from ESP's breach or non-performance under this Agreement, including the exercise by Owner of any of the remedies available to it under Article 10, and any credits due to or overpayments made by Owner may be offset against any payment due ESP under this Agreement. If such amount is insufficient to cover such damages or excess costs, ESP shall be liable for and promptly remit to Owner the difference within thirty (30) days of written demand therefor. This right to offset is in addition to and not a limitation of any other remedies available to Owner.

#### **10.8 Suspension**

Owner shall have the right at any time to direct ESP to suspend its performance, or any designated part thereof, for any reason whatsoever, or without reason, for a cumulative period of up to thirty (30) calendar days. If any such suspension is directed by Owner, ESP shall immediately comply with same. If such delays materially impact the Project Installation Schedule, then subject to Section 14.4, the parties shall collaborate reasonably to adjust the Project Installation Schedule as necessary

In the event Owner directs a suspension of performance under this Section, through no fault of ESP and if no Event of Default has occurred, then Owner shall pay, or authorize the Escrow Agent to pay, ESP as full compensation for such suspension ESP's reasonable costs, actually incurred and paid, of:

- (a) demobilization and remobilization, including such costs paid to subcontractors;
- (b) preserving and protecting work in place; and
- (c) storage of materials or equipment purchased for the Project, including insurance thereon.

## **ARTICLE 11. WARRANTIES**

### **11.1 ECM Warranties**

**11.1.1** ESP warrants that the ECMs are, and will continue to be, protected by written warranties covering all parts and equipment performance for the periods specified in Schedule P (Warranties) and Exhibit III (Equipment Warranties) (collectively “ECM Warranties”). ESP shall deliver to Owner all such written warranties as a condition precedent to final ECM Installation Payment.

**11.1.2** ESP shall pursue all rights and remedies against the manufacturer and each prior seller of the ECMs under the warranties identified in this Section 11.1 in the event of equipment malfunction, improper or defective function, or defects in parts, workmanship, or performance (“ECM Warranty Events”). ESP shall be responsible for managing all warranty work and activities during the warranty periods set forth in Schedule P (Warranties) and Exhibit III (Equipment Warranties). ESP shall notify Owner whenever an ECM Warranty Event occurs and when ESP exercises rights and remedies under the warranties. In its sole discretion, Owner shall have the right to pursue any warranty rights .

**11.1.3** ESP shall be liable to, and shall indemnify and hold harmless, Owner for all damage, loss, or claims by any person arising out of the ECMs which would have been recoverable or compensable under the ECM Warranties provided by third parties but for ESP’s failure to exercise such warranty rights on behalf of Owner. Without limitation, this Section shall apply to damage, loss, or claims arising out of the use or operation of the ECMs, damage to the ECMs and their performance, and damage to other property and equipment of Owner or the Premises.

**11.1.4** All warranties, including but not limited to manufacturers’ warranties, shall be transferable and extend to Owner. The warranties shall specify that only new, and not reconditioned, parts may be used and installed when repair is necessary. ESP warrants that all workmanship, materials, and equipment used in conjunction with the warranty work will be in conformance with the Contract Documents and free from defects.

### **11.2 Warranty of the Work**

**11.2.1** ESP warrants that the Work designed, procured, constructed, fabricated, and installed pursuant to this Agreement, including but not limited to the ECMs is new, in good and proper working condition , and will achieve the Guaranteed Savings. ESP warrants that all Work will be of good quality, free from faults and defects, and in strict conformance with the Contract Documents.

**11.2.2** From the date of installation of each ECM and continuing for the warranty periods set forth in Schedule P (Warranties) and Exhibit III (Equipment Warranties) for each , or for such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the Contract Documents, ESP shall correct or replace all faulty, defective, or nonconforming Work (together with ECM Warranty Events, the “Warranty Event”) as soon as possible, but no later than the time set forth in Section 11.4. ESP shall remove from the Premises all portions of defective, deficient, and nonconforming Work, including other property damaged by such Work as soon as possible, but no later than the time set forth in Section 11.4.

### **11.3 Notification of Warranty Events**

Notification of Warranty Events to ESP under Section 11.1 and Section 11.2 shall be in writing, but may be given by telephone in the event of an emergency.

### **11.4 ESP’s Responsibility for Warranty Work**

**11.4.1** ESP shall bear all damages, losses, and cost associated with remediating Warranty Events, including but not limited to the removing, replacing, and correcting Warranty Events and other property damaged thereby, and storing other property not damaged thereby. ESP shall indemnify and hold harmless Owner for any damages, losses, and cost incurred by Owner arising from the claims of third parties arising out of the Warranty Event or performance of the Warranty work resulting in bodily injury or death, or damage to tangible property, but only to the extent caused by the negligence or misconduct of ESP or a breach of Warranty.

**11.4.2** ESP’s obligation to achieve the Guaranteed Savings under Article 5 shall not be relieved or diminished as a result of any Warranty Event or warranty work.

**11.4.3** If ESP fails to commence the remedy of a Warranty Event as provided in this Article 11 within twenty-four (24) hours in the case of emergency conditions, or within fifteen (15) business days , after ESP receives notice from Owner as provided in Section 11.3, then (a) Owner may remediate such Warranty Event and (b) ESP shall be liable to Owner for all damages, losses, and cost incurred by Owner associated with the remediation of the Warranty Event , including but not limited to claims by third persons, cost incurred to remove, replace, and repair the affected Work and other property damaged thereby, cost incurred to remove and store equipment and materials, and cost incurred to remove, store, and reinstall property not damaged thereby.

**11.4.4** Nothing contained in this Article 11 shall establish any period of limitation with respect to other obligations which ESP has under the Contract Documents. Owner’s remedies under this Article 11 are in addition to, and without prejudice to, its remedies under other provisions in the Contract Documents.

## **ARTICLE 12. THE PREMISES**

### **12.1 Description of the Premises**

The Premises in which the Work will be performed under this Agreement are described in Schedule D (Premises), along with Owner's normal business hours.

## **12.2 Ownership of Existing Property**

The Premises and all equipment and materials existing at the Premises at the time of execution of this Agreement shall remain the property of Owner.

## **12.3 Location and Access**

Owner shall provide sufficient space at the Premises for the installation and operation of the ECMs, including access to office space with a telephone line, if necessary to allow ESP to perform all required ECM operation, maintenance, monitoring, repairs, replacements, and adjustments, and training services. Owner shall provide access to the Premises for ESP and its employees or subcontractors to install, inspect, operate, maintain, monitor, repair, replace, and adjust the ECMs in accordance with the terms of the Contract Documents during such reasonable hours as may be requested by ESP and acceptable to Owner. To avoid interference with Owner's operations, Owner may require ESP to perform Work during times other than normal business hours. Prior to Contract execution, Owner and ESP discussed Owner's planned operations, incorporated them into the Project Installation Schedule (Schedule J), and ESP agrees that it will not request and shall not be entitled to any additional compensation for those accommodations incorporated into the Project Installation Schedule pursuant to those discussions. ESP's access to correct any emergency condition shall not be unreasonably restricted by Owner.

## **12.4 Material Changes**

Subject to the definition of Material Change as provided herein, actions by Owner that may constitute a Material Change subject to this Section 12.4 include, but are not limited to, the following:

- (a) Changes in the manner of use of the Premises by Owner; or
- (b) Changes in the hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or
- (c) Permanent changes in the comfort and service parameters set forth in Schedule H (Operating Parameters for ECMs/Standards of Comfort & Service); or
- (d) Changes in the occupancy of the Premises; or
- (e) Changes in the structure of the Premises; or
- (f) Changes in the types and quantities of equipment used at the Premises; or
- (g) Modification, renovation or construction at the Premises; or
- (h) Owner's failure to maintain and repair the ECMs, unless ESP was responsible for such maintenance and repair, or unless ESP failed to identify and inform Owner in writing of such maintenance and repair before execution of this Agreement or prior to Owner's final approval of the ECM design under Section 3.1; or

- (i) Any significant damage to the Premises or the ECMs caused by fire, flood, or other casualty or any condemnation affecting a significant portion of the Premises; or
- (j) The permanent or temporary closing of a building at the Premises ; or
- (k) Any other substantially changed condition, other than weather, affecting energy use at the Premises.

#### **12.5 Reported Material Changes; Notice by Owner.**

Owner shall use its best efforts to deliver to ESP a written notice describing all actual or proposed Material Changes no less than thirty (30) days before any actual or proposed Material Change occurs. Owner shall use its best efforts to deliver to ESP a written notice describing Material Changes that result because of an emergency or other situation which precludes advance notification as soon as reasonably possible after Owner discovers that the Material Change occurred.

#### **12.6 Reported Material Changes; Adjustments to Baseline**

Any changes in energy usage which occur as the result of a Material Change reported in accordance with Section 12.5 shall be timely reviewed by ESP and Owner to determine what, if any, adjustments to the Baseline set forth in Schedule E (Baseline) are necessitated by such Material Change. Any adjustments made to the Baseline shall be in accordance with Industry Engineering Standards (as such term is defined in the Act). If the parties agree on an appropriate adjustment to the Baseline, such adjustment shall be reflected in a Change Order or Contract Amendment in accordance with Article 9.

If the parties are unable to agree on (1) whether a Material Change has occurred, (2) the appropriate variables to be accounted for as provided herein, or the proper adjustment arising from such variables, or (3) an acceptable adjustment to the Baseline resulting from a Material Change, then a mutually agreeable third party shall make such determinations in accordance with this Section. The Baseline shall be adjusted to reflect the adjustment, if any, determined by the third party.

If Owner and ESP are unable to mutually agree on a third party as provided in this Section, ESP shall provide, within five (5) days of Owner's request, a list of at least five (5) third parties that are independent from ESP and its affiliates, and who are qualified to make the determinations identified in this Section. Owner may select any third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to make the determinations identified in this Section. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, within the time required by this Section, Owner shall have the right to select the third party to make the determinations identified in this Section in its sole discretion. The determinations identified in this Section of the third party selected pursuant to this Section shall be conclusive for purposes of this Agreement.

#### **12.7 Unreported Material Changes**

During the Contract Time for Verified Savings, and in the absence of any reported Material Change, if Verified Savings deviate more than five percent (5) during any fiscal year from Guaranteed Savings for

such fiscal year, after adjustment for variables that are not, in whole or in part, within ESP's control, then ESP shall timely ascertain the cause of such deviation. ESP shall report its findings to Owner in a timely manner, but ESP shall not be entitled to an extension of time to complete the Annual Review and written report, and pay for any deficiency, as provided in Section 5.2, unless so provided in a Contract Amendment pursuant to Article 9.

If Owner agrees that the deviation was caused by a Material Change, then Owner and ESP shall determine what adjustments, if any, to the Baseline set forth in Schedule E (Baseline) are appropriate. Any mutually agreeable adjustment to the Baseline shall be reflected in a Contract Amendment in accordance with Article 9. No adjustment to the Baseline shall be made for any fiscal year prior to the fiscal year before which an unreported Material Change is identified pursuant to this Section.

If the parties are unable to agree on (1) whether a Material Change has occurred, (2) the appropriate variables to be accounted for as provided herein, or the proper adjustment arising from such variables, or (3) an acceptable adjustment to the Baseline resulting from a Material Change, then a third party mutually agreeable to Owner and ESP shall make such determinations in accordance with this Section. If Owner and ESP are unable to mutually agree on a third party as provided in this Section, ESP shall provide, within five (5) days of Owner's request, a list of at least five (5) third parties that are independent from ESP and its affiliates, and who are qualified to make the determinations identified in this Section. Owner may select any third party from such list. If Owner does not select a third party from ESP's list, then Owner and ESP shall each, within five (5) days of Owner's request, select one independent third party who will collectively select another independent third party to make the determinations identified in this Section. If ESP fails to provide the list of independent third parties, or fails to make a selection of its independent third party as provided in this Section, within the time required by this Section, Owner shall have the right to select the third party to make the determinations identified in this Section in its sole discretion. The determinations identified in this Section of the third party selected pursuant to this Section shall be conclusive for purposes of this Agreement.

#### **12.8 Owner's Election Upon Material Changes**

If a Material Change results from Owner vacating, abandoning, or transferring an entire Premises or a substantially separate building at a Premises, and if Owner makes an election under this Section, then Verified Savings associated with the ECMs in such Premises or building for each future fiscal year remaining in the Contract Time for Verified Savings shall be equal to the average of Verified Savings realized from such ECMs during the previous full fiscal years (according to the Annual Reports) before the Material Change, even if one or more fiscal years of Verified Savings did not meet or exceed the Guaranteed Savings for such years. At Owner's sole election, this provision may apply to any other Material Change that substantially changes the use, occupancy, or ownership of the Premises or a substantially separate building at a Premises.

#### **12.9 Hazardous Materials**

ESP shall comply with all applicable laws, rules, and regulations concerning hazardous materials, including but not limited to (i) asbestos, material containing asbestos, or the existence, use, detection, removal, containment, or treatment thereof, and (ii) pollutants, hazardous wastes, and contaminants. Without limitation, ESP shall comply with the National Emission Standard for Hazardous Air Pollutants as promulgated by the United States Environmental Protection Agency pursuant to Section 112 of the Clean Air Act, and with the standards set forth in 40 C.F.R. § 61.145. ESP shall observe all notification procedures established by the United States and Georgia environmental protection agencies.

If ESP or any of its subcontractors encounter any hazardous material on the Premises that has not been previously identified in connection with the Audit, in connection with the ECMs, or otherwise, then ESP shall, before disturbing such hazardous material, immediately notify Owner of such hazardous material and the location thereof. Within five (5) days after ESP discovers such hazardous material, ESP shall inform Owner whether the Work can be modified to avoid such hazardous material.

In its sole discretion, Owner may elect whether to proceed with or without the modification of the Work or suspend or terminate this Agreement in accordance with Article 10. If Owner elects to modify the Work, it will issue a Change Order in accordance with Article 9. If Owner elects to not modify the Work, and if ESP believes the Work can safely proceed by avoiding hazardous materials, then ESP shall proceed at Owner's direction. If Owner suspends the Work to remove hazardous materials, the Contract Time for Work may be extended, without any additional compensation to ESP other than as provided in Section 10.8, for the amount of time required to remove the hazardous materials. ESP is not required to remove or abate hazardous materials by the terms hereof or a Change Order hereunder, unless ESP consents in writing to perform such work.

Unless otherwise stated herein, ESP has no affirmative duty to actively inspect and discover the existence of hazardous materials on the Premises; however, ESP shall immediately notify Owner if it encounters or observes any hazardous materials on the Premises. Notwithstanding any other provision herein, ESP shall not be entitled to additional compensation or time for modifications or changes to the Work, or suspension or termination of this Agreement, resulting from the existence of hazardous materials on the Premises or Owner's election under this Section, if ESP could have reasonably discovered or reasonably anticipated such hazardous materials in connection with the Audit, site observations, or otherwise.

## **ARTICLE 13. ACCEPTANCE OF THE WORK**

### **13.1 Acceptance of the Work**

Acceptance of the Work shall occur on the date that all of the following conditions are satisfied:

- (a) Final Completion has occurred;
- (b) The ECMs identified in Schedule A (Energy Conservation Measures and Other Work) are installed and operable for their intended purpose;
- (c) Owner has issued or executed an ECM Acceptance Notice for all ECMs;
- (d) No Event of Default under Article 10 exists;
- (e) All warranties, as-built drawings, and similar close-out documents have been provided to Owner; and
- (f) Owner has executed a Certification of Acceptance as set forth in Exhibit II (Certification of Acceptance).

Acceptance of the Work shall not relieve ESP of any obligations hereunder, including but not limited to the obligations under the Annual Energy Savings Guaranty (as defined herein), ESP's reporting

obligations, and obligations to correct defective, deficient, and non-conforming work; to maintain and monitor the ECMs; to measure and verify Verified Savings; and to perform the Annual Review.

### **13.2 Documents Provided With Notice of Final Completion**

ESP shall submit the following documents to Owner with its notice of Final Completion:

- (a) All Contract Documents;
- (b) As-built drawings depicting actual ECMs installed and the condition of work performed;
- (c) Documentation of commissioning, including any certificates required by Schedule N (Systems Startup and Commissioning of ECMs);
- (d) Certificates of inspection for all ECMs which require local government inspection;
- (e) Any other certificate or document required by law to be provided by ESP to Owner; and
- (f) Asbestos abatement compliance records, if applicable.

### **13.3 Ownership of Documents**

Owner shall retain or receive ownership of all documents related to the Project, including but not limited to the Contract Documents, drawings, specifications, reports, renderings, models, electronic media and all such other documents, and Owner shall have a license to use any copyrighted material contained in such documents.

## **ARTICLE 14. CLAIMS**

### **14.1 Claim Procedures and Conditions**

All ESP claims shall be initiated by written notice and claim to Owner. Such written notice and claim must be furnished within thirty (30) days after occurrence of the event, or the first appearance of the condition, giving rise to the claim. The failure to give the notice of claim required by this Section shall constitute in a waiver of such claim and all damages, losses, and cost associated therewith.

Pending final resolution of any claim of ESP, ESP shall diligently proceed with performance of this Agreement and Owner shall continue to make payments to ESP in accordance with this Agreement. The resolution of any valid claim under this Article shall be reflected by a Change Order or Contract Amendment executed by Owner and ESP.

### **14.2 Claims for Concealed and Unknown Conditions**

Should concealed and unknown conditions encountered in the performance of the Work (a) below the surface of the ground or (b) in an existing structure be at variance with the conditions indicated in writing by Owner or Owner's agents or representatives, or should unknown conditions of an unusual nature differing materially from those ordinarily encountered in the area and generally recognized as inherent in Work of the character provided for in this Agreement, be encountered, ECM Installation Payments may be increased or

decreased by Change Order or Contract Amendment and an extension of time may be added by Change Order or Contract Amendment. Notwithstanding anything herein, conditions observable from a careful inspection shall not constitute a concealed or unknown condition. As a condition precedent to Owner having any liability to ESP, or any obligation to enter a Change Order or Contract Amendment, for concealed or unknown conditions, ESP must give Owner written notice as required by Section 14.1, and an opportunity to observe and document, the condition prior to disturbing it.

#### **14.3 Claims for Additional Compensation**

If ESP wishes to make a claim for an increase in the ECM Installation Payments pursuant to this Article 14, as a condition precedent to any liability of Owner therefor, ESP shall provide the notice required by Section 14.1 within the time set forth therein, but in any event, before proceeding to execute any additional or changed Work. The failure by ESP to timely give such notice shall constitute a waiver of any claim for additional compensation.

#### **14.4 Claims for Additional Time and Adjustment to Guaranteed Savings**

If ESP is delayed in progressing any task which at the time of the delay is then critical or which during the delay becomes critical to achieving Substantial Completion or Final Completion, to the extent caused by any act or neglect to act by Owner (e.g., Owner caused delays under Section 3.4.1, or Section 3.4.4, change requests by Owner under Section 9.2.8, Owner suspensions under Section 10.8, Owner operation requests under Section 12.3) or someone acting on Owner's behalf, unusually adverse weather conditions not reasonably anticipatable, concealed unknown condition under Section 14.2, hazardous materials under Section 12.9, or an "Event of Force Majeure," then the date for achieving Substantial Completion of the Work shall be extended as provided in a Change Order or Contract Amendment pursuant to Article 9. In addition, if, as the sole result of such delay, ESP's ability to achieve sufficient Verified Savings equal to or in excess of Guaranteed Savings is impacted for a fiscal year, then the Baseline for such fiscal year shall be equitably adjusted to reflect the impact directly and solely caused by such delay. ESP shall propose for Owner's review and acceptance such succeeding fiscal years to receive such increase in Guaranteed Savings. If the parties are able to agree upon such equitable adjustment (and the succeeding fiscal years to receive corresponding increases in Guaranteed Savings), then they shall execute a Contract Amendment. If the parties are unable to agree upon such equitable adjustment (or the succeeding fiscal years to receive corresponding increases in Guaranteed Savings), then it shall be determined by a third party in the same manner described in Section 2.2, costs to be split evenly between the parties.

An "Event of Force Majeure" shall mean any cause or event beyond the reasonable control of the ESP resulting from acts of God; acts of terrorism, war or the public enemy; flood; earthquake; tornado; storm; fire; civil disobedience; pandemic; insurrections; riots; labor disputes; sabotage; restraint by court order or public authority (whether valid or invalid), and action or non-action by any governmental authority or utility or the inability to obtain or keep in force the necessary governmental authorizations, permits, licenses, certificates or approvals, in each case not caused or contributed to by ESP.

Notwithstanding anything herein, the sole and exclusive remedy for any delay not caused by Owner, or someone acting on Owner's behalf, shall be an extension of time, and, if so provided in this Section, an equitable adjustment to the Guaranteed Savings. Approval by or on behalf of Owner of any schedule, including but not limited to any Project Installation Schedule and ECM Submittal Schedule, shall not constitute a Change Order that results in a change in the date required for Substantial Completion, Final Completion,

or any ECM Installation Deadline, and any such approval will not constitute approval of any activity duration, calendar assignment, logic tie, constraint, or other attribute in such schedule.

The notice and claim for an extension of time or adjustment to Guaranteed Savings by ESP shall be made in accordance with Section 14.1 and shall set forth in detail ESP's basis for seeking additional time in which to complete the Project or an equitable adjustment to Guaranteed Savings. In the event the delay to ESP is a continuing one, only one notice and claim for additional time shall be necessary. If ESP fails to make such claim as required in Section 14.1 and this Section 14.4, any claim for an extension of time or equitable adjustment in Guaranteed Savings shall be waived.

#### **14.5 Limitation on Claims and Owner's Liability**

**14.5.1** In connection with any valid claim by ESP against Owner, any liability of Owner shall be strictly limited to direct costs incurred by ESP and shall in no event include indirect costs or consequential damages of ESP, including but not limited to home office overhead, loss of profit, loss of efficiency or productivity, loss of bonding capacity, loss of use of capital, or similar items of alleged damage. Owner shall not be liable to ESP for claims of third parties, including subcontractors. ESP shall raise and assert any and all defenses which it may have to any claim of any subcontractor or other third party. ESP shall not "pass through" any such claims without first raising and asserting such defenses and litigating same in a court of competent jurisdiction, which shall be a condition precedent to the assertion of any such claims.

**14.5.2** ESP shall make no claims of any type when the basis of such claim resulted from ESP's breach of this Agreement, negligence, or failure to adequately observe, inspect, and test the existing conditions, or resulting from its failure to properly perform the Audit.

**14.5.3** Any adjustment to the ECM Installation Payments or ECM Continuing Services Payments made by Change Order or Contract Amendment shall be subject to the limitations of this Agreement, including but not limited to Article 9 and Section 7.5, and all other limitations provided by law.

**14.5.4** NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, EXCEPT TO THE EXTENT RECOVERABLE BY OWNER AS LIQUIDATED DAMAGES UNDER SECTION 10.1.2 AND 10.1.3 OR AS DAMAGES RECOVERABLE UNDER SECTION 3.10 OR ANY OTHER INDEMNIFICATION PROVISION HEREIN.

### **ARTICLE 15. STATUTORY AND REGULATORY RULES**

#### **15.1 Approval by the Authority**

This Agreement shall have no force and effect unless and until the Director of Georgia Environmental Finance Authority, or his or her delegate, approves this Agreement. Such approval is a condition precedent to Owner's obligations under, and execution of, this Agreement.

## **15.2 Appropriation**

**15.2.1** As expressly provided in the Act, the parties agree that the following statutory provision is incorporated herein:

At the beginning of each fiscal year, a governmental unit's appropriations shall be encumbered for the estimated payments for multiyear guaranteed energy savings performance contract work to be performed in the appropriation fiscal year. Payment for multiyear guaranteed energy savings performance contract work performed pursuant to contract in any fiscal year other than the current fiscal year shall be subject to appropriations by the General Assembly. Multiyear guaranteed energy savings performance contracts shall contain a schedule of estimated completion progress, and any acceleration of this progress shall be subject to the approval of the authority, provided funds are available. State agencies shall have the right to terminate without further obligation any multiyear guaranteed energy savings performance contract, provided that the cancellation is subject to the termination provisions of the multiyear guaranteed energy savings performance contract, if the state agency determines that adequate funds will not be available for all of the payment obligations of the state agency. The state agency's determination regarding the availability of funds for its obligations shall be conclusive and binding on all parties to the contract. In the event of termination of any contract, the contractor shall be given a written notice of termination at least 60 days before completion of scheduled work for which funds are available. In the event of termination, the contractor shall be paid for the work already performed in accordance with the contract specifications.

**15.2.2** Nothing contained herein shall give ESP the right to recover when this Agreement is terminated for cause as provided in Section 10.2.1.

## **15.3 Benefits Inure to Owner**

Unless Owner provides written consent otherwise, all benefits provided by, or arising out of, the Work, including but not limited to Verified Savings, utility rebates, and credits, belong to and inure to the benefit of Owner. All savings or other benefits of ECMs that accrue before the Contract Time for Verified Savings shall inure to the benefit of Owner and ESP shall receive no compensation therefor.

## **15.4 Owner's Limited Financial Obligation**

Owner's financial obligations under this Agreement, during each fiscal year and in the aggregate of all fiscal years, are limited to and cannot exceed the Verified Savings, as calculated using the Method of Measurement and Verification, actually generated by the ECMs, even if no Verified Savings are realized from the ECMs. Owner is obligated only for those sums payable and appropriated for payment during each fiscal year.

## **15.5 Notification to Owner's Utilities**

Upon execution of this Agreement, ESP shall provide written notification to Owner for Owner's transmittal to its utility providers. The notice shall include a description of all ECMs to be installed under this Agreement.

**15.6 Prompt Pay Act and Retention Law Inapplicable**

To the greatest extent permitted by law, the provisions of the Georgia Prompt Pay Act, O.C.G.A. §§ 13-11-1 through 13-11-11 shall not apply to Owner under this Agreement and Owner's payment obligation hereunder. ESP expressly waives any rights arising therefrom and agrees that this Agreement shall control ESP's rights and obligations.

**15.7 Davis-Bacon Act**

ESP acknowledges that the Davis Bacon Act, Subchapter IV of Chapter 31 of Title 40, United States Code (Pub. L. 111-5, Division B, Section 1601), CHECK ONE: applies / does not apply  to all labor on or related to the Project. ESP is responsible for compliance with each and every provision of the Davis Bacon Act and all rules and regulations promulgated thereunder. If the Davis Bacon Act applies, then ESP shall comply with Appendix A, which is incorporated herein by reference.

**15.8 Employment Authorization Program**

In accordance with the Georgia Security and Immigration Compliance Act, as amended, ESP shall register and participate in the federal work authorization program, or E-Verify. All subcontractors and sub-subcontractors, as such terms are defined in O.C.G.A. § 13-10-90, shall also be required to comply with these E-Verify requirements. ESP and its subcontractors and sub-subcontractors will be required to execute an affidavit verifying their compliance with O.C.G.A. Section 13-10-91.

**15.9 Generation of Electricity; Compliance with Laws**

If an ECM results in the generation of electricity, ESP shall ensure that such generation complies will all applicable federal and state laws and regulations. Without limitation, ESP shall be responsible for compliance with the Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1 through 46-3-15; the High-Voltage Safety Act, O.C.G.A. §§ 46-3-30 through 46-3-40; and the Georgia Cogeneration and Distributed Generation Act of 2001, O.C.G.A. §§ 46-3-50 through 46-3-56; rules, regulations, and orders of the Georgia Public Service Commission, the Georgia Environmental Protection Division, the U.S. Environmental Protection Agency, the Federal Energy Regulatory Commission, and all other governmental bodies with jurisdiction over the generation of electricity by the ECM.

**ARTICLE 16. EXECUTION UNDER SEAL**

IN WITNESS WHEREOF, the Parties have executed this Guaranteed Energy Savings Performance Contract under seal by their authorized signatures as of this \_ day of \_\_\_\_\_,  
\_\_\_\_\_.

For Owner

For ESP

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

Under Seal

SPECIMEN

**EXHIBIT B**

*[insert draft of Installment Purchase Agreement]*

# INSTALLMENT PURCHASE AGREEMENT

This Installment Purchase Agreement (this "Agreement") entered into as of «Agreement\_Date» between «ESP\_Name», as seller, whose mailing address is «ESP\_Address», and «Purchaser\_Name», as purchaser, [an agency of the State of Georgia] [a public body corporate and politic duly created and existing under the laws of the State of Georgia] ("State"), whose mailing address is «Purchaser\_Address».

For and in consideration of the premises hereinafter contained, the parties hereby agree as follows:

## ARTICLE I DEFINITIONS

Unless the context clearly otherwise requires or unless otherwise defined herein, the capitalized terms used in this Agreement shall have the respective meanings specified below.

"**Acceptance Certificate**" means a certificate in substantially the form attached to the Energy Savings Contract as Exhibit II and which shall be delivered by Purchaser to Seller upon receipt and acceptance of the Property.

"**Agreement**" means this Installment Purchase Agreement with its Exhibits, which Exhibits are attached hereto and incorporated herein by reference.

"**Commencement Date**" is the date when the term of this Agreement begins and Purchaser's obligation to pay purchase price accrues, which date shall be the date first above written.

"**Commission**" means the Georgia State Financing and Investment Commission.

"**Energy Savings Contract**" means the Guaranteed Energy Savings Performance Contract, dated \_\_\_\_\_, between Seller and Purchaser.

"**Escrow Agreement**" means the Escrow Agreement, dated the date hereof, among Seller, Purchaser, and «Escrow Agent\_Name», as escrow agent.

"**Event of Nonappropriation**" shall have the meaning specified in Section 6.04 of this Agreement.

"**Prepayment Price**" means the amount set forth and so titled in Exhibit A hereto that Purchaser may pay to Seller to prepay the Purchase Price as provided in Section 11.01.

"**Property**" means the property described in Exhibit B and which is the subject of this Agreement.

"**Purchase Amount**" means the outstanding and unpaid aggregate principal component of the payments of Purchase Price.

"**Purchase Price**" means the payments of Purchase Price payable by Purchaser pursuant to Exhibit A of this Agreement.

"**Purchase Term**" means the period beginning with the Commencement Date and continuing until terminated as provided in Article IV.

"**Purchaser**" means the entity that is described in the first paragraph of this Agreement and that is purchasing the Property from Seller under the provisions of this Agreement.

"**Seller**" means (i) «ESP\_Name», acting as seller hereunder, (ii) any surviving, resulting, or transferee entity, and (iii) except where the context requires otherwise, any assignee(s) of Seller.

"**Vendor**" means the manufacturer of the Property as well as the agents or dealers of such manufacturer.

## ARTICLE II REPRESENTATIONS, WARRANTIES, AND COVENANTS OF PURCHASER

Purchaser represents, covenants, and warrants, for the benefit of Seller and its assignees, as follows:

(a) Purchaser is [the State] [a public body corporate and politic duly created and existing under the Constitution and statutes of the State]. [Purchaser will do or cause to be done all things necessary to preserve and keep in full force and effect its existence as a public body corporate and politic.]

(b) Purchaser is authorized under the Constitution and statutes of the State to enter into this Agreement and the transaction contemplated hereby and to perform all of its obligations hereunder.

(c) Purchaser is duly authorized to execute and deliver this Agreement by the resolution of its governing body attached hereto as Exhibit C, or by other appropriate official approval. All requirements have been met and procedures have occurred, in order to ensure the enforceability of this Agreement, and Purchaser has complied with such legal procurement requirements as may be applicable to this Agreement and the acquisition by Purchaser of the Property hereunder. No event or condition that constitutes, or with the giving of notice or the lapse of time or both, would constitute, an Event of Default exists at the date hereof.

(d) During the Purchase Term, the Property will be used by Purchaser only for the purpose of performing one or more governmental or proprietary functions of Purchaser consistent with the permissible scope of Purchaser's authority and will not be used in a trade or business of any person or entity other than Purchaser or another agency of the State of Georgia.

(e) During the Purchase Term, Purchaser will annually provide Seller with current financial statements, budgets, proof of appropriation for the ensuing fiscal year, and such other financial information relating to the ability of Purchaser to continue this Agreement as may be reasonably requested by Seller or its assignee, when and if such information is reasonably available to Purchaser.

(f) The Property will have a weighted aggregate useful life in the hands of Purchaser that is substantially in excess of the Purchase Term.

(g) The execution, delivery, and performance of this Agreement by Purchaser does not (1) violate any state or federal law or local law or ordinance or any order, writ, injunction, decree, or regulation of any court or other governmental agency or body applicable to Purchaser or (ii) conflict with or result in the breach or violation of any term or provision of, or constitute a default under, any note, bond, mortgage, indenture, agreement, deed to secure debt, lease, or other obligation by which Purchaser is bound.

(h) There is no action, suit, proceeding, claim, inquiry, or investigation, at law or in equity, before or by any court, regulatory agency, or public board or body pending or, to the best of Purchaser's knowledge, threatened against or affecting Purchaser, challenging Purchaser's authority to enter into this Agreement or any other action wherein an unfavorable ruling or finding would adversely affect the enforceability of this Agreement.

(i) Except as otherwise disclosed in writing by Purchaser to Seller, no lease, rental agreement, lease-purchase agreement, payment agreement, or contract for purchase to which Purchaser has been a party at any time during the past ten (10) years has been terminated by Purchaser as a result of insufficient funds being appropriated in any budget year, and no event has occurred, to the knowledge of the Purchaser, that would constitute an event of default under any debt obligation that Purchaser has issued during the past ten (10) years.

(j) Purchaser has an immediate need for, and expects to make immediate use of, the Property, which need is not temporary or expected to diminish during the Purchase Term.

(k) The Property qualifies as an "allowable cost" of an "energy conservation measure," as each are defined in O.C.G.A. § 50-37-2, and Purchaser has complied with the requirements of Chapter 37 of Title 50 of the Official Code of Georgia Annotated in executing this Agreement and the Energy Savings Contract.

(l) On or before the Commencement Date, Purchaser shall provide the following to Seller in form reasonably acceptable to Seller:

- (i) an opinion of counsel to Purchaser in substantially the form attached hereto as Exhibit E; and
- (ii) such other items reasonably required by Seller.

**ARTICLE III  
SALE OF PROPERTY**

Seller hereby sells to Purchaser, and Purchaser hereby purchases from Seller, the Property, in accordance with the provisions of this Agreement. To the extent funds are held under the Escrow Agreement for the acquisition and installation of the Property, such funds shall be disbursed as provided therein. The insufficiency of funds held under the Escrow Agreement to pay all costs of acquiring and installing the Property shall not affect Purchaser's obligations under this Agreement. When the Property is delivered, installed, and accepted, Purchaser shall promptly execute and deliver to Seller an Acceptance Certificate.

**ARTICLE IV  
PURCHASE TERM**

The term of this Agreement shall commence as of the Commencement Date and shall remain in effect until the first to occur of: (a) the exercise by Purchaser of the option to prepay the Purchase Price under Article XI, (b) the occurrence of an Event of Nonappropriation in accordance with Section 6.04, or (c) the payment by Purchaser of all sums required to be paid by Purchaser hereunder.

**ARTICLE V  
ENJOYMENT OF PROPERTY**

**Section 5.01. Quiet Enjoyment.** Seller hereby agrees not to interfere with Purchaser's quiet use and enjoyment of the Property.

**Section 5.02. Vendor's Warranties.** Purchaser may assert claims and rights that Seller may have against any Vendor of any portion of the Property. Purchaser expressly acknowledges that Seller makes, and has made, no representation or warranty whatsoever in this Agreement as to the existence or availability of any warranties of the Vendor of the Property. Purchaser's sole remedy in this Agreement for the breach of such warranty shall be against the Vendor of the Property, and not against Seller, nor shall such matter have any effect whatsoever on the obligations of Purchaser hereunder. The obligation of Purchaser to pay the Purchase Price shall not be abated, impaired, or reduced by reason of any claims of Purchaser with respect to the Property, including but not limited to, its condition, quality, workmanship, delivery, shipment, installation, defects, or otherwise.

**Section 5.03. Disclaimer of Warranties.** No assignee of Seller that is not a party to the Energy Savings Contract shall make any warranty or representation, either express or implied, as to the value, design, condition, merchantability, or fitness for particular purpose or fitness for use of the Property, or any other warranty or representation, express or implied, with respect thereto and, as to any such assignee, Purchaser's acquisition of the Property shall be on an "as is" basis. In no event shall any such assignee be liable for any incidental, indirect, special, or consequential damage in connection with or arising out of this Agreement, the Property, or the existence, furnishing, functioning, or Purchaser's use of any item, product, or service provided for in this Agreement.

**ARTICLE VI  
PURCHASE PRICE**

**Section 6.01. Payment of Purchase Price; Interest and Principal Components.** Purchaser shall promptly pay payments of Purchase Price, exclusively from legally available funds, in lawful money of the United States of America, to Seller or, in the event of assignment by Seller, to its assignee, in such amounts and on such dates as are set forth in Exhibit A hereto. A portion of each payment of Purchase Price is paid as interest, and the balance of each payment of Purchase Price is paid as principal. Exhibit A hereto sets forth the interest component and the principal component of each payment of Purchase Price during the Purchase Term.

**Section 6.02. Purchase Price to be Unconditional.** The obligation of Purchaser to make payments of Purchase Price, and to perform and observe the covenants and agreements contained herein, shall be absolute and unconditional in all events, except as expressly provided in Section 6.04 of this Agreement, notwithstanding any dispute between Purchaser and Seller, any Vendor, or any other person. Purchaser shall not assert any right of set-off or counterclaim against its obligation to make payments under this Agreement. Purchaser's obligation to make payments of Purchase Price shall not be reduced, diminished, or abated through accident; unforeseen circumstances; failure of Seller to install the Property in accordance with the Energy Savings Contract; failure of the Property to perform as desired or in accordance with the Energy Savings Contract; defects, malfunctions, breakdowns, or infirmities in the Property; damage or destruction to the Property; loss of possession of the Property; or obsolescence of the Property; and Purchaser shall be obligated to continue to make payments required of it by this Agreement if title to, or temporary use of, the Property or any part thereof shall be taken under exercise of the power of eminent domain.

**Section 6.03. Continuation of Purchase Term by Purchaser.** Purchaser intends, subject to the provisions of Section 6.04, to continue the Purchase Term and to pay all of the Purchase Price hereunder. Purchaser reasonably believes that legally available funds of an amount sufficient to pay all of the Purchase Price during the Purchase Term can be obtained. Purchaser further intends to do all things lawfully within its power to obtain and maintain funds from which the Purchase Price may be paid.

**Section 6.04. Nonappropriation.** If (a) sufficient funds are not appropriated for Purchase Price due in any fiscal year and (b) Purchaser shall have at such time no funds legally available for the Purchase Price or other amounts payable hereunder from other sources, an Event of Nonappropriation shall be deemed to have occurred. Purchaser shall promptly deliver written notice thereof to Seller and the Commission. Purchaser's determination of the occurrence of an Event of Nonappropriation shall be conclusive and binding on Seller. Notwithstanding anything to the contrary contained in this Agreement, an Event of Nonappropriation shall not be deemed to have occurred until the Commission shall have adopted a resolution concurring with Purchaser's determination of the occurrence of an Event of Nonappropriation. Following the occurrence of an Event of Nonappropriation, Purchaser shall make the remaining payments of the Purchase Price and other amounts due hereunder for which funds have been properly appropriated in the then current fiscal year for which appropriations have been made.

**ARTICLE VII  
TITLE TO PROPERTY**

During the Purchase Term, title to the Property shall vest in Purchaser when installed by Seller pursuant to the Energy Savings Contract.

**ARTICLE VIII  
MAINTENANCE AND TAXES**

**Section 8.01. Maintenance of Property by Purchaser.** Purchaser shall, at Purchaser's own cost and expense, maintain, preserve, and keep the Property in good repair, working order, and condition. Purchaser shall not alter any item of the Property or install any accessory, equipment, or device on any item of the Property, if such alteration or improvement would impair any applicable warranty or the originally intended function or value of that Property.

**Section 8.02. Taxes, Other Governmental Charges, and Utility Charges.** In the event that the use, possession, or acquisition of the Property is found to be subject to taxation in any form (except for income taxes of Seller), governmental charges, or utility charges and expenses, Purchaser shall pay all such taxes and charges as they come due.

**ARTICLE IX  
DAMAGE, DESTRUCTION, AND CONDEMNATION; USE OF NET PROCEEDS**

Purchaser assumes all risk of loss of or damage to the Property from any cause whatsoever, and no such loss of or damage to the Property nor defect therein nor unfitness or obsolescence thereof shall relieve Purchaser of the obligation to make payments of Purchase Price or to perform any other obligation under this Agreement. If (a) the Property or any portion thereof is destroyed (in whole or in part) or is damaged by fire or other casualty or (b) title to, or the temporary use of, the Property or any part thereof is taken under the exercise of the power of eminent domain, Purchaser and Seller shall cause the Net Proceeds of any insurance claim or condemnation award to be applied either to the prompt repair, restoration, modification, or replacement of the Property or, at Purchaser's option, to the payment in full of the Prepayment Price. Any balance of the Net Proceeds remaining after such work or purchase has been completed shall be paid to Purchaser.

For purposes of this Article IX, the term "Net Proceeds" shall mean the amount remaining from the gross proceeds of any insurance claim or condemnation award paid as a result of any event described in clauses (a) or (b) above, after deducting all expenses (including attorneys' fees) incurred in the collection of such claim or award.

**ARTICLE X  
TAX COVENANT**

It is the intention of Purchaser and Seller that the interest component of the Purchase Price payments be and remain excluded from gross income for federal income tax purposes. Purchaser covenants that it will take any and all action necessary to maintain the exclusion from gross income for federal income tax purposes of the interest component of the Purchase Price payments, and that it will not perform or omit to perform any act or enter into any agreement or use or permit the use of the Property or any portion thereof in a manner that shall have the effect of causing the interest component of the Purchase Price payments to be included in gross income for federal income tax purposes, including (without limitation) leasing all or any portion of the Property or contracting to a third party for the use or operation of all or any portion of the Property if entering into such lease or contract would have such effect.

**ARTICLE XI  
PREPAYMENT OF PURCHASE PRICE**

**Section 11.01. Optional Prepayment of Purchase Price.** Purchaser shall be entitled to prepay the Purchase Price, in whole or in part, on any purchase price payment date on or after \_\_\_\_\_, by paying to Seller the payment of Purchase Price then due, together with the Prepayment Price set forth in Exhibit A, along with all other amounts then due hereunder, so long as there is no Event of Default continuing hereunder and upon written notice delivered at least 30 days in advance. In the event of a partial prepayment of the Purchase Amount, Seller or its assignee shall prepare and deliver to Purchaser a revised Exhibit A to this Agreement, reflecting such partial prepayment of Purchase Amount and the reduction in subsequent payments of Purchase Price resulting from such prepayment, and an amendment to this Agreement. Any such reduction in the payments of Purchase Price shall not become effective until Seller or its assignee has received a signed revised Exhibit A and a signed amendment to this Agreement and such other documentation reasonably requested by Seller or its assignee.

**Section 11.02. Extraordinary Optional Prepayment of Purchase Price.** Purchaser shall be entitled to prepay the Purchase Price, in whole or in part, on any purchase price payment date within 180 days after (1) the Energy Savings Contract is terminated or (2) the Acceptance Certificate is delivered, from amounts held under the Escrow Agreement, by paying to Seller the payment of Purchase Price then due, together with the Purchase Amount being prepaid, without premium or penalty [**BREAKAGE FORMULA**], along with all other amounts then due hereunder, so long as there is no Event of Default continuing hereunder and upon written notice delivered at least 30 days in advance.

**ARTICLE XII  
ASSIGNMENT, LEASING, ENCUMBERING, AND SELLING**

**Section 12.01. Assignment or Sale by Seller.**

(a) This Agreement, and the obligation of Purchaser to make payments hereunder, may be sold, assigned, or otherwise disposed of in whole or in part to one or more successors, grantors, holders, assignees, or subassignees by Seller without the consent of Purchaser. Upon any sale, disposition, assignment, or reassignment, Purchaser shall be provided with a written notice of such assignment containing the name and address of the assignee or transferee. During the Purchase Term, Purchaser shall keep a complete and accurate register of all such assignments in form necessary to comply with Section 149(a) of the Internal Revenue Code of 1986, as amended.

(b) Purchaser agrees to make all payments to the assignee designated in the assignment, notwithstanding any claim, defense, setoff, or counterclaim whatsoever that Purchaser may from time to time have against Seller or Vendor. Purchaser agrees to execute all documents, including notices of assignment, which may be reasonably requested by Seller or its assignee to protect its interests in this Agreement.

(c) Purchaser hereby agrees that Seller may sell or offer to sell this Agreement (i) through a certificate of participation program, whereby two or more interests are created in this Agreement or the Purchase Price or (ii) with other similar instruments, agreements, and obligations through a pool, trust, limited partnership, or other entity.

**Section 12.02. No Sale, Assignment, or Leasing by Purchaser.** This Agreement and the interest of Purchaser in the Property may not be sold, assigned, leased, or encumbered by Purchaser without the prior written consent of Seller or its assignee. Notwithstanding the foregoing, this Agreement and the interest of Purchaser in the Property may be assigned by Purchaser to any other agency of the State of Georgia without the consent of Seller or its assignee.

**ARTICLE XIII  
EVENTS OF DEFAULT AND REMEDIES**

**Section 13.01. Events of Default.** The following constitute "Events of Default" under this Agreement:

- (a) failure by Purchaser to pay any payment of Purchase Price or other payment required to be paid hereunder when due; or
- (b) Purchaser's breach in any material respect of any representation or warranty contained in this Agreement or failure by Purchaser to observe and perform any other covenant, condition, or agreement on its part to be observed or performed (other than as set forth in clause (a) above) for a period of 30 days after written notice is given to Purchaser by Seller, specifying such breach or failure and requesting that it be remedied; provided, however, that if the breach or failure stated in such notice cannot be corrected within such 30-day period, Seller will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by Purchaser within the applicable period and diligently pursued until the breach or failure is corrected; or
- (c) initiation by or against Purchaser of a proceeding under any federal or state bankruptcy or insolvency law seeking relief under such laws concerning its indebtedness.

The foregoing provisions of this Section are subject to the provisions of Section 6.04 hereof.

**Section 13.02. Remedies on Default.** Whenever any Event of Default shall have occurred and be continuing, Seller shall have the right, at its sole option without any further demand or notice, to proceed by appropriate court action to enforce performance by Purchaser of the applicable covenants of this Agreement or to recover for the breach thereof. Purchaser shall pay the reasonable attorneys' fees and expenses incurred by Seller in exercising any remedy hereunder.

**Section 13.03. No Remedy Exclusive.** No remedy herein conferred upon or reserved to Seller is intended to be exclusive, 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. No delay or omission to exercise any right or power accruing upon any Event of Default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right or power may be exercised from time to time and as often as may be deemed expedient.

**Section 13.04. Late Charge; Interest on Late Payment.** Any payment of Purchase Price or portion thereof that is not paid on its due date shall bear a late charge equal to two percent (2%) of the amount of the past due payment of Purchase Price or portion thereof, but in no event less than \$100.00. Any unpaid payment of Purchase Price or other amount payable by Purchaser to Seller hereunder shall bear interest at the lesser of (a) the rate payable on the principal component of the Purchase Price, plus five full percentage points per annum, or (b) the maximum rate allowed by law.

**Section 13.05. Force Majeure.** If by reason of force majeure Purchaser is unable in whole or in part to carry out its agreement on its part herein contained, other than the obligations on the part of Purchaser contained in Article VI, Purchaser shall not be deemed in default during the continuance of such inability. The term "force majeure" as used herein shall mean, without limitation, the following: acts of God; strikes; lockouts or other industrial disturbances; acts of public enemies; orders or restraints of any kind of the government of the United States of America or the State or any of their departments, agencies, or officials, or any civil or military authority; insurrections; riots; landslides; earthquakes; fires; storms; droughts; floods; or explosions.

#### **ARTICLE XIV MISCELLANEOUS**

**Section 14.01. Notices.** All notices, certificates, or other communications hereunder shall be in writing (including, without limitation, telecopy or facsimile with receipt confirmed) and mailed, telecopied, or delivered to the address set forth on the first page hereof. Any notice, certificate, or other communication that is mailed shall be mailed registered mail, postage prepaid, return receipt requested. Notices, certificates, or other communications shall be effective upon the earlier of (i) actual receipt by the addressee or (ii) the date shown on the return receipt, fax confirmation, or delivery receipt.

**Section 14.02. Binding Effect.** This Agreement shall inure to the benefit of and shall be binding upon Seller and Purchaser and their respective successors and assigns.

**Section 14.03. Severability.** In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

**Section 14.04. Execution in Counterparts.** This Agreement may be executed in several counterparts.

**Section 14.05. Applicable Law.** This Agreement shall be governed by and construed in accordance with the laws of the State.

**Section 14.06. Captions.** The captions or headings in this Agreement are for convenience only and no way define, limit, or describe the scope or intent of any provisions or sections of this Agreement.

**Section 14.07. Entire Agreement; Amendments.** This Agreement constitutes the entire agreement between Seller and Purchaser concerning the matters addressed herein. No waiver, consent, amendment, modification, or change of terms of this Agreement shall bind either party unless in writing signed by both parties, and then such waiver, consent, amendment, modification, or change shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, representations, or warranties, express or implied, not specified herein regarding this Agreement or the Property purchased hereunder, except as set forth in the Energy Savings Contract and the Escrow Agreement. Any terms and conditions of any purchase order or other document submitted by Purchaser in connection with this Agreement that are in addition to or inconsistent with the terms and conditions of this Agreement will not be binding on Seller and will not apply to this Agreement. Purchaser by the signature below of its authorized representative acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms and conditions.

**Section 14.08. No Waiver Under Energy Savings Contract.** Nothing contained in this Agreement, express or implied, shall be construed to waive, release, limit, affect, impair, diminish, change, or modify any obligations of Seller, or any rights or remedies that Purchaser may have against Seller, in or under the Energy Savings Contract, any related payment or performance bond or guaranty, or any other related agreement.

**Section 14.09. Usury.** It is the intention of the parties hereto to comply with any applicable usury laws; accordingly, it is agreed that, notwithstanding any provisions to the contrary herein, in no event shall this Agreement require the payment or permit the collection of interest or any amount in the nature of interest or fees in excess of the maximum amount permitted by applicable law. Any such excess interest or fees shall first be applied to reduce principal components of Purchase Price, and when no principal components of Purchase Price remain, refunded to Purchaser. In determining whether the interest paid or payable exceeds the highest lawful rate, the total amount of interest shall be spread through the Purchase Term so that the interest is uniform through such term.

**Section 14.10. USA Patriot Act Compliance Notification.** Seller hereby notifies Purchaser that pursuant to the requirements of the USA PATRIOT Act (the "Patriot Act"), its assignee is required to obtain, verify, and record information that identifies Purchaser, which information includes the name and address of Purchaser and other information that will allow Seller's assignee to identify Purchaser in accordance with the Patriot Act. Purchaser shall, promptly upon the request of Seller's assignee, provide all documentation and other information that Seller's assignee requests in order to comply with its ongoing obligations under applicable "know your customer" and anti-money laundering rules and regulations, including the Patriot Act.

**IN WITNESS WHEREOF**, Seller has executed this Agreement in its corporate name, and Purchaser has caused this Agreement to be executed in its official name. All of the above occurred as of the date first written on the heading hereof.

**SELLER:**

**PURCHASER:**

«ESP\_NAME»

«PURCHASER\_NAME»

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

**REVIEWED AND APPROVED:**

\_\_\_\_\_  
Executive Director, Georgia Environmental Finance Authority

This Agreement is in compliance with the multiyear contract value authority set by the Georgia State Financing and Investment Commission for multiyear guaranteed energy savings performance contracts pursuant to Section 50-37-7(3) of the Official Code of Georgia Annotated.

**GEORGIA STATE FINANCING AND INVESTMENT COMMISSION**

By: \_\_\_\_\_  
Director, Financing and Investment Division

Counterpart No. \_\_\_\_ of \_\_\_\_\_ manually executed and serially numbered counterparts. To the extent that this Agreement constitutes chattel paper (as defined in the Uniform Commercial Code), no security interest herein may be created through the transfer or possession of any Counterpart other than Counterpart No. 1.

**EXHIBIT A**

**PURCHASE PRICE PAYMENT SCHEDULE**

<u>Payment Number</u>	<u>Due Date of Payment</u>	<u>Total Purchase Price Payment</u>	<u>Principal Component</u>	<u>Interest Component</u>	<u>Prepayment Price After Purchase Price Payment Due Has Been Made</u>
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Interest Rate - \_\_\_\_\_%

Purchaser: «Purchaser\_Name»

By: \_\_\_\_\_

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

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

**EXHIBIT B**

**DESCRIPTION OF THE PROPERTY**

PROPERTY:      «Property\_Description»

Purchaser: «Purchaser\_Name»

By: \_\_\_\_\_

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

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

**EXHIBIT C**

**EXTRACT OF MINUTES  
RESOLUTION OF GOVERNING BODY**

Purchaser: «Purchaser\_Name»  
Date of Agreement: «Agreement\_Date»

At a duly called meeting of the governing body of the Purchaser identified above (“Purchaser”) held on the \_\_\_\_ day of \_\_\_\_\_, the following resolution was introduced and adopted.

**WHEREAS**, the governing body of Purchaser has determined that a true and very real need exists for the acquisition of the Property described in the Installment Purchase Agreement (the “Agreement”) presented to this meeting; and

**WHEREAS**, the governing body of Purchaser has taken the necessary steps, including any legal procurement requirements, under applicable law to arrange for the acquisition of such Property;

**NOW, THEREFORE, BE IT RESOLVED** by the governing body of Purchaser that the forms, terms, and conditions and the execution, delivery, and performance of the Agreement and the Escrow Agreement (collectively the “Contracts”) presented to this meeting are hereby approved and authorized.

**BE IT FURTHER RESOLVED** by the governing body of Purchaser that the terms of the Contracts are in the best interests of Purchaser for the acquisition of such Property, and the governing body of Purchaser designates and authorizes the following person to execute and deliver the Contracts and any related documents necessary to the consummation of the transactions contemplated by the Contracts.

\_\_\_\_\_  
(Name of Person to Execute Contracts)

\_\_\_\_\_  
(Title)

Yes  No **BE IT FURTHER RESOLVED** by the governing body of Purchaser that the purchase obligation contemplated by the Agreement is hereby designated as a “qualified tax-exempt obligation” for purposes of Section 265(b)(3) of the Internal Revenue Code of 1986, as amended.

The undersigned further certifies that the above resolution has not been repealed or amended and remains in full force and effect and further certifies that the above and foregoing Installment Purchase Agreement is the same as presented at such meeting of the governing body of Purchaser.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Secretary

**EXHIBIT D**

**CERTIFICATE OF PURCHASER**

I, \_\_\_\_\_, am a duly authorized representative of «Purchaser\_Name» (“Purchaser”), as purchaser under that certain Installment Purchase Agreement, dated «Agreement\_Date» (the “Agreement”), with «ESP\_Name» (“Seller”), as seller, and as purchaser under that certain Escrow Agreement, dated «Agreement\_Date» (the “Escrow Agreement”), with Seller and«Escrow Agent\_Name», as escrow agent, and hereby certify as follows and in accordance with the requirements of the Agreement. Capitalized terms used herein have the same meaning as in the Agreement.

**A. INCUMBENCY OF OFFICIAL AND SIGNATURE:**

I have custody of the records of Purchaser, and the following official of Purchaser is duly elected or appointed and holds the office or title set forth opposite such individual’s name, and the signature opposite his or her name is true and correct, and such individual has the authority to enter into the Agreement and the Escrow Agreement on behalf of Purchaser:

<u>Name</u>	<u>Title/Office</u>	<u>Signature</u>
_____	_____	_____

**B. ESSENTIAL USE:**

- The Property will be used by Purchaser for the following governmental or proprietary purpose:

\_\_\_\_\_

\_\_\_\_\_

- The Property is essential for the functioning of Purchaser and is immediately needed by Purchaser. Such need is neither temporary nor expected to diminish during the Purchase Term. The Property is expected to be used by Purchaser for a period in excess of the Purchase Term.

**C. CERTIFICATE OF APPROPRIATION:**

Moneys for all payments of purchase price to be made under the Agreement for the fiscal year ending \_\_\_\_\_, \_\_\_\_\_, are available from unexhausted and unencumbered appropriations or funds within Purchaser’s budget for such fiscal year, and appropriations or funds have been designated for the payment of those payments of purchase price that may come due under the Agreement in such fiscal year.

IN WITNESS WHEREOF, I have executed and delivered this certificate as of the \_\_\_ day of \_\_\_\_\_.

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

**EXHIBIT E**

**FORM OF LEGAL OPINION OF SPECIAL COUNSEL TO PURCHASER**

[Attached]

«Agreement\_Date»

«Purchaser\_Name»  
\_\_\_\_\_, \_\_\_\_\_

«ESP\_Name»  
\_\_\_\_\_, Georgia

«Assignee\_Name»  
\_\_\_\_\_, \_\_\_\_\_

Re: Installment Purchase Agreement between «ESP\_Name», as seller, and «Purchaser\_Name», as purchaser

Ladies and Gentlemen:

We have acted as Special Counsel to «Purchaser\_Name» (the “Purchaser”) in connection with the execution and delivery on this date of an Installment Purchase Agreement, dated the date hereof (the “Agreement”), between «ESP\_Name» (the “Seller”), as seller, and the Purchaser, as purchaser. The Agreement provides for the sale by the Seller to the Purchaser of certain property (or interests in property) for use by the Purchaser in connection with its governmental undertakings, in consideration of the Purchaser’s agreement to make periodic installment payments of purchase price (the “Purchase Price Payments”) to the Seller or its assignee. The Agreement provides that the payment of all Purchase Price Payments and other amounts required to be paid by the Purchaser under the Agreement are subject to and dependent upon appropriations being made from time to time by the Purchaser sufficient for such purposes.

«Assignee\_Name» (the “Assignee”) has purchased the Seller’s right to receive Purchase Price Payments under the Agreement from the Seller, and the Seller has assigned its right to receive Purchase Price Payments under the Agreement to the Assignee, pursuant to an Absolute Assignment Agreement, dated the date hereof (the “Assignment”), between the Seller and the Assignee. In exchange for the Purchaser executing and delivering the Agreement to the Seller, the Seller deposited the proceeds from the sale of its right to receive Purchase Price Payments under the Agreement into a fund created under the terms of an Escrow Agreement, dated the date hereof (the “Escrow Agreement”), among the Purchaser, the Seller, and «Escrow Agent\_Name», as escrow agent (the “Escrow Agent”).

We have examined the law and such certified proceedings and other papers authorizing and relating to the contracts described above as we deem necessary to render this opinion, including the following:

1. Article VII, Section IV, Paragraph XII of the Constitution of the State of Georgia.
2. Chapter 37 of Title 50 of the Official Code of Georgia Annotated.
3. Certified copy of an authorizing resolution adopted by the Purchaser on \_\_\_\_\_, authorizing the execution, delivery, and performance of the Agreement and the Escrow Agreement.
4. Fully executed counterpart of the Agreement.
5. Fully executed counterpart of the Escrow Agreement.
6. Fully executed counterpart of the Assignment.
7. Fully executed counterpart of the Tax Certificate of the Purchaser, dated the date hereof (the “Tax Certificate”).
8. Fully executed counterpart of the Certificate as to Arbitrage Matters of the Purchaser, dated the date hereof (the “Non-Arbitrage Certificate”).

In all such examinations, we have assumed the authenticity of all documents submitted to us as original documents and the authenticity of originals and conformity to original documents of all documents submitted to us as certified, conformed, or photostatic copies. We have assumed, but not independently verified, that the signatures on all documents and certificates that we have examined are genuine, and, as to certificates, we have assumed the same to be properly given and to be accurate.

As to questions of fact material to our opinion, we have relied upon the following items, without undertaking to verify any of them by independent investigation: (a) certified proceedings and other certifications of public officials furnished to us, (b) certifications furnished to us by or on behalf of the Purchaser (including certifications made in the Tax Certificate and in the Non-Arbitrage Certificate), and (c) representations of the Purchaser contained in such proceedings and in documents delivered in connection with the Agreement.

With your permission, in rendering the opinions set forth herein, we have assumed the following, in addition to the assumptions set forth elsewhere in this letter, without any investigation or inquiry on our part:

- (i) the due authorization, execution, and delivery of the Agreement, the Escrow Agreement, and the Assignment (collectively the "Contracts") by the parties thereto other than the Purchaser;
- (ii) that the Contracts constitute the binding obligations of the parties thereto other than the Purchaser and that the parties thereto other than the Purchaser have all requisite power and authority to perform their respective obligations thereunder; and
- (iii) that the only interest, fees, and other charges contracted for or to be reserved, charged, taken, or paid in connection with the Agreement are those set forth in the Agreement and that all such interest, fees, and charges will be reserved, charged, taken, and applied solely as described in the Agreement, and that, contrary to its terms, no interest shall be reserved, charged, taken, or paid under the Agreement on unpaid interest and that under no circumstances shall the rate of interest paid or payable under the Agreement (including any fees, charges, premiums, or similar amounts that may be characterized as interest) exceed 5.00% per month (whether due to prepayment, acceleration, termination, or otherwise).

Based upon the foregoing, it is our opinion, as of the date hereof and under existing law, that:

(1) The Purchaser has all requisite power and authority to enter into and perform its obligations under the Agreement and the Escrow Agreement.

(2) The Agreement and the Escrow Agreement have been duly authorized, executed, and delivered by the Purchaser and constitute the legal, valid, and binding obligations of the Purchaser enforceable upon the Purchaser. We note that under the terms of the Agreement payment of the Purchase Price Payments is enforceable only if and to the extent appropriations for such purpose are made by the Purchaser. We express no opinion as to the validity or enforceability of the provisions of Section 13.04 of the Agreement (relating to late charges and interest on late payments).

(3) The Purchaser may not assert the defense of sovereign immunity to any action at law (as opposed to equity) for the breach of the Agreement or the Escrow Agreement or to any action at law (as opposed to equity) to enforce a judgment taken for the breach of the Agreement or the Escrow Agreement, provided that such action is filed only in the Superior Court of Fulton County, Georgia and such judgment is enforced only against moneys specified in the Agreement. We express no opinion as to whether the Purchaser may assert the defense of sovereign immunity against the enforcement of equitable remedies for breach of the Agreement or the Escrow Agreement.

(4) The portion of each Purchase Price Payment paid and denominated as interest under the Agreement and received by the owner of the Agreement is excluded from gross income for federal income tax purposes (including the tax imposed by Chapter 2A of Subtitle A of the Internal Revenue Code of 1986, as amended (the "Code")) and is not an enumerated "item of tax preference" for purposes of the federal alternative minimum tax imposed on individuals and corporations; however, it should be noted that, for the purpose of computing the alternative minimum tax imposed on corporations (as defined for federal income tax purposes), such interest is taken into account in determining adjusted current earnings. The opinions set forth in the immediately preceding sentence are subject to the condition that the Purchaser complies with all requirements of the Code that must be satisfied subsequent to the execution and delivery of the Agreement in order that the portion of each Purchase Price Payment paid and denominated as interest be, or continue to be, excluded from gross income for federal income tax purposes. The Purchaser has covenanted to comply with all such requirements. Failure to comply with certain of such requirements may cause the inclusion of the portion of each Purchase Price Payment paid and denominated as interest in gross income for federal income tax purposes (including the tax imposed by Chapter 2A of Subtitle A of the Code) to be retroactive to the date of execution and delivery of the Agreement. [The purchase obligation contemplated by the Agreement is a "qualified tax-exempt obligation," within the meaning of Section 265(b)(3) of the Code, and, in the case of certain financial institutions (within the meaning of Section 265(b)(5) of the Code), a deduction is allowed for 80 percent of that portion of such financial institutions' interest expense allocable to the portion of each Purchase Price Payment paid and denominated as interest.] We express no opinion regarding any other federal tax consequences arising with respect to the Agreement.

(5) The portion of each Purchase Price Payment paid and denominated as interest under the Agreement and received by the owner of the Agreement is exempt from State of Georgia income taxation.

(6) The Assignee is the owner of the Agreement for federal income tax purposes by virtue of the Assignment.

«Purchaser\_Name»  
«ESP\_Name»  
«Assignee\_Name»  
«Agreement\_Date»  
Page 3

With respect to the enforceability of the Contracts, we have assumed that, to the extent that any applicable law would require the rights and remedies of the Seller or the Assignee set forth therein to be exercised by it in good faith or in a reasonable or commercially reasonable manner as a condition to the enforceability thereof, the Seller or the Assignee will observe and satisfy such legal requirements.

The enforceability of the Contracts (i) may be limited by bankruptcy, insolvency, reorganization, moratorium, and other similar laws affecting the enforcement of creditors' rights; (ii) may be subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law); and (iii) may also be subject to the exercise of judicial discretion in appropriate cases.

We also note that, to the extent that the Contracts require the Purchaser to pay attorneys' fees, such provisions may be subject to the requirements and limitations of Section 13-1-11 of the Official Code of Georgia Annotated.

We make no statement with respect to the ability or willingness of the Purchaser to budget and appropriate sufficient funds for the payment of amounts to become due under the Agreement for any fiscal year of the Purchaser.

Notwithstanding anything herein to the contrary, we express no opinion in this letter regarding: (i) the enforceability of any provisions in the Agreement that purport to provide for payment of interest on unpaid interest in violation of Section 7-4-17 of the Official Code of Georgia Annotated; (ii) the enforceability of any provisions in the Agreement that, due to prepayment, acceleration, or otherwise, would cause the rate of interest payable under the Agreement to exceed five percent (5.0%) per month in violation of Section 7-4-18 of the Official Code of Georgia Annotated; and (iii) the enforceability of any provisions in any of the Contracts that purport to provide that any party shall be deemed to have been given or to have received any notice that such party did not actually receive.

We are members of the State Bar of Georgia. Our opinions herein are limited to the laws of the State of Georgia and any applicable federal laws of the United States. This opinion is limited to the matters expressly set forth above, and no opinion is implied or may be inferred beyond the matters so stated. This opinion is intended solely for the use of the Purchaser, the Seller, and the Assignee in connection with the transactions contemplated by the Contracts and may not be relied upon for any other purpose or by any other person for any purpose without our prior written consent. We expressly disclaim any duty to update this opinion in the future for any changes of fact or law that may affect any of the opinions expressed herein.

Very truly yours,

**DENTONS US LLP**

By: \_\_\_\_\_  
Earle R. Taylor, III, Partner

**EXHIBIT C**

*[insert draft of Escrow Agreement]*



reasonable fees and expenses incurred by the Escrow Agent in connection herewith as evidenced by its statement forwarded to Seller and Purchaser, and, second, to prepay to Seller (or its assignee) principal components of Purchase Price under the Agreement.

**Section 5.** The reasonable fees and expenses of the Escrow Agent incurred in connection herewith shall be the responsibility of Purchaser. The Escrow Agent agrees to look only to Purchaser for the payment of its fees and the reimbursement of its expenses for acting as escrow agent under this Escrow Agreement, and in no event shall it ever assert any claim or lien against any portion of the Escrow Fund for any fees for its services, whether regular or extraordinary, as escrow agent, or for reimbursement for any of its expenses; provided, however, that the Escrow Agent's fees and expenses may be paid from the Escrow Fund pursuant to Section 4(a) hereof.

**Section 6.** The Escrow Agent shall have no liability for acting upon any written instruction presented by Seller or Purchaser in connection with this Escrow Agreement that the Escrow Agent in good faith believes to be genuine. Furthermore, the Escrow Agent shall not be liable for any act or omission in connection with this Escrow Agreement except for its own negligence, willful misconduct, or bad faith. The Escrow Agent shall not be liable for any loss or diminution in value of the Escrow Fund as a result of the investment decisions made under this Escrow Agreement.

**Section 7.** The Escrow Agent may at any time resign by giving at least 30 days' prior written notice to Purchaser and Seller, but such resignation shall not take effect until the appointment of the successor escrow agent. In addition, the Escrow Agent may be removed at any time, with or without cause, by an instrument in writing executed by Seller and Purchaser. In the event of any resignation or removal of the Escrow Agent, a successor escrow agent shall be appointed by an instrument in writing executed by Seller and Purchaser. Such successor escrow agent shall indicate its acceptance of such appointment by an instrument in writing delivered to Seller, Purchaser, and the predecessor escrow agent. Thereupon such successor escrow agent shall, without any further act or deed, be fully vested with all the trusts, powers, rights, duties, and obligations of the Escrow Agent under this Escrow Agreement, and the predecessor escrow agent shall deliver all moneys and securities held by it under this Escrow Agreement to such successor escrow agent.

**Section 8.** This Escrow Agreement and the escrow established hereunder shall terminate upon disbursement by the Escrow Agent of all amounts contained in the Escrow Fund in accordance with this Escrow Agreement.

**Section 9.** All notices hereunder shall be in writing, sent by certified mail, return receipt requested, addressed to the other parties at their respective addresses set forth in this Escrow Agreement or at such other address as any such party shall from time to time designate in writing to the other parties, and shall be effective on the date of receipt.

**Section 10.** This Escrow Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns. This Escrow Agreement may be sold, assigned, or otherwise disposed of in whole or in part to one or more successors, grantors, holders, assignees, or subassignees by Seller without the consent of Purchaser or the Escrow Agent. Upon any sale, disposition, assignment, or reassignment, Purchaser and the Escrow Agent shall be provided with a notice of such assignment.

**Section 11.** This Escrow Agreement constitutes the entire agreement among the parties hereto with respect to the subject matter hereof, and no waiver, consent, modification, or change of terms hereof shall bind any party unless in writing signed by all parties.

**Section 12.** In the event any provision of this Escrow Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

**Section 13.** This Escrow Agreement may be executed in several counterparts.

**Section 14.** This Escrow Agreement shall be governed by and construed in accordance with the laws of the State of Georgia.

**Section 15.** Nothing in this Escrow Agreement, express or implied, shall give to any person, other than the parties hereto and their successors and assigns hereunder, any benefit or any legal or equitable right, remedy, or claim under this Escrow Agreement.

**Section 16.** The parties acknowledge that in order to help the United States government fight the funding of terrorism and money laundering activities, pursuant to federal regulations that became effective on October 1, 2003 (Section 326 of the USA PATRIOT Act), all financial institutions are required to obtain, verify, record, and update information that identifies each person establishing a relationship or opening an account. The parties to this Escrow Agreement agree that they will provide to the Escrow Agent, Seller, or any assignee thereof such information as it may request, from time to time, in order for such parties to satisfy the requirements of the USA PATRIOT Act, including but not limited to, the name, address, tax identification number, and other information that will allow it to identify the individual or entity who is establishing the relationship or opening the account and may also ask for formation documents such as articles of incorporation or other identifying documents to be provided.

**IN WITNESS WHEREOF**, the parties hereto have caused this Escrow Agreement to be duly executed as of the day and year first above written.

**SELLER:**

«ESP\_NAME»

By: \_\_\_\_\_

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

**PURCHASER:**

«PURCHASER\_NAME»

By: \_\_\_\_\_

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

**ESCROW AGENT:**

«ESCROW AGENT\_NAME»

By: \_\_\_\_\_

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

**SCHEDULE A**

**PAYMENT REQUEST FORM NO. \_\_\_\_\_**

**SECTION I - PAYMENT REQUEST**

«Escrow Agent\_Name», as escrow agent (the “Escrow Agent”) under the Escrow Agreement, dated «Agreement\_Date» (the “Escrow Agreement”), by and among the Escrow Agent, «ESP\_Name» (“Seller”), and «Purchaser\_Name» (“Purchaser”), is hereby requested to pay, from the Escrow Fund held under the Escrow Agreement, to the persons, firms, or corporations designated below as payee, the amount set forth opposite each such name, in payment of (1) the invoice cost of the Property designated opposite such payee’s name and amount or (2) the installation costs of such Property designated opposite such payee’s name and amount. The Property comprises all or a portion of the Property described in the Description of Property - Exhibit B of the Agreement referred to in the Escrow Agreement.

<u>Payee</u>	<u>Amount</u>	<u>Property</u>	<u>Installation Costs</u>
--------------	---------------	-----------------	-------------------------------

The undersigned Purchaser hereby certifies that the attached manufacturer’s, dealer’s, or Seller’s invoice is a duplicate original or certified copy of the order, delivery, and acceptance of the Property and related installation costs described in this Payment Request Form.

Dated: \_\_\_\_\_

Received and Approved:

Purchaser: «Purchaser\_Name»

Seller: «ESP\_Name»

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

**SECTION II - PARTIAL ACCEPTANCE**

If the above payment is a progress payment and if the payment is for less than all of the Property described in the Description of Property - Exhibit B and is not the final payment with respect to the Property described in the Description of Property - Exhibit B, then Purchaser hereby acknowledges that the Property listed above has been delivered to, tested, inspected, and accepted by Purchaser.

Dated: \_\_\_\_\_

Received and Approved:

Purchaser: «Purchaser\_Name»

Seller: «ESP\_Name»

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

**NOTE - Please execute both of the above signature blocks if this is a *Partial Payment* and Acceptance of a portion of the Property. If this is the *Final Payment* with respect to the Property described in the Property Description - Exhibit B — Do Not Complete Section II. Please forward an executed Acceptance Certificate (as defined in the Agreement referred to in the Escrow Agreement).**

**A RESOLUTION OF  
THE BOARD OF ECONOMIC DEVELOPMENT**

WHEREAS, the Geo. L. Smith II Georgia World Congress Center Authority (the “Authority”) operates the convention and tradeshow facility known as the Geo. L. Smith II Georgia World Congress Center (the “Center”); and

WHEREAS, by an Agreement between the Authority and the Department of Economic Development (the “Department”), dated April 8, 1974, as amended, the Authority manages and operates the Center for the Department; and

WHEREAS, in accordance with the provisions of Chapter 37 of Title 50 of the Official Code of Georgia Annotated and subject to the procedure, terms and conditions identified in that Chapter, governmental units may incur debt for the purpose of entering into certain guaranteed energy savings performance contracts (“GESPC(s)”) with qualified energy service providers for terms not to exceed twenty (20) years for energy efficiency or conservation improvement projects that generate guaranteed energy and operational cost savings or enhanced revenues; and

WHEREAS, on April 5, 2024, the Authority submitted to the Georgia Environmental Finance Authority (“GEFA”) an application to enter into a GESPC in respect of such projects; and

WHEREAS, on July 2, 2024, the Authority issued a Request for Expression of Interest (“RFEOI”) to all pre-qualified Energy Service Providers; and

WHEREAS, on July 12, 2024, the Authority received Expressions of Interest in respect to its RFEOI from nine pre-qualified Energy Service Providers; and

WHEREAS, on May 1, 2024, the Georgia State Financing and Investment Commission (“GSFIC”) approved the Authority’s GESPC application authorizing the pursuit of an Energy Performance Contract of up to \$25,738,289; and

WHEREAS, on Jun 23, 2025, GSFIC approved the Authority’s GESPC application

essentially to revise its earlier application and authorize the pursuit of an Energy Performance Contract of up to \$36,900,000; and

WHEREAS, on July 3, 2024, following an evaluation and ranking of responses by the Authority's Selection Committee pursuant to GEFA guidelines, notice of eligibility was given to eight pre-qualified Energy Service Providers; and

WHEREAS, on July 16, 2024, a Request for Proposals ("RFP") was issued to the pre-qualified Energy Service Providers to whom notices of eligibility had been provided; and

WHEREAS, six (6) proposals responding to the RFP were received on August 5, 2024 and subsequently interviews with pre-qualified Energy Service Providers were held; and

WHEREAS, an Investment Grade Audit was conducted by Trane U.S., Inc. and a report was issued on March 20, 2026; and

WHEREAS, Trane U.S., Inc. has demonstrated that it has the expertise, experience, resources and capacity successfully and effectively to undertake the obligations which would be required under the GESPC; and

WHEREAS the Board of Economic Development has determined that the improvements to property described will be useful for and beneficial to the operation of the Center and are in the public interest.

NOW, THEREFORE, BE IT RESOLVED by the Board of Economic Development that:

The Board of Economic Development and the Department of Economic Development is authorized to execute with Trane U.S., Inc. the Guaranteed Energy Savings Performance Contract substantially in the form attached as Exhibit A.

BE IT FURTHER RESOLVED that the Board of Economic Development and the Department of Economic Development is authorized to execute with Trane U.S., Inc. the Installment

Purchase Agreement substantially in the form attached as Exhibit B.

BE IT FURTHER RESOLVED that the Board of Economic Development and the Department of Economic Development is authorized to execute with Trane U.S., Inc. and            (the “Escrow Agent”) the Escrow Agreement substantially in the form attached hereto as Exhibit C.

BE IT FURTHER RESOLVED that the Commissioner of Economic Development is authorized to take any and all actions, to execute and deliver any and all documents, agreements, certificates and instruments, and to take any and all steps deemed by the Chief Executive Officer to be necessary and proper to effectuate the intent and purpose of this Resolution.

ADOPTED: \_\_\_\_\_, 2026.

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CHAIR  
Board of Economic Development

**EXHIBIT A**

*[insert draft of Guaranteed Energy Savings Performance Contract]*

**EXHIBIT B**

*[insert draft of Installment Purchase Agreement]*

**EXHIBIT C**

*[insert draft of Escrow Agreement]*

CERTIFICATE

The undersigned hereby certifies that I hold the position of Assistant Secretary, as stated below my signature, of the Geo. L. Smith II Georgia World Congress Center Authority and that the Resolution, a true and correct copy of which is attached to this Certificate, was duly adopted by the Board of Governors of the Authority at and in a public meeting duly scheduled and for which all public notices required by law were given.

Dated: April 30, 2026.

---

Crystal Lowe, Assistant Secretary

{Authority Seal}