

**DATED**

**DAY OF**

---

## **ENERGY PERFORMANCE CONTRACT**

**THE CUSTOMER SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT**

**-AND-**

**THE ESCO SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT**

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**ENERGY PERFORMANCE CONTRACT**

**THIS CONTRACT** is made on the \_\_\_\_\_ day of \_\_\_\_\_ 2016

**BETWEEN**

**THE CUSTOMER SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT  
("Customer")**

**AND**

**THE ESCO SPECIFIED IN THE FORMAL INSTRUMENT OF AGREEMENT ("ESCO")**

**WHEREAS**

- A. The ESCO is on the pre-qualified list of ESCOs established by the Department of State Development for the supply of Energy Performance Contracting Services.
- B. The Customer has issued a Request for Proposal regarding the installation of Energy Conservation Measures ("**EPC Solutions**") at the *premises* in order to achieve reductions in energy consumption and cost savings from improvements in the operation and maintenance of *equipment* at the *premises*.
- C. The ESCO has expertise in the design, installation, implementation, operation and measurement and verification of the *EPC Solutions*.
- D. The ESCO has performed under a Detailed Facility Study Agreement a Detailed Facility Study ("**DFS**") and attached at Annexure 2 specifying energy usage on the *premises* and identifying strategies for the delivery of *energy savings* and other operational and environmental benefits.
- E. The Customer has reviewed the DFS and has agreed to appoint the ESCO to design, install and monitor the operation of the *EPC Solutions* at the *premises* under the terms and conditions of the Energy Performance Contract attached to the Request for Proposal ("**EPC or Agreement**").

**OPERATIVE PROVISIONS**

**1. CONDITIONS PRECEDENT**

It is a condition precedent to the commencement of the EPC that if the EPC Solutions works is considered a public work and the EPC Solutions works contract sum exceeds the threshold figure of \$4 million under the *Parliamentary Committees Act 1991 (SA)*, then it is a condition precedent to the commencement of the EPC that a report is tabled with the Public Works Committee.

## 2. DESIGN AND INSTALLATION OF EPC SOLUTIONS

### 2.1 Submission of the works specification

- (a) Within ten (10) days of the *commencement date*, the ESCO and the Customer shall meet to discuss the preparation of a *works specification* for completion of the design and installation of the EPC Solutions.
- (b) Within the time period specified in Schedule 1, the ESCO must submit to the Customer a *works specification* for completion of the design and installation of the *EPC Solutions*. The *works specification* must as a minimum include the information as required by this *Agreement*, (in particular the information required by Schedules 2 and 3) and be fit for the purpose of achieving and (subject to this *Agreement*) ensure achievement of the *guaranteed energy savings* and other benefits identified in the DFS.
- (c) The *works specification* and every additional *works specification* must comply with the DFS, the *statutory requirements*, this *Agreement*, standards of proper and tradesmanlike workmanship and *good industry practice*.

### 2.2 Proceeding with or changing a *works specification*

- (a) Within twenty (20) Business Days of receipt of a *works specification*, the Customer must either:
  - (i) instruct the ESCO to proceed with the installation of the *EPC Solutions works* in accordance with the *works specification*; or
  - (ii) notify the ESCO of any non-conformance between the *works specification* and this *Agreement* requiring rectification or of changes the Customer otherwise requires to the *works specification*.
- (b) If the Customer requires any changes to the *works specification* under Clause 2.2(a)(ii), the ESCO and the Customer must discuss the changes required by the Customer and the ESCO must resubmit the *works specification* within a further ten (10) Business Days (or within such other time as the parties agree) for the Customer's further consideration and instruction in accordance with Clause 2.2(a).
- (c) The ESCO must rectify any non-conformance and use its best endeavours to incorporate any changes the Customer otherwise requires into its resubmission of the *works specification*.
- (d) If the parties cannot agree on the *works specification* within thirty (30) days of the ESCO resubmitting the *works specification* to the Customer (or within such other time as the parties agree) such that the installation of the *EPC Solutions* does not proceed, the ESCO may issue the Customer with an invoice for the *DFS fee* and the *works specification fee*, to be paid by the Customer in accordance with Clause 10.

### 2.3 Installation Timetable

- (a) The *works specification* submitted by the ESCO to the Customer shall include and specify the date(s) for:
  - (i) completion of the design of the *EPC Solutions*;

- (ii) commencement of the installation of the *EPC Solutions*
- (iii) progress claims to be made by the ESCO during the *installation period*, subject to achievement of the benchmarks to be identified in the *works specification*; and
- (iv) completion of the installation of the *EPC Solutions* ("*contractual completion date*"),

which must be consistent with any corresponding dates identified in the DFS unless the Customer agrees otherwise.

- (b) The ESCO must complete the installation of the *EPC Solutions* on or before the *contractual completion date*.

#### 2.4 Due care and skill

The ESCO acknowledges and agrees that at all times during this *Agreement* it shall be under an obligation to:

- (a) design the *EPC Solutions* with due care, skill and diligence and in accordance with *good industry practice*;
- (b) conduct installation of the *EPC Solutions* with due care, skill and diligence and in accordance with *good industry practice*;
- (c) take care of property and persons; and
- (d) use workmanship of a standard consistent with the best industry standards and which is fit for its purpose.

#### 2.5 Installation of the EPC Solutions

- (a) Following the receipt of instructions from the Customer under Clause 2.2 or approval under Clause 3, the ESCO must install the *EPC Solutions* or the *EPC Solutions works* (as the case may be) at the *premises* in accordance with the *works specification* as approved pursuant to Clause 2.2 by the *contractual completion date*.
- (b) During the *installation period*, the ESCO shall:
  - (i) comply with the Building Code 2016 (as updated) and any applicable codes and standards;
  - (ii) ensure that the ESCO and its employees and subcontractors have the appropriate licenses to perform the *EPC Solutions works*;
  - (iii) give the Customer reasonable prior notice of its requirements for access and storage;
  - (iv) comply with all applicable work health and safety legislation and safety rules and all reasonable instructions of the Customer;
  - (v) meet regularly with the Customer to provide progress reports on the installation procedure;
  - (vi) not, without first obtaining the consent of the Customer, cause or permit any act which may unreasonably interfere with the use of the *premises* or the *core business*;
  - (vii) provide the necessary labour (which shall be suitably qualified and experienced), supervision, tools and

- materials, equipment and plant to install the *EPC Solutions* at the *premises*; and
- (viii) where the nature of the materials to be used is not specified in the *works specification*, use suitable new materials which are fit for purpose in the installation of the *EPC Solutions*.
  - (ix) assume full responsibility for the care of the *EPC Solutions works* until *completion*;
  - (x) ensure that the *EPC Solutions works* are at all times adequately protected until *completion*;
  - (xi) do all things necessary to protect all people from death or injury caused by the ESCO, its employees, agents or contractors, protect all property from loss or damage and promptly make good any damage to any property including that of the Customer or third parties arising from or in connection with the *EPC Solutions works*;
  - (xii) not allow the delivery of any plant, material or other things before they are reasonably required in connection with the *EPC Solutions works* caused by the ESCO, its employees, agents or contractors; and
  - (xiii) ensure that utility services to or from the *premises* are not disconnected or disrupted at any time without the Customer's prior consent and are promptly reinstated.
- (c) The ESCO must and must ensure that each of its employees, agents and subcontractors at all times comply with any policy and procedures of the Customer relating to safety, identification and interruptions to the *core business*. The Customer must provide its policy and procedures to the ESCO on or before the *commencement date* and provide any changes made from time to time as soon as reasonably practicable.
- (d) If either party becomes aware that the *premises* have changed materially and in a way that is materially detrimental to the implementation of the *EPC Solutions* since the performance by the ESCO of the DFS it must promptly notify the other party in writing. The parties must negotiate in good faith amendments to the *works specification* to address the impact of the change and the cost of the amendments proposed. The Customer must pay to the ESCO the additional reasonable costs incurred directly as a result of such amendments with payment to be made in accordance with Clause 10. If the parties cannot agree on the amendments or the cost of implementing them, the dispute must be referred to resolution under Clause 21.
- (e) The Customer shall, at its own cost:
- (i) subject to the ESCO complying with Clause 2.5.3, provide the ESCO with reasonable access to the *premises* to the extent necessary to discharge its obligations including, if required, access outside the Customer's normal working hours;
  - (ii) provide reasonable storage space and other facilities necessary for the implementation of the *works specification* to the extent identified in this Agreement; and



- (iii) remove or render safe any asbestos or other toxic or hazardous material of which it is or becomes aware in any part of the *premises* where the ESCO may be required to undertake work.
- (f) If the installation of the *EPC Solutions* requires any modification to or of the *premises* or of any utilities or services connected to the *premises* which is not included (or required to be included had the ESCO complied with the DFS Agreement) in the *works specification*, and provided such modification is not something of which the ESCO was aware or should have been aware exercising *good industry practice*, the ESCO must promptly notify the Customer in writing and provide details of the work required. The Customer must:
  - (i) arrange for the necessary work to be performed at its own cost and assume full responsibility for such work;
  - (ii) co-ordinate the work with the ESCO's activities so as not to delay or disrupt the installation of the *EPC Solutions*;
  - (iii) notify the ESCO when the work has been completed; and
  - (iv) to the extent that the ESCO has first notified the Customer in writing before incurring the cost reimburse the ESCO for any direct cost reasonably and necessarily incurred by the ESCO as a direct result of undertaking the work which, but for this clause, it would not have had to undertake and provided it has taken all reasonable steps to avoid such work and cost.

## 2.6 Site Conditions

- (a) The *ESCO* must undertake all enquiries and research in relation to the existence and nature of any *site conditions*.
- (b) The *ESCO* agrees that it has carefully examined all documents relating to the construction of the *EPC Solutions works* upon the *premises* and the *site conditions*, and has satisfied itself as to the extent, nature and location of all *the EPC Solutions works* and all other matters which could in any way affect the performance of its obligations under the *Agreement*.
- (c) Any failure by the *ESCO* to acquaint itself with any *site conditions* under this clause will not relieve it from responsibility for performing its obligations under the *Agreement*.
- (d) The *ESCO's* entitlements in relation to *site conditions* and *latent conditions* are as follows:
  - (i) *ESCO* is not entitled to claim an extension of time as a result of any *site condition*.
  - (ii) the *ESCO* is not entitled to claim any adjustment to the *EPC Solutions works contract sum*, the *measurement and verification fee*, the *works specification fee* or to any amounts under clause 7, or to make any claim for payment whether under the *Agreement* or otherwise at law by reason of the occurrence of a *site condition*.

- (iii) the *ESCO* is entitled to claim an extension of time as a result of a *latent condition* provided that the *ESCO* complies with clause 17.
  - (iv) the *ESCO* may be entitled to recover the costs of a *latent condition* in accordance with clause 2.7.
- (e) The *ESCO* agrees that the *Customer* is not liable in respect of any error or omission in any information supplied by the *Customer* or its employees, consultants or agents in relation to the *premises* and any *site conditions*. The *ESCO* acknowledges that this information is provided for its assistance only and does not form part of the *Agreement*.

## 2.7 Latent Conditions

- (a) If during the installation of the *EPC Solutions works*, the *ESCO* becomes aware of a *latent condition* that will affect the completion of the installation, the *ESCO* must (as a condition precedent to any entitlement to additional time or money) forthwith and where possible before the latent condition is disturbed, (and in any event within five Business Days) give written notice thereof to the *Customer*.
- (b) The *ESCO* shall provide in that notice to the *Customer* a statement specifying:
- (i) the *latent conditions* encountered and in what respects they differ materially from the *site conditions* which should reasonably have been anticipated by a competent and experienced *ESCO* exercising *good industry practice* at the *commencement date*;
  - (ii) the additional work and additional resources which the *ESCO* estimates to be necessary to deal with the *latent conditions*;
  - (iii) the time the *ESCO* estimates will be required to deal with the *latent conditions* and the expected delay in *completion*;
  - (iv) the *ESCO*'s reasonable estimate of the cost of the measures necessary to deal with the *latent conditions*; and
  - (v) any other details that may be reasonably required by the *Customer*.
- (c) Delay caused by a *latent condition* may justify an extension of time for *completion*.
- (d) If a *latent condition* causes the *ESCO* to:
- (i) carry out additional work;
  - (ii) use additional materials; or
  - (iii) incur extra cost (including, but not limited to, the cost of delay or disruption),

which the *ESCO* did not and could not reasonably have anticipated at the time of tendering exercising *good industry practice*, the *Customer* must pay to the *ESCO* any agreed amount of additional payment in respect of additional costs caused by the *latent condition* or, if no agreement has been

reached, any actual reasonable direct costs to the extent caused by the *latent condition*, with payment to be made in accordance with Clause 10. If there is any dispute regarding the cost associated with the *latent condition* this will be dealt with in accordance with clause 21.

- (e) Subject to Clause 2.6(f), if the Customer does not wish the ESCO to proceed as notified, the Customer must promptly instruct the ESCO not to proceed, and the ESCO must comply with such an instruction.
- (f) The Customer and the ESCO may negotiate and agree on some other way of overcoming the *latent condition*, including, but not limited to having necessary work performed by others, and may agree to an amount of any additional payment to the ESCO in respect of costs caused by the *latent condition*.

## 2.8 Fees

- (a) The ESCO must submit progress claims to the Customer for the *EPC Solutions works contract sum* payable in respect of the installation of the *EPC Solutions works*, subject to achievement of the benchmarks set out in the timetable detailed in the *works specification* relating to those *EPC Solutions works*. Each progress claim to be valid must set out the value of the *EPC Solutions work* performed, certify that the benchmarks for payment of the amount claimed have been achieved and comply with all the *statutory requirements* applicable to any such claim.
- (b) Each progress claim submitted by the ESCO must set out all relevant information necessary to particularise the items of *EPC Solution work* undertaken and the amount payable for each item.
- (c) The Customer must pay the ESCO's progress claims in accordance with the terms of payment set out in Clause 10.
- (d) The ESCO may invoice the Customer for the *DFS fee* on the *commencement date*.
- (e) The ESCO acknowledges that it has calculated the *EPC Solutions works contract sum* and the *measurement and verification fee* and the *works specification fee* with due care and skill and taken into account all risks reasonably identified in relation to the *EPC Solutions works* and made full allowance for those risks in the *EPC Solutions works contract sum* and the *measurement and verification fee* and the *works specification fee*.

## 2.9 Subcontracting

- (a) The ESCO may subcontract any part or parts of the *project*, but not the *project as a whole*.
- (b) The ESCO must consult with the Customer on the selection of subcontractors for the *project*. The ESCO will give the Customer no less than fourteen (14) days notice of its intention to select a particular subcontractor. The Customer may veto the selection of a subcontractor within twenty one (21) days of being notified of the selection of a subcontractor by the ESCO. The Customer must not veto the selection of a subcontractor unreasonably.

- (c) If requested by the Customer, the ESCO must provide to the Customer the names and addresses of subcontractors appointed by the ESCO.
- (d) By subcontracting any part or parts of the *project*, the ESCO will not be relieved of any of its liabilities or obligations under this *Agreement* and will be liable to the Customer for the acts, defaults and omissions of the subcontractors as if they were the acts, defaults or omissions of the ESCO.
- (e) The ESCO indemnifies the Customer against all claims, actions and loss or damage and all other liability arising out of any acts or omissions of any subcontractor.
- (f) The subcontractors named in Schedule 1 are presently approved by the Customer in accordance with this clause.
- (g) The ESCO must obtain from subcontractors and suppliers warranties on the same terms as under this *Agreement* in relation to the *work* performed by the subcontractor, and ensure that the warranties are assignable to the Customer.

#### 2.10 Approvals and consents

- (a) The Customer must obtain all statutory approvals and consents required that are necessary for the installation of the *EPC Solutions* and the Customer hereby appoints the ESCO as its agent for the purpose of obtaining any such approvals and consents as are required and shall give the ESCO all reasonable assistance in this regard. The ESCO will not be obliged to install any *EPC Solutions* until all necessary approvals and consents have been obtained.
- (b) The Customer shall pay the ESCO's reasonable costs of acting on its behalf (for which prior written approval has been given) in obtaining all necessary approvals and consents upon presentation of the ESCO's invoice. If the ESCO is delayed or suffers any loss because of the Customer's failure to obtain any necessary approval or consent (including by reason of the ESCO having undertaken the *EPC Solutions work* before becoming aware of the absence of a necessary consent), the Customer will reimburse the ESCO for the loss (including the ESCO's reasonable direct costs caused by the delay) and the amount of the losses and costs will be added to the *EPC Solutions works contract sum*.

### 3. ADDITIONAL EPC SOLUTIONS

- 3.1 At any time during the Term, the ESCO may, with the prior written approval of the Customer, change (where used in this clause, "change" also includes, but is not limited to, replace, remove, alter or add to) the *equipment* or the *procedures*, provided that:
  - (a) the *guaranteed energy savings* are not diminished as a result of the change; and
  - (b) the change is explained in writing to the Customer.
- 3.2 The Customer shall not unreasonably withhold its consent to any such change where the costs of the change are borne by the ESCO. The Customer may

grant in its absolute discretion its consent to any such change, if the costs of the change are to be borne by the Customer and will pay the reasonable costs of the change, where those costs are reasonable by comparison with the *energy savings* to be achieved as a result of that change.

- 3.3 The ESCO shall submit an additional *works specification* in respect of the proposed change and, following receipt by the Customer, Clauses 2.2 to 2.5 shall apply to the additional *works specification*.

#### 4. COMMISSIONING PROCEDURE

##### 4.1 Acceptance Certificate

- (a) The ESCO must provide to the Customer an *acceptance certificate* within twenty (20) *Business Days* of the completion of the construction of the *EPC Solutions works*.
- (b) Within twenty (20) *Business Days* of receipt of the *acceptance certificate*, the Customer must either:
- (i) notify the ESCO of its acceptance of the *EPC Solutions works* by signing and returning the *acceptance certificate* to the ESCO; or
  - (ii) notify the ESCO in writing of any *deficiencies* in the construction of the *EPC Solutions works* which it reasonably requires the ESCO to rectify before it will accept the *EPC Solutions works*.
- (c) If the Customer gives notice under Clause 4.1(b)(ii), the ESCO shall promptly rectify any *deficiencies* in the construction of the *EPC Solutions works* and re-issue the *acceptance certificate* for the Customer's further consideration pursuant to Clause 4.1(b).
- (d) If the Customer fails to issue a notice under Clause 4.1(b)(i) or 4.1(b)(ii) within the twenty (20) *Business Day* period specified and a further five *Business Days* has elapsed following written notice from the ESCO to the Customer of such failure, the Customer shall be deemed to have accepted the completion of the construction of the *EPC Solutions works* as of the date of the *acceptance certificate*.

- 4.2 Once the Customer has returned the *acceptance certificate* in accordance with Clause 4.1(b)(i) or Clause 4.1(d) applies (as the case maybe), the ESCO must provide to the Customer:

- (i) any third party warranties, relevant manuals, performance test reports, drawings and parts lists in relation to the operation or maintenance of *equipment*; and
- (ii) a dilapidation report in relation to the premises sufficient to demonstrate compliance with Clause 2.5(b)(xi) and a schedule listing all items of *equipment* installed at the *premises*, which schedule the ESCO must review and update periodically during the *performance guarantee period* (but not less often than every two (2) years) from the date of the Contractual Completion Date.

##### 4.3 Performance Guarantee Commencement Date

- (a) The date of the *acceptance certificate* shall be the *performance guarantee commencement date*, which is the date on which the *performance guarantee* takes effect (and where clause 5.2 applies, the commencement date for the provision of *maintenance services*), unless:
- (i) the Customer gives a notice under Clause 4.1(b)(ii) in which case the *performance guarantee commencement date* shall be the date on any *acceptance certificate* which the Customer signs and returns; or
  - (ii) the ESCO has nominated (and the Customer has accepted) a *performance guarantee commencement date* to the Customer in writing prior to commencement of the construction of the *EPC Solutions works*, being a date on which a specific task identified in the installation timetable set out in the *works specification* is to be completed, in which case the *performance guarantee commencement date* shall be the date on which the specific task is actually completed, subject to Clause 15; or
  - (iii) where there is to be a staged commencement of the performance guarantee, any series of dates during the *installation period* nominated to and accepted by the Customer in writing by the ESCO prior to commencement of the construction of the *EPC Solutions works*, being dates on which specific tasks identified in the installation timetable set out in the *works specification* are to be completed, in which case the *performance guarantee commencement date* shall be the date on which the specific task is actually completed, subject to Clause 15.

#### 4.4 Title to the equipment

Title to each item of *equipment* shall pass to the Customer upon payment in full for each respective item of *equipment*.

#### 4.5 Loss of or damage to the equipment

Subject to Clause 14, the ESCO shall not be liable for loss of or damage to the *equipment* following installation of the *equipment* at the Customer's *premises* unless loss of or damage to the *equipment* is the fault of the ESCO. The Customer will ensure that it has adequate insurance to cover loss of or damage to the *equipment*.

#### 4.6 Defects Liability Period

- (a) Without limiting in any way the obligations of the ESCO as set out in Clause 11.2, at any time prior to the expiration of the *defects liability period*, the Customer may direct the ESCO to rectify any omission or defect in the *EPC Solutions work* performed under the *Agreement* which becomes apparent prior to the expiration of the *defects liability period*. The direction shall identify the omission or defect and may state a date by which the ESCO shall complete the work of rectification and may state a date by which the work of rectification shall commence. The direction may provide that in respect of the work of rectification there shall be a separate *defects liability period* of a further 12 month period.

The separate *defects liability period* shall commence on the date the ESCO completes the work of rectification.

- (b) If the work of rectification is not commenced or completed by the stated dates, the Customer may have the work of rectification carried out at the ESCO's expense, but without prejudice to any other rights that the Customer may have against the ESCO with respect to such omission or defect and the cost of work of rectification incurred by the Customer shall be a debt due from the ESCO and shall (at the Customer's discretion) either be payable within 10 Business Days of demand by the Customer or set-off against any monies payable by the Customer to the ESCO arising out of or in any way in connection with the *Agreement*.
- (c) If it is necessary for the ESCO to carry out work of rectification, the ESCO shall do so in accordance with the reasonable directions of the Customer.
- (d) Despite this clause 4.6 the ESCO shall not be responsible for the effects of normal wear and tear during the *defects liability period*.

## 5. EQUIPMENT MAINTENANCE

### 5.1 Equipment maintenance by Customer

- (a) If the Customer is to service and maintain the *equipment*, it must do so (or engage a third party to do so) to specification.
- (b) The Customer must provide to the ESCO a quarterly service and maintenance checklist in relation to each item of *equipment*, with the first such checklist being due three (3) months after the *performance guarantee commencement date*.
- (c) The checklist must set out details of the Customer's compliance with its obligations under Clause 5.1. The form of the checklist is to be as set out in Schedule 2, or as agreed by the parties from time to time.
- (d) Where the Customer engages a third party to service and maintain the *equipment*, the Customer must require, as a condition of its engagement of the third party, that the third party service and maintain the *equipment* to specification.

### 5.2 Equipment maintenance by ESCO

- (a) If the ESCO is to service and maintain the *equipment* which is in the Customer's discretion, it shall provide all labour, materials, service and equipment necessary and perform the *maintenance services* identified in Schedule 3 *to specification* for the duration of the agreed maintenance period.
- (b) If any *equipment* is modified materially adversely, except by or with the agreement of the ESCO or persons authorised by the ESCO, or is sold by the Customer, the ESCO's maintenance obligations for that *equipment* will immediately cease to that extent, unless the parties agree (acting reasonably) a change to the *maintenance services fee* as a consequence.

### 5.3 Payment for maintenance services

- (a) The Customer shall pay the ESCO for the *maintenance services* in the amount and frequency specified in Schedule 1.
- (b) Upon each anniversary of the *performance guarantee commencement date* during the term of the performance guarantee, the amount of the *maintenance services fee* payable for the following year shall be adjusted by the percentage specified in Schedule 1.
- (c) The ESCO will invoice the Customer separately for the provision of any additional maintenance or other service requested by the Customer not specifically referred to in this *Agreement*.

#### 5.4 Training

- (a) The ESCO is required to provide the Customer, its servants, agents and employees with such training as is reasonably required to effect the ongoing operation and maintenance of the *EPC Solutions*, as identified in the DFS.
- (b) The ESCO must complete the training for the *EPC Solutions* prior to the *performance guarantee commencement date* and, for any additional *EPC Solutions* or for ongoing training requirements, as and when reasonably required by the Customer.

#### 5.5 Retraining/Ongoing Training

The Customer shall pay the cost of any retraining or ongoing training that may be required, upon presentation of an invoice by the ESCO and subject to prior acceptance of the ESCO's quote for such retraining or ongoing training.

## 6. OTHER OBLIGATIONS OF CUSTOMER

### 6.1 Access to premises

- (a) In addition to its obligations under Clause 2.5(e) and subject to Clause 2.5(c), the Customer must ensure that the ESCO has reasonable access to the *premises* at all reasonable times to the extent necessary to enable the ESCO to:
  - (i) inspect the *premises* for the purposes of measuring and verifying the *EPC Solutions*; and
  - (ii) comply with its obligations under this *Agreement*.
- (b) The ESCO will provide reasonable notice to the Customer of its intention to inspect the *premises* and will not interfere with or disrupt the Customer or the *core business* during the course of any such inspection.

### 6.2 Cooperation with the ESCO

The Customer must cooperate fully with the ESCO and must use its best endeavours to ensure that its employees, agents and other contractors cooperate fully with the ESCO, in order to enable the ESCO to perform its obligations under this *Agreement*.

### 6.3 Provide information

The Customer must provide to the ESCO such information as is reasonably required by the ESCO and which the Customer has available, to enable the ESCO to perform its obligations under this *Agreement*.



#### 6.4 Consent of mortgagee

The Customer must ensure that it obtains the consent of any lessor, mortgagee or chargee over the *equipment* to the terms of this *Agreement* within three (3) days of the *commencement date*. Any such consent must be on terms reasonably acceptable to the ESCO.

#### 6.5 Further encumbrances

The Customer must notify the ESCO of any further encumbrance of the *premises* or the *equipment*.

### 7. PERFORMANCE GUARANTEE

#### 7.1 Commencement and term

This *Agreement* commences on the *commencement date* and terminates on the expiration of the *performance guarantee period* specified in Schedule 1, unless determined earlier in accordance with this *Agreement*.

#### 7.2 Measurement and Verification

- (a) All measurement and verification activities shall be in accordance with the Measurement and Verification Plan specified in Annexure 1.
- (b) The Customer is to use its best endeavours to ensure that all necessary suppliers' metering is installed at the *premises* and is operating correctly and accurately. At the end of each quarter during the *performance guarantee period*, or such other period as is agreed in writing by the parties, the Customer must arrange for any necessary readings to be taken of all meters at the *premises* and must provide a copy of those meter readings to the ESCO.
- (c) Within thirty (30) days of the end of each *guarantee year*, and subject to having received all information referred to in Clause 7.2(e), the ESCO will calculate in good faith and in accordance with this *Agreement* the *energy savings* and *energy cost savings* realised at the *premises* in that year as a result of the construction of the *EPC Solutions works* and provide to the Customer an audit report setting out the results for that year.
- (d) The Customer must assist in the preparation of that audit report by providing to the ESCO:
  - (i) copies of all bills, invoices or other records of expenditure relating to *energy consumption* incurred in that *guarantee year* within ten (10) Business Days of receipt;
  - (ii) any accounting records to the extent that they relate to *energy consumption*; and
  - (iii) any other assistance the ESCO may reasonably require.
- (e) The ESCO shall make available to the Customer (or to any independent contractor engaged by the Customer to review the audit report) all data and calculations it uses in the preparation of the audit report and provide any explanations or clarification the Customer may reasonably request to assist in its interpretation of the audit report.

- (f) The Customer must notify the ESCO within twenty (20) Business Days of receiving the audit report whether it accepts the audit report or whether the audit report requires further correction, explanation or clarification. Where the Customer requests such correction, notification or clarification the ESCO shall provide the Customer an amended audit report within ten (10) Business Days. The Customer must notify the ESCO whether it accepts the amended audit report within ten (10) Business Days of receiving the amended audit report. In the event that no notice is provided within these timeframes and this is not rectified within five (5) Business Days of a request by the ESCO to do so, the report will be deemed to have been accepted by the Customer.

### 7.3 Savings guarantee

The ESCO guarantees that the Customer will realise *energy savings* and *energy cost savings* at the *premises* in each *guarantee year* of not less than the *guaranteed energy savings* and the *guaranteed energy cost savings*.

### 7.4 Calculation of guaranteed energy savings

- (a) *Energy savings* are determined by calculating and comparing *energy consumption* for each *guarantee year* with the adjusted *base energy rates* for the *premises*. The Methodology for Energy Data Verification set out in Annexure 1 details the process for calculating savings. *Energy cost savings* are determined by comparing the cost of *energy consumption* at the *premises* for each *guarantee year* based on the *base energy rates* for the *premises*.
- (b) The *guaranteed energy savings* and the *guaranteed energy cost savings* for each *guarantee year* are considered satisfied if the actual savings in *energy consumption* and energy cost for that year, as determined by the audit report which has been accepted by the Customer in accordance with clause 7.2, equal or exceed the adjusted *guaranteed energy savings* and the *guaranteed energy cost savings*, regardless of how those savings are achieved.
- (c) Where the DFS specifies that Option A in Annexure 1 shall be used for measurement and verification of the guaranteed energy savings for a particular *EPC Solutions* the Customer may instruct the ESCO that there is no requirement for the measurement of energy use specified in sub-clause 7.2 for the relevant *EPC Solutions*.

### 7.5 Savings Shortfalls

- (a) Subject to Clause 7.6, if the *guaranteed energy savings* or the *guaranteed energy cost savings* are not achieved in any *guarantee year*, the ESCO shall pay to the Customer the amount of the shortfall within ten (10) Business Days of the date of acceptance of the audit report by the Customer for that year. The ESCO agrees that the amount of the shortfall has been negotiated on an arms length basis by the parties and represents a genuine pre-estimate of the loss that the Customer will suffer as a result of the *guaranteed energy savings* not being achieved.
- (b) Without in any way limiting the Customer's other rights under this *Agreement*, the payment obligation specified in Clause 7.5(a) shall be the ESCO's sole liability to the Customer for any shortfall in *guaranteed*

*energy savings* or the *guaranteed energy cost savings*, as referred to in Clause 14.1.

- (c) Where the ESCO can correct a shortfall through an operational improvement at no material expense or material inconvenience to the Customer and with no future operational expenses and the Customer declines to allow such operational improvement any future savings shortfalls that the improvement would have corrected will be negated.

#### 7.6 Excess Savings

- (a) If the ESCO has made shortfall payments to the Customer under Clause 7.5 in any *guarantee year* and the actual savings in *energy consumption* or the savings in operational costs in any subsequent *guarantee year* exceed the *guaranteed energy savings* or the *guaranteed energy cost savings* for that year then the Customer shall reimburse the ESCO for the shortfall payments up to the amount of the excess. Payment will be made within twenty (20) Business Days of notice being given by the ESCO to the Customer of the excess in actual savings.
- (b) If a payment is due by the Customer under Clause 7.6(a), the ESCO must submit an invoice to the Customer for the amount owing which shall be paid in accordance with Clause 10.
- (c) *Energy* and operational *savings* or *cost savings* achieved during the first year of the *performance guarantee period* that in total exceed the *guaranteed energy savings* or *guaranteed energy cost savings* for that year will be offset against any shortfalls in any subsequent *guarantee year*.

#### 7.7 Measurement and Verification Fee

The Customer shall pay the *measurement and verification fee* to the ESCO as specified in Schedule 1.

### 8. SECURITY

#### 8.1 Security for EPC Solutions Works

As security for the ESCO's performance of the *EPC Solutions works* the ESCO shall provide to the Customer the *EPC Solutions works security* within ten (10) Business Days after the Customer accepts the *works specification*.

#### 8.2 Recourse to EPC Solutions Works Security

The Customer may at any time, use the *EPC Solutions works security* to pay itself any amount claimed by the Customer from the ESCO arising from or in connection with the non-performance of the *EPC Solutions works* in accordance with this *Agreement*, but the Customer must have first given the ESCO an opportunity to pay the amount claimed within a period of five (5) Business Days after the Customer notifies the ESCO of the amount claimed. The fact that the ESCO disputes the amount claimed is not to preclude the Customer from drawing on or the relevant *EPC Solutions security* provider paying under the *EPC Solutions works security*. Any disputes regarding the *EPC Solutions security* will be determined in accordance with clause 21.

#### 8.3 Release of EPC Solutions Works Security

Subject to the Customer's rights to use the *EPC Solutions works security*, the ESCO shall be entitled to the release of the *EPC Solutions works security* (or the balance remaining after an exercise of the Customer's rights) upon expiry of the last *defects liability period* to expire and the rectification of all defects for which the ESCO is responsible.

#### 8.4 Security for Performance Guarantee Period

- (a) As security for the *guaranteed energy savings* the ESCO shall provide to the Customer within twenty (20) Business Days of the *performance guarantee commencement date* the *performance guarantee security*.
- (b) The Customer may at any time, use the *performance guarantee security* to pay itself any amount claimed by the Customer from the ESCO arising from or in connection with the non-payment of the *guaranteed energy savings* in accordance with this *Agreement*, but the Customer must have first given the ESCO an opportunity to pay the amount claimed within a period of five (5) Business Days after the Customer notifies the ESCO of the amount claimed. The fact that the ESCO disputes the amount claimed is not to preclude the Customer from drawing on the *performance guarantee security* or the relevant *performance guarantee security* provider paying under the *performance guarantee security*.
- (c) Any disputes regarding the *performance guarantee security* will be determined in accordance with clause 21.

#### 8.5 Release of Performance Guarantee Security

Subject to the Customer's rights to use the *performance guarantee security*, the Customer shall release the *performance guarantee security* (or the balance remaining after an exercise of the Customer's rights) within ten (10) Business Days of the expiration of the *performance guarantee period*.

### 9. BASE YEAR ENERGY ADJUSTMENTS

#### 9.1 Customer to provide a quarterly report on changes affecting *base year energy*

Subject to the requirements of the Measurement and Verification Plan at the end of each quarter on the 31 March, 30 June, 30 September and 31 December during the *performance guarantee period*, the Customer must provide to the ESCO a report which details any significant change (and the date of any such change) in any factor which may result in a change in *energy consumption* or the timing of *energy consumption* at the *premises* including, without limitation, changes in the following factors:

- (a) the size, construction, condition and state of repair of the *premises*;
- (b) the use of the *premises*, including the hours and level of occupancy of the *premises* and the number of employees of the Customer employed on the *premises*;
- (c) the lighting, temperature, humidification and ventilation levels of the *premises* and any operational procedures in relation to these;
- (d) the heating and air conditioning *equipment* and other energy-consuming *equipment* at the *premises*, and the general level of repair and efficiency of this *equipment*

- (e) material alteration, modification or change to the *premises* including the date of the alteration, modification or change;
  - (f) any failure by the Customer to comply with the *procedures* and
  - (g) maintenance of the *equipment* by the Customer (or a third party engaged by it) other than *to specification*.
- 9.2 To the extent that the cause of any such change is beyond the ESCO's reasonable control and not a *foreseeable change*, the ESCO shall be entitled to adjust the *base year energy* and/or the *guaranteed energy savings* to account for the change.
- 9.3 ESCO to determine effect on base year energy and guaranteed energy savings
- (a) The ESCO will acting in good faith and in accordance with this Agreement determine the effect on the *base year energy* or the *guaranteed energy savings* of:
    - (i) any change notified by the Customer under Clause 9.1; or
    - (ii) any change required as a result of an additional *works specification* requested by the Customer; or
    - (iii) any other similar matter coming to the attention of the ESCO and notified promptly in writing to the Customer which may result in a variation in energy consumption or the timing of energy consumption at the *premises*
  - (b) If the ESCO determines in accordance with 9.3(a) that the *base year energy* or the *guaranteed energy savings* should be changed, it shall notify the Customer in writing and provide to the Customer the detailed reasons and calculations upon which it bases its determination. Any such change to the *base year energy* shall be based on the Methodology for Energy Data Verification set out in Annexure 1.
  - (c) The ESCO must obtain the Customer's consent in writing to the change before it can take effect. If the Customer does not provide its consent in writing within thirty (30) days of its receipt of the said calculations, then a dispute will be taken to exist for the purposes of Clause 21.
  - (d) If the resolution of the dispute requires an adjustment to the *base year energy* or the *guaranteed energy savings* as redetermined by the ESCO under Clause 9.3(b), then that adjustment together with any necessary reimbursements will be made with effect from the date of the ESCO's original redetermination under Clause 9.3(b).
- 9.4 Energy saving procedures and methods of operation
- (a) The Customer must develop the *procedures* relating to any *EPC Solutions works* installed in accordance with Clause 2.5.
  - (b) The ESCO acknowledges and agrees that the *procedures* shall not exceed the requirements set by manufacturers or relevant *statutory requirements*.
  - (c) Without limiting the operation of this Clause 9, the ESCO will not be liable to the Customer for any failure to realise the *guaranteed energy savings* in any *guarantee year* to the extent that such failure is attributable to default or failure by the Customer to perform fully any of its obligations under this *Agreement* and which directly cause the ESCO

to fail to realise the *guaranteed energy savings* in any *guarantee year*, provided that the ESCO has first provided the Customer with written notice of the default and the Customer has failed to rectify the default within thirty (30) days of the notice and provided that the ESCO has taken all reasonable steps to mitigate the effects of such default.

- (d) If this *Agreement* is terminated before the end of the *performance guarantee period*, the *guaranteed energy savings* shall be recalculated for the current *guarantee year* on a pro rata basis to the date of termination. In recalculating the *guaranteed energy savings*, the ESCO may make adjustments in good faith for seasonal variations in *energy consumption*.

## 10. TERMS OF PAYMENT

### 10.1 Time for payment

- (a) The Customer must pay all invoices issued by the ESCO under this *Agreement* within twenty (20) Business Days of receipt of the invoice.
- (b) If the Customer disagrees with any information or calculations set out in an invoice, the Customer must provide written notice of its disagreement to the ESCO within ten days of receipt of the invoice. If the ESCO and the Customer are not able to agree on the invoice within a further ten (10) Business Days, then a dispute will be taken to exist for the purposes of Clause 21. The Customer must pay so much of the disputed invoice that is genuinely not in dispute pending outcome of the dispute resolution.
- (c) Where, subsequent to the payment of an invoice, the parties agree pursuant to Clause 10.1(b) or a determination is made pursuant to Clause 21 that an adjustment is necessary to the invoice, the amount of the adjustment shall be deducted from the next invoice or (where the amount of the adjustment is greater than the amount of the next invoice) invoices issued by the ESCO.

### 10.2 Interest

Subject to there being no dispute in existence in accordance with sub-clause 10.1, interest at the rate specified in Schedule 1 will accrue (and compound monthly) on all amounts due but unpaid by the Customer more than thirty (30) days after receipt of the invoice.

### 10.3 Taxes

In addition to any other fees owing to the ESCO under this *Agreement*, the *EPC Solutions works contract sum* is deemed to include any federal, state, local or excise taxes that may be imposed on the purchase by the Customer of goods or services to be installed or provided under this *Agreement* when the provider of such services or the seller of such goods is required by law to collect such taxes.

## 11. REPRESENTATIONS AND WARRANTIES

- 11.1 The Customer represents and warrants to the ESCO that:

- (a) it has provided to the ESCO such records as it has available (to the best of its knowledge) which have been requested by the ESCO in relation to the *project*.
  - (b) no other agreements are currently in force with other persons for the provision of energy performance or energy management services at the premises other than as disclosed prior to the execution of this *Agreement*;
  - (c) it currently intends to continue to use the *premises* in a manner similar to its present use, except as disclosed in Schedule 1 or as otherwise disclosed prior to the execution of this *Agreement*;
  - (d) except as disclosed in Schedule 1, at all times it is the owner or lessee of or otherwise lawfully entitled to occupy the premises and the existing equipment and energy systems in place at the premises, and will at all times during the continuance of this *Agreement* be entitled to do so.; and
  - (e) it will use reasonable endeavours to ensure at all times that the *premises* and the *equipment* comply with all applicable occupational health and safety legislation.
- 11.2 The ESCO warrants to the Customer that the *equipment* shall:
- (a) be fit for the purpose as specified in the *works specification* and for the purpose of achieving the *guaranteed energy savings*;
  - (b) be of good quality and free from defects in materials and workmanship; and;
  - (c) operate effectively under normal and reasonably foreseeable (by a service provider exercising *good industry practice*) abnormal use and service for the period specified in Schedule 1, which period shall commence on the *performance guarantee commencement date*.
- 11.3 If the *equipment* is found to be defective during the defects liability period, defined where appropriate with reference to the manufacturer's catalogues and bulletins for capacities and ratings and with this *Agreement*, the ESCO must, at its own cost, repair such *equipment* or (at the ESCO's option) install a similar piece of *equipment* with the same or better capabilities to replace it without prejudice to the Customer's other rights, provided that the Customer allows the ESCO to remove the original piece of *equipment*.
- 11.4 The warranty given in Clause 11.2(c) shall not apply to the extent that any equipment or material has been:
- (a) damaged (and not repaired) by anyone other than the ESCO or a person authorised by the ESCO;
  - (b) repaired, altered or modified by anyone other than *to specification* by anyone other than the ESCO or a person authorised by the ESCO; or
  - (c) used in a manner contrary to the *procedures*.
- 11.5 The ESCO shall procure assignment for the benefit of the Customer and the ESCO of all manufacturer's warranties and guarantees for *equipment* supplied under this *Agreement* that is not manufactured by the ESCO.
- 11.6 Each party represents and warrants to the other that:
- (a) it has the power and authority and any licence, permit or franchise required to enter this *Agreement* and perform its obligations;

- (b) the execution of this *Agreement* by the signatories and performance of the obligations of this *Agreement* has been duly authorised and legally binds the party;
- (c) the obligations it has under this *Agreement* do not breach any other agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected; and
- (d) it has not received notice and is not aware of any pending notice of a contravention of any applicable law, ordinance, regulation, rule, decree, award, permit or order which affects or may affect materially and adversely its ability to perform its obligations under this *Agreement*.

## 12. INTELLECTUAL PROPERTY

- 12.1 Subject to Clause 12.2, the ESCO warrants that all *intellectual property rights* in the *EPC Solutions* and any materials, systems, software or any other thing or document supplied by the ESCO to the Customer under this *Agreement* are owned by the ESCO. The parties agree that such rights remain the property of the ESCO and do not pass to the Customer.
- 12.2 All drawings, designs, specifications or other documents prepared by the ESCO (the “**Documents**”) will remain the property of the ESCO (subject to Clause 20.5) where the *EPC Solutions* installation proceeds in accordance with Clause 2 or Clause 3. The ESCO grants the Customer a perpetual, irrevocable non-exclusive royalty free licence (with a right to sub-licence) to use the said Documents in connection with the use of the *EPC Solutions* on the *premises* and not otherwise.
- 12.3 The Customer may elect to purchase the Documents provided it pays to the ESCO a price acceptable to the ESCO for the said purchase.
- 12.4 Regarding the *EPC Solutions*:
  - (a) Subject to the specific provisions of any licence accompanying software, the ESCO grants to the Customer a licence (with a right to sub-licence) to use the software forming part of the *EPC Solutions* for the *project*, and not otherwise.
  - (b) The Customer must not modify, copy or reverse engineer the software or merge it with any other software.
  - (c) During the Term, ESCO will provide to the Customer user manuals, technical information and all updates and revisions to the software.
- 12.5 The ESCO indemnifies the Customer against any claims which the Customer is legally liable for, in respect of any infringement of third party *intellectual property rights* relating to the *EPC Solutions* or any part of the Documents supplied by the ESCO (“the Infringing Part”). The ESCO’s obligation to indemnify the Customer against claims is subject to the Customer:
  - (a) giving the ESCO prompt written notice of the claim;
  - (b) not making any admission or prejudicing the ESCO’s defence of the claim or the ESCO ability to negotiate a satisfactory settlement;
  - (c) allowing the ESCO the opportunity to control at the ESCO expense the conduct of the defence and any negotiations for the settlement of the claim; and



- (d) giving the ESCO (at the ESCO' expense) such assistance and information as may reasonably be required by the ESCO to assist the ESCO with the conduct of the defence and any negotiations for the settlement of the claim.
- 12.6 The ESCO shall, at its option, either replace or modify the Infringing Part with a non-infringing part or procure for the Customer the right to use such infringing part.
- 12.7 The rights and obligations set out in this Clause 12 survive the expiry or earlier termination of the Agreement.

### 13. **INSURANCE**

- 13.1 The ESCO must maintain in force at its own expense during the Term:
- (a) public risk and product liability insurance for not less than the amount specified in Schedule 1 for any one event (and in the aggregate for products liability in any one policy period) or such other amount as the Customer may reasonably require;
  - (b) professional indemnity insurance policy for not less than the amount specified in Schedule 1 for any one event and in the aggregate in any one policy period or such other amount as the Customer may reasonably require;
  - (c) asbestos liability policy of insurance for not less than the amount specified in Schedule 1 if any EPC Solutions work involves asbestos decontamination work;
  - (d) workers compensation insurance in accordance with the applicable worker's compensation legislation.
- 13.2 The insurances to be maintained by the ESCO pursuant to this clause must be with insurers satisfactory to the Customer.
- 13.3 The ESCO will, without limiting the operation of clause 13.1, ensure that the insurance policy referred to in clause 13.1(b) is renewed and maintained for a period specified in Schedule 1 from the date of termination or early expiration of this Agreement.
- 13.4 The Customer may require the ESCO to provide proof that the policies of insurance required by this clause have been effected and maintained.
- 13.5 The Customer in specifying levels of insurance in this Agreement accepts no liability for the completeness of their listings, the adequacy of the sum insured, limit of liability, scope of coverage, conditions or exclusions of those insurances in respect to how they may or may not respond to any loss, damage or liability.
- 13.6 The ESCO acknowledges and agrees that it is its responsibility to assess and consider the risks and scope of insurances required under this Agreement.
- 13.7 This clause will survive the termination or expiry of this Agreement.

### 14. **SUSPENSION**

- 14.1 Subject to Clause 14.2, the ESCO may, by written notice served on the Customer, suspend any work under this *Agreement* following notice to the Customer of the event and failure by the Customer to remedy the event within five (5) Business Days after receipt of the notice:

- (a) if the Customer has not given safe access to the *premises* or any *equipment* in accordance with Clause 2.5(e)(i) as required by this Agreement;
  - (b) if there is any toxic or hazardous materials discovered in areas where the ESCO is required to work which renders such work unsafe; or
  - (c) if the Customer fails to pay when due any monies owing to the ESCO pursuant to this *Agreement* or is in breach of any other material obligation under this *Agreement* which materially affects the continued provision of the work.
- 14.2 Where there is a suspension of work by the ESCO pursuant to Clause 14.1 such suspension shall cease immediately upon:
- (a) in the case of a suspension of work pursuant to Clause 14.1(a), provision by the Customer of written confirmation of compliance with all applicable work health and safety legislation;
  - (b) in the case of a suspension of work pursuant to Clause 14.1(b), provision by the Customer of written notification stating that the affected area is clear of toxic or hazardous materials; or
  - (c) in the case of a suspension of work pursuant to Clause 14.1(c),, the payment of any such monies owing to the ESCO or rectification of any such breach.
- 14.3 The Customer must pay to the ESCO:
- (a) any agreed amount of additional payment in respect of additional costs caused by such suspension; or
  - (b) if no agreement has been reached, any actual reasonable direct costs caused by the suspension which shall not include consequential losses or loss of profits as determined in accordance with the dispute resolution clause 21, and any such payment shall be made in accordance with clause 10.
- 14.4 Damage or destruction of premises
- (a) The Customer must immediately notify the ESCO if any part of the *premises* or the *equipment* is damaged or destroyed.
  - (b) If a majority of the *premises* is damaged or destroyed so as to render it substantially unfit for occupation and the affected part is not repaired or reconstructed within one hundred and twenty (120) days of the date of such damage or destruction, either party may terminate this *Agreement* by written notice to the other.
  - (c) Any such termination is without prejudice to the parties' rights in respect of any prior breach, matter or thing.
- 14.5 Force majeure
- If a party becomes unable, wholly or in part, to carry out an obligation placed on it under this *Agreement* as a result of fire, flood, earthquake or other act of God, strike or other industrial action, civil commotion, act of terrorism, war, unavailability of materials or any other similar cause beyond that party's reasonable control (hereinafter referred to as a “**force majeure event**”):

- (a) the party affected by the force majeure event must give to the other party prompt written notice of:
  - (i) reasonable particulars of the force majeure event; and
  - (ii) so far as is known, the probable extent to which the party affected by the force majeure event will be unable to perform or be delayed in performing its obligations;
- (b) the relevant obligation, so far as it is affected by the force majeure event, will be suspended during but not longer than the continuance of the force majeure event; and
- (c) the party affected by the force majeure event must take all reasonable measures to overcome or remove the force majeure event as quickly as possible. The party affected by the force majeure event will not have to settle any labour or other dispute creating the force majeure event on terms contrary to its wishes or to contest the validity or enforceability of any law, regulation or decree by way of legal proceedings.

#### 14.6 Suspension by Customer

The Customer may direct the ESCO to suspend the carrying out of the whole or part of the installation of the *EPC Solutions works* for such time as the Customer thinks fit, if the Customer, acting reasonably, forms the opinion that it is necessary:

- (a) because of an act, default or omission of:
  - (i) the Customer or its employees, contractors, agents or other contractors (not being employed by the ESCO); or
  - (ii) the ESCO or a person authorised by the ESCO or the ESCO's subcontractors, employees or agents.
- (b) for the protection or safety of any person or property;
- (c) to comply with a court order; or
- (d) because suspension of work under a contract upon which the installation of the *EPC Solutions works* depends, prevents the carrying out of the installation of the *EPC Solutions works*.

#### 14.7 Where there is a suspension of work by the Customer under clause 14.6, other than under clause 14.6(a)(ii), the Customer must pay to the ESCO:

- (a) any agreed amount of additional payment in respect of additional costs caused by such suspension or
- (b) if no agreement has been reached, any actual direct reasonable costs caused by the suspension which shall not include consequential losses or loss of profits; and any such payment shall be made in accordance with clause 10.

### 15. DELAY COSTS

Other than payments to which the ESCO may be entitled to under Clause) 14.7, the ESCO will not be entitled to any claim for damages or costs resulting from delay or disruption or suspension from any cause (including breach by the Customer).

## 16. LIQUIDATED DAMAGES

### 16.1 Liquidated Damages

If *completion* is not achieved by the *contractual completion date*, the ESCO shall be indebted to the Customer for liquidated damages calculated by applying the *liquidated damages rate* to every day from the *contractual completion date* to and including the earlier of the date that *completion* is achieved and the date of termination of the *Agreement*.

### 16.2 Scope of Liquidated Damages

The parties acknowledge that the liquidated damages provided for by this Clause represent a genuine pre-estimate of the Customer's damages arising from delays in the construction of the *EPC Solutions works* after the *contractual completion date*.

### 16.3 Extension of Time Claimed by ESCO

The ESCO agrees to bear the risk of all delays to or disruption of the carrying out of the construction of the *EPC Solutions works* from any cause and will not be entitled to any extension of the *contractual completion date* except that if all of the following conditions in Clause 16.3(a) to (e) below are met (as conditions precedent):

- (a) the ESCO is delayed so as to prevent it from achieving *completion* by the *contractual completion date* by either:
  - (i) a breach of the provisions of the Agreement by or any other act or omission of the Customer, the Customer's representative or any of the Customer's employees, consultants, other contractors or agents, whenever occurring (not permitted or authorised by this Agreement); or
  - (ii) any of the following events occurring before the *contractual completion date*:
    - (A) a force majeure event; or
    - (B) a variation of the *EPC Solutions works* under Clause 17.
- (b) the cause of the delay is beyond the reasonable control of the ESCO;
- (c) the ESCO has demonstrated to the satisfaction of the Customer's representative that the delay has affected the construction timetable specified in the *works specification*;
- (d) the ESCO has taken all reasonable measures to avoid or minimise the delay; and
- (e) the ESCO gives the Customer written notice of:
  - (i) the occurrence and cause of the delay, within five (5) Business Days after the delay commences; and
  - (ii) the total period of the delay for which the ESCO seeks an extension of time together with evidence satisfactory to the Customer that as a result of the delay the ESCO will be delayed in achieving completion, within ten (10) Business days after the end of the period of delay,

- 16.4 In the event that the conditions in Clause 16.3(a) to (e) above are met the Customer shall by notice in writing to the ESCO within five (5) Business Days of the receipt by the Customer of the ESCO's notice given under Clause 16.3, grant a reasonable extension of the *contractual completion date*.

16.5 Extension of time by Customer

The Customer may at any time grant an extension of the *contractual completion date* for any reason (including any delay caused by or within the control of the Customer) whether or not the ESCO is entitled to or has claimed an extension under the Agreement.

## 17. VARIATIONS

### 17.1 Directing variations

- (a) The ESCO shall not vary the *EPC Solutions works or equipment* except as agreed or directed in writing by the Customer.
- (b) The Customer may direct the ESCO to vary the *EPC Solutions works or equipment* in accordance with this clause.

### 17.2 Proposed variations

- (a) The Customer may give the ESCO written notice of a proposed variation to the *EPC Solutions works or equipment*.
- (b) The ESCO shall as soon as is practicable after receiving such notice, notify the Customer whether the proposed variation can be effected, together with, if it can be effected, the ESCO's estimate of the:
  - (i) effect on the program (including the *contractual completion date*); and
  - (ii) cost of the proposed variation, including where applicable, costs and quotations from any relevant subcontractor or subcontractors.
- (c) The Customer may direct the ESCO to give a detailed quotation for the proposed variation.
- (d) The Customer may approve a fee adjustment in accordance with Clause 17.3.

### 17.3 Fee adjustment

The ESCO shall, as soon as possible and subject to subclause 17.2 price each variation using the following order of precedence:

- (a) prior agreement;
- (b) applicable rates or fees in the Agreement;
- (c) rates or fees, even though not in the Agreement documents, to the extent that it is reasonable to use them; and
- (d) reasonable rates and fees.

## 18. PAYMENT OF WORKERS AND SUBCONTRACTORS

### 18.1 Workers and subcontractors

The ESCO must pay all moneys due and payable to subcontractors in respect of work under the Agreement as and when due. If required by the Customer, the ESCO shall with each progress claim and, to the extent not prohibited by law, as a precondition to the Customer becoming obliged to make any payment to the ESCO arising out of such progress claim give in respect of a progress claim a statutory declaration by the ESCO or, where the ESCO is a corporation, by a representative of the ESCO who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of work under the Agreement.

18.2 Withholding payment

- (a) The Customer may withhold moneys due and payable in respect of the progress claim until the ESCO complies with Clause 18.1.
- (b) The Customer shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to Clause 18.1 as due and payable to workers and subcontractors.

**19. INDUSTRY PARTICIPATION POLICY**

Option (a) where an IPP (Tailored) Plan was submitted with the ESCO's tender. Delete option (b) below.

- 19.1 The ESCO must provide an Industry Participation Report (IPP Report) in respect of each Industry Participation Reporting Period within two weeks of the end of each period, in the format set out in the IPP (Tailored) Plan Implementation Report template which is attached to the Agreement, including all the information indicated in that template.
- 19.2 The Industry Participation Reporting Period is:
  - 19.2.1 the period between the Commencement Date and the date six (6) months after the Contractual Completion Date;
  - 19.2.2 each subsequent six (6) month period during the Term;
  - 19.2.3 the Contractual Completion date..

Option (b) where an IPP (Standard) Plan was submitted with the ESCO's tender. Delete option (a) above.

- 19.3 The ESCO must provide an Industry Participation Report (IPP Report) in respect of each Industry Participation Reporting Period within two weeks of the end of each period, in the format set out in the IPP (Standard) Plan Implementation Report template which is attached to the Contract, including all the information indicated in that template.
- 19.4 The Industry Participation Reporting Period is:
  - 19.4.1 the period between the Commencement Date and the first anniversary of the Date of Contract;
  - 19.4.2 each subsequent 12 month period during the Term;
  - 19.4.3 the Contractual Completion Date.
- 19.5 The ESCO must attend any meeting scheduled by the Industry Participation Advocate during the term of the Contract to review how the ESCO's Industry Participation Plan is being implemented and advanced, and for this purpose, the ESCO must provide all information reasonably requested by the IPA. The IPA

- must give the ESCO not less than ten (10) Business Days' notice of any such meeting.
- 19.6 The ESCO's failure to comply, in whole or in part, with the commitments contained within the ESCO's Industry Participation Plan may be a factor taken into account in the award of future contracts for the Government of South Australia.
- 19.7 In this clause, 'Industry Participation Advocate' or 'IPA' means the person who from time to time has been appointed to the position of Industry Participation Advocate within the Office of the Industry Advocate, situated within the Department of the Premier and Cabinet, or his/her successor.

## 20. BREACH AND TERMINATION

- 20.1 Either party ("**the first party**") may terminate this Agreement immediately by notice in writing to the other party ("**the defaulting party**") before expiry of this Agreement if:
- (a) the defaulting party fails to make any payment due and payable or commits any other material breach of a term of the Agreement;
  - (b) the first party serves a written notice on the defaulting party requiring the defaulting party to pay the overdue amount or to remedy the breach;
  - (c) the defaulting party fails to pay the overdue amount or remedy the breach within thirty (30) days of receipt of the notice;
  - (d) the ESCO enters into an arrangement or compromise with, or assignment for the benefit of, all or a class of its creditors or members or a moratorium involving any of them;
  - (e) an event described in section 461 of the Corporations Act 2001 occurs in relation to the ESCO;
  - (f) the ESCO being or stating that it is unable to pay its debts as and when they fall due;
  - (g) the appointment of a liquidator, provisional liquidator, official manager, receiver, receiver and manager, controller or administrator in respect of the ESCO or the property of the ESCO.
- 20.2 Subject to Clause 20.3, if the Customer's interest in the premises is sold, transferred or assigned, the ESCO will use its reasonable endeavours to enable this Agreement to be novated to the purchaser or assignee of that interest. However, the ESCO will not be obliged to enter into a novation of the Agreement, and may at its option terminate the Agreement upon notice of such sale, transfer or assignment.
- 20.3 Subject to any contrary legislative intention, the parties agree that if there is any Machinery of Government change that this Agreement is deemed to refer to the new entity succeeding or replacing the Customer and all of the Customer's rights and obligations under this Agreement will continue and will become rights and obligations of that new entity.
- 20.4 Upon termination of this Agreement:
- (a) both parties' obligations under the Agreement shall cease;

- (b) the ESCO shall be entitled to invoice the Customer for the following amounts, which shall be payable within twenty (20) Business Days of the invoice:
- (i) all amounts which the Customer has become liable to pay to the ESCO prior to the date of termination, whether or not previously invoiced to the Customer; and
  - (ii) if the defaulting party is the Customer and Clause 5.5 applies, an amount equal to the next two payments which would fall due to the ESCO for *maintenance services* as specified in Schedule 1; and (c) If the defaulting party is the ESCO, then the ESCO's entitlement to invoice and be paid the amounts set out in this Clause 20.4 shall be subject to the Customer's right to claim damages from the ESCO as the defaulting party.
- (c) the Customer shall be entitled to invoice the ESCO for any amounts that the ESCO remains liable to pay under this Agreement which shall be payable within twenty (20) Business Days of the invoice.
- 20.5 Upon termination of this Agreement pursuant to any of 20.1 for the ESCO's default or insolvency, the ESCO grants the Customer an irrevocable, royalty-free, non-exclusive licence (including a right to sub-licence) to use the *EPC Solutions and Documents* on the *premises* including for the purpose of:
- (a) completing the design, manufacture, testing, commissioning and delivery of *the EPC Solutions works*, following termination of the Agreement by the Customer for default; and
  - (b) testing, operating, maintaining, repairing, upgrading and modifying the *EPC Solution works*.
- 20.6 The Customer may by written notice served on the ESCO terminate this Agreement for any reason on twenty (20) Business Days prior notice. In such event the ESCO may submit an invoice for the amounts stated in Clause 20.4 as if the Customer was in default, except that the reference in paragraph (ii) to 'two payments' will be deemed to be deleted. Additionally, the ESCO will be entitled to payment for its reasonable direct costs (not including loss of profits) of demobilising its personnel and equipment from the site to their usual locations and the cost of materials and equipment reasonably ordered and substantiated by the ESCO for the *EPC Solution* and which the ESCO is liable to accept, sub-contractors and suppliers cancellation fees and costs incurred by the ESCO in expectation of completing the work under the EPC and not including in any other payment to the extent that those liabilities and expenses cannot be further mitigated as a result of the Customer's termination. Such payments will be the ESCO's exclusive remedy arising from such termination.

## 21. DISPUTE RESOLUTION

- 21.1 If any dispute arises under this Agreement, representatives of the parties must meet within five (5) Business Days of either party giving written notice of the dispute to the other party and attempt to resolve the dispute.
- 21.2 If any dispute is not resolved within ten (10) Business Days of the issue of a notice under Clause 21.1, or such longer period as may be agreed in writing



between the parties, either party may refer the dispute to an appropriately qualified expert agreed by the parties as appropriate for determination. The parties agree that any dispute in connection with Clauses 7 or 8 must be determined by an expert.

- 21.3 If the dispute is referred to an expert for determination, then:
- (a) the expert shall determine the dispute as an expert and not as an arbitrator, and the process of determination shall not be a process of arbitration;
  - (b) subject to any error of law or manifest error of fact by the expert, the determination of the expert shall be final and binding on the parties if the amount of the expert's determination involves a sum not exceeding one hundred thousand dollars (\$100,000.00);
  - (c) the procedures applying to any expert determination under the Agreement shall be as set out in Schedule 7 and (to the extent not inconsistent) in accordance with the Expert Determination Guidelines of the Australian Commercial Disputes Centre;
  - (d) the parties shall each pay one half of the costs of the expert.
- 21.4 If the parties cannot agree on an expert within five (5) Business Days of a referral for expert determination pursuant to Clause 21.2, then either party may ask the Law Society of South Australia to appoint an expert or mediator.
- 21.5 Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Agreement or to seek injunctive or urgent declaratory relief.
- 21.6 This clause will survive the expiry or termination of this Agreement.

## 22. WORK HEALTH AND SAFETY

### 22.1 General

Without limiting the generality of Clauses 2.5.2 and 23.15, the ESCO must comply with all statutory requirements, including the *Work Health and Safety Act 2012 (SA)* and *Work Health and Safety Regulations 2012 (SA)*.

### 22.2 The ESCO shall:

- (a) implement and maintain work practices and systems to ensure safe systems of work on the *premises*;
- (b) ensure that the work carried out by the ESCO and the work of any and all other persons on the premises and the respective safety procedures and systems of the ESCO and others, are co-ordinated by the ESCO so as to ensure safety;
- (c) undertake an auditing process of the workplace on a regular basis to ensure that safe systems of work are maintained on the *premises*;
- (d) implement and maintain an effective process of identifying actual or potential hazardous or unsafe or unhealthy conditions at the premises, assessing associated risks and identifying and implementing appropriate risk control and prevention measures;

- (e) implement and maintain an appropriate incident investigation process and designate responsibility for investigation to persons with appropriate skills;
  - (f) implement and maintain a system to manage work health and safety risks with respect to employees, subcontractors, and other persons who may attend the *premises*;
  - (g) implement an emergency response procedure for responding to work health and safety incidents at the *premises*; and
  - (h) comply with any induction program as may be required by the Customer.
- 22.3 The ESCO must instruct its employees, agents and subcontractors to:
- (a) follow safe work practices and procedures (including work health and safety policy, site safety action plan and protocol and induction and training programs) at all times;
  - (b) take reasonable care for their own safety; and
  - (c) take reasonable care for the health and safety of anyone else who may be affected by anything that they do or fail to do, in connection with the work under the Agreement.
- 22.4 Appointment as principal contractor
- For the purposes of this clause 22.4
- (a) 'the Regulations' is a reference to the *Work Health and Safety Regulations 2012 (SA)*; and
  - (b) construction work' has the same meaning as under regulation 289 of the Regulations.
- 22.5 The Customer:
- (a) appoints the ESCO as 'Principal Contractor' for the construction work performed for or on behalf of the Customer; and
  - (b) authorises the ESCO as Principal Contractor to manage, control and exercise such authority of the Customer to the extent necessary to discharge the duties imposed on the ESCO as Principal Contractor under Chapter 6 Part 2 of the Regulations.
- 22.6 The ESCO, as Principal Contractor, must ensure that, in carrying out construction work:
- (a) it complies with any obligations imposed upon the Principal Contractor by the Regulations;
  - (b) it does nothing nor omits to do anything which might leave the Customer in breach of its obligations under the Regulations;
  - (c) it complies with all statutory requirements and other requirements of the Agreement for work health, safety and rehabilitation management; and
  - (d) those subcontractors engaged by the ESCO in accordance with the Agreement comply with the requirements referred to in this clause;
  - (e) keep the Customer fully informed of all work health, safety and rehabilitation matters arising out of, or in any way connected with, the *premises* as soon as they occur including providing copies of all relevant documentation or notices in connection with such matters;
  - (f) ensure that its subcontractors, employees and agents, and any other person for whom it is responsible or over whom it is capable of

exercising control engaged in carrying out any part of the construction work or the work under the Agreement, comply with and implement:

- (ii) the safety requirements set out in this Agreement;
  - (iii) any further reasonable safety requirements as notified to the ESCO by the Customer from time to time, including any reasonable direction given to protect the health and safety of any person on or near the *premises*; and
  - (iv) all work health and safety statutory requirements.
- (a) ensure that signs are placed on the *premises* that are clearly visible from outside the *premises* and on which the name and contact telephone numbers (including an afterhours emergency telephone number) of the ESCO as Principal Contractor are stated.
- 22.7 The Contractor acknowledges and agrees that it is not entitled to claim any additional cost or expense or any adjustment to the *EPC Solutions works contract sum, the measurement and verification fee or the works specification fee* or to claim an extension of time to the date for completion or to make any claim otherwise at law in relation to complying with this clause 22.4.
- 22.8 This clause will survive the expiry or termination of this Agreement.

## 23. GENERAL

### 23.1 Assignment

Subject to Machinery of Government changes, neither party may assign, sell or transfer its interest under this Agreement without the other party's prior written consent, such consent not to be unreasonably withheld and not to be withheld at all if:

### 23.2 Confidentiality

- (a) The parties each agree not to disclose any *Confidential Information* to the other party disclosed pursuant to this Agreement without the prior written consent of the other party except where such information is:
- (i) publicly available other than through a breach of this Agreement;
  - (ii) lawfully known to the party to which it is disclosed;
  - (iii) approved for release in writing by an authorised representative of the party owning the information;
  - (iv) disclosed only to a party's employees, board members, auditors, insurers, lawyers, lenders or other persons having a legitimate reason to know such information;
  - (v) required by law to be disclosed; or
  - (vi) for the purposes of prosecuting or defending any legal proceeding.
- (b) ESCO acknowledges that the Customer may disclose Confidential Information:
- (i) to Parliament, the Governor, Cabinet or a Parliamentary or Cabinet committee or subcommittee;
  - (ii) to any agency, authority, instrumentality, Minister or Officer of the State of South Australia to whom it is customary for the Customer to disclose information such

as the Confidential Information (whether or not the Customer is legally obliged to do so).

- (c) The Customer may disclose this Agreement and/or information in relation to this Agreement in either printed or electronic form and either generally to the public or to a particular person as a result of a specific request.
- (d) Nothing in this clause derogates from:
  - (i) the Customer's obligations under any provisions of this Agreement; or
  - (ii) the provisions of the *Freedom of Information Act 1991* (SA).
- (e) The Customer acknowledges and consents to the use by the ESCO of any data and information relating to the energy consumption at the *premises*, whether provided by the Customer or obtained by the ESCO, for the purposes of benchmarking and compilation of a national data base or for the purposes of use by the ESCO as a reference or for any internal purpose agreed to by the Customer, but does not consent to the publication of any of this data or information for any purpose.
- (f) Nothing in this Agreement derogates from the powers of the Auditor-General under the *Public Finance and Audit Act 1987* (SA).
- (g) The obligations set out in this Clause 23.2 will survive the completion or earlier termination of this Agreement.

### 23.3 Equal Opportunity

The ESCO must, if it is a relevant employer within the meaning of the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) comply with its obligations under that Act, and use its best endeavours to ensure that any sub-contractor, consultant or supplier who is a relevant employer complies with its obligations under that Act.

### 23.4 Counterparts

The parties may execute this Agreement in two or more counterparts and all counterparts together constitute one instrument.

### 23.5 Entire agreement

This Agreement, constituted by this document and the DFS, contains the entire agreement between the parties hereto. Each party acknowledges that, except as expressly stated in this Agreement, that party has not relied on any representation, warranty or undertaking of any kind made by or on behalf of the other party in relation to the subject matter of this Agreement.

### 23.6 Further Assurances

Each party, at its own expense and within a reasonable time of being requested by the other party to do so, must do all things and execute all documents which are reasonably necessary to give full effect to this Agreement.

### 23.7 Governing law and jurisdiction

This Agreement is governed by and must be construed in accordance with the laws applying in the State of South Australia.

The parties submit to the non-exclusive jurisdiction of the Courts of South Australia and the Commonwealth of Australia in respect of all matters or things arising out of this Agreement.

23.8 Legal costs

Each party must pay its own legal costs of and incidental to the preparation and completion of this Agreement.

23.9 No merger

A term or condition of, or act done in connection with, this Agreement does not operate as a merger of any of the rights or remedies of the parties under this Agreement and those rights and remedies continue unchanged. Each term of this Agreement that has not been carried into effect at the termination of this Agreement survives the termination.

23.10 No variation

This Agreement may not be modified, amended, added to or otherwise varied except by a document in writing signed by each of the parties.

23.11 No waiver

Failure by either party to insist upon the performance by the other party of any one or more of the terms and conditions hereof or to exercise any power or right conferred on that party by this Agreement shall not be deemed to be a waiver of any rights or remedies that a party may have and shall not be deemed a waiver of any prior or subsequent breach or default.

No provision of this Agreement shall be deemed to have been waived unless such waiver shall be in writing and signed by the person being or purporting to be a director, manager, secretary or other officer or authorised person of the party giving notice on that party's behalf.

23.12 Notices

(a) Any notice or other communication to or by a party to this Agreement:

- (i) may be given by personal service, post, facsimile or email;
- (ii) must be in writing, legible and in English addressed in accordance with Schedule 1;
- (iii) or to any other address last notified by the party to the sender by notice given in accordance with this clause;
- (iv) in the case of a corporation, must be signed by an officer or under the common seal of the sender;
- (v) is deemed to be given by the sender and received by the addressee:
  - (A) if delivered in person, at the time of delivery to the addressee;
  - (B) if posted, two (2) Business Days (or six (6) Business Days, if addressed outside Australia) after the date of posting to the addressee whether delivered or not; or
  - (C) if sent by facsimile transmission, at the time shown on the transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety and in legible form to the facsimile

number of the addressee notified for the purposes of this clause,

- (vi) if sent by email at the time shown on the email as received by computer system of the addressee.
- (vii) but if the delivery or receipt is on a day which is not a Business Day or is after 5.00 PM (addressee's time) it is deemed to have been received at 9.00 am on the next Business Day.

#### 23.13 Relationship between the parties

The relationship between the parties to this Agreement is one of independent contractors and nothing in this Agreement or any arrangement made between the parties shall constitute either party as an employee, agent or partner of the other party nor shall either party represent that it has any power, right or authority to bind the other party to any obligation or liability or to assume or create any obligation or liability on behalf of the other party.

#### 23.14 Stamp duty

All stamp duty (including fines and penalties, if any) payable in respect of this Agreement or any instrument created in connection with it must be borne by the Customer, except where the ESCO is at fault. The Customer undertakes to keep the ESCO indemnified against all liability relating to the stamp duty, fines and penalties.

#### 23.15 Compliance with Law

The parties shall at all times comply with the statutory requirements. Without limitation to the foregoing, the ESCO must comply with the provisions set out in Schedule 6.

#### 23.16 Severability

In the event of any clause or part of a clause of this Agreement being invalid, illegal, unlawful or otherwise being incapable of enforcement pursuant to any law, that clause or part of a clause shall be deemed to be severed from this Agreement and shall be of no force and effect but all other clauses and parts of clauses of this Agreement shall nevertheless remain in full force and effect and no clause or part of a clause of this Agreement shall be construed to be dependent upon any other clause or part of a clause unless so expressed herein.

#### 23.17 Goods and Services Tax (GST)

- (a) All prices and fees stated in this Agreement or provided under this Agreement must include GST which may be applicable.
- (b) Every invoice issued must be in the form of a valid GST tax invoice, or be accompanied by a valid GST tax invoice. No amount is payable under this Agreement until a valid GST tax invoice for the amount is received.
- (c) If there is any abolition or reduction of any tax, duty, excise or statutory charge associated with the GST, or any change in the GST, the consideration payable for the taxable supply must be varied so that the ESCO's net dollar margin in respect of the supply remains the same.
- (d) If the Customer is required to reimburse the ESCO for any costs or other amount, despite any other provision of this Agreement, the Customer

does not have to pay to the ESCO any sum included in that amount for which the ESCO can claim an input tax credit or other like offset.

- (e) For the purposes of this clause GST means the goods and services tax under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and the terms tax invoice, taxable supply and input tax credit have the meaning under the said Act.

#### 23.18 Set-Off

If either party claims a sum to be properly payable under this Agreement, it may withhold, deduct or set off the sum claimed against any sum to which the other party is entitled under this Agreement.

#### 23.19 Parties representatives

The Customer may from time to time appoint individuals to exercise delegated Customer's functions, provided that:

- (a) no aspect of any function shall at any one time be the subject of delegation to more than one Customer's representative;
- (b) delegation shall not prevent the Customer exercising any function; and
- (c) the Customer forthwith gives the ESCO written notice of respectively the appointment, including the Customer's representative's name and delegated functions; and the termination of each appointment.

The ESCO shall manage the installation of the EPC Solutions personally or by a competent representative. In that regard:

- (d) matters within an ESCO's representative's knowledge (including directions received) shall be deemed to be within the ESCO's knowledge.
- (e) the ESCO shall forthwith give the Customer written notice of the representative's name and any subsequent changes.
- (f) if the Customer makes a reasonable objection to the appointment of a representative, the ESCO shall terminate the appointment and appoint another representative.

#### 23.20 Customer records

The ESCO agrees that in performing its obligations under this Agreement it will act in a manner that ensures that the Customer is able to comply with the Contracting and Official Records Standard.

#### 23.21 Ownership of carbon credits

Any carbon credits, carbon offsets or renewable energy certificates that may accrue pursuant to the Commonwealth Government's carbon pollution reduction scheme or similar emissions trading scheme or any Commonwealth or State renewable energy target scheme as a result of the *EPC Solutions works* or in connection with the *EPC Solutions works* and any subsequent measurement and verification process will be wholly owned by the Customer and the ESCO must take all steps necessary to give effect to this result (including signing all necessary documents).

#### 23.22 Construction Industry Training Fund

For construction contracts over \$15,000, the *Construction Industry Training Fund Act 1993* (SA) imposes a levy of 0.25% of the value of building and construction

works in South Australia from 1 September 1993. Payment of this levy shall be the responsibility of the ESCO. Proof of payment of the levy may be required prior to the first or any progress payment being made under the Agreement.

### 23.23 Workforce Participation and Skills Development

#### (a) General

- (i) This clause 23.23 applies where the EPC Solutions works contract sum is more than \$150,000.
- (ii) An objective of this Agreement is to increase the employment and training of Apprentices and Trainees, Cadets, Aboriginal people and Local Persons with Barriers to Employment (the 'Target Group') and to Upskill people engaged directly in connection with the performance of the Agreement.
- (iii) The ESCO formally declares its intent to work in conjunction with the South Australian Government to meet the South Australian Government's policy targets by employing and training people from the Target Group, including through on-site work by subcontractors and Upskilling people engaged directly in connection with the performance of the Agreement.
- (iv) Without limiting other remedies available to the Customer, the ESCO acknowledges that failure to comply in part or in whole with the requirements of this clause may be a factor that will be taken into account in the award of future contracts by the South Australian Government.

#### (b) Targets

- (i) If this Agreement is a Tier 1 Contract or a Tier 2 Contract, the ESCO must, subject to this clause 23.23, ensure that:
  - (A) the number of On-site Hours performed by people in the Target Group (engaged by either the ESCO or its subcontractors) (the 'Target Group Component') is no less than 11% of the Total Contract Hours; and
  - (B) the sum of:
    - (I) the Target Group Component; and
    - (II) the number of hours of Upskilling provided to people engaged directly in connection with the performance of the Contract (engaged by either the ESCO or its subcontractors) (the 'Upskilling Component'),

is no less than 15% of the Total Contract Hours (the 'Target Hours'); and the On-site Hours performed by Aboriginal people is equivalent to up to 2% of the Total Contract Hours.

#### (c)

In reporting performance against this clause, and in calculating whether the ESCO has met the targets in clause 23.23(b) the following provisions apply:

- (A)  $\frac{3}{4}$  hours cannot be double counted;



- (B)  $\frac{3}{4}$  On-site Hours performed by Aboriginal people must be reported separately but also contribute to the Target Group Component;
- (C)  $\frac{3}{4}$  Upskilling provided up to 6 months prior to the commencement date and during the Term can be included in the Upskilling Component;
- (D)  $\frac{3}{4}$  on-Site Upskilling provided to people in the Target Group should be included in the Target Group Component, rather than in the Upskilling Component. On-Site Upskilling provided to all other categories of worker engaged directly in connection with the performance of the Agreement can be included in the Upskilling Component; and
- (E)  $\frac{3}{4}$  off-Site Upskilling hours provided to all categories of worker (other than Cadets) engaged directly in connection with the performance of the Agreement can be included in the Upskilling Component.
- (d) The ESCO will seek, but is not obliged, to achieve performance by Apprentices, Trainees and Cadets of On-site Hours equivalent to 10% of the Total Contract Hours or more.
- (e) Reporting
- (i) If this Agreement is a Tier 1 Contract or a Tier 2 Contract, the ESCO:
- (A) must submit to the Customer:
- (I) for Tier 1 Contracts - a Workforce and Skills Development Plan before it commences any on-EPC Solutions work under the Agreement;
- (II) for Tier 2 Contracts - a Workforce and Skills Development Strategy no later than 15 Business Days before it commences any on *EPC Solutions work* under the Agreement,
- each of which must contain the information required by and be in the form set out in the Workforce Participation in Government Construction Procurement Implementation Guidelines For Contractors and Contracting Agencies from time to time which can be accessed at [www.dpti.sa.gov.au/wpgcp](http://www.dpti.sa.gov.au/wpgcp) (the 'Implementation Guidelines') (unless the Customer has approved in writing another form);
- (III) must submit to the Principal:
- (B) a Workforce Participation and Skills Development Interim Report no later than 10 Business Days after the end of each quarter (with the first quarter commencing on the date the Contractor commences on-Site work under the Contract); and
- (C) a Workforce Participation and Skills Development Final Report no later than 20 Business Days after completion,
- each of which must contain the information required by and be generated using the Workforce Participation Reporting System (WPRS) (unless the Customer

has, in writing, either approved another form or agreed to generate the report itself);

- (II) must (and must ensure that its subcontractors) regularly update the WPRS with:
  - (D) details of the On-site Hours worked by people in each category of the Target Group;
  - (E) the total labour hours for all workers;
  - (F) the total On-site Hours for all workers;
  - (G) details of the Upskilling provided to people engaged directly in connection with the performance of the Contract, including the hours undertaken, the name and date of the course and the name of the training organisation; and
  - (H) any other information required by the WPRS for the reports described in clause 23.23(e);

and the ESCO must ensure that for each reporting period described in clause 23.23(e), the WPRS is updated with all such information before the report for that period is generated (or where the Customer has agreed to generate the report, before the expiration of the period for lodgement of the relevant report described in clause 23.23(e);

- (I) must report in accordance with the Implementation Guidelines; and
- (J) must (and must ensure that its subcontractors) keep records of compliance with this clause 23.23(e) and provide the Customer with such assistance, including the provision of information, as it may reasonably require in connection with it carrying out an audit of the ESCO's compliance with this clause.

(f) Additional requirements for Tier 2 Contracts

- (i) If this Agreement is a Tier 2 Contract, the ESCO must:
  - (I) appoint a person to be responsible for coordination of the Workforce and Skills Development Strategy; and
  - (II) seek to use Aboriginal owned and/or managed enterprises where possible.

(g) Other

- (i) The ESCO must not (and must ensure that its subcontractors do not) contravene the *Privacy Act 1988* (Cth). This may require the ESCO (or its subcontractor) to obtain a person's consent prior to disclosing that person's personal information in connection with this clause.
- (ii) Where the EPC Solutions works contract sum is more than \$150,000, but is not a Tier 1 Contract or a Tier 2 Contract, the ESCO is encouraged (but is not required) to meet the obligations set out in clauses 23.23(e)..

(h) Definitions

For the purpose of this clause:

- (i) 'Aboriginal person' means a person who identifies as being Aboriginal and/or is considered by members of his or her community as being Aboriginal. This definition includes Torres Strait Islander people;

- (j) 'Apprentice/Trainee' means a person (who may be either an apprentice or a trainee) undertaking training in a trade or declared vocation under a training contract as provided for in the Training and Skills Development Act 2008 (SA) whether on a full-time or part-time basis;
- (k) 'Building Contract' means a contract for construction of residential, commercial, industrial or institutional facilities;
- (l) 'Building Work' means any work required to be done by the Contractor under the Contract in connection with the construction of residential, commercial, industrial or institutional facilities;
- (m) 'Business Day' means any day other than a Saturday, Sunday or public holiday in South Australia;
- (n) 'Cadet' means a person undertaking tertiary or post-graduate study linked to paid employment with the Contractor (or its subcontractor), provided that both the person's employment and study are linked to the building and civil construction industry (for example, employment and training in civil engineering, structural engineering, mechanic engineering, architecture, surveying or construction management);
- (o) 'CITB' means the Construction Industry Training Board;
- (p) 'Civil Construction Contract' means a contract for construction of earthworks, road works, rail works pilings, power stations, dams, drainage or other water resource management works;
- (q) 'Civil Construction Work' means any work required to be done by the Contractor under the Contract in connection with the construction of earthworks, road works, rail works pilings, power stations, dams, drainage or other water resource management works;
- (r) 'Contract Duration' means the period commencing on the date of commencement of the Contract and ending on the Date of Practical Completion;
- (s) 'Implementation Guidelines' has the meaning given to it in clause 54.3(a);
- (t) 'Local Person With Barriers to Employment' means any person residing in South Australia who is unemployed at the time of commencing employment with the Contractor (or its subcontractor). A Local Person with Barriers to Employment includes a person who is:
  - (i) registered with Centrelink or a Job Services Australia provider;
  - (ii) registered with the Disability Employment Network;
  - (iii) a skilled migrant job seeker holding a General Skilled Migrant visa;
  - (iv) a participant in a South Australia Works program (being the initiative of the South Australian Government which links people with skills and jobs through a range of learning, training and work programs).

A person maintains his or her status as a Local Person with Barriers to Employment for 12 months from the commencement of employment with the ESCO or subcontractor (as the case may be);

- (u) 'On-site Hour' means an hour of work performed by a person on the Site;
- (v) 'Target Group' has the meaning given to it in clause 23.23(a)
- (w) 'Target Group Component' has the meaning given to it in clause 23.23(b);
- (x) 'Target Hours' has the meaning given to it in clause 23.23(b);
- (y) 'Tier 1 Contract' means a contract with a EPC Solutions works contract sum between \$5,000,000 and \$50,000,000 (both inclusive) and a Term of six months or more;
- (z) 'Tier 2 Contract' means a contract with a EPC Solutions works contract sum greater than \$50,000,000 and a Term of six months or more;
- (aa) 'Total Contract Hours' means:
  - (i) the number of hours approved in writing by the Principal as representing the estimated total labour hours required to execute the work under the Agreement; or
  - (ii) in the absence of an approval under the preceding paragraph, the estimated total labour hours required to execute the work under the Agreement, determined using the following formula:
    - (l) if the Agreement is a Building Contract Total Contract Hours = (Contract Value x 0.3)/42.
- (bb) 'Upskilling' means training where:
  - (i) the training is:
    - (A) (on the list of courses eligible for CITB funding support;
    - (B) provided by an organisation approved by the CITB (a list of eligible courses and approved providers is available from the CITB; and
    - (C) is relevant to the employment and skills required for the performance of the Contract; or
    - (D) the training is otherwise approved by CITB as eligible to be included in the Upskilling Component,

Notwithstanding this definition, Upskilling does not include any off-Site training undertaken by Cadets;
- (cc) 'Upskilling Component' has the meaning given to it in clause 23.23(b); and
- (dd) 'Workforce Participation Reporting System' or 'WPRS' means the reporting tool available at <http://www.wprs.sa.gov.au/Default.aspx> or any other reporting tool nominated by the Customer from time to time.

## 24. DEFINITIONS & INTERPRETATION

In this Agreement, unless the context requires otherwise:

- 24.1 acceptance certificate means the certificate to be issued by the ESCO to the Customer for its execution upon completion of the installation of the EPC Solutions which certificate shall itemise the completion of each task specified in a works specification.

- 24.2 Agreement means the operative provisions of this contract (being Clauses 1 to 24, this Dictionary and Schedules 1 to 8).
- 24.3 base energy rate(s) means the energy rate(s) set out in the DFS and in Schedule 4 for each energy source used at the premises during the base year energy period.
- 24.4 base year energy means the twelve (12) month period of consumption (expressed in units such as kilowatt hours of electricity, megajoules of natural gas, pounds of steam and litres of oil) of each energy source used at the premises as set out in the DFS, and as modified from time to time in accordance with Clause 9.
- 24.5 BPG-MPV means the AEP/CA Best Practice Guide to Measurement and Verification of Energy Savings as set out in Annexure 1.
- 24.6 Business Day means any day that is not a Saturday, Sunday or a public holiday in Adelaide.
- 24.7 Commencement Date means the agreed date of contract commencement, as specified in Schedule 1.
- 24.8 completion means the date of the acceptance certificate (unless the Customer gives notice under Clause 4.1.2(b) in which case the date shall be the date of any acceptance certificate which the Customer signs and returns);
- 24.9 Confidential Information means information disclosed by or on behalf of a party to this Agreement that:
- (a) is by its nature confidential or by the circumstances in which it is disclosed is confidential; or
  - (b) is designated by the disclosing party as confidential or identified in terms connoting its confidentiality,
- but does not include:
- (c) this Agreement; or
  - (d) information which is or becomes public knowledge other than by a breach of this Agreement; Contracting and Official Records Standard means the standard relating to records management amended by the Manager (Director), State Records pursuant to section 14(1) of the *State Records Act 1997* (SA) and which can be found at <http://www.archives.sa.gov.au>;
- 24.10 Contractual Completion Date means the date specified in Schedule 1 on or before which completion must occur.
- 24.11 Core business has that meaning in Schedule 1.
- 24.12 Defects liability period means the period which:
- (a) commences on the date of completion; and
  - (b) continues for a period of 12 months, subject to clause 4.6;
- 24.13 deficiencies means defects or omissions, or any other non compliance with this Agreement.
- 24.14 DFS means the document prepared by the ESCO and attached at Annexure 2.
- 24.15 DFS fee means any fee payable by the Customer to the ESCO as set out in Schedule 1.
- 24.16 Energy cost savings means the reduction in costs associated with the EPC Solutions at a premises in a guarantee year determined on the basis of the base energy rates;

- 24.17 EPC Solutions means the energy conservation measures (including energy and other associated utility cost savings) specified in a works specification the subject of an instruction under Clause 2.2 or approval under Clause 3.2, consisting of the installation of equipment and the development and implementation of procedures.
- 24.18 EPC Solutions works means the work undertaken by the ESCO to install the EPC Solutions.
- 24.19 EPC Solutions works contract sum means the total cost of performing the EPC Solutions works as agreed by the Customer as part of the works specification and specified in Schedule 1. If there are changes to the works specification subsequent to the execution of this Agreement, the price specified in the agreed works specification shall supersede the price specified in Schedule 1, to the extent that they are different.
- 24.20 EPC Solutions works security means security in the amount calculated as set out in Schedule 1.
- 24.21 Energy consumption means the consumption of an energy source.
- 24.22 Energy savings means the reduction in energy consumption of each energy source used at the premises during the performance guarantee period which result from the work undertaken by the ESCO to install the EPC Solutions. The reduction in energy consumption for each energy source during each guarantee year must be calculated as follows:
- 24.23 total energy consumption of that energy source during the base year energy period less actual energy consumption of each energy source during that guarantee year.
- 24.24 Energy source means electricity, natural gas propane, fuel oil, or coal.
- 24.25 Equipment means all items of equipment specified in a works specification.
- 24.26 Foreseeable changes means a change of which the ESCO was aware before the date of this Agreement, or which an ESCO exercising good industry practice should reasonably have been aware of or catered or allowed for having regard to the nature of the premises, the Customer, the core business and the future developments.
- 24.27 Future developments means possible changes to or impacting the premises after the date of this Agreement, as identified by the Customer as part of the Request for Proposals.
- 24.28 Good industry practice means standard of skill and care to be expected or an experienced, professional service provider regularly undertaking work and services of the same or similar scope and complexity as this Agreement.
- 24.29 Guaranteed energy savings means the sum of the reduction in consumption of each energy source used at the premises during each guarantee year as specified in Schedule 1, or such sum as amended by the ESCO in accordance with Clause 9 for each of the EPC Solutions.
- 24.30 Guaranteed energy cost savings means agreed upon guaranteed energy savings multiplied by the base energy rates as specified in Schedule 4.
- 24.31 Guarantee year means any period of one year beginning on the performance guarantee commencement date or on any anniversary of that date during the performance guarantee period.
- 24.32 Installation period means the period during which the EPC Solutions works are installed by the ESCO at the premises.
- 24.33 Intellectual property rights means any patent, copyright, trade mark, trade name, design, trade secret, know how, semi conductor, circuit layout or other form of intellectual property right whether arising before or after the execution of this Agreement and the right to registration and renewal of those rights;

- 24.34 Latent conditions are physical conditions on the premises or its near surroundings, including artificial things but excluding weather conditions or physical conditions which are a consequence of weather conditions, which differ materially from the physical conditions which the ESCO anticipated or which should reasonably have been anticipated by a competent ESCO exercising good industry practice at the time of the ESCO's tender and which would affect the completion of the installation if the ESCO had inspected:
- (a) all information made available in writing by the Customer to the ESCO for the purpose of tendering;
  - (b) all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquiries; and
  - (c) the premises and its surroundings.
- 24.35 Liquidated damages rate means the rate specified in Schedule 1;
- 24.36 Machinery of Government means a change to the structure, function or operations of the South Australian Government or the Customer as a result of any government reorganisation, restructuring or other organisational or functional change;
- 24.37 Maintenance services means, where Clause 5.2 applies, those services to be provided by the ESCO (including provisions for emergency repairs) as set out in Schedule 3.
- 24.38 Maintenance services fee means:
- (a) the amount set out in Schedule 1; or
  - (b) an amount specified by the ESCO relating to the provision of maintenance services for additional EPC Solutions.
- 24.39 Measurement and verification fee means the ESCO's fee for performing measurement and verification activities under the Agreement and is the amount set out in Schedule 1.
- 24.40 Performance guarantee commencement date shall have the meaning given in Clause 4.3 of this Agreement.
- 24.41 Performance guarantee period means the period of years set out in Schedule 1, commencing on the performance guarantee commencement date.
- 24.42 Performance guarantee security means security in the amount set out in Schedule 1.
- 24.43 Premises mean the property of the Customer inclusive of the existing equipment and systems on the property as set out in Schedule 1, and where more than one property is specified in Schedule 1, the terms and conditions of this Agreement shall apply to each property jointly and severally.
- 24.44 Procedures means all systems and procedures to be implemented by the Customer at the premises, including energy efficient methods of operating equipment and other energy efficient operational procedures, as described in a works specification.
- 24.45 Project means the design, installation, implementation, operation and measurement and verification of the EPC Solutions by the ESCO in accordance with this Agreement.
- 24.46 Security means either:
- (a) a cash deposit; or

- (b) an unconditional undertaking for the relevant period specified in clause 8 issued by an Australian trading bank acceptable to the Customer's Representative.
- 24.47 Site conditions means the physical and artificial conditions and characteristics of, under, over, near and adjacent to the premises, including:
- (a) disposal, handling and storage of material;
  - (b) matters affecting transportation and access;
  - (c) existing utilities and services, above or below ground level and the location of all facilities with which such systems and services are connected;
  - (d) physical conditions above, upon and below the site including weather conditions;
  - (e) all known asbestos;
  - (f) known contamination of any kind;
  - (g) equipment and facilities needed preliminary to, and during the performance of the works; and
  - (h) all other matters which may in any way affect the performance of the ESCO under the EPC,
  - (i) but does not include latent conditions;
- 24.48 Statutory requirements means the laws relating to the EPC Solutions, the equipment, the premises, or the work under the Agreement (including without limitation the current Building Code of Australia current relevant Australian Standards), or the lawful requirements of any authority having jurisdiction over the EPC Solutions, the equipment, the premises or the work under the Agreement.
- 24.49 Term means the term of this Agreement commencing on the Commencement Date and expiring on the Contractual Completion Date or earlier termination of this Agreement.
- 24.50 To specification means in accordance with the manufacturer's recommended maintenance procedures and the terms of any other operation or maintenance manuals or specifications provided to the Customer by the ESCO under Clause 4.2(a).
- 24.51 Works specification means the scope of works submitted to the Customer by the ESCO for the design and installation of EPC Solutions, which is consistent with the DFS (unless otherwise agreed by the Customer):
- (a) sets out the tasks involved (and a timetable for completing them) in relation to the design and installation of the EPC Solutions;
  - (b) specifies the EPC Solutions works contract sum, broken down into a schedule of progress claims corresponding to the tasks relating to the installation of the EPC Solutions;
  - (c) in the case of additional *EPC Solutions*, specifies the *works specification fee* for the additional *EPC Solutions*;
  - (d) specifies the *guaranteed energy savings* for the *EPC Solutions*, as identified in the DFS or pursuant to Clause 3.1(a).



- (e) includes any other information the ESCO considers necessary, including plans, specifications, engineering designs and drawings relating to the proposed facility upgrade;
- (f) includes a listing and description of the *equipment* that needs to be upgraded or replaced;
- (g) includes a detailed listing of all maintenance programmes, training programmes and schedules for the *equipment*, and
- (h) includes a detailed list of criteria prepared by the Customer to control and define performance of the works by the ESCO, as specified in the Request for Proposals.

24.52 Works specification fee means the ESCO's fee for the preparation of a works specification for the installation of the EPC Solutions pursuant to Clause 2 or additional EPC Solutions pursuant to Clause 3, provided that the fee charged for the preparation of a works specification for the installation of additional EPC Solutions shall be limited to ten percent (10%) of the project cost of any such additional EPC Solutions.

24.53 The following rules of interpretation shall apply to this Agreement:

- (a) Reference to any person or to any party to this Agreement shall include that person's or party's legal personal representatives, executors, administrators, successors and permitted assigns.
- (b) Words importing the singular shall include the plural and vice versa and words importing any gender will include all genders.
- (c) Where the day on or by which any act, matter or thing is required to be done is a day other than a Business Day in the place in which the act, matter or thing is to be done, such act, matter or thing shall be done on the next succeeding Business Day unless specifically provided for to the contrary in this Agreement.
- (d) The table of contents, headings and underlinings contained in this Agreement are for convenience only and do not affect the interpretation of this Agreement.
- (e) Where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of such word or phrase shall have a corresponding meaning.
- (f) References to any statute or statutory provision include that statute or statutory provision as amended, extended, consolidated or replaced by subsequent legislation and any orders, regulations, instruments or other subordinate legislation made under the relevant statute.
- (g) The word "person" means and includes any natural person, company, firm or any other legal entity whether acting as a trustee or not.
- (h) When a party comprises two or more persons, the rights and obligations of such persons pursuant to this Agreement shall inure for the benefit of and bind all of them jointly and each of them severally.
- (i) The ESCO must perform the work and the services required to be performed by it under this Agreement at its own cost and risk, except to the extent that this Agreement expressly states otherwise.
- (j) A reference to dollars is to Australian dollars.

24.54 For the purposes of this Agreement the documents below have the following order of priority:

- (a) This Agreement (excluding the Schedules and Annexures);
- (b) the Schedules;
- (c) the Annexures;
- (d) Request for Proposal;
- (e) Proposal;
- (f) DFS.