

**AGREEMENT FOR TURNKEY DESIGN AND CONSTRUCTION ENERGY SERVICES**

This Agreement between the **Gilroy Unified School District** ("Customer") and **Schneider Electric Buildings Americas, Inc.** ("ESCO"), a Delaware corporation, for turnkey design and construction energy services ("Agreement") is made effective as of May 10, 2019 ("Effective Date") and set forth in the attached schedules and exhibit(s) which are listed below and incorporated fully herein, subject to the terms and conditions set forth herein:

- Exhibit A: Scope of Work - Design Services
- Exhibit B: Preliminary Schedule – Design Services
- Exhibit C: Compensation for Design and Construction Services
- Exhibit D: Scope of Work - Construction Services
- Exhibit E: Preliminary Schedule – Construction Services
- Exhibit F: Insurance Requirements
- Exhibit G: Performance Assurance Support Services Agreement
- Exhibit H: Performance Guarantee
- Exhibit I: Measurement & Verification ("M&V") Plan
- Exhibit J: Customer Responsibilities for Performance Guarantee
- Exhibit K: Performance Assurance Support Services

The Customer and ESCO may be referred to herein individually as a "Party" and collectively as the "Parties."

*RECITALS*

A. The Parties intend, and agree, subject to all other provisions of this Agreement, that the design and construction services to be completed by ESCO pursuant to Articles 1 and 2 of this Agreement and the Exhibits referenced therein (the "ESCO Services") shall include energy and operational efficiencies as detailed in Exhibits "A" and "D".

B. The Parties intend to determine the precise scope of the construction services in conjunction with completion of the design services.

C. The Parties intend that this Agreement shall be a "turnkey" agreement providing for ESCO to undertake both the design and construction phases of the Project, and the Parties have entered into this Agreement for purposes of setting forth the terms and conditions for ESCO to perform the ESCO Services for the Customer.

Now, in consideration of the foregoing and of the respective rights and obligations of the Parties set forth herein, the Parties agree as follows:

*ARTICLE 1*

*DESIGN PHASE OF THE PROJECT*

*PART 1.1: SCOPE, TIMING AND COMPENSATION*

*Section 1.1.1 Scope of Article 1 Requirements.* Except to the extent terms are defined in this Article 1 and used elsewhere in this Agreement and except as may be expressly provided in this

Agreement, this Article 1 shall be deemed and construed to apply only to the design phase of the Project, which is to be performed prior to commencement of the construction phase of the Project.

*Section 1.1.2 Scope of Design Services.* The scope of the design services to be performed by ESCO under this Agreement is described in Exhibit "A." In completing the Scope of Services pursuant to this Article 1, ESCO must at all times work toward assisting the Customer to achieve the goals as are described in this Agreement and as otherwise may be determined after the Effective Date.

*Section 1.1.3 Time for Completion.* Time is of the essence with respect to this Agreement and the performance by ESCO of each of its obligations pursuant to this Article 1. ESCO must complete the design phase of the Project required pursuant to this Article 1 not later than the final completion date and, if any, the applicable milestone dates specified in the "Services Schedule" set forth in Exhibit "B" attached to this Agreement. However, if, for any reason, the design phase of the Project has not been (or likely will not be) completed prior to the final completion date or an applicable milestone date, with the result that the Customer continues to require design services in connection with this Agreement, the Customer may request an extension of the term of this Agreement, and ESCO shall not unreasonably refuse, condition or delay its consent to such request. Upon receipt of any such request, the Parties shall amend this Agreement to extend the term of this Agreement on substantially the same terms as set forth herein, except that the amendment may specify such adjustments to ESCO's compensation as agreed by the Parties. In the event the Scope of Services is modified in accordance with Section 1.1.7 herein, the amendment to this Agreement providing for such modification shall specify any applicable modification to the time(s) for completion of the design phase of the Project.

*Section 1.1.4 ESCO Fee.* The Customer shall pay to ESCO, in exchange for full and satisfactory performance by ESCO of the design phase of the Project required pursuant this Article 1, the compensation set forth as the Design Fee in Exhibit "C" attached to this Agreement ("Compensation for ESCO Services"). The Design Fee shall be paid to ESCO upon full and satisfactory completion of Steps 1-4 of the design phase of the Project, as those steps are described in Exhibit "A", attached to this Agreement. In the event the Scope of Services is modified in accordance with Section 1.1.6 of this Article 1, the amendment to this Agreement providing for such modification shall specify any applicable modification to the Design Fee. The Design Fee shall be deemed and construed for all purposes to be all-inclusive compensation for any and all design services, and ESCO shall in no event be entitled to any reimbursement whatsoever of any expenses or other costs incurred by ESCO in connection with the performance of the design services other than as provided in Section 1.1.5 of this Article 1. Concurrently with signing this Agreement, and as a condition precedent to commencing the performance of the design phase of the Project, ESCO must write its federal taxpayer identification number where shown on the signature page of this Agreement.

*Section 1.1.5 Reimbursement of Expenses.* This Section establishes the sole and exclusive bases for reimbursement to ESCO of any expenses that it incurs in connection with performance of the design phase of the Project. Any reimbursement pursuant to this Section shall be in addition to the design fee payable to ESCO pursuant to Section 1.1.4 of this Article 1, and shall be for the reasonable, actual costs incurred by ESCO, without markup for profit, overhead or other purposes. The Customer shall reimburse ESCO only for expenses incurred in connection with the performance of the design phase of the Project as the Customer in its sole discretion may agree, and only if the reimbursement for each such expense is approved in writing by the Customer prior to the expense being incurred by ESCO. Without limiting the foregoing or the Customer's discretion as described in the foregoing, because the Design Fee payable to ESCO is intended to be all-inclusive, in no event shall the Customer be required to reimburse ESCO for any of the following: (i) home- office overhead or personnel costs; (ii) supplies, materials, equipment, tools and other items required for performance of the design phase of the Project; (iii) postage or cost of private delivery services less than \$25 for any one delivery; (iv) salary, benefits,

travel, lodging and/or meal expenses of any person; (v) expenses of overtime work requiring higher than regular compensation rates; or (vi) costs of any additional insurance coverage or limits in excess of that normally carried by ESCO or any of its sub-consultants that perform any of the design services as authorized pursuant to Section 1.2.1 of this Article 1 (each a "Sub-Consultant").

*Section 1.1.6 ESCO Invoices.* Upon the completion of the design phase of the Project, ESCO shall provide an invoice to the Customer seeking payment for the Design Fee, and for reimbursement of expenses authorized pursuant to Section 1.1.5 of this Article 1, if any. Any and all invoiced amounts are subject to verification by the Customer. ESCO must in the invoice specifically describe the basis or bases for the amounts requested and shall submit with the invoice such documentation as reasonably, specifically and adequately evidences and supports the amounts specified in the invoice. If the invoice requests payment for design services provided on a time-and-materials or other hourly-rate basis, the documentation to be submitted by ESCO in support of the invoice must also include an itemization of the amount of time spent by each person performing the design services and the work accomplished by such person during such time. The Customer shall pay the undisputed portion of the invoice within thirty days after receipt of the invoice. However, within ten days after receipt of the invoice from ESCO, the Customer may request in writing that ESCO provide additional information relating to some or all of the amounts specified in the invoice, and, in such event: (i) ESCO shall provide such information to the Customer within five days following receipt of the Customer's request; and (ii) if ESCO does not provide such information within such five-day period, the date by which the Customer must pay such amounts to ESCO shall be extended for each day or portion of day in excess of the applicable five-day period, until such time as ESCO provides the requested additional information to the Customer.

*Section 1.1.7 Change in Scope of Services.* The Customer may at any time request any decrease, reasonable increase, or reasonable other change in the Scope of Services to be performed by ESCO pursuant to this Article 1. In response to any such request, ESCO must provide to the Customer a written proposal that describes in reasonable detail: (i) the change; (ii) the impact of the change on the time required for performance of ESCO's obligations pursuant to this Article 1; and (iii) the impact of the change on the cost to the Customer for the performance of the design phase of the Project. Each proposal shall set forth any proposed adjustment to the compensation payable to ESCO using such basis (fixed fee, time and materials, etc.) as requested by the Customer. No proposal shall be valid or binding on the Parties unless and to the extent incorporated into an amendment to this Agreement that has been duly-approved, signed and delivered by both Parties. However, regardless of whether the Customer has obtained approval from the City Council of the Customer ("Governing Board") of any proposal, if the Customer has requested that specific design services be deleted from the Scope of Services, under no circumstances shall ESCO thereafter perform such design services unless further directed to do so in writing from the Customer. The Parties shall mutually agree upon the adjustments to the Design Fee attributable to any such deletion from the Scope of Services. Otherwise, if the Parties are unable to agree on and document the terms and conditions for any such deletion, the time for performance of the modified Scope of Services and the compensation to ESCO for performance of such modified Scope of Services shall be equitably adjusted as determined through any dispute resolution method authorized pursuant to this Agreement. However, in no event shall ESCO be entitled to any profit, overhead, or other amounts on account of the deleted portion of the design phase of the Project.

## *PART 1.2: ESCO OBLIGATIONS*

*Section 1.2.1 Consent Required to Use Sub-Consultants.* ESCO may use a Sub-Consultant to perform a portion of the design phase of the Project to be provided pursuant to this Article 1. The Customer, in its sole discretion, may deny, delay or condition its approval of the use of any one or more proposed Sub-Consultants. With respect to any Sub-Consultant that the Customer may approve pursuant to this Section, and subject to the Customer's rights pursuant to Section 1.2.3 herein, the Customer shall

not require that ESCO replace or terminate any such Sub-Consultant, and ESCO shall not replace or terminate any such Sub-Consultant: (i) absent reasonable evidence that the Sub-Consultant has failed to timely or adequately perform its obligations in connection with the design phase of the Project; or (ii) unless the Parties agree otherwise in writing.

*Section 1.2.2 ESCO and Sub-Consultant Capability.* ESCO represents and warrants that: (i) it has any and all licenses as are required by law to permit ESCO to enter into this Agreement and perform the design phase of the Project; (ii) any and all Sub-Consultants performing any of the design services shall be sufficiently skilled and qualified to perform the tasks, duties and responsibilities assigned to them by ESCO, and shall be licensed to practice in their respective professions to the extent required by law; (iii) any and all persons who will provide or perform the design services, including, without limitation, all employees of any Sub-Consultants, shall have the technical expertise and experience required to perform the design services in an efficient, timely and satisfactory manner; and (iv) ESCO has sufficient financial, personnel and other resources to adequately and timely perform the design phase of the Project as required pursuant to this Article 1. Upon request of the Customer, ESCO shall remove from the site of the Project, and prevent from performing any of the design services, any person whom the Customer has determined is not performing the design services in a reasonable manner or is a threat to the safety of any person(s) or property, and ESCO shall not thereafter use such person for or in connection with performance of any of the design services.

*Section 1.2.3 Required Standard of Care.* ESCO must perform or cause to be performed all design services using such levels of care as are not less than the reasonable levels of care employed by other consultants providing similar services to customers within the State of California in similar circumstances, and considering the Customer's goals and any facilities, financial, or other constraints or parameters described to ESCO either before or after the Effective Date.

*Section 1.2.4 Compliance with Law.* ESCO must perform the design phase of the Project in compliance with all applicable federal, State of California and local laws, regulations, ordinances and other governmental requirements.

*Section 1.2.5 Prevailing Wages.* ESCO shall be solely responsible for determining whether performance of the design phase of the Project will constitute "public work" that is subject to payment of prevailing wages and other requirements of Section 1720 and other provisions of the California Labor Code ("Labor Code"). In such event, ESCO must comply with Part 7, Chapter 1, of the Labor Code, Title 8 of the California Code of Regulations, Section 16000 *et seq.*, and other provisions of law applicable to performance of its obligations.

*Section 1.2.6 Reliance on Customer Information.* ESCO shall be entitled to rely on the accuracy and completeness of any and all information provided to ESCO by the Customer, subject to any qualifications or limitations on such information as the Customer may describe, and provided that ESCO may so rely only if it would be reasonable to do so.

*Section 1.2.7 Criminal-History Background Checks.* ESCO and each of its Sub-Consultants that will have personnel at or on any Customer property shall comply with the requirements of Education Code Section 45125.1, regardless of whether such requirements are otherwise applicable. For such purposes, ESCO, at its sole cost and expense, and without additional compensation from the Customer, must comply with all California Department of Justice guidelines and requirements with respect to fingerprinting of ESCO's and any Sub-Consultant's officers, employees, agents, or other representatives who will or might be present on or at any Customer facility.

### *PART 1.3: ESCO INSURANCE*

*Section 1.3.1 Required Insurance.* Prior to commencing any of the ESCO Services, ESCO must procure at its sole cost and expense, and, during all periods as required by this Article 1, must maintain in effect, the following policies of insurance:

- (I) *General Liability Insurance.* A policy of commercial general liability insurance, written on an "occurrence" basis, providing coverage with a combined single limit of not less than one million dollars for all activities conducted by ESCO pursuant to this Article 1 ("General Liability Policy"). The General Liability Policy must include coverage for the contractual liability assumed by ESCO pursuant to this Article 1.
- (ii) *Vehicle Liability Insurance.* A policy of automobile liability insurance, written on an "occurrence" basis, with a combined single limit of not less than one million dollars per accident for bodily injury and property damage ("Vehicle Liability Policy"). The Vehicle Liability Policy must include coverage for owned, hired and non-owned automobiles.
- (iii) *Workers' Compensation Insurance.* Workers' compensation insurance as required by California law and employer's liability insurance with coverage in an amount not less than one million dollars. Notwithstanding the insurer rating standards set forth in this Article 1, coverage provided by the California State Compensation Insurance Fund shall be deemed, with respect to the workers' compensation insurance, to satisfy such insurer rating standards.
- (iv) *Professional Liability Insurance.* Professional liability insurance with coverage in an amount of not less than two million dollars ("Professional Liability Policy"), which the Customer acknowledges shall be written on a "claims made" basis.

*Section 1.3.2 Duration of Insurance.* Except as provided in this Article 1 with respect to insurance written on a "claims made" basis, ESCO must maintain the insurance required pursuant to this Article 1 in effect at least until the date that is one year following final payment to ESCO pursuant to this Agreement.

*Section 1.3.3 Professional Liability Insurance.* The Professional Liability Policy shall provide coverage for claims arising out of the performance of the design phase of the Project pursuant to this Article 1. Notwithstanding anything to the contrary: (i) ESCO must have the Professional Liability Policy, as described herein, in full force and effect prior to commencing any of the design services; (ii) each renewal or replacement of the Professional Liability Policy must have a retroactive date that is prior to the date ESCO commenced the design services; and (iii) ESCO must maintain the Professional Liability Policy in full force and effect and applicable to claims arising from the design phase of the Project, without any gaps in coverage, for a period of at least two years following final payment to ESCO pursuant to this Agreement and, if the Professional Liability Policy will not so remain in effect, ESCO must obtain at its cost a supplemental extended reporting period (i.e., tail) applicable to the Professional Liability Policy covering the remainder of such two-year period, and the obligations of this clause (iii) shall survive termination of this Agreement and/or completion of the design phase of the Project. If the claims reporting period applicable to the design phase of the Project, as specified in or determined pursuant to the Professional liability Policy for the design services, will terminate prior to the end of the two-year period following final payment to ESCO pursuant to this Agreement, then ESCO, at its cost, must obtain and provide satisfactory evidence to the Customer of: (i) an endorsement to extend the claims reporting period to include whatever will remain of such two-year period; or (ii) a supplemental extended reporting period (tail) applicable to the Professional Liability Policy as required to provide coverage until the end of such two-year period. Such tail coverage shall be required, for example: (i) if ESCO intends to switch insurance carriers and the prospective new carrier will not agree to cover claims arising from the design

phase of the Project submitted at any time prior to the end of the two-year period following final payment to ESCO pursuant to this Agreement; (ii) if ESCO's business is to be wound- up or otherwise terminated, whether voluntarily or involuntarily; or (iii) when necessary for any other reason to ensure that professional liability insurance applicable to the design phase of the Project is in effect at all times required by this Article 1.

*Section 1.3.4 Insurer Rating Standards.* Except as the Customer, in its sole discretion, may approve in writing, in advance, the insurance policies required pursuant to this Article 1 must be issued by one or more insurers licensed to do business in the State of California and having an A.M. Best Company rating of not less than "A-" and a financial size category of not less than "VII."

*Section 1.3.5 Additional Insureds.* The Customer, the Governing Board and each individual member thereof, and the Customer's other officers, employees, and agents (collectively, not including the Customer, the "Customer Agents"), shall all be included as additional insureds, to the extent of ESCO's acts and omissions (regardless of whether constituting negligence) in connection with this Article 1, on all insurance that ESCO is to have in effect pursuant to this Article 1, excepting the workers' compensation insurance and the Professional Liability Policy. The additional insured endorsements must be ISO Form CG 2010 04/13 and ISO Form CG 2037 04/13 combined or equivalent approved in advance by the Customer.

*Section 1.3.6 Waiver of Subrogation.* ESCO hereby waives, on behalf of its insurers, any and all rights to subrogation against the Customer and the Customer Agents that any such insurer may acquire by virtue of the payment of any loss. Each of the General Liability Policy and the Vehicle Liability Policy must be endorsed with a cross-liability endorsement and a waiver of the insurer's rights of subrogation against the Customer and the Customer Agents.

*Section 1.3.7 ESCO Insurance is Primary.* The General Liability Policy and the Vehicle Liability Policy must be endorsed to provide that they are so primary and non-contributory.

*Section 1.3.8 Premiums, Deductibles and Self-Insured Retentions.* ESCO shall be solely responsible and liable for paying any and all deductibles and self-insured retentions applicable to any of the insurance that ESCO must have in effect pursuant to this Article 1. However, each insurance policy subject to any deductible or self-insured retention shall provide, or be endorsed to provide, for payment or satisfaction of the deductible or self-insured retention by the Customer in the event of ESCO's insolvency or inability to otherwise pay or satisfy the deductible or self-insured retention. ESCO's indemnification and other obligations pursuant to Section 1.4.1 of this Article 1 shall apply with respect to any and all claims arising from such premiums, deductibles and/or self-insured retentions.

*Section 1.3.9 Evidence of Coverage.* Prior to commencing the design phase of the Project, ESCO must provide to the Customer such duly-authorized and executed certificates of insurance evidencing that the insurance policies to be maintained by ESCO pursuant to this Article 1 are in effect (each a "Certificate of Insurance"), together with a copy of each endorsement to such insurance as is required pursuant to this Article 1. The delivery of such Certificates of Insurance and endorsements shall be a condition precedent to ESCO commencing any of the design services. As applicable, the Certificates of Insurance must identify those who are additional insureds in accordance with this Article 1. Not less than thirty days prior to the expiration of any insurance policy that ESCO is required to maintain pursuant to this Article 1, ESCO must provide updated Certificates of Insurance to the Customer evidencing the renewal of such policy.

*Section 1.3.10 Notice of Change in Policies.* ESCO shall notify the Customer within thirty (30)

days of its receipt of written notice from an applicable insurer that a policy required hereunder will be canceled, terminated, reduced in coverage or will expire without renewal, or that a policy has been cancelled due to non-payment of premium.

*Section 1.3.11 Review of Coverage.* No failure by the Customer to identify any non-compliance with the requirements of this Part 3, shall be deemed or construed to relieve ESCO from any of its obligations in regard to such insurance-related requirements.

*Section 1.3.12 Sub-Consultant Insurance.* ESCO shall require that each of its Sub-Consultants independently comply with all requirements of this Part 3 relating to insurance covering their activities for the benefit of the Customer, unless the Customer specifically approves in writing some different standards or requirements that shall be applicable to any particular Sub-Consultant. ESCO shall require in its agreements with its Sub-Consultants that each Sub-Consultant be subject to, and that it comply with, the requirements set forth in this Part 3, except to the extent the Customer has approved any different standards or requirements applicable to any particular Sub-Consultant.

#### *PART 1.4: INDEMNIFICATION*

*Section 1.4.1 Indemnification of Customer.* ESCO shall indemnify and hold-harmless the Customer, the Governing Board and each individual member thereof, and the Customer's other officers, employees and agents (collectively, not including the Customer, the "Customer Agents"), and each of them, against and from any and all third party claims, demands, actions, judgments, damages, losses, costs and expenses (including, without limitation, attorneys' fees and expenses) and other liabilities including, but not limited by, those arising from (i) the performance of design services by ESCO or any Sub-Consultant or the officers, employees, or agents of either (collectively, not including ESCO, the "Sub-Consultant Agents"); and (ii) the injury (including death) of any person or the damage to any property in connection with the design phase of the Project. The scope of the foregoing shall include, without limitation, any disputes of any nature between ESCO and any of the Sub-Consultant Agents.

*Section 1.4.2 Defense of Customer.* ESCO, at its cost and expense, shall defend the Customer, and, as applicable, the Customer Agents, with respect to any claim, demand, action, or other proceeding that is within the scope of ESCO's indemnification obligation pursuant to Section 1.4.1 of this Article 1. Each such defense must be conducted by qualified and appropriately experienced legal counsel reasonably acceptable to the Customer, but selected and retained by ESCO, at no cost to the Customer or any of the Customer Agents.

*Section 1.4.3 Limitation on ESCO Obligations.* ESCO shall not be obligated pursuant to Sections 1.4.1 and 1.4.2 of this Article 1 to the extent any claim, demand, action, judgment, damage, loss, cost or expense, or other liability results from the active negligence, sole negligence, or willful misconduct of the Customer or any of the Customer Agents.

*Section 1.4.4 Applicability of Civil Code Section 2782.8.* To the extent ESCO or any Sub-Consultant, as part of the design phase of the Project, will provide "design professional services" that are within the scope of Civil Code Section 2782.8, Sections 1.4.1 through 1.4.3, inclusive, of this Article 1 shall be interpreted consistent with Civil Code Section 2782.8 as it exists as of the Effective Date, and, with respect to such design professional services, the obligation to indemnify the Customer and the Customer Agents shall relate only to matters arising from the negligence, recklessness, or willful misconduct of ESCO or any of the Sub-Consultant Agents.

*Section 1.4.5 Notice of Potential Liabilities.* The Customer shall promptly provide written notice

to ESCO of any liabilities for which ESCO may be responsible pursuant to this Part 1.4, and, to the extent reasonable and at ESCO's cost, the Customer shall cooperate with ESCO in regard to the performance of its obligations pursuant to this Part 1.4.

*Section 1.4.6 Payment of Costs.* ESCO shall reimburse to the Customer, or upon request of the Customer shall directly pay, any and all costs, expenses, penalties, judgments, settlements, and other amounts paid or owed by the Customer that are payable by ESCO pursuant to the indemnity provisions of this Article 1. ESCO must pay each such amount not later than when the amount is due or within thirty days of receipt of a written invoice from the Customer requesting payment, and any late payments by ESCO shall accrue interest at the maximum legal rate.

*Section 1.4.7 Insurance Not a Limitation.* The obligations of ESCO pursuant to this Part 1.4 shall not be deemed or construed to be: (i) conditioned upon or in any other manner limited by the existence of any insurance coverage maintained by a Party or other person or entity; or (ii) conditioned upon the receipt by any person or entity of, or limited to the amount of, any insurance proceeds.

*Section 1.4.8 Sub-Consultant Indemnity.* ESCO shall require in its agreements with its Sub-Consultants that each Sub-Consultant independently comply with all requirements of this Part 4 related to indemnifying, holding-harmless, and defending the Customer, unless and only to the extent the Customer specifically approves in writing some different standards or requirements that shall be applicable to any particular Sub-Consultant.

*Section 1.4.9 Indemnification of ESCO.*

*Subsection 1.4.9.1 General Requirement.* The Customer shall indemnify and hold-harmless ESCO and the Sub-Consultant Agents, and each of them, against and from any and all claims, demands, actions, judgments, damages, losses, costs and expenses (including, without limitation, attorneys' fees and expenses) and other liabilities arising from the sole negligence, active negligence or willful misconduct of the Customer or any of the Customer Agents in connection with the performance of the design phase of the Project.

*Subsection 1.4.9.2 Defense of ESCO.* The Customer, at its cost and expense, shall defend ESCO and, as applicable, the Sub-Consultant Agents with respect to any claim, demand or action that is within the scope of the Customer's indemnification obligation pursuant to Subsection 1.4.9.1 of this Article 1. Each such defense must be conducted by qualified and appropriately experienced legal counsel reasonably acceptable to ESCO, but selected and retained by the Customer, at no cost to ESCO or Sub-Consultant Agents.

*Section 1.4.10 Comparative Liability.* Notwithstanding the foregoing provisions of this Part 4, to the extent any claim, demand, action, judgment, damage, loss, cost or expense, or other liability arising in connection with this Article 1 is to some extent within the scope of ESCO's obligations pursuant to Section 1.4.1 of this Article 1, and to some extent is within the scope of the Customer's obligations pursuant to Subsection 1.4.9.1 of this Article 1, then, with respect to such liability, the Parties shall be responsible and liable on a comparative basis.

*Section 1.4.11 Survival of Obligations.* With respect to any and all acts, omissions or incidents occurring prior to completion of the design phase of the Project and/or termination of this Agreement, the Parties' respective rights and obligations pursuant to this Part 1.4 shall survive such completion and/or termination.

**PART 1.5: TERMINATION OF SOME OR ALL OF THE DESIGN SERVICES**

*Section 1.5.1 Customer Termination for Convenience.* The Customer, without need for cause, may terminate some or all of the design services, or upon the completion of the design phase of the Project may terminate this Agreement in its entirety, by providing written notice of termination to ESCO. Such termination shall be effective immediately upon receipt of the notice of termination by ESCO. In the event the Customer terminates this Agreement in its entirety pursuant to this Section, the Customer shall have the right to retain a contractor other than ESCO to perform any or all of the services contemplated in the construction phase of the Project.

*Section 1.5.2 Customer Termination for Breach of Warranties.* If the Customer at any time determines that any of the representations and/or warranties of ESCO set forth in this Article 1 are materially untrue or incorrect, and if ESCO fails to correct or remedy such breach within a reasonable period of time, then the Customer shall have the right to terminate this Agreement immediately and without liability (including, without limitation, any liability for paying any further compensation to ESCO), and ESCO shall be liable to the Customer for all costs, expenses and damages arising therefrom. ESCO's representations and warranties pursuant to this Article 1 shall survive termination of this Agreement, regardless of whether at such time ESCO has fully completed the design phase of the Project.

*Section 1.5.3 Customer Termination for Cause.* In addition to other termination rights it may have pursuant to this Agreement, the Customer may give ESCO written notice of the Customer's intent to terminate this Agreement for cause if the Customer reasonably determines that ESCO has failed to perform some or all of the design services in a satisfactory and timely manner or if ESCO otherwise has breached any of its obligations pursuant to this Agreement. ESCO must cure such failure or breach, or make arrangements satisfactory to the Customer for cure of such failure or breach, within the time permitted pursuant to Section 1.6.1 herein and, if ESCO does not, the Customer may terminate this Agreement by giving written notice of termination to ESCO, and the termination shall be effective immediately upon receipt of the notice of termination by ESCO. Nothing in this Agreement shall be deemed or construed as a waiver by ESCO of any rights it may have in regard to a wrongful termination by the Customer.

*Section 1.5.4 ESCO Termination for Cause.* ESCO may give the Customer written notice of ESCO's intent to terminate this Agreement for cause if ESCO reasonably determines that the Customer has breached any of its material obligations pursuant to this Article 1. The Customer must cure such breach, or make arrangements satisfactory to ESCO for cure of such breach, within the time permitted pursuant to Section 1.6.1 herein and, if the Customer does not, ESCO may terminate this Agreement by giving written notice of termination to the Customer, and the termination shall be effective immediately upon receipt of the notice of termination by the Customer. Nothing in this Agreement shall be deemed or construed as a waiver by the Customer of any rights it may have in regard to a wrongful termination by ESCO.

*Section 1.5.5 Compensation to ESCO Upon Termination.* Subject to all other provisions of this Agreement, in the event of any termination, the Customer shall compensate ESCO consistent with Sections 1.1.3, 1.1.4 and 1.1.5, inclusive, of this Article 1, and Exhibit "C" hereto: (i) for those of the design services as have been fully and satisfactorily completed prior to termination; and (ii) for design services in progress by ESCO and any of its Sub-Consultants at such time, including any profit or overhead attributable to such work in progress.

*Section 1.5.6 ESCO to Provide Copies of Project Documents.* Not later than sixty days following the effective date of a termination pursuant to this Part 1.5, regardless of the reason for such termination, ESCO must provide to the Customer copies of all Project Documents (defined in Subsection 3.4.2 of Article 3), relating to the terminated portion of the design services. Satisfaction of ESCO's obligations pursuant to this Section shall be a condition precedent to the Customer's obligation to pay

any compensation or reimbursement to ESCO pursuant to Section 1.5.5 of this Article 1 or other provisions of this Agreement.

*Section 1.5.7 Survival of Obligations.* The Parties' respective rights and obligations pursuant to this Part 1.5 shall survive termination of this Agreement.

**PART 1.6: DISPUTE RESOLUTION**

*Section 1.6.1 Notice and Opportunity to Cure.* If one of the Parties (the "Alleging Party") alleges that the other Party (the "Defaulting Party") has breached any of its obligations pursuant to this Article 1, the Alleging Party may provide written notice thereof to the Defaulting Party, specifying in reasonable detail the nature and extent of the alleged default ("Notice of Default"). If the Defaulting Party has not cured the alleged default within thirty days after receipt of the Notice of Default, then the Alleging Party in its discretion may initiate the dispute resolution process described in Section 1.6.2 of this Article 1. The giving of a Notice of Default and allowing the period for cure of the alleged default in accordance with this Section 1.6.1 shall be a condition precedent to the Alleging Party exercising any available remedy in response to the alleged default. Nothing shall be construed to prohibit the Defaulting Party from disputing that a default has occurred. Neither the giving of any Notice of Default, nor the initiation by the Alleging Party of any dispute resolution in connection with the alleged default, shall by itself operate to terminate this Agreement.

*Section 1.6.2 Informal Attempts at Dispute Resolution.* If a dispute between the Parties arises out of or relates in any way to the design phase of the Project pursuant to this Article 1 (each a "Dispute"), the Parties shall attempt as provided in this Section to resolve the Dispute as quickly and as amicably as possible, including, without limitation, any Disputes as to the meaning of any provision of this Article 1, the validity of any determination or calculation required pursuant to this Article 1, or the rights or obligations of the Parties pursuant to this Article 1. If the Dispute does not relate to an alleged default or is not of such nature that a Party may give a Notice of Default, then the Party alleging the Dispute shall give to the other Party a written notice of the Dispute ("Notice of Dispute"). Within a reasonable time, not in excess of fourteen calendar days, after receipt of either a Notice of Default or a Notice of Dispute, the Parties shall commence attempts to informally resolve the Dispute as required pursuant to this Section. Such attempts shall include good-faith, reasonable and diligent efforts by both Parties to communicate and, if possible, to reconcile or compromise their respective positions. The participation by a Party in such attempts to informally resolve a Dispute shall be a condition precedent to such Party exercising any available remedy in response to the Dispute. If, after diligently making the attempts required pursuant to this Section for at least thirty calendar days, the Parties cannot resolve Dispute, either Party may give written notice to the other Party that the attempts have been unavailing and, therefore, have been terminated effective upon receipt of that notice by the other Party.

*Section 1.6.3 Exercise of Available Remedies.* If attempts to resolve a Dispute pursuant to Section 1.6.2 of this Article 1 are terminated without the Dispute having been resolved to the satisfaction of either Party, the Alleging Party may initiate any legal or equitable action or other proceeding in response to the Dispute that is available pursuant to this Agreement and applicable law. In addition, however, if a Party fails to respond to, or participate in good faith in, any requests or requirements for resolution of the Dispute pursuant to Section 1.6.2 of this Article 1, the other Party, in its discretion and without needing to further comply with Section 1.6.2 of this Article 1, may initiate any legal or equitable action or other proceeding in response to the Dispute that is available pursuant to applicable law. However, in any case in which a Notice of Default has been provided pursuant to Section 1.6.1 of this Article 1, no such legal or equitable action may be initiated until the applicable period specified in Section 1.6.1 of this Article 1 for cure of the alleged default has expired without the alleged default having been cured.

*Section 1.6.4 Performance During Disputes.* At all times while any Dispute is pending, each Party shall continue to fully perform its obligations pursuant to this Article 1 and the other provisions of this Agreement. Notwithstanding the foregoing, a Party shall not be responsible for continued performance of such obligations to the extent a default or alleged default by the other Party makes performance impossible, impractical or unreasonable.

*Section 1.6.5 Remedies Not Limited.* In connection with any Dispute, and except as expressly provided in this Article 1, each Party may exercise any or all rights and remedies available pursuant to applicable law. No such available remedy shall be deemed or construed to be exclusive, and a Party may exercise any available remedy individually or in combination with any other available remedies.

## ARTICLE 2

## CONSTRUCTION PHASE OF THE ESCO SERVICES

## PART 2.1: SCOPE, TIMING AND COMPENSATION

*Section 2.1.1 Scope of Article 2 Requirements.* Except to the extent terms are defined in this Article 2 and used elsewhere in this Agreement and except as may be expressly provided in this Agreement, this Article 2 shall be deemed and construed to apply only to the construction phase of the Project.

*Section 2.1.2 Scope of Work.* The scope of construction services to be performed by ESCO pursuant to this Article 2 is described generally in Exhibit "D" attached to this Agreement. The Parties shall determine the precise scope of the construction phase of the Project in conjunction with completion of the design phase. Subject to the Customer issuing a notice to proceed with the construction phase ("Notice to Proceed"), ESCO must complete the construction services in strict accordance with the Construction Documents (defined in Subsection 2.1.3.3 of this Article 2).

*Section 2.1.3 Component Parts of Contract.*

*Subsection 2.1.3.1 Payment and Performance Bonds.* ESCO shall provide payment and performance bonds for 100% of the sum required to secure the faithful performance of the construction phase of the Project, compliance with the terms of this Contract, and to insure ESCO'S payment obligations to its Subcontractors and suppliers related to the construction phase. Notwithstanding any provision to the contrary herein, any payment and performance bonds associated with the construction phase guarantee only the performance of the construction phase, and shall not be construed to guarantee the performance of: (1) any efficiency or energy savings guarantees, (2) any support or maintenance service agreement, or (3) any other guarantees or warranties with terms beyond one (1) year in duration from the completion of the construction phase.

*Subsection 2.1.3.2 Construction Documents.* This Agreement is but one of the agreements and other documents that, collectively, set forth the complete understanding and agreement of the Parties with respect to the performance of the construction phase of the Project. Each Agreement and other such documents (together, the "Construction Documents"), as those may be duly made or amended from time to time, is hereby incorporated as an operative and effective part of this Agreement. The Construction Documents include, but are not limited to: (i) this Agreement; (ii) any and all drawings, plans, elevations, sections, details, schedules and diagrams approved by the Customer that illustrate any or all of the construction phase and the written requirements approved by the Customer for materials, equipment, construction systems, quality workmanship, services and other things to be furnished in connection with the construction phase of the Project ("Specifications"); (iii) any and all Required Construction Forms; and (iv) any duly-authorized agreements or orders providing for changes in the scope of the construction phase.

*Subsection 2.1.3.3 Complementary Nature.* The Construction Documents shall be deemed and construed to be complementary and an integrated whole. Any requirement or provision set forth in one Construction Document, although not set forth in any one or more of the other Construction Documents, shall be interpreted as if set forth in or applicable to all Construction Documents.

*Section 2.1.4. Commencement and Completion of the Construction Phase.*

*Subsection 2.1.4.1 Scheduling Goals.* ESCO acknowledges that the Customer will schedule the construction phase for a specific period of time, in order to promote the best usage of

Customer facilities. ESCO further acknowledges that compliance with scheduling requirements for the construction phase as provided herein, or as directed by the Customer, is mandatory in order to accomplish such goals and, therefore, that time is of the essence with respect to the performance of the construction phase.

*Subsection 2.1.4.2 Construction Time.* ESCO must commence the construction phase not later than the date(s) specified by the Customer as the date by which ESCO must commence the construction phase ("Commencement Date"). ESCO must fully and satisfactorily complete all of the construction services not later than the date(s) specified by the Customer as the date by which ESCO must complete the construction phase ("Completion Date"). ESCO must commence and proceed with the construction phase with continuous reasonable diligence to ensure full and satisfactory completion of all of the construction services within the period between such stated Commencement Date and such stated Completion Date (such period referred to herein as the "Construction Time"). Upon the mutual agreement of the Parties as to the final scope of the construction phase, the Parties shall cooperate in developing a milestone schedule, within ten days after the Notice to Proceed, that is reasonably acceptable to both Parties and that provides for completion of the Project by each milestone and all Work not later than the Completion Date, while still accommodating the Customer's operations at the Project Site(s) (defined in Section 2.4.1 of this Article 2).. Upon the Parties agreeing on such schedule, it shall be deemed and construed to be part of this Agreement without need for further action by the Parties. The schedule developed by the Parties shall set forth the Commencement Date and the Completion Date for the Project. The Construction Time may be extended as provided in the Construction Documents or as the Parties otherwise may agree in writing, including, without limitation, to account for unanticipated delays.

*Subsection 2.1.4.3 Acceptance Upon Final Completion.* The work encompassed within the construction phase of Project is subject to acceptance by the Governing Board as of the date of the regularly-scheduled meeting of the Governing Board following the determination by the Customer, in its reasonable discretion, that ESCO has fully and satisfactorily completed all of the construction phase ("Project Acceptance Date").

*Subsection 2.1.4.4 Notice to Proceed.* ESCO acknowledges and agrees that the Customer is not bound to proceed with the construction phase set forth in this Article 2, and, upon completion of the design phase provided for in Article 1, or at any other time as set forth in Article 1, the Customer, based on its judgment and at its sole discretion, may terminate this Agreement, compensate ESCO for the Design Fee, and choose not to proceed further with the Project. The terms and conditions set forth in this Article 2 shall go into effect upon the issuance of a formal, written Notice to Proceed by the Customer.

#### *Section 2.1.5. Compensation to ESCO.*

*Subsection 2.1.5.1 Construction Fee.* The compensation payable to ESCO for the construction phase shall not exceed a specific maximum amount in exchange for which, as described in more detail in Subsection 2.1.5.3 herein, ESCO guarantees that it will perform all of its obligations pursuant to this Article 2 in strict accordance with the Construction Documents (the "Construction Fee"). As set forth in Exhibit "C" to this Agreement, the Construction Fee shall be agreed upon by the Parties prior to the issuance of any Notice to Proceed. ESCO will deliver to Customer a final scope and firm fixed price proposal for that scope at the completion of the design phase of the Project. Upon approval of that proposal, Customer will issue a Notice to Proceed.

*Subsection 2.1.5.2 Adjustment and Payment of the Construction Fee.* The Construction Fee shall be subject to increase and/or decrease as provided in the Construction Documents. The Customer shall pay the total amount of the adjusted Construction Price to ESCO, in progress payments

no more than monthly. In no event shall the sum total of the progress payments payable to ESCO pursuant to this Agreement exceed the adjusted Construction Price. Upon completion of the construction phase, ESCO shall provide a "final payment request" to the Customer that establishes the total cost of construction services as adjusted pursuant to the Construction Documents.

*Subsection 2.1.5.3 Limitation on Compensation.* The Customer's sole and exclusive liability for Construction ESCO for full and satisfactory performance of its obligations pursuant to this Article 2 and other Construction Documents shall be deemed and construed to be limited to an amount equal to the Construction Price as it may be adjusted in accordance with the Construction Documents. ESCO hereby represents and guarantees that it can and shall satisfactorily and completely perform all of its obligations pursuant to this Article 2, including, without limitation, performing all construction services in strict accordance with the Construction Documents, without seeking funds from the Customer in excess of the Construction Price or requesting a redesign or change in scope of the construction phase in order to reduce ESCO's costs, and regardless of any anticipated or unanticipated increases in costs of labor, materials, equipment, or other services or things necessary in connection with the construction phase of the Project, other than as set forth in this Agreement. ESCO shall be solely responsible for any and all costs it incurs in performing its obligations pursuant to this Article 2 and other Construction Documents that are in excess of the adjusted Construction Price, without right to reimbursement from the Customer.

Thus, the Parties have entered into this Agreement with the understanding that the Agreement shall be deemed or construed to be a "fixed price" contract. Nothing in this Subsection 2.1.5.3 shall be deemed or construed to limit or otherwise condition ESCO's obligations pursuant to Subsection 2.1.5.3 herein.

## *PART 2.2: ESCO INSURANCE*

*Section 2.2.1 ESCO Insurance.* ESCO must comply with the insurance-related requirements set forth in Exhibit "F" attached to this Agreement. Without limiting the foregoing, prior to commencing the construction phase of the Project, ESCO must obtain and have in effect each and every policy of insurance required pursuant to Exhibit "F" (each an "Insurance Policy" and, collectively, the "Insurance Policies"). ESCO must also ensure compliance by its subcontractors with the applicable provisions of such insurance-related requirements. Except as provided in Exhibit "F" hereto or as the Customer may expressly consent in writing, ESCO and each of its subcontractors must maintain required Insurance Policies in full force and effect at all times prior to the Project Acceptance Date.

## *PART 2.3: COMPLIANCE WITH LABOR LAW REQUIREMENTS*

*Section 2.3.1 Compliance Generally.* In connection with the performance of the construction phase of the Project, ESCO and each of its subcontractors must comply with all requirements of the Labor Laws (defined in 2.3.2). The Customer will coordinate and conduct any mandatory pre-construction conference, and ESCO and each of its subcontractors must attend the conference in order to ensure they are aware of applicable labor-law requirements.

*Section 2.3.2 Compliance with Labor Code Requirements.* The Project is a "public works project" as defined in Section 1720 of the California Labor Code ("Labor Code") and, therefore, is subject to Part 7, Chapter 1, of the Labor Code and Title 8 of the California Code of Regulations, Section 16000 et seq. (collectively, "Labor Laws"). ESCO must be, and shall be deemed and construed to be, aware of and understand the requirements of California Labor Code Sections 1720 et seq. and 1770 et seq., and other provisions of the Labor Laws that require the payment of prevailing wage rates and the performance of other requirements on public works projects. ESCO acknowledges that the Project will be subject to compliance monitoring and enforcement by the California Department of Industrial Relations ("DIR"). ESCO, at no additional cost to the Customer, must: (i) comply with any and all

applicable requirements of the Labor Laws, including, without limitation, requirements for payment of "prevailing wages," inspection and submittal (electronically, as required) of payroll records, interviews of worker(s), etcetera; (ii) ensure that any and all of its Sub ESCOs are aware of and comply with applicable provisions of the Labor Laws; (iii) in connection with Labor Laws compliance matters, cooperate with the DIR, the Customer and other entities with competent jurisdiction; and (iv) post all job-site notices required by law in connection with ESCO Services, including, without limitation, postings required by DIR regulations. ESCO or an ESCO sub contractor that has been debarred in accordance with the Labor Code, including, without limitation, pursuant to Sections 1777.1 or 1777.7, is not eligible to bid on, perform, or contract to perform any portion of the ESCO Services. Wage rates for the ESCO Services shall be in accordance with the general prevailing rates of per-diem wages determined by the Director of Industrial Relations pursuant to Labor Code Section 1770. Wage rates shall conform to those on file at the Customer's principal office and posted at the Project Site. The Customer will withhold payment to ESCO necessary to satisfy civil wage and penalty assessment issued by the Labor Commissioner. The following Labor Code sections are by this reference incorporated into and are a fully operative part of Article 1 of this Agreement, and ESCO shall be solely responsible for compliance therewith:

- (i) Section 1735: Anti-Discrimination Requirements;
- (ii) Section 1775: Penalty for Prevailing Wage Rate Violations;
- (iii) Section 1776: Payroll Records;
- (iv) Sections 1777.5, 1777.6 and 1777.7: Apprenticeship Requirements;
- (v) Sections 1810 through 1812: Working Hour Restrictions;
- (vi) Sections 1813 and 1814: Penalty for Failure to Pay Overtime; and
- (vii) Section 1815: Overtime Pay.

*Section 2.3.3 Requirements for Payroll Records.* ESCO must comply with all applicable provisions of Labor Code Section 1776, which relates to preparing and maintaining accurate payroll records, and making such payroll records available for review and copying by the Customer, the DIR's Division of Labor Standards Enforcement, and the DJR's Division of Apprenticeship Standards ("DAS"). The payroll records must be certified, maintained at the principal offices of the ESCO, and made available as required by Labor Code Section 1776. ESCO must inform the Customer of the location at which the payroll records are located, including the street address, city and county, and must, within five working days, provide a notice of any change of location and address. ESCO or an ESCO subcontractor that fails to timely comply with requests for certified payroll records, shall forfeit, as a penalty to the Customer, \$100 for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated, and, in addition to penalties as provided by law, may be subject to debarment pursuant to Labor Code Section 1771.1. Timely provision by ESCO of certified payroll records also shall be a condition precedent to the Customer's obligation to make any payments to ESCO pursuant to Article 1 of this Agreement.

*Section 2.3.4. Penalties for Violations of Prevailing Wage Laws.* In accordance with Section 1775 of the Labor Code, ESCO shall forfeit, as a penalty to the Customer, not more than \$200 and, subject to limited exceptions, not less than certain amounts specified by law, for each calendar day, or portion thereof, for each worker paid less than prevailing wage rates as determined by the DIR Director. ESCO shall pay to each worker the difference between such stipulated prevailing wage rate and the amount paid to the worker for each calendar day or portion thereof for which the worker was paid less than the applicable prevailing wage rates.

*Section 2.3.5. Requirements for ESCO Registration.* No contractor may bid on a public works project unless the contractor is, and no subcontractor may be listed in any bid for a public works project unless the subcontractor is, currently registered with the DIR and qualified to perform public work pursuant to Labor Code Section 1725.5. In addition, no contractor or subcontractor may be awarded a contract for work on a public works project, or may perform any work on a public works project, unless

the contractor or subcontractor is currently registered with the DIR and qualified to perform public work pursuant to Labor Code Section 1725.5. It is not a violation of Labor Code Section 1725.5 for an unregistered contractor to submit a bid authorized by Business and Professions Code Section 7029.1 or Public Contract Code Section 20103.5, if the contractor is registered at the time the contract is awarded.

*Section 2.3.6. Registration Requirements Applicable to Project.* ESCO shall be responsible for ensuring that it and all ESCO subcontractors are currently and properly registered with the DIR and qualified to perform public work pursuant to Labor Code Section 1725.5. Prior to commencing the ESCO Services: (i) ESCO must complete, execute, and submit to the Customer the "Certification Regarding ESCO Registration" form; and (ii) provide to the Customer the evidence of registration as described in the Certification Regarding ESCO Registration form. Notwithstanding anything to the contrary, if at any time during the performance of the ESCO Services, ESCO or any of its subcontractors is not duly registered pursuant to Labor Code Section 1725.5 (including, without limitation, if the registration expires or the DIR revokes the registration), the Customer in its sole discretion may cancel the Agreement and/or replace ESCO or an ESCO-subcontractor with a contractor or subcontractor that is duly registered pursuant to Labor Code Section 1725.5.

#### *PART 2.4: ADMINISTRATION OF ARTICLE 2*

*Section 2.4.1 Regular Working Hours.* Except as the Customer, in its sole discretion, may agree, ESCO shall perform the portions of the construction phase that are to occur at or in the vicinity of the Project Site(s) only: (i) on weekdays (i.e., any day, Monday through Friday, inclusive); and (ii) commencing at or after such time, and ending by or prior to such time, as may be specified in either an applicable local ordinance or any "Mitigation Monitoring Plan" adopted by the Customer pursuant to the California Environmental Quality Act, whichever is more restrictive.

*Section 2.4.2 Taxes.* The Construction Price shall be deemed and construed to include compensation to ESCO for any and all duties, sale, use, excise or other similar taxes required by federal, state or local laws in effect as of the Effective Date or promulgated thereafter, and payable in connection with the construction phase of the Project.

#### *PART 2.5: ESCO STATUS*

*Section 2.5.1 Standard of Performance.* The ESCO represents and warrants that it has the professional skill, knowledge and experience necessary to perform and complete the construction phase of the Project within the Construction Time. The ESCO shall apply such skill, knowledge and experience in the completion of the Project, at a minimum level at least equal to that expected generally of professionals employed in construction of facilities within the State. The ESCO shall perform and complete the construction phase in accordance with standards not less than established by applicable laws, rules and regulations, industry and trade association standards, manufacturers' recommendations, and, if any, community or area standards. The ESCO represents and warrants that all of its employees and subcontractors shall have sufficient skill, knowledge and experience to perform the construction services that will be assigned to them.

*Section 2.5.2 Licenses.* The ESCO represents and warrants that it currently has, and that it shall maintain until completion and acceptance of the Project all licenses, permits, qualifications and approvals of whatever nature as are legally required to permit the ESCO to perform the construction services required pursuant to the Agreement and to complete the Project.

#### *PART 2.6: EMPLOYEES AND SUBCONTRACTORS*

*Section 2.6.1 Job Superintendent.* The ESCO shall have present on the Project Site(s) during the course of the construction phase of the Project an experienced and competent superintendent and any necessary assistants, all satisfactory to the Customer, who shall supervise the construction services and the ESCO's employees and subcontractors on the Project.

*Section 2.6.2 ESCO's Employees.* The employees of the ESCO shall at all times be under the ESCO's exclusive direction and control on the Project. The ESCO shall pay all wages, salaries, and other amounts due to such personnel in connection with their performance of construction services, as required by law. ESCO shall be responsible for all reports and obligations respecting such personnel, including, but not limited to: social security taxes, federal and state income tax withholdings, unemployment insurance, and workers' compensation insurance. The ESCO shall employ only competent workers for performance of the construction services and shall not employ any person who is unfit or unskilled in the work assigned to him or her. The ESCO shall at all times enforce strict discipline and good order among its employees and any and all subcontractors' employees performing any portions of the construction services. The ESCO shall supervise and control its employees and all subcontractors' employees performing any portions of the construction phase of the Project to ensure adequate performance and discipline. The ESCO shall immediately remove from the Project and Project Site(s) any person, regardless of whether employed by the ESCO or any subcontractor, who is determined by the Customer to be uncooperative, incompetent, or a threat to the safety of persons or the Project, or who fails or refuses to perform the construction services in a manner acceptable to the Customer. The ESCO shall not thereafter suffer or permit any such person to perform any of the construction services or to be present on or at the Project Site(s).

*Section 2.6.3 Prohibition Against Unlawful Discrimination.* The ESCO represents and warrants that it is an equal opportunity employer and it shall not discriminate in violation of any applicable federal State, or other law, rule, regulation, or governmental requirement, including, but not limited to discrimination against any employee or applicant for employment on account of such person's race, religion, color, national origin, ancestry, sex, or age. The ESCO must apply such policy of non-discrimination in connection with all activities related to initial employment, promotion, demotion, transfer, recruitment or recruitment advertising, layoff or termination of ESCO's employees or any subcontractors.

*Section 2.6.4 Responsibility for Subcontractors.* The ESCO shall be responsible for ensuring that all portions of the construction phase performed by its subcontractors conform with all requirements of the Construction Documents and applicable law. The ESCO shall immediately remove from the Project and Project Site(s) any subcontractor that the Customer determines is uncooperative, incompetent, or a threat to the safety of persons or the Project, or that fails or refuses to perform the construction services in a manner acceptable to the Customer.

*Section 2.6.5 Subcontractor Insurance.* The ESCO shall ensure and verify that its subcontractors obtain and maintain all necessary liability and other insurance as required pursuant to the Construction Documents and/or by law.

## **PART 2.7 PAYMENTS**

*Section 2.7.1* The payments shall be taken from an escrow account set up in accordance with Customer's project financing agreement. ESCO may submit "Payment Request Forms" and payments shall be made to ESCO on a monthly basis during construction. Customer shall promptly forward Payment Request Form to the escrow agent requesting payment to ESCO in an amount equal to the value of services rendered since the last interim payment as shown on the Schedule of Values provided during installation. If any payment is over thirty (30) days late from the due date stated on the

invoice, Customer shall pay to ESCO a 1% late penalty per month and ESCO reserves the right to terminate this Contract due to non-payment upon seven (7) days prior written notice.

*Section 2.7.2* Within ten (10) days of the Date of Commencement, Customer shall make payment to ESCO for expenses incurred to date and project mobilization expenses, including but not limited to engineering, project start-up and mobilization, equipment and material procurement, bonds and other expenses incurred to date ("Project Mobilization Payment") in the amount of not to exceed 20% of the implementation contract payment total of the Contract Sum as provided for on the Project Mobilization Payment invoice attached hereto and made a part hereof.

*Section 2.7.3* For the initial one (1) year beginning at the Savings Guarantee Commencement Date, Customer shall receive the services as described in the Performance Assurance Support Services Agreement ("PASS Agreement") at no additional cost. Thereafter, the PASS Agreement shall automatically renew for a period of one (1) year, whereby Customer can maintain the current service or upgrade the level of service as provided for in Exhibit "G".

*Section 2.7.4* Payments may be withheld on account of (1) Defective Work not remedied, (2) claims filed by third parties, (3) failure of ESCO to make payments properly to the "Subcontractor(s)" or for labor, materials or equipment, or (4) repeated failure to carry out the Work in accordance with the Contract Documents.

*Section 2.7.5* Final payment shall not become due until ESCO has delivered to Customer a complete release of all liens arising out of this Contract covering all labor, materials, and equipment for which a lien could be filed, or a bond satisfactory to Customer to indemnify Customer against such lien.

*Section 2.7.6* The making of final payment shall constitute a waiver of claims by Customer except those arising from (1) liens, claims, security interests or encumbrances arising out of the Contract and which are unsettled, (2) failure of the Work to comply with the requirements of the Contract Documents, or (3) terms of special warranties required by the Contract Documents.

## *PART 2.8: PERFORMANCE SERVICES*

*Section 2.8.1* For the initial one (1) year beginning at the first day of the first utility billing period following the month in which ESCO delivers to Customer the project completion letter ("Savings Guarantee Commencement Date"), Customer shall receive the services as described in the Performance Assurance Support Services Agreement ("PASS Agreement") accompanying this Agreement at no additional cost. Thereafter, the PASS Agreement shall automatically renew for a period of one (1) year, whereby Customer can maintain the current service or upgrade the level of service as provided for in Exhibit "G".

*Section 2.8.2* If Customer (1) fails or neglects to maintain Customer responsibilities as set forth in Schedule E, or (2) fails to fulfill any of its other obligations or responsibilities under the Construction Documents, ESCO may, after delivery of written notice and providing Customer seven (7) days to cure, terminate the Agreement, including, but not limited to the termination of any obligation of ESCO to provide the Performance Guarantee, as defined in Subsection 2.5.2.3 below.

*Subsection 2.8.2.1* "Annual Savings Guarantee" is the amount of energy savings guaranteed by ESCO for a twelve (12) month period beginning on the Savings Guarantee Commencement Date and any subsequent twelve (12) month anniversary thereafter.

*Subsection 2.8.2.2* "Guarantee Year" is the twelve (12) month period beginning on the

Savings Guarantee Commencement Date and each subsequent twelve (12) month anniversary thereafter.

*Subsection 2.8.2.3* "Performance Guarantee" is the sum of the Annual Savings Guarantee for each year of the guarantee term as set forth in Exhibit "H" or unless terminated earlier in accordance with the Contract Documents.

*Subsection 2.8.2.4* "Savings Guarantee Commencement Date" means the first day of the first utility billing period following the month in which ESCO delivers to Customer the project completion letter.

### ARTICLE 3

#### MISCELLANEOUS

##### PART 3.1 WARRANTY

*Section 3.1.1* ESCO warrants to Customer for a period of one (1) year from the corresponding dates of Substantial Completion that the materials and equipment manufactured by ESCO will be of good quality and new unless the Contract Documents require or permit otherwise, and further warrants that the Work will conform to the requirements of the Contract Documents and will be free from defects, except for those inherent in the quality of the Work the Contract Documents require or permit. Work, materials, or equipment not conforming to these requirements may be considered defective. ESCO'S warranty excludes remedy for damage or defect caused by abuse, alterations to the Work not executed by or for ESCO, improper or insufficient maintenance, improper operation, or normal wear and tear and normal usage. ESCO shall repair or replace defective material or equipment and re-perform Work to correct any defect within the Warranty Period. In the event warranty work by the ESCO is necessary, the ESCO shall provide an additional one year warranty on the corrected work only from the date the corrected work is completed or the end of the initial warranty period, whichever is later. ESCO does not warrant products not manufactured by ESCO, but it will pass on to Customer any manufacturer's warranty to the extent permitted.

##### PART 3.2: GIVING OF NOTICE

*Section 3.2.1 General Requirements.* Any and all demands and notices required or permitted to be given pursuant to this Agreement (each a "Notice") must be in writing and must be given or served in accordance with this Part 2.

*Section 3.2.2 Methods of Delivery.* Each Notice must be sent via: (i) personal delivery (with name and signature of recipient obtained on delivery receipt); (ii) registered or certified United States mail (postage pre-paid and return receipt requested); (iii) FedEx, U.P.S. or other reliable, private delivery service (with name and signature of recipient obtained on electronic or other delivery receipt); or (iv) electronic mail (e-mail) transmission (with printed confirmation of transmission from the sender's machine or device retained in the sender's files and a copy of such confirmation provided to recipient upon request, and with original of the Notice deposited into the United States mail, first-class postage prepaid, within 12 hours after transmission). Neither Party may unreasonably refuse to accept delivery of any Notice in an attempt to avoid the giving or service of the Notice, and any such refusal by a Party shall be deemed and construed as a material breach of such Party's obligations pursuant to this Agreement.

*Section 3.2.3 Persons to Whom Notices Must Be Sent.* Notices sent to a Party must be

addressed and delivered to that Party's representative as specified in 3.2.6. A Party must give Notice of each change in the Party's address, person to whom attention should be directed, or e-mail address by giving notice in accordance with this Part 2. If any such information applicable to a Party changes, and the Party does not give notice of such change in accordance with this Part 2, any subsequent Notices addressed and delivered to the Party's old contact information shall be deemed and construed to have been given or served in accordance with Section 3.2.4 herein, regardless of whether "actual receipt" has occurred.

*Section 3.2.4 Effect of Receipt.* A Notice shall be deemed given or served only upon actual receipt by the addressee. In the case of e-mail, "actual receipt" shall mean delivery to the recipient's e-mail in-box. However, if any Notice (including, without limitation, any Notice sent by e-mail) is delivered after 4:00p.m. on any weekday, on a weekend {Saturday or Sunday}, on any federal or State of California holiday, or on any Customer furlough day mandated by the State of California or the Governing Board, the Notice shall be deemed to have been given or served as of 9:00a.m. on the next subsequent business day. As an additional condition to sending a Notice by e-mail, the reference line must indicate that it is a "Notice Pursuant to Agreement for Turnkey Energy Conservation Services." Because e-mail addresses are subject to change more frequently than physical addresses, if a Notice is to be sent by e-mail, unless the sender has personal knowledge of the then-current correct e-mail address of each intended recipient, the sender must call and verify the then-current e-mail address of each intended recipient prior to sending the Notice, or must use some other method of delivering the Notice.

*Section 3.2.5 Applicability of Notice Requirements.* The requirements of this Part 2 shall not be deemed or construed to apply to: (i) communications between the Customer and/or ESCO necessary for day-to-day administration of this Agreement or performance of the ESCO Services; or (ii) service of process in accordance with any applicable law or court rule.

*Section 3.2.6 Parties for Notices.* Parties for Notices are as noted below:

Customer:  
GIRLOY UNIFIED SCHOOL DISTRICT  
7810 Arroyo Circle  
Gilroy, CA 95020  
Attention: Deborah A. Flores, Superintendent  
Attention: Alvaro Meza, Asst. Superintendent

ESCO:  
Schneider Electric Buildings Americas Inc.  
1650 West Crosby Rd  
Carrollton, TX 75006  
Attention: Tammy Fulop

### **PART 3.3: INTERESTS OF PARTIES**

*Section 3.3.1 Independent Contractor.* ESCO is, for any and all purposes of or related to this Agreement, an independent contractor to the Customer. In no circumstances shall ESCO or any of its Sub-Consultants or subcontractors, or any officer, employee or agent of either, be deemed or construed to be an officer, employee or agent of the Customer on account of this Agreement. ESCO must at all times conduct its activities in a manner consistent with its status as an independent contractor to the Customer, and, except as provided in this Agreement, ESCO shall have the right to determine the methods, means and mechanisms by which it shall perform the ESCO Services. The Customer shall analyze the data and information provided by ESCO in connection with the design phase of the Project and, based on its judgment and at its sole discretion, determine whether it shall proceed with the construction phase. ESCO shall not suffer or permit any third party (whether person or entity) to continue in any apparent belief that ESCO or any of its Sub-Consultants, or any officer, employee or agent of either, is an officer, employee, or agent of the Customer. ESCO shall be responsible for ensuring compliance with all laws related to its employees and the employees of any Sub-Consultant or subcontractor, including, without limitation, laws relating to workers' compensation and, if applicable,

payment of prevailing wages. The compensation payable to ESCO hereunder shall not be increased as a result of any costs incurred by ESCO that are attributable to such compliance.

*Section 3.3.2 Intellectual Property Rights.* Nothing in this Agreement shall be deemed or construed to result in the Customer acquiring any interest or rights in any such intellectual property owned by any third parties. However, to the extent provided in this Agreement, ESCO shall indemnify, defend and hold-harmless the Customer and the Customer Agents with respect to any violation of such third-party rights by ESCO or any of its Sub-Consultants in connection with this Agreement.

#### **PART 3.4: PROJECT RECORDS**

*Section 3.4.1 Project Records.* ESCO shall maintain all documents, books, papers, accounting records, computer files, and other information related to the ESCO Services ("Project Records"), including, but not limited to, the Construction Documents, the Plans and Specifications, Change Orders, submittals, cut-sheets, projected energy-savings calculations, requests for information, daily reports, correspondence, permits, insurance policies, Certificates of Insurance, testing and inspection reports, records relating to the costs of administering the Project, and safety records. ESCO shall keep such accurate and comprehensive Project Records as are (i) necessary for proper administration and performance of the ESCO Services and (ii) required by law and/or this Agreement. All Project Records, as applicable, shall be maintained in accordance with generally-accepted accounting principles. In accordance with Government Code Section 8546.7, the State has the right to examine, review, audit and/or copy the Project Records during the three-year period following final payment to ESCO pursuant to this Agreement. In addition, the Customer hereby has the right to examine, review, audit and/or copy the Records of the Project during the two-year period following final payment to ESCO pursuant to this Agreement. Therefore, ESCO shall make the Project Records available at its offices at all reasonable times during the performance of the ESCO Services and for four years from final payment to ESCO pursuant to this Agreement. However, if any audit is commenced within such two-year period, ESCO shall make the Project Records available at all reasonable times until proceedings related to such audit are complete and all statutes of limitation related thereto have expired.

*Section 3.4.2 Customer Ownership and Use of Documents.* Any and all conceptual, preliminary, working, and final documents (both originals and reproductions), presentations, computations, analyses, and other documents, in whatever format or storage medium, obtained or prepared by ESCO or any Sub-Consultant pursuant to this Agreement (each a "Project Document") and paid for by the Customer in accordance with this Agreement shall be deemed and construed to be and remain the property of the Customer. Except for purposes of this Agreement, and except for a copy of any Project Document that ESCO either submits to a State of California agency with competent jurisdiction or makes for purposes of including such copy as part of the Project Records, ESCO shall not permit reproductions to be made of any of the Project Documents without the advance written approval of the Customer, regardless of whether the Project Documents are in the possession of ESCO or any Sub-Consultant. The Customer may use the Project Documents as the Customer deems appropriate, with no compensation due to ESCO except as provided in this Agreement. The Customer shall have the unconditional right to use the Project Documents, for their intended purposes and, at Customer's sole discretion, for any other purpose, with no additional compensation due to ESCO. Except as expressly agreed in writing, the Customer shall not be required to employ ESCO in connection with any future use of the Project Documents. Notwithstanding anything to the contrary, ESCO acknowledges and agrees that the Customer will rely on the accuracy and completeness of the Project Documents when used for their intended purposes. The Customer shall indemnify and hold ESCO harmless with respect to any liabilities caused by Customer use of the Project Documents for other than their intended purposes.

### PART 3.5: INTERPRETATION OF AGREEMENT

*Section 3.5.1 Fair and Reasonable Interpretations.* Prior to execution and delivery of this Agreement, each Party has received, or had unqualified opportunities to receive, independent legal advice from its legal counsel with respect to the advisability of executing this Agreement and the meaning of the provisions herein. Therefore, the provisions of this Agreement shall be construed based on their fair and reasonable meaning, and not for or against any Party based on whether such Party or its legal counsel was primarily responsible for drafting this Agreement or any particular provision herein.

*Section 3.5.2 Headings and Captions.* The headings and captions set forth in this Agreement are for the convenience of the reader only and shall not be deemed or construed to establish, define or limit the meaning of any Part, Section or other provision herein.

*Section 3.5.3 Recitals and Exhibits.* Each Recital set forth herein and each Exhibit referenced herein and attached hereto is hereby incorporated as an effective and operative provision of this Agreement.

*Section 3.5.4 Meaning of "Days."* Except as expressly provided in this Agreement in any particular case, each reference in this Agreement to a specific number of days shall be construed to mean consecutive calendar days.

*Section 3.5.5 Entire Agreement.* This Agreement, together with the Construction Documents as set forth in Section 2.1.3.3 above, constitute the entire understanding and agreement between the Parties pertaining to the performance of the ESCO Services required by this Agreement, and all prior and contemporaneous agreements, representations and understandings of the Parties relating to such subject matter, whether oral or written, are hereby superseded and replaced.

*Section 3.5.6 Modifications of Agreement.* This Agreement may be amended or otherwise modified only by means of a written agreement duly-approved, signed, and delivered by both Parties.

*Section 3.5.7 Waiver.* A waiver by a Party of any provision of this Agreement shall be binding only if the waiver is set forth in writing and has been duly approved and signed by the waiving Party. Unless so specified in the written waiver, a waiver by a Party of any provision of this Agreement shall not constitute a waiver of any other provision(s) herein, similar or not, and shall not be construed as a continuing waiver. Except as waived in accordance with this Section, neither the failure by a Party at any time to require performance of any requirement of this Agreement, nor any forbearance or indulgence of the Party in regard to such requirement, shall in any manner affect the Party's right at a later time to enforce the same or any other provision of this Agreement.

*Section 3.5.8 Governing Law and Venue.* This Agreement shall be governed by and interpreted in accordance with California law, regardless of any conflict-of-laws provisions applicable in California or any other jurisdiction. Any action, arbitration, or other proceeding arising from this Agreement shall be initiated and conducted only in the County where the project is located.

*Section 3.5.9 Correct Legal Requirements Deemed Included.* Each and every provision required by any applicable law to be included in this Agreement is hereby deemed to be so included, and this Agreement shall be construed and enforced as if all such provisions are so included. If, for any reason, any provision required by any applicable law is not expressly included herein, or is not correctly included herein, then, upon request of either the Customer or ESCO, they shall amend this Agreement to include or incorporate, or to correctly include or incorporate, such provision.

*Section 3.5.10 Severability.* If a court of competent jurisdiction determines, for any reason, that any provision or requirement of this Agreement is invalid or unenforceable, such determination shall not invalidate or render unenforceable any other provision or requirement of this Agreement. In such event, the provisions and requirements that are not the subject of the court's determination shall be interpreted, to the extent permitted by law, in a manner that is consistent with the intent and purpose underlying the invalid or unenforceable provision or requirement. Likewise, if a court of competent jurisdiction determines, for any reason, that any provision or requirement of this Agreement is invalid or unenforceable as applied to a specific person or entity, such determination shall not affect the applicability of such provision or requirement to other persons or entities. In such event, the provisions and requirements that are not the subject of the court's determination shall be interpreted, to the extent permitted by law, in a manner that is consistent with the intent and purpose underlying the inapplicable provision or requirement.

*Section 3.5.11 Successors and Assigns.* ESCO may not assign this Agreement without the express written consent of the Customer, and any attempt to do so shall be null and void. Subject to the foregoing, this Agreement shall inure to the benefit of, and be binding on, the Parties' authorized successors and assigns.

*Section 3.5.12 No Third-Party Beneficiaries.* The Parties have entered into this Agreement solely for their own purposes, and this Agreement shall not be deemed or construed to: (i) benefit any third party; (ii) create any right for any third party; or (iii) except as provided by law, provide a basis for any claim, demand, action or other proceeding by any third party.

*Section 3.5.13 Agreement is Public Record.* Notwithstanding anything in any proposal or any discussions or writings relating hereto: (i) nothing in this Agreement shall be deemed or construed to constitute confidential information; and (ii) this Agreement is a public record which the Customer may disclose in accordance with California law or otherwise.

### *PART 3.6 LIMITATION OF LIABILITY*

*Section 3.6.1* Notwithstanding anything in this agreement to the contrary, in no event shall either party, its officers, directors, affiliates or employees be liable for any form of indirect, special, consequential or punitive damages, including, but not limited to, loss of use, loss of production, loss of product, loss of revenue, profits or loss of data damages whether such damages arise in contract or tort, irrespective of fault, negligence or strict liability or whether such party has been advised in advance of the possibility of such damages. Notwithstanding any other provision of this agreement and to the extent permitted by applicable law, the maximum liability of ESCO for damages hereunder shall not exceed the amounts actually paid by the Customer to ESCO for the service(s) giving rise to a claim.

### *PART 3.7: EXECUTION OF AGREEMENT*

*Section 3.7.1 Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which, taken together, shall constitute one and the same instrument. Signature pages may be detached from counterpart originals and combined to physically form one or more copies of this Agreement having original signatures of both Parties.

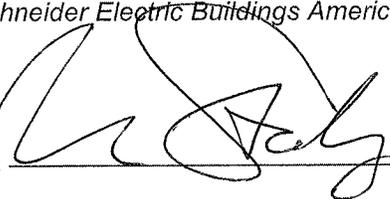
*Section 3.7.2 Due Authority of Signatories.* Each person signing this Agreement represents and warrants that he or she has been duly authorized by appropriate action of the Party he or she represents to *execute*, and thereby bind such Party *to*, this Agreement.

*In Witness Whereof.* The Parties have executed this Agreement as evidenced by the signatures of their authorized representatives below.

Gilroy Unified School District

Schneider Electric Buildings Americas, Inc.

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

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

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

Print Name: MARC STARKEY

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

Print Title: Business Development Mgr.

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

Date Signed: MAY 2, 2019

Fed. Tax ID No: 1419-6719