

**STATE OF NEW MEXICO**

**GALLUP ELECTRIC UTILITY  
PROFESSIONAL SERVICES CONTRACT # \_\_\_\_\_  
For Energy Performance Contracting**

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STATE OF NEW MEXICO

**GALLUP ELECTRIC UTILITY**  
PROFESSIONAL SERVICES CONTRACT # \_\_\_\_\_  
**For Energy Performance Contracting**

THIS AGREEMENT is made and entered into by and between the **City of Gallup Electric Department, New Mexico**, hereinafter referred to as the "Agency," and **ENGIE Services U.S. Inc.**, hereinafter referred to as the "Contractor," and is effective as of the date set forth below.

**RECITALS**

WHEREAS, Agency owns and operates the Project Site(s), and is in need of energy and water cost saving equipment and services designed to save energy and associated energy costs at said Project Sites; and

WHEREAS, Agency has been authorized to enter into a third-party financing agreement for all professional services, equipment and construction for the purchase and installation of energy and water cost savings measures, collectively referred to as the "Work" (as hereinafter defined); and

WHEREAS, Contractor has developed or become knowledgeable about certain procedures for controlling energy and water consumption through services provided and equipment installed and maintained at project sites similar in scope and scale of Agency; and

WHEREAS, Contractor was selected after a determination that its proposal was the most advantageous to Agency pursuant to the Statewide Pricing Agreement for the Investment Grade Audit contract Audit and GSA Schedule 84 SIN 246-53 for Project Development Proposal (as hereinafter defined); and

WHEREAS, Contractor has made an assessment of the utility consumption characteristics of the Project Site(s) and existing Equipment described in Schedule Q (Description of Project Site(s)), which was delivered to Agency as an Investment-Grade Energy Audit Report which Agency has approved and is attached as Appendix D; and

WHEREAS, Agency desires to retain Contractor to purchase, install and service certain energy and water cost savings equipment and to provide other services and strategies described in the attached Schedules, for the purpose of achieving energy and water cost reductions within Project Site(s), as more fully described herein; and

WHEREAS, Agency is authorized under the New Mexico Constitution and state law, Chapter 6, Article 23, New Mexico Statutes Annotated (NMSA) 1978, to enter into this Contract for the purposes set forth herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Agency and Contractor hereto covenant and agree that the following Schedules, Exhibits and Appendices are attached hereto (or will be, as provided in this Contract) and are made a part of this Contract by reference.

IT IS AGREED BETWEEN THE PARTIES:

**1. Definitions.**

- A. “Commencement Date” means the date described in Section 6 (Commencement Date);
- B. “Contract” means this Energy Performance Contract and all Schedules, Exhibits, and Appendices attached hereto;
- C. “Contract Sum” means the sum of all materials, labor, auditing, design, engineering, project construction management fees, overhead, profit, contingency, subcontracted services related to the project;
- D. “Energy and Cost Savings Guarantee” means the guarantee of Schedule A (Savings Guarantee) that is achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract as specified in Schedule J (Compensation to Contractor for Annual Services) and in accordance with the Savings Calculation Formula as set forth in Schedule C (Savings Measurement and Verification (M&V) Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements);
- E. “Energy and Water Cost Savings” means the savings as provided in Schedule A (Savings Guarantee);
- F. “Equipment” means the material goods enumerated in Schedule R (Equipment to be Installed by Contractor) that is now, or hereafter from time to time, attached hereto and incorporated herein by reference, together and with any and all additions, modifications, attachments, replacements and parts thereof;
- G. “Event of Default” means those events described in Sections 65 (Events of Default by Contractor) and 64 (Events of Default by Agency) hereof;
- H. “Interim Period” means the period from contract execution until the Commencement Date;
- I. “Investment Grade Audit” means a study by the Contractor selected for a particular energy performance contracting project, which includes detailed descriptions of the improvements recommended for the project, the estimated costs of the improvements and the utility and operations and maintenance cost savings projected to result from the recommended improvements;
- J. “Project Site(s)” means the facilities of the Agency in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Project Site(s);
- K. “Qualified Provider” means the Contractor, who is a person experienced in the design, implementation and installation of energy or water conservation measures and who meets the experience qualifications developed by the Energy, Minerals and Natural Resources Department (EMNRD) for energy conservation measures or the Office of the State Engineer for water conservation measures;

L. “Substantial Completion” means the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that the Agency can utilize and take beneficial use of the Work for its intended use or purpose.

M. “Work” means the Equipment, materials, professional services and construction services for the project at Agency’s Project Site, as described by this Agreement and attachments.

**2. Scope of Work.**

Contractor shall:

A. perform and complete the Work at the Agency’s Project Site, as defined and described in this Agreement and the attached Schedules, Exhibits, and Appendices;

B. provide the Equipment, together with installation, maintenance and other services as provided herein, as in Schedule R (Equipment to be Installed by Contractor) based upon the terms and conditions set forth in Schedule S (Construction and Installation Schedule);

C. provide the Work and all related services identified in Schedule R (Equipment to be Installed by Contractor) and the services detailed in Schedule BB (Contractor’s Maintenance Responsibilities) and Schedule J (Compensation to Contractor for Annual Services);

D. supervise and direct the Work and shall be responsible for the engineering, design, and quality control; construction means, methods, techniques, sequences, and procedures; and for coordinating all portions of the Work under this Contract; and

E. comply with all federal, state, and local government laws, codes, and regulations in effect at the time the Agreement is fully executed.

**3. Compensation.**

A. The Agency shall pay to the Contractor in full payment for services satisfactorily performed pursuant to the Scope of Work at the rate of Two Million Three Hundred Forty-Eight Thousand Three Hundred Fifty-Nine and no/100 dollars (\$2,348,359.00) in FY2019-20. The New Mexico gross receipts tax levied on the amounts payable under this Agreement in FY2019-20 totaling One Hundred Seventy-Five Thousand Eight Hundred Sixty-Two and 41/100 dollars (\$175,862.41) shall be paid by the Agency to the Contractor. **The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed Two Million Five Hundred Twenty-Four Thousand Two Hundred Twenty-One and 41/100 dollars (\$2,524,221.41) in FY2019-20.**

	Price	GRT	Total
LED Street Lights	\$ 2,115,638.00	\$ 175,862.41	\$ 2,291,500.41
Contingency	\$ 211,565.00	Included	\$ 211,565.00
EMNRD fee	\$ 21,156.00	Included	\$ 21,156.00
<b>Total</b>	<b>\$ 2,348,359.00</b>	<b>\$ 175,862.41</b>	<b>\$ 2,524,221.41</b>

Payment in FY20, FY21, FYXX, and FYXX is subject to availability of funds pursuant to the

Appropriations Paragraph set forth below and to any negotiations between the parties from year to year pursuant to Paragraph 1, Scope of Work. All invoices MUST BE received by the Agency no later than fifteen (15) days after the termination of the Fiscal Year in which the services were delivered. Invoices received after such date WILL NOT BE PAID.

B. The total amount payable to the Contractor under this Agreement, including gross receipts tax and expenses, shall not exceed Two Million Five Hundred Twenty-Four Thousand Two Hundred Twenty-One and 41/100 dollars (\$2,524,221.41) as set forth in Schedule H (Final Project Cost & Project Cash Flow Analysis). This amount is a maximum and not a guarantee that the work assigned to the Contractor under this Agreement to be performed shall equal the amount stated herein. Payment terms are described in Schedule I (Financing Agreement and Payment Schedule).

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

#### **4. Term.**

A. This Agreement shall terminate on **October 31, 2029** unless terminated pursuant to paragraph 4, infra, or paragraph 5. In accordance with Section 13-1-150 NMSA 1978, no contract term for a professional services contract, including extensions and renewals, shall exceed four years, except as set forth in Section 13-1-150 NMSA 1978. An exception is that for contracts entered into pursuant to the Public Facility Energy Efficiency and Water Conservation Act (6-23 NMSA 1978), the term shall not exceed twenty-five years, including all extensions and renewals.

B. Subject to the following sentence, the term of this Contract shall be Twenty (20) years measured beginning with the Commencement Date. Nonetheless, the Contract shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the interim period will be fully credited to the Agency.

#### **5. Termination.**

A. Termination. This Agreement may be terminated by the Agency upon written notice delivered to the Contractor at least ten (10) days prior to the intended date of termination. By such termination, the Contractor may not nullify obligations already incurred for performance or failure to perform prior to the date of termination. Notwithstanding the foregoing, this Agreement may be terminated immediately upon written notice to the Contractor if the Contractor becomes unable to perform the services contracted for, as determined by the Agency or if, during the term of this

Agreement, the Contractor or any of its officers, employees or agents is indicted for fraud, embezzlement or other crime due to misuse of state funds or due to the Appropriations paragraph herein. THIS PROVISION IS NOT EXCLUSIVE AND DOES NOT WAIVE THE STATE'S OTHER LEGAL RIGHTS AND REMEDIES CAUSED BY THE CONTRACTOR'S DEFAULT/BREACH OF THIS AGREEMENT.

B. **Termination Management.** Immediately upon receipt by the Contractor of notice of termination of this Agreement, the Contractor shall: 1) not incur any further obligations for salaries, services or any other expenditure of funds under this Agreement without written approval of the Agency; 2) comply with all directives issued by the Agency in the notice of termination as to the performance of work under this Agreement; and 3) take such action as the Agency shall direct for the protection, preservation, retention or transfer of all property titled to the Agency and records generated under this Agreement. Any non-expendable personal property or equipment provided to or purchased by the Contractor with contract funds shall become property of the Agency upon termination and shall be submitted to the agency as soon as practicable.

**6. Commencement Date.**

A. The Commencement Date shall be the first day of the month after the month in which all schedules are in final form and accepted by Agency and Contractor shall have delivered a Notice to Agency that it has installed and commenced operating all of the Equipment specified in **Schedule R (Equipment to be Installed by Contractor)** and in accordance with the provisions of **Schedule S (Construction and Installation Schedule)** and **Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**; and Agency has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in **Exhibit VI (Agency Certificate of Acceptance—Installed Equipment)**.

B. Notwithstanding anything to the contrary in **Sections herein (Purchase and Sale; Commencement Date and Terms; Interim Period)**, the Commencement Date shall not occur and the Agency shall not be required to accept the work under this Contract unless and until all Equipment installation for the Project Site(s) is completed by Contractor in accordance with the terms and conditions of this Contract. Agency shall have 45 days after notification by the Contractor to inspect and accept the Equipment. Agency reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. Contractor shall not be paid in full, including retainage, until after the punch list is completed and Contractor has satisfied any and all claims for labor and materials and the Certificate of Acceptance has been signed. The Certificate of Acceptance will not be unreasonably withheld by the Agency.

C. Compensation payments due to Contractor for on-going services and maintenance under this Contract as set forth in **Schedule J (Compensation to Contractor for Annual Services)** shall begin no earlier than 60 from the Commencement Date as defined herein.

**7. Performance Measures.**

Contractor shall substantially perform the following Agency Performance Measures:

- A. Reduce electric energy use across the Street Light System in the program by an aggregate of 55%
- B. Increase the Street light fixture equipment life by 500%, with a concurrent reduction in replacement fixture cost and labor.
- C. Improve the Street light System Asset management program by an aggregate of 20%

Agency Performance Measures documentation is provided as Attachment I.

**8. Contractor is Qualified Provider.**

Contractor is certified as a Qualified Provider by EMNRD to perform the Work, pursuant to Sections 6-23-2E and 6-23-5 NMSA 1978 and as shown by Exhibit III (EMNRD Certification of Contractor as Qualified Provider).

**9. Investment-Grade Energy Audit Report and Project Development Proposal.**

Contractor has provided the complete Investment-Grade Energy Audit Report and Project Development Proposal of the Project Site(s), as set forth in Appendix D (Investment-Grade Energy Audit and Project Proposal Contract) and dated March 20, 2019. The Investment-Grade Energy Audit Report includes all energy conservation measures agreed upon by Agency and Contractor for implementation in the Work. The guaranteed energy savings of energy conservation measures stated in the Investment-Grade Energy Audit Report appear to be accurately estimated and reasonable and are certified by EMNRD, as shown in Exhibit IV (EMNRD Certification of Guaranteed Energy Savings).

**10. Schedules, Exhibits and Appendices.**

Contractor has provided and Agency has approved the following Schedules, Exhibits and Appendices, copies of which are attached hereto (or will be as provided for in the Contract), set forth in their entirety as Attachment II and made a part of this Contract by reference.

A. Schedules

Savings Guarantee

- Schedule A Energy and Cost Savings Guarantee
- Schedule B Baseline Energy Consumption; Methodology to Adjust Baseline
- Schedule C Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements
- Schedules D-G *[optional schedules]*

Payments and Schedule

- Schedule H Final Project Cost & Project Cash Flow Analysis
- Schedule I Financing Agreement and Payment Schedule
- Schedule J Compensation to Contractor for Annual Services



- Appendix B Contractor Proposal (Pre-qualification Phase; Final Selection Phase)
- Appendix C Investment-Grade Energy Audit and Project Development Contract
- Appendix D Investment-Grade Energy Audit Report

**11. Purchase and Sale.**

A. Agency agrees to lease Equipment through a third-party financier, **Sterling National Bank (LENDER)**, as provided for in a separate lease document, Schedule I (Financing Agreement and Payment Schedule).

B. Contractor shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work.

**12. Energy Usage Records and Data.**

Agency has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract to Contractor or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance for the Project Site(s).

**13. Location and Access.**

Contractor acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Agency shall take reasonable steps to protect such Equipment from harm, theft and misuse during the term of this Contract. Agency shall provide access to the Project Site(s) for Contractor to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by Contractor and acceptable to the Agency. Contractor shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The Contractor's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Agency. Contractor shall immediately notify the Agency when emergency action is taken and follow up with written notice within three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Project Site(s), if any.

**14. Permits and Approvals.**

Agency shall use its best efforts to assist Contractor in obtaining all necessary permits and approvals for installation of the Equipment. In no event shall Agency, however, be responsible for payment of any permit fees. The equipment and the operation of the equipment by Contractor shall at all times conform to all federal, state and local code requirements. Contractor shall furnish copies of each permit or license which is required to perform the work to the Agency before the Contractor commences the portion of the work requiring such permit or license.

**15. Coordination During Installation.**

The Agency and Contractor shall coordinate the activities of Contractor's equipment installers with those of the Agency, its employees, and agents. Contractor shall not commit or permit any act which will interfere with the performance of business activities conducted by the Agency or its employees without prior written approval of the Agency.

**16. Construction Schedule; Equipment Installation.**

Construction and equipment installation shall proceed in accordance with the construction schedule approved by Agency and attached as Schedule S (Construction and Equipment Installation Schedule).

**17. Systems Startup and Equipment Commissioning.**

The Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment) and prior to acceptance of the project by the Agency as specified in Exhibit VI (Certificate of Acceptance—Installed Equipment). Testing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The Contractor shall provide notice to the Agency of the scheduled test(s) and the Agency and/or its designees shall have the right to be present at any or all such tests conducted by Contractor and/or manufacturers of the Equipment. The Contractor shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures as specified in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment). The Contractor shall be responsible for correcting and/or adjusting all deficiencies in Equipment operation that may be observed during system testing procedures. Prior to Agency acceptance Contractor shall also provide Agency with reasonably satisfactory documentary evidence that the Equipment installed is the Equipment specified in Schedule R (Equipment to be Installed by Contractor).

**18. Equipment Warranties.**

A. Contractor warrants that all equipment sold and installed as part of this Contract is new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of at least one (1) year from the date of the Substantial Completion for the particular energy conservation measure, if operated and maintained in accordance with the procedures established per building. Substantial Completion does not occur until the Equipment or system has been commissioned, accepted, and Exhibit V (Notice of Substantial Completion) is fully executed.

B. After the warranty period, Contractor shall have no responsibility for performing maintenance, repairs, or making manufacturer warranty claims relating to the Equipment, except as provided in Schedule BB (Contractor's Maintenance Responsibilities).

C. Contractor further agrees to assign to Agency all available manufacturer's warranties relating to the Equipment and to deliver such written warranties and which shall be attached and set forth as Exhibit VII (Equipment Warranties); pursue rights and remedies against the manufacturers under the warranties in the event of Equipment malfunction or improper or defective function, and defects in parts, workmanship and performance. Contractor shall, during the warranty period, notify the Agency whenever defects in Equipment parts or performance occur, which give rise to such rights and remedies and those rights and remedies are exercised by Contractor. During this period, the cost of any risk of damage or damage to the Equipment and its performance, including damage to property and equipment of the Agency or the Project Site(s), due to Contractor's failure to exercise its warranty rights, shall be borne solely by Contractor.

D. All warranties, to the extent transferable, shall be transferable and extend to the Agency. The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction. All extended warranties shall be addressed as the property of the owner and appropriately documented and titled.

E. Notwithstanding the above, nothing in this Section shall be construed to alleviate/relieve the Contractor from complying with its obligations to perform under all terms and conditions of this Contract and as set forth in all attached Schedules.

**19. Standards of Comfort.**

Contractor shall maintain and operate the Equipment in a manner which will provide the standards of heating, cooling, ventilation, hot water supply, and lighting quality and levels as described in Schedule U (Standards of Comfort). During the term of this Contract, Contractor and Agency will maintain, according to Schedule BB (Contractor's Maintenance Responsibilities) and Schedule CC (Agency's Maintenance Responsibilities), and operate the Equipment in a manner that will provide the standards of comfort and levels of operation as described in Schedule U (Standards of Comfort).

**20. Environmental Requirements, Excluded Material and Activities.**

Agency recognizes that in connection with the installation and/or service or maintenance of Equipment at Agency's Project Site(s), Contractor may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof; (ii) fungus (any type of form of fungi, including mold or mildew, and mycotoxins, spores, scents or by-products produced or released by fungi); (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement; or (iv) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities." Agency agrees that if performance of work involves any Excluded Materials and Activities, Agency will perform or arrange for the performance of such work and shall bear the sole risk and responsibility therefore. In the event Contractor discovers Hazardous or Excluded Materials, Contractor shall immediately cease work, remove all Contractor personnel or

subcontractors from the site, and notify the Agency. The Agency shall be responsible to handle such Materials at its expense. Contractor shall undertake no further work on the Project Site(s) except as authorized by the Agency in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Agency shall not constitute a default by the Agency. In the event of such stoppage of work by Contractor, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by Contractor as a result will be added by Change Order.

Contractor shall be responsible for any hazardous or other materials, including, without limitation, those listed in this section that it may bring to the Project Site(s).

**21. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps.**

A. Contractor shall enter into an agreement with an approved PCB ballast disposal company that will provide an informational packet, packing receptacles and instructions, labels and shipping materials, transportation, and recycling or incineration services for PCB ballasts. All capacitors and asphalt potting compound materials removed from Agency's PCB ballasts will be incinerated in a federally approved facility. After proper disposal, a Certificate of Destruction will be provided by the approved facility to Agency. Contractor's responsibility shall be for the proper and legal management of any of Agency's PCB ballasts removed as a result of the installation of the Equipment and shall be limited only until said PCB ballasts are loaded onto an approved PCB ballast disposal Contractor's vehicle for transportation.

B. Contractor shall enter into an agreement with an approved lamp disposal company, who will provide approved containers, materials required to label, transportation, recycling or incineration in accordance with EPA requirements, and a copy of the manifest.

C. Agency agrees to sign manifests of ownership for all PCB ballasts and mercury lamps removed from the Project Site(s).

**22. Training by Contractor.**

The Contractor shall conduct the training program described in Schedule V (Contractor's Training Responsibilities) hereto. The must be completed prior to acceptance of the Equipment installation. The Contractor shall provide ongoing training whenever needed with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to the Agency and shall have no effect on prior acceptance of Equipment installation.

**23. Equipment Service, Actions by Contractor.**

Contractor shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Contract pursuant to Schedule BB (Contractor's Maintenance Responsibilities). Agency shall incur no cost for Equipment service, repairs, and adjustments, except as set forth in Schedule J (Compensation to Contractor for Annual Services), provided, however, that when the need for

maintenance or repairs principally arises due to the negligence or willful misconduct of the Agency or any employee or other agent of Agency, and Contractor can so demonstrate such causal connection, Contractor may charge Agency for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

**24. Malfunctions and Emergencies.**

A. Agency shall use its best efforts to notify the Contractor or its designated subcontractors within 24 hours after the Agency's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings, (ii) any interruption or alteration to the energy supply to the Project Site(s), or (iii) any alteration or modification in any energy-related equipment or its operation.

B. Where Agency exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions as having a material impact upon the guaranteed energy savings. Agency shall notify Contractor within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. Contractor shall respond or cause its designee(s) to respond within 72 hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by Agency shall be followed within three business days by written notice to Contractor from Agency. If Agency unreasonably delays in so notifying Contractor of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, Contractor may charge Agency for its loss, due to the delay, associated with the guaranteed savings under this Contract for the particular time period, provided that Contractor is able to show the direct causal connection between the delay and the loss.

C. The Contractor shall provide a written record of all service work performed. This record will indicate the reason for the service, description of the problem and the corrective action performed.

**25. Actions by Agency.**

Agency shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of Contractor except as set forth in Schedule CC (Agency's Maintenance Responsibilities). Notwithstanding the foregoing, Agency may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify Contractor before taking any such actions. In the event of such an emergency, Agency shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by Contractor. Agency agrees to maintain the Project Site(s) in good repair and to protect and preserve all portions thereof which may in any way affect the operation or maintenance of the Equipment.

**26. Modification of Equipment.**

During the Term of this Contract, Agency will not, without the prior written consent of Contractor, affix or install any accessory Equipment or device on any of the Equipment if such addition will change or impair the originally intended functions, value or use of the Equipment without Contractor's prior written approval, which shall not be unreasonably withheld.

**27. Upgrade or Alteration of Equipment.**

A. Contractor shall at all times have the right, subject to Agency's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions in the Project Site(s), provided that: (i) the Contractor complies with the standards of comfort and services set forth in Schedule U (Standards of Comfort) herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the Contractor to achieve the guaranteed energy and cost savings at the Project Site(s) and; (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the Contractor.

B. All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Agency for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. The Contractor shall have the right to update any and all software to be used in connection with the Equipment in accordance with the provisions of Section 41 (Ownership of Certain Proprietary Rights) and Schedule BB (Contractor's Maintenance Responsibilities). All replacements of and alterations or additions to the Equipment shall become part the Equipment described in Schedule R (Equipment to be Installed by Contractor) and shall be covered by the provisions and terms of **Section 16 (Construction Schedule; Equipment Installation)**.

**28. Material Change Defined.**

A. A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Agency, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) by at least 2% after adjustments for climatic variations.

B. Actions by the Agency which may result in a Material Change include, but are not limited to, the following:

- i) manner of use of the Project Site(s) by the Agency; or
- ii) hours of operation for the Project Site(s) or for any equipment or energy using systems operating at the Project Site(s); or
- iii) Permanent changes in the comfort and service parameters set forth in Schedule U (Standards of Comfort); or

- iv) occupancy of the Project Site(s); or
- v) structure of the Project Site(s); or
- vi) types and quantities of equipment used at the Project Site(s) or
- vii) modification, renovation or construction at the Project Site(s); or
- viii) the Agency's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule CC (Agency's Maintenance Responsibilities); or
- ix) any other conditions other than climate affecting energy use at the Project Site(s) including but not limited to the replacement, addition or removal of energy and water consuming devices whether plug in or fixed assets,
- x) casualty or condemnation of the Project Site(s) or Equipment, or
- xi) changes in utility provider or utility rate classification, or
- xii) any other conditions other than climate affecting energy or water use at the Project Site(s).
- xiii) Modifications, alterations or overrides of the energy management system schedules or hours of operation, set back/start up or holiday schedules.

**29. Reported Material Changes; Notice by Agency.**

The Agency shall use its best efforts to deliver to the Contractor a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) at least 30 days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the Contractor of Material Changes which results because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Agency within 72 hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Agency to have occurred.

**30. Other Adjustments.**

As agreed in **Section 29 (Reported Material Changes; Notice by Agency)** Agency will alert Contractor of materials changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, the Contractor shall work with Agency to investigate, identify and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, Contractor and Agency shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Schedule B (Baseline Energy Consumption; Methodology to Adjust Baseline) and Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). Any disputes between the Agency and the Contractor concerning any such adjustment shall be resolved in accordance with the provisions of Schedule JJ (Alternative Dispute Resolution Procedures) hereto.

**31. Corrective Action; Accuracy of the Services.**

A. Contractor shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Schedule U (Standards of Comfort) and the construction schedule specified in Schedule S (Construction and Installation

Schedule). Contractor shall repair and restore to its original condition any area of damage caused by Contractor's performance under this Contract. The Agency reserves the right to review the work performed by Contractor and to direct Contractor to take certain corrective action if, in the opinion of the Agency, the structural integrity of the Project Site(s) or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by Contractor's performance of the work shall be borne by Contractor.

B. Contractor shall remain responsible for the professional and technical accuracy of all services performed, whether by the Contractor or its subcontractors or others on its behalf, throughout the term of this Contract.

**32. Annual Reporting Requirements; Annual ENERGY STAR Rating.**

At the end of each year during the guarantee period as specified in Schedule A (Savings Guarantee) and no later than ninety (90) days thereafter, the Contractor shall complete and submit the data required in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Contractor shall provide an ENERGY STAR rating for each eligible facility for each year of the guarantee period if applicable. Note: Street Light Systems currently are not part of the Energy Star Rating System. Individual lamps and fixtures may be Energy Star rated but the installed systems are not.

**33. Other Documents.**

This Contract incorporates herein and makes a part hereof the entire Request for Proposal and Project Development Proposal, labeled Appendix A and B, respectively. Notwithstanding, the provisions of this Contract and the attached Schedules, Exhibits and Appendices shall govern in the event of any inconsistencies between the Investment-Grade Energy Audit Report and the provisions of this Contract.

**34. Energy and Cost Savings Guarantee.**

Contractor has formulated and, subject to the adjustments provided for in Sections 28, 29 and 30 (Material Changes), has guaranteed the annual level of energy and water cost savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Contract in accordance with the methods of savings measurement and verification as set forth in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements). The Energy and Cost Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Schedule A (Savings Guarantee) and has been structured by the Contractor to be sufficient to cover any and all annual payments required to be made by the Agency as set forth in Schedule J (Compensation to Contractor for Annual Services) and Schedule I (Financing Agreement and Payment Schedule).

**35. Annual Review and Reimbursement/Reconciliation.**

A. Energy-related cost savings shall be measured and/or calculated as specified in Schedule C (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements) and a report provided within ninety (90) days of the end of the year for the previous year for each anniversary of the Commencement Date.

B. Annual savings shall exceed annual payments each and every year while this Contract is in effect. In the event the Energy and Cost Savings achieved during such guarantee year are less than the Guaranteed Energy and Cost Savings as defined in Schedule A (Savings Guarantee), Contractor shall pay the Agency an amount equal to the deficiency.

C. The Contractor shall remit such payments to the Agency within 60 days of written notice by the Agency of such monies due. Such excess savings will be retained by Agency and will not be allocated to shortfalls in savings in other years. In no event shall credit for excess savings be used to satisfy saving guarantees in any other year(s) of the Contract.

**36. Contractor Compensation and Fees.**

Contractor has structured the Energy and Cost Savings Guarantee referred to in Section 34 above, to be sufficient to include any and all annual payments required to be made by the Agency in connection with financing/purchasing the Equipment to be installed by Contractor under this Contract as set forth in Schedule I (Financing Agreement and Payment Schedule). Actual energy and operations savings achieved by Contractor through the operation of Equipment and performance of services by Contractor shall be sufficient to cover any and all annual fees to be paid by Agency to Contractor for the provision of services as set forth and in accordance with the provisions of Schedules J (Compensation to Contractor) and BB (Contractor's Maintenance Responsibilities).

**37. Billing Information Procedure.**

A. Payments due to Contractor shall be calculated each month of the construction period/Interim Period in the following manner:

i) By the 30th day after receipt, Agency shall pay Contractor the amounts invoice as supported by the schedule of values and inspections of equipment purchased, stored, and installed.

**38. Payment.**

Agency shall pay Contractor within 30 days of receipt of Contractor's invoice.

**39. Effective Date of Payment Obligation.**

Notwithstanding the above provisions, Agency shall not be required to begin any payments to Contractor under this Contract unless and until all equipment installation is completed by Contractor in accordance with the provisions of Section 16 (Construction Schedule; Equipment Installation) and Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment), and accepted by Agency as evidenced by the signed Certificate of Acceptance as set forth in Exhibit

VI (Certificate of Acceptance—Installed Equipment), and unless and until said equipment is fully and properly functioning.

**40. Open Book Pricing.**

Open book pricing will be required, such that the Contractor shall fully disclose all costs of materials and labor purchased and subcontracted by the Contractor and a list of hourly rates and position descriptions for labor or services provided by the Contractor. Estimates for number of hours required for the project and deviations of these budgeted hours shall require prior written approval by the owner or shall not be paid. Contractor shall maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. Contractor shall afford Agency access to these records and preserve them for a period of three (3) years after final payment. Costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices or historical prices. The pricing methodology and individual cost markups disclosed during preliminary contract negotiations will be expected to be applied, providing the scope and size of the project remain the same as assumed when markups were disclosed.

**41. Ownership of Certain Proprietary Property Rights.**

Agency shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. The Contractor shall grant to the Agency a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for the Agency to continue to operate, maintain, and repair the Equipment in a manner that will yield guaranteed utility consumption reductions for the specified contract term. Contractor shall not be liable for providing new versions of software or other enhancements if or unless such new versions or enhancements are necessary to achieve the guaranteed utility consumption reductions.

**42. Ownership of Existing Equipment.**

Ownership of the equipment and materials presently existing at the Project Site(s) at the time of execution of this Contract shall remain the property of the Agency even if it is replaced or its operation made unnecessary by work performed by Contractor pursuant to this Contract. If applicable, Contractor shall advise the Agency in writing of all equipment and materials to be replaced at the Project Site(s) and the Agency shall within 30 days designate in writing to the Contractor which equipment and materials that should not be disposed of off-site by the Contractor. It is understood and agreed to by both Parties that the Agency shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The Contractor shall be responsible for the disposal of all equipment and materials designated by the Agency as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

**43. Damages to Equipment or Property.**

Contractor shall be responsible for (i) any damage to the Equipment or other property on the Project Site(s) and (ii) any personal injury where such damage or injury occurs as a result of Contractor's performance under this Contract.

**44. Liabilities.**

Neither party shall be liable for any special, incidental, indirect, punitive or consequential damages, arising out of or in connection with this Contract. Further, the liability of either party under this Contract shall not exceed the Contract Sum in the aggregate.

**45. Appropriations.**

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate on the last day of the fiscal year for which appropriations were made, without penalty or expense to the Agency of any kind whatsoever, except as to the portions of payments herein agreed upon for which Agency and/or other funds shall have been appropriated and budgeted or are otherwise available, and upon written notice being given by the Agency to the Contractor. The Agency's decision as to whether sufficient appropriations are available shall be accepted by the Contractor and shall be final. If the Agency proposes an amendment to the Agreement to unilaterally reduce funding, the Contractor shall have the option to terminate the Agreement or to agree to the reduced funding, within thirty (30) days of receipt of the proposed amendment.

**46. Status of Contractor.**

The Contractor and its agents and employees are independent contractors performing professional services for the Agency and are not employees of the State of New Mexico. The Contractor and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of state vehicles, or any other benefits afforded to employees of the State of New Mexico as a result of this Agreement. The Contractor acknowledges that all sums received hereunder are reportable by the Contractor for tax purposes, including without limitation, self-employment and business income tax. The Contractor agrees not to purport to bind the State of New Mexico unless the Contractor has express written authority to do so, and then only within the strict limits of that authority.

**47. Subcontracting.**

The Contractor shall not subcontract any portion of the services to be performed under this Agreement without the prior written approval of the Agency.

**48. Release.**

Final payment of the amounts due under this Agreement shall operate as a release of the Agency, its officers and employees, and the State of New Mexico from all liabilities, claims and obligations whatsoever arising from or under this Agreement.

**49. Confidentiality.**

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by the Contractor without the prior written approval of the Agency.

**50. Product of Service -- Copyright.**

All materials developed or acquired by the Contractor under this Agreement shall become the property of the State of New Mexico and shall be delivered to the Agency no later than the termination date of this Agreement. Nothing developed or produced, in whole or in part, by the Contractor under this Agreement shall be the subject of an application for copyright or other claim of ownership by or on behalf of the Contractor.

**51. Conflict of Interest; Governmental Conduct Act.**

The Contractor warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Contractor certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer or state employee or former state employee have been followed.

**52. Amendment.**

This Agreement shall not be altered, changed or amended except by instrument in writing executed by the parties hereto.

**53. Merger.**

This Agreement incorporates all the Agreements, covenants and understandings between the parties hereto concerning the subject matter hereof, and all such covenants, Agreements and understandings have been merged into this written Agreement. No prior Agreement or understanding, oral or otherwise, of the parties or their agents shall be valid or enforceable unless embodied in this Agreement.

**54. Penalties for violation of law.**

The Procurement Code, Sections 13-1-28 through 13-1-199, NMSA 1978, imposes civil and criminal penalties for its violation. In addition, the New Mexico criminal statutes impose felony penalties for illegal bribes, gratuities and kickbacks.

**55. Equal Opportunity Compliance.**

The Contractor agrees to abide by all federal and state laws and rules and regulations, and executive orders of the Governor of the State of New Mexico, pertaining to equal employment opportunity. In

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

**56. Applicable Law.**

The laws of the State of New Mexico shall govern this Agreement, without giving effect to its choice of law provisions. Venue shall be proper only in a New Mexico court of competent jurisdiction in accordance with Section 38-3-1 (G) NMSA 1978. By execution of this Agreement, Contractor acknowledges and agrees to the jurisdiction of the courts of the State of New Mexico over any and all lawsuits arising under or out of any term of this Agreement.

**57. Insurance.**

At all times during the term of this Contract, Contractor shall maintain in full force and effect, at its expense: (1) Workmen's Compensation Insurance sufficient to cover all of the employees of (Contractor) working to fulfill this Contract, and (2) Casualty and Liability Insurance on the Equipment and Liability Insurance for its employees and the possession, operation, and service of the Equipment. The limits of such insurance shall be not less than \$1,000,000.00 for injury to or death of one person in a single occurrence and \$1,000,000.00 for injury to or death of more than one person in a single occurrence and \$1,000,000.00 for a single occurrence of property damage. Such policies shall name the Agency as an additional insured.

Prior to commencement of work under this Contract, Contractor will be required to provide Agency with current certificates of insurance specified above. These certificates shall contain a provision that coverages afforded under the policies will not be canceled or changed until at least thirty (30) days' prior written notice has been given to Agency.

**58. Workers Compensation.**

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

**59. Records and Financial Audit.**

The Contractor shall maintain detailed time and expenditure records that indicate the date; time, nature and cost of services rendered during the Agreement's term and effect and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Agency, the Department of Finance and Administration and the State Auditor. The Agency shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Agency to recover excessive or illegal payments

**60. Indemnification.**

The Contractor shall defend, indemnify and hold harmless the Agency and the State of New Mexico from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Contractor, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Contractor resulting in injury or damage to persons or property during the time when the Contractor or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement. In the event that any action, suit or proceeding related to the services performed by the Contractor or any officer, agent, employee, servant or subcontractor under this Agreement is brought against the Contractor, the Contractor shall, as soon as practicable but no later than two (2) days after it receives notice thereof, notify the legal counsel of the Agency and the Risk Management Division of the New Mexico General Services Department by certified mail.

**61. Invalid Term or Condition.**

If any term or condition of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be valid and enforceable.

**62. Enforcement of Agreement.**

A party's failure to require strict performance of any provision of this Agreement shall not waive or diminish that party's right thereafter to demand strict compliance with that or any other provision. No waiver by a party of any of its rights under this Agreement shall be effective unless express and in writing, and no effective waiver by a party of any of its rights shall be effective to waive any other rights.

**63. Conditions Beyond Control of The Parties.**

If a party ("performing party") shall be unable to reasonably perform any of its obligations under this Contract due to acts of God, insurrections or riots, or similar events, this Contract shall at the other party's option (i) remain in effect but said performing party's obligations shall be suspended until the said events shall have ended; or, (ii) be terminated upon ten (10) days' notice to the performing party, in which event neither party shall have any further liability to the other.

**64. Events of Default by Agency.**

A. Each of the following events or conditions shall constitute an "Event of Default" by Agency:

i) any failure by Agency to pay Contractor any sum due for a service and maintenance period of more than 90 days after written notification by Contractor that Agency is delinquent in making payment and provided that Contractor is not in default in its performance under the terms of this Contract; or

ii) any other material failure by Agency to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for 90 days after notice to Agency demanding that such failures to perform be cured

or if such cure cannot be effected in 90 days, Agency shall be deemed to have cured default upon the commencement of a cure within 30 days and diligent subsequent completion thereof;

iii) any representation or warranty furnished by Agency in this Contract which was false or misleading in any material respect when made.

**65. Events of Default by Contractor.**

A. Each of the following events or conditions shall constitute an "Event of Default" by Contractor:

i) the standards of comfort and service set forth in Schedule U (Standards of Comfort) are not provided due to failure of Contractor to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within 45 days after written notice by Agency to Contractor demanding that such failure be cured, shall be deemed cured for purposes of this Contract.

ii) any representation or warranty furnished by Contractor in this Contract is false or misleading in any material respect when made;

iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in Schedule R (Equipment to be Installed by Contractor) and Schedule S (Construction and Installation Schedule);

iv) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in Schedule U (Standards of Comfort) are maintained, any failure by Contractor to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within 45 days after written notice by the Agency to Contractor demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;

v) any lien or encumbrance upon the equipment by any subcontractor, laborer or material vendor of Contractor;

vi) the filing of a bankruptcy petition whether by Contractor or its creditors against Contractor which proceeding shall not have been dismissed within 90 days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of Contractor.

vii) failure by the Contractor to pay any amount due the Agency or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in Schedule A (Savings Guarantee).

**66. Remedies upon Default by Agency.**

If an Event of Default by Agency occurs, Contractor may, without a waiver of other remedies which exist in law or equity, exercise any remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Agency, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy.

**67. Remedies Upon Default by Contractor.**

In the Event of Default by Contractor, Agency may exercise any remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred, including attorney's fees.

**68. Assignment.**

The Contractor shall not assign or transfer any interest in this Agreement or assign any claims for money due or to become due under this Agreement without the prior written approval of the Agency.

**69. Assignment by Contractor.**

The Contractor may, with prior written approval of the Agency, which consent shall not be unreasonably withheld, delegate its duties and performance under this Contract, and/or utilize Contractors, provided that any assignee(s), delegee(s), or Contractor(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, the Contractor shall remain jointly and severally liable with its assignees(s), or transferee(s) to the Agency for all of its obligations under this Contract.

**70. Assignment by Agency.**

Agency may transfer or assign this Contract and its rights and obligations herein to a successor or purchaser of the Buildings or an interest therein. The Agency shall remain jointly and severally liable with its assignees or transferees to the Contractor for all of its obligations under this Contract.

**71. Representations and Warranties.**

- A. Each party warrants and represents to the other that:
- i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;
  - ii) its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its organic instruments, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;
  - iii) its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or
  - iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

**72. Additional Representations of the Parties.**

- A. Agency hereby warrants, represents and promises that:
- i) it has provided or shall provide timely to Contractor, all records relating to

energy usage and energy-related maintenance of Project Site(s) requested by Contractor and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract will be true and accurate in all material respects; and

ii) it has not entered into any leases, contracts or Contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Project Site(s) or with regard to servicing any of the energy related equipment located in the Project Site(s). Agency shall provide Contractor with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Project Site(s) which may be executed from time to time hereafter within 30\_ days after execution thereof.

B. Contractor hereby warrants, represents and promises that before commencing performance of this Contract:

- i) it shall have become licensed or otherwise permitted to do business in the State of New Mexico.
- ii) it shall have provided proof and documentation of required insurance and bonds pursuant to this Contract;
- iii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- iv) it shall use qualified subcontractors who are qualified, licensed and bonded in this state to perform the work so subcontracted pursuant to the terms hereof;
- v) the Equipment will meet or exceed the provisions set forth in Section 17 (Systems Start Up and Equipment Commissioning) and in Schedule T (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment).
- vi) the Equipment is or will be compatible with all other Project Site(s) mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation;
- vii) it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

**73. Construction Performance and Payment Bonds, Labor and Material Payment Bonds.**

Such executed bonds are incorporated herein by reference as **Exhibit I (Performance Bond)** and **Exhibit II (Labor and Material Payment Bond, if applicable)**.

**74. Further Documents.**

The parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Contract.

**75. Methods of Operation by Agency.**

The parties acknowledge and agree that said Energy and Cost Savings would not likely be obtained unless certain procedures and methods of operation designed for energy and water conservation shall be implemented, and followed by Agency on a regular and continuous basis.

**76. Agency's Maintenance Responsibilities.**

Agency agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule CC (Agency Maintenance Responsibilities), to be attached hereto and made a part hereof after Agency's approval, such approval not to be unreasonably withheld, conditioned or delayed.

**77. Inspection of Project Site(s).**

Agency agrees that Contractor shall have the right once a month, with prior notice, to inspect Project Site(s) to determine if Agency is complying, and shall have complied with its obligations as set forth in **Section 76 (Agency's Maintenance Responsibilities)**. For the purpose of determining Agency's said compliance, the checklist to be set forth at **Schedule DD (Facility Maintenance Checklist)** as completed and recorded by Contractor during its monthly inspections, shall be used to measure and record Agency's said compliance. Agency shall make the Project Site(s) available to Contractor for and during each monthly inspection, and shall have the right to witness each inspection and Contractor's recordation on the checklist. Agency may complete its own checklist at the same time. Contractor agrees to not interfere with the Agency operations during any monthly inspection.

**78. Waiver of Liens.**

Contractor shall obtain and furnish to Agency a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment.

**79. Conflicts of Interest.**

Conflicts of interest relating to this Contract are strictly prohibited. Except as otherwise expressly provided herein, neither party hereto nor any director, employee or agent of any party hereto shall give to or receive from any director, employee or agent of any other party hereto any gift, entertainment or other favor of significant value, or any commission, fee or rebate in connection with this Contract. Likewise, neither party hereto nor any director, employee or agent of either party hereto, shall without prior notification thereof to the other party enter into any business relationship with any director, employee or agent of the other party or of any affiliate of the other party, unless such person is acting for and on behalf of the other party or any such affiliate. A party shall promptly notify the other party of any violation of this section and any consideration received as a result of such violation shall be paid over or credited to the party against whom it was charged. Any representative of any party, authorized by that party, may audit the records of the other party related to this Contract, upon reasonable notice and during regular business hours including the expense records of the party's employees involved in this Contract, upon reasonable notice and during regular business hours, for the sole purpose of determining whether there has been compliance with this section.

**80. Notices.**

Any notice required to be given to either party by this Agreement shall be in writing and shall be delivered in person, by courier service or by U.S. mail, either first class or certified, return receipt requested, postage prepaid, as follows:

<p><b>To the Agency:</b>                  Gallup Electric Utility                  110 W Aztec Avenue                  Gallup, NM 87301                  Attn: John Wheeler, Director                  JWheeler@Gallup.nm.gov</p>	<p><b>To the Contractor:</b>                  Engie Services U.S. Inc.                  2600 American Road SE, Suite 360                  Rio Rancho, NM 87124                  Attn: David Frederick, VP                  David.Frederick@Engie.com</p>
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**81. Non-Substitution.**

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by Contractor due to a default by the Agency, the Agency agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by Contractor under the terms of this Contract for a period of three-hundred sixty five (365) calendar days following such default by Agency, or termination of this Contract due to non-appropriations.

**82. Authority.**

If Contractor is other than a natural person, the individual(s) signing this Agreement on behalf of Contractor represent and warrant that he or she has the power and authority to bind Contractor, and that no further action, resolution, or approval from Contractor is necessary to enter into a binding contract. (I've encountered some situations where there was a question whether the person signing had authority; having the contractor assure the agency the person signing has authority creates an argument the agency has no obligation to check.

**IN WITNESS WHEREOF, the parties have executed this Agreement as of the date of signature by the DFA Contracts Review Bureau below.**

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

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

By: \_\_\_\_\_  
 Agency's Legal Counsel –Certifying legal sufficiency

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

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

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

The records of the Taxation and Revenue Department reflect that the Contractor is registered with the Taxation and Revenue Department of the State of New Mexico to pay gross receipts and compensating taxes.

ID Number: **01-813920-005**

By: \_\_\_\_\_  
Gallup Electric Utility

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

This Agreement has been approved by the DFA Contracts Review Bureau:

By: \_\_\_\_\_  
DFA Contracts Review Bureau

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