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GUARANTEED ENERGY AND WATER PERFORMANCE SAVINGS CONTRACT

By and Between

CITY OF FORT PIERCE, FLORIDA

and

BGA, INC.

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GUARANTEED ENERGY AND WATER  
PERFORMANCE SAVINGS CONTRACT

This Guaranteed Energy and Water Performance Savings Contract (this “Contract”) is made and entered into as of the day last signed below, at \_\_\_\_\_, in the County of \_\_\_\_\_, State of Florida, by and between BGA, Inc. (“Company”), having its principal offices at 3101 W. Dr. Martin Luther King Jr. Boulevard, Suite 110, Tampa, Florida 33607, and The City of Fort Pierce, Florida (“City”) with its principal offices at 100 N. US 1, Fort Pierce, Florida 34950, for the purpose of installing certain equipment, and providing other services designed to reduce energy or water consumption or energy-related operating costs for the City.

**RECITALS**

WHEREAS, Pursuant to RFQ No. 6052, Energy Savings Procurement Contracting, the City solicited proposals from qualified Energy Services Companies, (“ESCOs”) qualified by the Florida Department of Management Services, to design, install, maintain, and monitor a large-scale comprehensive energy-conservation program; and

WHEREAS, Company was selected by the City under the competitive selection process as the ESCO to perform the energy and water conservation services described in the RFQ; and

WHEREAS, Company was selected by the City specifically to perform an Investment Grade Energy Audit (“IGA”) for the City with the goal of developing an Energy Savings Performance Contract for the City; and

WHEREAS, the objective of the IGA was to define a turnkey Project, with guaranteed costs and savings that would be comprised of Energy Conservation Measures (“ECMs”) that in sum will generate the energy and operational cost savings necessary to fund the Project; and

WHEREAS, City obtained from Company an Audit that (i) recommends certain Conservation Measures at the Facilities, (ii) summarizes the costs of those Conservation Measures, and (iii) provides an estimate of the amount of cost savings resulting from those Conservation Measures; and

WHEREAS, City finds that the amount it would spend on the Conservation Measures will not likely exceed the amount of the cost savings for up to twenty (20) years after the date of installation, based on the calculations required under the Guaranteed Energy, Water, and Wastewater Performance Savings Contracting Act (“the Act”); and

WHEREAS, Company gives a written guarantee that the cost savings will meet or exceed the costs of the Project and the actual cost savings will meet or exceed the estimated cost savings provided in the executed Contract; and

WHEREAS, all selection criteria, notice requirements, certifications and approvals set forth in the Act have been satisfied or obtained; and

WHEREAS, Company has made an assessment of the energy and water performance characteristics of the Facilities and existing equipment described in Schedule A, which City has approved; and

WHEREAS, the Parties desire that Company install the Conservation Measures at the Facilities in accordance with and subject to the terms set forth in this and

WHEREAS, Consolidated Edison Solutions, Inc., will guarantee the performance of certain payment obligations of the Company under this Contract pursuant to a corporate guarantee agreement executed concurrently herewith.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, City and Company agree as follows:

## **SECTION 1. DEFINITIONS**

**Section 1.1. Definitions.** The following terms have the meanings specified below unless the context clearly requires otherwise:

**“Annual Excess Savings”** means the amount of any actual annual Cost Savings that exceeds the total annual contract payments made by County under this Contract for such calendar year pursuant to § 489.145(3)(d)(2), Florida Statutes.

**“Annual Reconciliation”** means a determination pursuant to § 489.145(5)(e), Florida Statutes, and Section 5.3 of this Contract, as to whether a shortfall in annual Cost Savings or an excess in annual Cost Savings exists based on the provisions of Company’s written savings guarantee reflected in Schedule C (Savings Guarantee) with savings calculated according to Schedule E (Savings Calculation Formula).

**“Baseline”** means County’s energy or water consumption for the CM. The initial Baseline shall be for each month of the calendar year preceding the year this Contract is entered and is set forth in Schedule G (Baseline). To the extent the Baseline may be adjusted, it shall be adjusted in accordance with Schedule G.

**“City”** means the City of Fort Pierce, Florida, the governmental entity which has entered into this Contract, or any governmental entity succeeding to the powers and duties of the City pursuant to law or governmental organization.

**“Commencement Date”** means, with respect to the Work, the first day of the calendar month after which all of the following events have occurred: (i) all schedules are in final form and accepted by City; (ii) Company has delivered a notice to City that it has completed the CMs in accordance with the provisions of Schedule F (Design, Construction and Installation Requirements and Schedule); and (iii) City has inspected and finally accepted said installation

and operation of all CMs and issued an executed Certificate of Acceptance as set forth in Exhibit III.

“**Company**” means BGA, Inc., the contractor identified in the first paragraph of this Contract.

“**Conservation Measure**” or “**CM**” means either individually or collectively, each of the facility alterations or equipment purchases set forth in Schedule B, together with any training programs incidental to this Contract, which reduces energy or water consumption, wastewater production, or energy-related operating costs at the Facilities.

“**Contract**” means this Guaranteed Energy and Water Performance Savings Contract, including each of the Contract Documents, as they are described in Section 2.1.

“**Contract Documents**” shall be as defined in Section 2.1.

“**Contract Price**” shall be as defined in Schedule F(6)(A).

“**Contract Time**” shall mean the scheduled, aggregate number of days between the Notice to Proceed and the scheduled date for Final Acceptance and shall not mean the actual number of days taken to construct the Work.

“**Corporate Guaranty**” means the Corporate Guaranty Agreement entered into concurrently with this Contract from the Guarantor to the City in the form set forth in Exhibit II hereto, as the same may be amended from time to time in accordance therewith.

“**Cost of the Work**” means that portion of the total contract price attributable to the design, construction, and installation of the CMs through start up and commissioning but shall not include the annual fees paid to the Company during the Performance Period.

“**Cost Savings**” means the measured reduction in the cost of energy, water consumption, and stipulated operation and maintenance savings, if applicable, created from the implementation of one or more Conservation Measures when compared with the established Baseline. The Cost Savings shall be determined in accordance with the formulas and methodologies set forth in Schedule E, which will include a minimum real return on investment calculation and a specification of a benchmark cost of capital.

“**Equipment**” means all items of property described in the Schedule B (Conservation Measures to be Installed by Company) pursuant to this agreement and any other items of property pursuant to § 489.145(3)(b), Florida Statutes.

“**Excess Savings**” shall be as defined in Section 5.3(c).

“**Facilities**” means the City-owned facilities as described in Schedule A (Description of Facilities). A Facility must be a distinct auditable unit.

**“Final Acceptance”** means that the City has determined that all of the required actions for constructing and commissioning the Work have been completed in accordance with the Contract Documents and a Certificate of Acceptance (contained at Exhibit III), has been issued.

**“Fiscal Year”** means the annual period from October 1<sup>st</sup> to September 30<sup>th</sup>.

**“Guarantor”** means Consolidated Edison Solutions, Inc., a corporation organized and existing under the laws of the State of New York, and its successors and assigns permitted thereunder.

**“Guarantied Party”** means the Company, and its successors and assigns.

**“Guaranteed Savings”** means the level of energy savings, operational cost savings, and revenue enhancements identified in Audit Report and calculated in conformance with the requirements of this Agreement

**“Guaranteed Savings Period”** means one year period beginning the first day of the month following the City’s issuance of the Certificate of Final Completion and recurring each year thereafter for the Performance Period.

**“Interim Period”** means the period from the date the Contract is signed until the Commencement Date.

**“Interim Period Savings”** means the energy and water cost savings achieved and accruing during the Interim Period as a result of the installation one or more of the CMs.

**“Investment Grade Energy Audit”** or **“Audit”** means the detailed energy audit performed by Company prior to entry of this Contract and dated along with an accompanying analysis of the Conservation Measures, and their costs, savings, and benefits. The Audit includes a narrative describing and justifying the need for the CM. The Investment Grade Energy Audit is attached as Appendix A and has been accepted by the City as evidenced by a Certificate of Acceptance for Investment Grade Audit.

**“Legally Available Funds”** means funds duly appropriated or otherwise legally available for the purpose of making payments under this Contract.

**“Measurement and Verification Fees”** or **“M&V Fees”** means the fees to be paid by the City to the Company for the measurement and verification services described in Schedule K and as detailed in Schedule D.

**“Non-Appropriation”** means the failure of an appropriation or availability of the Governing body of City to appropriate money for any Fiscal Year sufficient for the continued performance by City of all of City’s obligations under this Contract as evidenced by the passage of a final budget which does not include funding sufficient to pay all payments due.

**“Notice to Proceed”** means the written directive from the City to the Company authorizing it to begin the design, construction and implementation phase of the Project and beginning the tolling of the Contract Time.

“**Parties**” means both the City and the Company collectively.

“**Performance Period**” means the first day of the month following the City’s issuance of the Certificate of Final Completion and extending until the end of the Term.

“**Project**” means the entirety of services performed by the Company pursuant to the Contract Documents, including the design, installation and construction of the CMs as well as the operation, maintenance, monitoring and verification services as described in the Contract Documents, and all other contract related services provided by the Company over the Interim and Performance Periods of the Contract.

“**Project Costs**” shall be as defined in Section 5.8 of this Contract.

“**Savings Calculation Formula**” means the Company’s Savings Calculation Formula reflected on Schedule E.

“**Savings Guarantee**” means Company’s guarantee reflected on Schedule C (Savings Guarantee), whereby Company guarantees that the savings will meet or exceed the costs of the Project and the estimated cost savings established under this Contract.

“**Substantial Completion**” means the stage in the progress of the Work or portion of the Work, where the Work or portion of the Work is sufficiently complete and in accordance with the Contract Documents so that Customer can utilize and take beneficial use of the Work for its intended purpose. Substantial Completion may be for an individual CM, a combination or all CMs provided the requirements of Section 4.2 have been satisfied.

“**Term**” means the term of this Contract as set forth in Section 3 of Contract.

“**Total Guaranteed Savings**” means actual energy savings, operational cost savings, and revenue enhancements realized with reference to the Baseline set forth in the Audit Report, and determined in accordance with the methods and procedures to be prescribed and agreed upon between the **Parties** and incorporated into the ESPC. Verified Savings shall result solely from ECMs installed or performed by **ESCO** in accordance with the ESPC.

“**Work**” means the design, construction, installation, start-up and commissioning of the CMs identified in Schedule B, in accordance with the Contract Documents and as more particularly described in Schedule F, Design, Construction and Installation Requirements and Schedule.

## **SECTION 2. INCORPORATION OF OTHER DOCUMENTS**

**Section 2.1.** This Contract incorporates and makes a part hereof the following documents, listed in their order of precedence in the event of a conflict between any of their terms and conditions:

- (a) Guaranteed Energy and Water Performance Savings Contract

- (b) All Schedules, Exhibits and Appendixes listed in the Table of Contents
- (c) The Investment Grade Energy Audit (Appendix A)

**Section 2.2. Investment Grade Energy Audit.** Company has, under separate agreement, submitted the completed Investment Grade Energy Audit and analysis of the Facilities, which is attached as Appendix A and dated \_\_\_\_\_, and which has been approved and accepted by City. The Investment Grade Energy Audit includes all Conservation Measures agreed to and approved by the City. The City's Certificate of Acceptance of the Investment Grade Energy Audit is contained at Exhibit IV.

### **SECTION 3. TERM OF CONTRACT**

**Section 3.1. Initial Term; Interim Period.** The Contract Term shall begin on the date this Contract becomes fully executed and, subject to the renewal provision in Section 3.2 and the termination provisions in Section 7, shall expire at the end of Fiscal Year in which the Commencement Date occurred. The Contract shall be effective and binding upon the parties immediately upon the date it is last signed, and the period from such contract execution until the Commencement Date shall be known as the Interim Period.

**Section 3.2. Renewals.** The Term shall automatically renew for each successive Fiscal Year subject to the City making sufficient annual appropriations based upon continued realized savings; provided, however, the Term shall not extend beyond the earlier of: (i) the effective date of termination under Section 7 of this Contract; or (ii) Twenty (20) years after the Commencement Date.

### **SECTION 4. SCOPE OF WORK**

#### **Section 4.1. Installation of CMs.**

- (a) Company shall design, construct and install each of the CMs in the Facilities pursuant to the requirements and specifications contained in Schedule F. Construction and installation shall proceed in accordance with the requirements and schedule approved by City and attached hereto as Schedule F, Exhibit 1, (Design, Construction and Installation Requirements and Schedule). Company agrees to access the Facilities and perform the Work without interfering with the City's use and occupancy of the Facilities. If this requires the Company to perform Work on an overtime basis, the Company shall be responsible for all associated costs with performing the Work and the City shall have no obligation or liability for the Company's increased cost necessary to comply with this provision.
- (b) Company shall perform the Work under this Contract 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 common engineering practice further set out in ANSI, ASTM, ASHRAE and ASME, and the requirements specified in Schedule F. Company

shall repair and restore to its original condition any area of damage caused by Company's performance under this Contract. City reserves the right to direct Company to take certain corrective action if the structural integrity of the Facilities or its operating systems are harmed. All costs associated with such corrective action to damage caused by Company's performance of the Work shall be borne by Company.

- (c) Company shall remain responsible for the professional and technical accuracy of all services performed, whether by Company or its subcontractors or others on its behalf, throughout the Term of this Contract.
- (d) Company shall prepare, for written approval by the City, working drawings and specifications setting forth in detail the requirements of the construction and installation of the CMs in accordance with the Contract Documents. The Company shall provide all 30%, 60% and 90% drawings. The final engineering and design drawings shall be submitted to the City for written approval prior to commencement of any construction under this Contract. City shall respond in writing with approval or disapproval. Company shall not proceed with construction or installation until the drawings shall have been approved by the City. City shall not unreasonably delay its approval of the engineering and design drawings. Design and engineering documents shall include all drawings, specifications, schedules, diagrams and plans, and such content and detail as is necessary to properly complete the construction of the Work, and shall provide information customarily necessary for the use of such documents by those in the building trades. Where required by law, the design and engineering document must bear the stamp of a registered professional engineer or seal of architects licensed by the State of Florida.
- (e) The City shall not, by virtue of review and approval of design drawings in any way take responsibility for the completeness, accuracy or effect of the drawings nor shall City in any way, by review or approval, certify that the design drawings are adequate for the purposes created. City shall assume no liability for the accuracy or compliance of the drawings by any act, right or responsibility the City exercises under the provisions of the Contract Documents and all responsibility, liability and indemnification obligations for the design documents remain exclusively with Company.

#### **Section 4.2. Substantial Completion of CM.**

- (a) When Company considers the CM to have been substantially completed in accordance with all requirements of the Contract Documents, Company shall provide City with a written request for substantial completion inspection. Within ten (10) business days from receipt of Company's written request, City will make an inspection to determine whether the CM installation is complete. If City determines the CM installation is not complete, City will provide Company with a specific material performance deficiency list of all items that must be corrected or

completed before City would consider the CM complete. City shall not unreasonably delay providing a specific material performance deficiency list. Once Company has completed all items on the deficiency list, Company can request a second inspection by City to verify the CM is complete. The re-inspection shall occur within ten (10) business days and a written response within fifteen (15) business days.

- (b) The Parties intend that City's acceptance of Substantial Completion will be executed for the CM installation as soon as the installation is complete and beneficial use is provided. However, it is anticipated and agreed that City may require use of the installed and completed CM prior to the execution of the Substantial Completion or Certificate of Acceptance.
- (c) Correction of the Work: The City shall have the right and authority to reject Work which does not conform to the Contract Documents. The Company shall promptly correct the Work rejected by the City for failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within the warranty period set forth in Section 5.10. The provisions of this Section shall apply to Work done by subcontractors as well as to Work done by Company employees.

If the Company fails to correct the Work, or any portion thereof, that is not in accordance with the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, and, the Company, after receipt of written notice from the City either, (i) has not cured such failure within seven (7) days or (ii) if the nature of the failure is such that is not capable of cure within seven (7) days, has not reached agreement with the City for a plan to cure such failure or has not commenced and diligently and continuously pursued the cure of such failure in accordance with such plan within such seven (7) day period, the City, by written order to the Company may order the Company to stop the Work or any portion thereof, until the cause for such order has been eliminated or the Company has provided the City with a plan for corrective action acceptable to the City in its sole judgment.

- (d) Startup/Commissioning. The Company shall conduct a thorough and systematic performance test of each element and total system of the installed CMs in accordance with Schedule L, (Company Test and Balance and Commissioning Responsibilities), and demonstrate, to City's satisfaction, that all CMs comply with the requirements of the Contract Documents. The tests shall be performed by the commissioning entity designated in the Contract Documents, or, if no commissioning entity is designated, a qualified commissioning entity acceptable to the City. The Company shall provide to City advance written notice of at least ten (10) business days prior to conducting the schedule commissioning tests. The City shall have the right to designate representatives to be present at any or all

such tests, including representative of the manufacturers of the CMs. The Company or its subcontractors shall correct or adjust all deficiencies in operation of the CMs identified during the course of the tests described in this section. The Company shall provide the City a description of the ongoing training requirements for the Facilities operations and maintenance personnel necessary to maintain proper CM performance after Final Acceptance.

- (e) Final Acceptance. All CMs shall be deemed to be installed and completed once such final inspection has occurred and no additional non-warranty items have been addressed, all applicable permits have been closed, a conditional release of lien has been provided by Company, and all operation and maintenance, equipment warranties, test and balance reports, commissioning reports have been received and accepted by City. At such time, City will provide the Company a signed Certificate of Acceptance in the format set forth in Exhibit III, which shall establish the Commencement Date.

**Section 4.3. Maintenance.** Company shall not provide any maintenance service, repairs, and adjustments to the CMs other than as provided in Schedule I unless expressly authorized under a separate, future service and repair agreement in writing between the parties or a dully authorized scope of work amendment to this Contract. This agreement contemplates, though does not at the time of execution provide for, any maintenance service agreement between the parties.

**Section 4.4. Records and Data.**

- (a) City has furnished or shall furnish (or cause its suppliers to furnish) to Company, upon its request, all of its records and complete data concerning energy or water usage and energy/water-related maintenance for the Facilities described in Schedule A. During the Term, City will provide Company copies of all bills relevant to CMs on a regular basis so that Company may provide the Cost Savings report identified in subsections 4.3(b) and 5.3 below.
- (b) The reports to be issued by Company to City are more particularly delineated in Schedule K (Company Measurement and Verification Plan to Monitor Savings). At a minimum, Company shall provide an annual Cost Savings and reconciliation report under Schedule C (Savings Guarantee) calculated in accordance with Schedule E (Savings Calculation Formula).
- (c) Company shall also furnish City with a full set of diagrams, instructions, manuals, reports and other documentation needed to maintain and operate the CM.
- (d) If this Contract is terminated for any reason, all finished or unfinished documents, data, studies, correspondence, reports and any other products, including engineering and architectural drawings and designs described more specifically in Section 4.1, above prepared for the purpose of performing this Contract and for which payment has been received by Company, shall be made available to, or

delivered to, City for its use and shall become the property of the City, which documents, data, studies, correspondence, reports and any other products City may use for its purposes.

- (e) Company acknowledges that information submitted to the City in the course of the Work or information about or related to the Company or the Project in the City's possession may be subject to disclosure under State Freedom of Information laws. In the event that such a request for disclosure is made, City shall make reasonable efforts to notify company of such request prior to disclosure of the information so that company may take such action as it deems appropriate.
- (f) Company shall be subject to audit by the City or its designee. City shall have the right upon reasonable notice to have its employees or agents inspect all of the books and records of Company, its subcontractors, agents or assigns relating to this Contract at Company's principal place of business during City's normal business hours. In each sub-contract, Company shall include this "open book" provision as described in this Section to bind and place sub-contractors on notice of the requirements.
- (g) If City receives a public records request related to the Contract, Company shall be solely responsible for taking whatever action it deems appropriate to legally protect its claim of exemption from the public records law. Company acknowledges that Company information submitted to the City in the course of the Work or information about or related to the Company or the Project in the City's possession may be subject to disclosure under public freedom of information laws. In the event that such a request for disclosure is made, City shall make reasonable efforts to notify Company of such request prior to disclosure of the Information so that Company may take such action as it deems appropriate.

**Section 4.5. Maintenance and Training.** Company shall conduct the maintenance and training described in Schedule I (Company's Maintenance and Training Responsibilities) hereto. The training specified in Schedule I must be completed prior to acceptance of the CMs. Company shall provide ongoing operation and maintenance of the Facilities during construction, or as otherwise specifically provided in Schedule I, (Company's Maintenance and Training Responsibilities). Company shall also provide training in accordance with Schedule I and whenever needed for City or its designated maintenance contractor to provide continued, manufacturer and equipment warranty and operational maintenance services at no additional cost to City.

**Section 4.6. Performance Measurement Services.** Company shall provide ongoing performance measurement services during the contract term, beginning on the Commencement Date and continuing through the end of the Contract Term. Performance measurement services shall be conducted as described in Schedule K, (Company Measurement and Verification Plan to Monitor Cost Savings).

**Section 4.7. Permits and Approvals.** Company shall be responsible for both the costs and the administrative process for obtaining all governmental permits and approvals as may be required for installation of the CM and for the performance of its obligations hereunder, except for those governmental permits and approvals which only the City, as facility owner, can apply for. City shall cooperate with Company in obtaining all such permits and approvals. In no event shall City, however, be responsible for payment of any permit fees. The equipment furnished by Company shall at all times conform to all federal, state and local code requirements. Company shall furnish copies of each permit or license which is required to perform the Work to City before Company commences the portion of the Work requiring such permit or license. Any additional Work that is required by any permitting authority to be performed prior to closing permits, as a direct result of Company's installation of the CM shall be considered within the scope of Work under this Contract

## **SECTION 5. PAYMENTS TO COMPANY**

**Section 5.1. Energy Performance Savings Guarantee.** Company has formulated and provided a written Savings Guarantee that the Cost Savings, calculated in accordance with Schedule E, will meet or exceed the costs of the Project and the estimated cost savings set forth in the Audit pursuant to § 489.145(4)(c), Florida Statutes, and that the amount of any actual annual savings meet or exceed total annual contract payments made by the City for the Contract pursuant to § 489.145 (3)(d)(2), Florida Statutes. This Savings Guarantee is being given by Company based on the project economic analysis contained on page 7 of the IGA. The Savings Guarantee is attached as Schedule C, providing the annual level of Cost Savings to be achieved as a result of the Conservation Measures provided for in this Contract and in accordance with the Savings Calculation Formula as set forth in Schedule E, which is calculated in compliance with Florida law. The Savings Guarantee is set forth in annual increments for the term of the Contract as specified in Schedule C and has been structured so as to be sufficient to cover any and all annual payments required to be made by the City to cover the Project Costs.

**Section 5.2. Measuring Cost Savings.** The Company will measure the Cost Savings using the cost savings formula set forth in Schedule E and the monitoring and verification plan set forth in Schedule K. Company will ensure that the reported Cost Savings have in fact been realized or the provisions of Section 5.3(b) shall apply. The Cost Savings shall be based on the Federal Energy Management Program's (FEMP) *M&V Guidelines: Measurement and Verification for Federal Energy Management Projects version 3.0*. Notwithstanding the forgoing provisions, the City is free, at its option and cost, to require third-party verification of Company's measurement and verification data and conclusions that Company shall provide in conformance with and as provided for in this agreement. If the Measurement and Verification data provided by the Company, included its conclusions and supporting information, are discrepant or vary from the data and conclusions observed and calculated by the independent-third party, the Parties agree to attempt to resolve the discrepancy through self-mediation prior to initiating any legal proceedings under Applicable Law.

### **Section 5.3. Annual Reconciliation.**

- (a) Reconciliation Reports. Pursuant to § 489.145(5)(e), Florida Statutes, Company is required to provide to City an annual reconciliation of the Cost Savings. Within sixty (60) days after of each year beginning on the Commencement Date, Company will deliver to City an Annual Reconciliation report for such calendar year, reflecting the amount guaranteed and the amount of actual Cost Savings achieved. Upon delivery of the report and all supporting documentation, City will have sixty (60) days to accept or reject the report. City shall provide written notice of such rejection, within the stated acceptance period, specifying the basis of the deficiency. Company shall have thirty (30) business days to cure such deficiency and deliver to City a corrected reconciliation report. The Annual Reconciliation report verification requirements of the Measurement and Verification Plan (M&V Plan) shall be in the form attached, in Schedule K (Company Measurement and Verification Plan to Monitor Cost Savings)
- (b) Annual Review and Reimbursement/Reconciliation, Savings Shortfall and Excess Savings. If the Annual reconciliation report shows that the Company has failed to achieve the annual Savings Guarantee specified in Schedule C and, upon written request by the City, the Company will pay the City the difference between the annual amount guaranteed and the amount of actual Cost Savings achieved at the Facilities in accordance with the provisions of Schedule C. The Company shall remit such payment to the City within thirty (30) days of written notice by the City of such monies due. When the total Actual Cost Savings in any one year during the Savings Guarantee period exceed the Guaranteed Savings as set forth in Schedule C, such Annual Excess Savings shall inure solely and exclusively to the benefit of the City and shall not be used as a reimbursement to the Company for payment of shortfalls paid by Company in any prior years.
- (c) Annual Excess Savings. “**Excess Savings**” shall mean the monetized value by which the measured, actual Cost Savings achieved exceed the Guaranteed Savings in any one year. Any Excess Savings will accrue to the City, as provided in Section 5.3(b).

**Section 5.4. City Payments.** In addition to any required payments the City makes to any lender or finance entity for the principal, interest and finance costs associated with the full cost of the Work, City shall pay Company M&V Fees for the Performance Period of the Contract in accordance with Schedule D (Measurement and Verification Fees), and said M&V Fees, together with the Contract Price, and related financing costs, shall not exceed the extent of actual annual savings in accordance with the Act. All other payment and contract provisions of § 287.058(1), Florida Statutes, are incorporated herein by reference. When there exists a material conflict between the terms of the Statute and the Contract, the Statute shall control. City shall not make payments for Measurement and Verification Fees until the Acceptance Date. City shall pay Company pursuant to § 215.422, Florida Statutes. The Parties agree that (i) at least one twentieth of the Project Costs must be paid within two years from the Commencement Date by City, using straight-line amortization for the term of the loan, (ii) the remaining costs are to be paid at least quarterly, not to exceed a 20-year term, based on life cycle cost calculations, and (iii) the Cost Savings are guaranteed to the extent necessary to make payments.

**Section 5.5. Financing.** In the event the City enters into a separate Financing Agreement with a third party, such Financing Agreement shall be incorporated herein as Schedule J (Financing Agreement). Should the City obtain financing through a General Obligation Bond, (GO Bond), the bond information, including an amortization schedule, shall be referenced in Schedule J. In either such event, the Financing Agreement or General Obligation Bond, constitutes City's source of funding for its obligations under this Contract. The Energy and Water Savings Performance Contract (Contract) will have been executed prior to or contemporaneous with the financing instrument contained as Schedule J and the City shall have no obligation under this Contract until there has been full execution and necessary municipal approvals of the Finance Instruments in accordance with any applicable state or local law, regulation, policy or ordinance and disbursement of funds under that Agreement.

**Section 5.6. Current Expense.** City's obligations hereunder constitute a current expense that is payable exclusively from Legally Available Funds and shall not be construed to be debt, liability or obligation within the meaning of any applicable constitutional or statutory limitation or requirement. Neither City nor the State nor any political subdivision or County thereof has pledged any of its full faith and credit or its taxing power to make any payments under this Contract.

**Section 5.7. Baseline Costs.** Actual savings are measured against baseline costs, the expenses that the City would have incurred had the Project not been implemented. The Parties agree that baseline costs shall be calculated using the Baseline set forth in Schedule G, (Baseline), which has been based on the Federal Energy Management Program's (FEMP) *M&V Guidelines: Measurement and Verification for Federal Energy Management Projects version 3.0*. Details of the Measurement and Verification methodology shall be in accordance with Schedule K, (City Measurement and Verification Plan to Monitor Cost Savings).

**Section 5.8. Project Costs.** Project costs, for the purpose of calculating the Savings Guarantee shall include:

- (a) Engineering/design costs for all ECMs;
- (b) Construction, installation or implementation costs for all ECMs;
- (c) Construction Management Fees for the Project, including contractor overhead and profit;
- (d) Commissioning costs for all ECMs;
- (e) Finance costs, including interest and financing fees;
- (f) Annual Company, City and third-party costs, including:
  - (i) Measurement and Verification;
  - (ii) Operations and maintenance costs;
  - (iii) Performance monitoring;
  - (iv) Ongoing training services;
- (g) Third-party verification, annual City costs associated with on-going operations, maintenance, training, certification, replacement or repair of each individual ECM.

## **SECTION 6. FISCAL FUNDING**

**Section 6.1. Annual Appropriations.** City's performance and obligation to make payments under this Contract is contingent upon an annual appropriation of funds by its governing body in an amount sufficient to allow continuation of its performance in accordance with the terms and conditions of this Contract for each and every Fiscal Year following the initial Fiscal Year in which the Contract is in effect.

**Section 6.2. City's Intent to Request Appropriations and Make Payments.** City intends for this Contract to continue until all payments contemplated under Section 5 have been satisfied. The Parties acknowledge that appropriation for such payments is a governmental function that City cannot contractually commit the governing body of City to perform and this Contract does not constitute such a commitment. City, however, reasonably believes that money in an amount sufficient to make all payments can and will lawfully be appropriated and made available to permit continued utilization of the CM in the performance of its essential function during the Term.

**Section 6.3. Notice of Non-Appropriation.** City, upon learning that sufficient funds will not be available to continue its full and faithful performance under this Contract, shall provide prompt written notice to Company.

## **Section 7. TERMINATION**

**Section 7.1. Termination for Non-Appropriation.** This Contract shall immediately terminate if Non-Appropriation has occurred. The termination shall be effective as of the last day for which funds were appropriated. In the event that necessary and required appropriations have not been adopted by the governing body of City prior to expiration of a Fiscal Year, and the Notice of Non-Appropriation is not yet due under Section 6.3, the Term will be deemed extended and renewed pending the enactment of such appropriations act. If any payments are due under this Contract during such period, such Term will be extended and renewed only if: (a) an interim or emergency budget implemented by the governing body of City pending enactment of a final budget makes available to City money that may legally be used to make payments during such period; or (b) sums are otherwise available to make such payments.

**Section 7.2. Company Option to Terminate the Contract.** In the event of a termination under Section 7.1 above, Company may elect to terminate this Contract. This election shall be made by written notice to City within thirty (30) days after the Non-Appropriation has occurred and shall be effective upon the last day of the Fiscal Year for which funds were not appropriated. Upon the effective date of the termination, City shall pay to Company any payments that are due and have not been paid at or before the end of its then current Fiscal Year with respect to this Contract.

**Section 7.3. Termination Upon Default.** This Contract is also subject to termination upon the occurrence of an Event of Default, as provided in Section 14 below.

**Section 7.4. Effect of Termination.** No additional design, construction or implementation shall be done for any CM after any termination due to Non-Appropriation or Event of Default.

## **SECTION 8. WARRANTIES**

**Section 8.1. Equipment Warranties.** Company covenants and agrees that all materials and equipment to be installed as part of this Contract shall be new, in good and proper working condition and protected by original equipment manufacturer (OEM) written warranties covering all parts and equipment performance for a period of one year from the date the City issues a Certificate of Acceptance, except in the event that Company further agrees to warranty certain specified Equipment for longer terms, as mutually agreed and stated in Exhibit I (Equipment Warranties). Company further agrees to deliver to City for inspection and approval, all such written warranties. Prior to issuance of the Certificate of Acceptance, Company shall be solely responsible for processing all warranty claims.

All warranties shall be transferable and extend to City. Upon completion of the construction, installation and acceptance of the Work, the Company shall take all steps necessary and execute all required documents to transfer the warranties to the City. The warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessary.

Nothing in this Section shall be deemed to extinguish or relieve Company of any other implied or express remedies provided for in the Contract Documents or by Applicable Law. Company warrants that the equipment and materials installed under this agreement are fit for their particular purposes.

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

**Section 8.2. Labor Warranties.** Company warrants that all Work performed under this Contract complies with customary, reasonable and prudent standards of care in accordance with standards in the industry and are performed in a professional manner and consistent with City supplied specifications and standards.

## **SECTION 9. INDEMNIFICATION AND LIMITATION OF LIABILITY**

**Section 9.1. Indemnification by Company.** The Company agrees to assume all risk of loss and to defend, indemnify and hold the City and its officers, agents and employees harmless from and against any and all liabilities, demands, claims, suits, losses, damages, causes of action, fines or judgments, including costs, attorneys' and witnesses' fees, and expenses incident thereto, for injuries to persons (including death) and for loss of, damage to or destruction of property (including property of the City) because of the Company's, its agents, employees, subcontractors and assigns negligent or intentional acts or omissions. In the event that any demand or claim is made or suit is commenced against the City, the Company shall give prompt written notice thereof to the City and the Company shall have the right to compromise or

defend the same to the extent of its own interest. Any settlement or compromise by the Company shall be ineffective as to its obligations under this Section unless and until a release of claims discharging the City is executed in lawful form by the claimant. The Company agrees to maintain all required insurance as specified in Section 12 of this agreement.

## **SECTION 10. OWNERSHIP**

**Section 10.1. Ownership of Certain Proprietary Property Rights.** Except as otherwise provided in this paragraph, City 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 CMs. Company shall grant to City for the useful life of the CM any and all software or other intellectual property rights, licenses or authorizations reasonably necessary for City to continue to operate, maintain, and repair the CM in a manner consistent with Contract requirements.

**Section 10.2. Ownership of Existing Equipment.** Ownership of the equipment and materials presently existing at the Facilities at the time of execution of this Contract shall remain the property of City even if it is replaced or its operation made unnecessary by Work performed by Company pursuant to this Contract. Company shall be responsible, at its sole cost for the disposal of all equipment and materials designated by City as disposable off-site in accordance with all applicable laws and regulations regarding such disposal, provided, however, that Company shall not be responsible for the disposal of any hazardous materials except as provided in the scope of Work and where such removal, transportation and disposal of the specified Hazardous Materials is necessary or incidental to prosecution of the Work.

**Section 10.3. Ownership of Installed Equipment; Risk of Loss.** Upon the issuance of a Certificate of Acceptance for the Work, City shall have all legal title to and ownership of all underlying equipment, subject to any security interests of any lender, and Company shall take all actions necessary to vest such title and ownership in City. Prior to the date upon which the City executes a Certificate of Acceptance, the risk of loss or damage to all equipment and materials, included those installed, stored on site, or in transit, shall be the responsibility of Company, and Company shall be responsible for filing, processing and collecting all damage claims.

**Section 10.4. Patent and Copyright.** Company, without exception, shall indemnify, defend and hold harmless City and its employees, agents and assigns, to the extent and in the manner provided for in Section 9, from liability of any nature or kind, including cost and expenses for or on account of any copyrighted, patented, or unpatented invention, process or article supplied by Company. Company has no liability when such claim is solely and exclusively due to the combination, operation or use of any article supplied hereunder with equipment or data not supplied by Company to the extent that such actions are taken by the City. City will provide prompt written notification of a claim of copyright or patent infringement and will afford Company full opportunity to defend the action and control the defense. Further, if such a claim is made or is pending Company may, at its options and expenses procure for City the right to continue use of replace or modify the article to render it non-infringing. If none of the alternatives are reasonably available, City agrees to return the article upon request to Company and receive reimbursement. If Company uses any design, device, or materials covered by letters, patent or copyright, it is mutually agreed and understood without exception that the

Company shall solely bear the costs of all licenses, fees, royalties or costs arising from the use of such design, device, or materials in any way involved in the Work.

## **SECTION 11. FACILITIES MAINTENANCE AND EQUIPMENT SERVICES**

**Section 11.1. Maintenance Procedures.** City agrees that it shall adhere to, follow and implement the maintenance procedures and methods of operation recommended in the equipment manufacturers' maintenance manuals, common and recommended industry practices, and other mutually agreed maintenance procedures, once Company's Maintenance obligations under this Contract and Schedule I have expired.

**Section 11.2. Changes to CM and Facilities by City.** City shall not move, remove, modify, alter, or change in any way the CM or any part thereof without the prior written approval of Company, which consent shall not be unreasonably withheld or delayed. City agrees to maintain the Facilities in good repair and to protect and preserve all portions thereof that may in any way affect the operation or maintenance of the CM. If Company contends that City is not performing maintenance responsibilities, or that City has made any other material changes, including a change in manner of use, hours of operation for the equipment, permanent changes in the comfort and service parameters, occupancy or structure of the Facilities, types and quantities of equipment at the Facilities, then Company shall submit a report to City and upon which the City and Company shall mutually agree on what, if any, adjustments to Baseline will be made. If applicable, the Baseline may also be adjusted to reflect: changes in occupied square footage; changes in energy-consuming equipment; changes in use of the Facilities; and changes in occupancy census.

**Section 11.3. Changes to CM by Company.** Notwithstanding anything to the contrary in this Contract or elsewhere, Company may, subject to City's prior written approval, change the CM, revise any procedures for the operation of the equipment or implement other saving actions in the Facilities, provided that (i) such modifications or additions to, or replacement of the CM, and any operational changes, or new procedures are necessary to enable Company to achieve the savings at the Facilities; (ii) the City operations are not unfavorably affected; and (iii) any cost incurred relative to such modifications, additions or replacement of the CM, or operational changes or new procedures shall be the responsibility of Company. All modifications, additions or replacements of the CM or revisions to operating or other procedures shall be made by written amendment to this Contract pursuant to § 255.258, Florida Statutes.

## **SECTION 12. PROPERTY/CASUALTY/INSURANCE**

**Section 12.1. Insurance.** Company shall, at its own expense, procure and maintain, with insurers acceptable to the City, the types and amounts of insurance conforming to the minimum requirements set forth herein. Company shall not commence work until the required insurance is in force and evidence of insurance acceptable to the City has been provided to and approved by the City.

- (a) Evidence of Insurance.

As evidence of compliance with the insurance required herein, Company shall furnish the City with:

- (1) a fully completed satisfactory Certificate of Insurance (ACORD Form 25 or equivalent) evidencing all coverage required herein and a copy of the actual additional insured endorsement as issued on the Commercial General Liability policy signed by an authorized representative of the insurer(s) verifying General Liability coverage.;
- (2) the original of the policy(ies); or
- (3) other evidence satisfactory to City. Such evidence shall include thirty (30) days written notice of cancellation to the City for all coverage

Until such insurance is no longer required by this Agreement, Company shall provide the City with renewal or replacement evidence of insurance at least thirty (30) days prior to the expiration or termination of such insurance.

(b) Workers' Compensation Insurance.

Such insurance shall be no more restrictive than that provided by the Standard Workers' Compensation Policy, as filed for use in Florida by the National Council of Compensation Insurance, without restrictive endorsements. In addition to coverage for the Florida Workers' Act, where appropriate, coverage is to be included for the Federal Employer's Liability Act and any other applicable Federal or State law. The minimum amount of coverage (inclusive of any amount provided by an umbrella or excess policy) shall be:

Part One:	"Statutory"	
Part Two:	\$2,000,000	Each Accident
	\$2,000,000	Disease-Policy Limit
	\$2,000,000	Disease-Each Employee

The policy must be endorsed to waive the insurer's right to subrogation against City and its officials, officers and employees in the manner which would result from the attachment of National Council on Compensation Insurance's (NCCI) Waiver of Our Right to Recover From Others' Endorsement (Advisory Form WC 00 03 13) with City and its officials, officers and employees scheduled thereon.

(c) General Liability Insurance.

Such insurance shall be no more restrictive than that provided by the standard Commercial General Liability Form (ISO Form CG 00 01) as filed for use in the State of Florida without any restrictive endorsements other than those required by ISO or the State of Florida or those described below. The coverage may include restrictive endorsements which exclude coverage for liability arising out of:

- Mold, fungus, or bacteria
- Terrorism
- Sexual molestation

The City and the City’s officials, officers and employees shall be included as an “Additional Insured” on a form no more restrictive than ISO Form (CG 20 10), Additional Insured – Owners, Lessees, or Contractors). The minimum limits (inclusive of amounts provided by an umbrella or excess policy) shall be:

\$2,000,000	General Aggregate
\$2,000,000	Products/Completed Operations Aggregate
\$2,000,000	Personal and Advertising Injury
\$2,000,000	Each Occurrence

(d) Automobile Liability Insurance.

Such insurance shall be no more restrictive than that provided by Section II (Liability Coverage) of the most recent version of the standard Business Auto Policy (ISO Form CA 00 01) without restrictive endorsements, including coverage for liability contractually assumed, and shall cover all owned, non-owned, and hired autos of the Company. Such insurance shall not be subject to any aggregate limit and the minimum limits (inclusive of any amounts provided by an umbrella or excess policy) shall be:

\$2,000,000	Each Occurrence - Bodily Injury and Property Damage Combined
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(e) Pollution Legal Liability.

Such insurance shall cover the Company for liability resulting from pollution or other environmental impairment arising out of, or in connection with work performed on the premises by the Company or subcontracted by the Company including coverage for clean-up of pollution conditions and third party bodily injury and property damage claims arising from pollution conditions relating to Company’s Work, as provided for under this Contract. Coverage must either be on an occurrence basis; or, if on a claims-made basis, the coverage must respond to all claims reported within three years following the period for which coverage is required and which would have been covered had the coverage been on an occurrence basis.

The minimum limits (inclusive of any amounts provided by an umbrella or excess policy) shall be:

Each Claim	\$2,000,000
Annual Aggregate	\$2,000,000

The City and the City’s officials, officers, and employees shall be included as an

“Additional Insureds” on the policy.

(f) Professional Liability.

Such insurance shall be on a form acceptable to the City and shall cover Company for liability arising out of the rendering or failure to render professional services in the performance of the services required in the Agreement including any hold harmless and/or indemnification agreement. Coverage must either be on an occurrence basis; or, if on a claims-made basis, the coverage must respond to all claims reported within three years following the period for which coverage is required and which would have been covered had the coverage been on an occurrence basis.

The minimum limits (inclusive of any amounts provided by an umbrella or excess policy) shall be:

\$ 2,000,000 Each Claim  
\$ 2,000,000 Annual Aggregate

(g) Property.

Company shall provide, in a policy acceptable to the City, “all risk” (i.e., Special Form) property insurance on all construction, additions, modifications, machinery, and equipment to be installed in connection with the Agreement. The policy shall be issued on a non reporting form of policy.

The amount of the property insurance shall be no less than the total estimated replacement cost at the time of the City’s Final Acceptance of such construction, addition(s), modification(s), building(s), structure(s), machinery, and equipment.

The maximum deductible for other than windstorm or hail shall be \$10,000 per occurrence. The maximum deductible per occurrence for windstorm and hail shall be the greater of \$20,000 or 5% of the Contract Price. Company shall pay on behalf of the City any such deductible.

The property policy(ies) must be endorsed to include the City as an additional insured as their interests may appear and to waive the insurer’s right to subrogate against the City, and its officials, officers and employees.

(h) General Conditions.

The insurance provided by the Company shall apply on a primary basis. Any insurance maintained by the City shall be excess of and shall not contribute with the insurance provided by the Company.

Except as otherwise specifically authorized in this Agreement, or for which prior written approval has been obtained hereunder, the insurance maintained by the Company shall apply on a first dollar basis without application of a deductible or self-insured retention. Under limited circumstances, the City may permit the

application of a deductible or permit the Company to self-insure, in whole or in part, one or more of the insurance coverages required by this Agreement. The Company shall pay on behalf of the City or City's officials, officers and employees any deductible or self-insured retention applicable to a claim against the City or the City's officials, officers and employees.

All Insurance policies provided by the Company shall be endorsed to provide the City with thirty (15) days' notice of cancellation

**In the event, ~~CONTRACTOR~~ Company is unable to comply with the requirement of providing a notice of cancellation endorsement for any of the required insurance policies, Company will provide a separate written agreement, acceptable to CITY, between the CITY and Company's insurance agent providing that Company's insurance agent will provide prior written notice to the CITY of the cancellation, termination or nonrenewal of any policies of insurance required by this Section 12 Article 17. Such agreement will be signed by an authorized representative of the insurance agent with the appropriate authority to make such commitment on behalf of the insurance agent. Such notice to CITY shall be provided within five (5) days of the Company's insurance agent receiving knowledge of any such pending cancellation, termination or nonrenewal. Further, in the same written statement, Company's insurance agent shall agree to notify CITY, in writing, if they cease to become the agent of record for any insurance policies required by Article 17.**

Compliance with these insurance requirements shall not limit the liability of the Company. Any remedy provided to the City by the insurance provided by the Company shall be in addition to and not in lieu of any other remedy (including, but not limited to, as an indemnitee of the Company) available to the City under this Agreement or otherwise.

Neither approval nor failure to disapprove insurance furnished by the Company shall relieve the Company from responsibility to provide insurance as required by this Agreement.

**Section 12.2. Additional Waivers.** The City and Company waive all rights against (1) each other and any of their subcontractors, subcontractors' agents, and employees each of the other, and (2) the separate contractors if any, and any of their subcontractors, subcontractors' agents, and employees, for damages caused by fire or other causes of loss to the event covered by property insurance obtained pursuant to sub-article 12.1(g) (Builder's Risk), or other property insurance applicable to the Work, provided such waiver does not compromise coverage under such insurance coverage. The City or Company, as appropriate, shall require separate contractors, if any, and the subcontractors, sub-subcontractors, agents and employees of any of them, by appropriate agreements, written where legally required for validity, similar waivers each in favor of other parties enumerated herein. The required Builder's Risk policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation

shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

## **SECTION 13. PERFORMANCE AND PAYMENT BOND – SECURITY FOR PERFORMANCE**

### **Section 13.1. Bonds required.**

- (a) Bonds Required. Within fifteen days after receipt of the Contract, Company shall provide City with a Common Law Performance Bond and a Statutory Payment Bond meeting the standards specified herein, on the forms provided by the City, and attached hereto, with a Power of Attorney Affidavit, each in an amount not less than the amount of the Cost of the WorkIn addition, the Company shall provide a Performance Bond, in the full amount of the Guaranteed Savings over the Term, as that amount is described in Schedule C (Savings Guarantee).
- (b) Surety's Qualifications. All bonds required under this Contract, including, but not by way of limitation, any Bid Bond, Common Law Performance Bond or Statutory Payment Bond, shall be written through a reputable and responsible surety bond agency licensed to do business in the State of Florida and with a surety which holds a certificate of authority authorizing it to write surety bonds in Florida meeting the following requirements:

- (1) Ratings by A.M. Best

The surety company or corporation shall have the following minimum ratings by A. M. Best Company: Best's Rating Classification: A- or better; Financial Size Category: V or larger.

- (2) Circular 570

In addition to meeting the requirements of paragraph (1) above, the surety shall also comply with the Circular 570 requirements as set forth in this paragraph (2). The surety shall maintain a current certificate of authority as an acceptable surety on Federal Bonds in accordance with U.S. Department of Treasury Circular 570, current revision. If the amount of the bond exceeds the underwriting limitations set forth in the Circular, in order to qualify, the net retention of the surety company shall not exceed the underwriting limitation in the Circular and the excess risk must be protected by co-insurance, reinsurance, or other methods in accordance with Treasury Circular 297, revised September 1, 1978 (3) CFR Section 223.10 - Section 223.111. Further the surety company shall provide the CITY with evidence satisfactory to the City, that such excess risk has been protected in an acceptable manner.

- (c) Additional or Replacement Bond. It is further mutually agreed between the parties hereto that if, at any time, the City shall deem the surety or sureties upon any bond to be unsatisfactory, or if for any reason, such bond (because of increases in the work or otherwise) ceases to be adequate, the Company shall, at their expense within five (5) days after the receipt of notice from the City to do so, furnish an additional or replacement bond or bonds in such form, amount, and with such surety or sureties as shall be satisfactory to the City. In such event, no further payments to the Company shall be deemed to be due under this Contract until such new or additional security for the faithful performance of the work shall be furnished in manner and form satisfactory to the City.
- (d) Florida Agent. The surety company shall have a Florida agent whose name shall be listed in the prescribed space on the forms provided by the City for all bonds required by the City.

**Section 13.2. Corporate Guaranty.** The Company shall cause the Corporate Guaranty to be provided and maintained by the Guarantor during the Term hereof in the form set forth in Exhibit II hereto.

#### **SECTION 14. EVENTS OF DEFAULT**

**Section 14.1.** The following are events of default under this Contract:

- (a) Any failure by either Party to pay any payment required to be paid when due. City's failure to pay for reason of Non-Appropriation shall not constitute an event of default, and shall be governed by Sections 6 and 7 of this Contract.
- (b) Any failure by either Party to observe and perform any material covenant, condition or agreement on its part to be observed or performed hereunder or under this Contract, other than as referred to in Clause (a) of this Section.
- (c) Company initiates a proceeding in any court, seeking liquidation, reorganization, debt arrangement, dissolution, winding up, appointment of trustee, receiver, custodian, or the like for substantially all of its assets, and such proceeding continues undismissed, unstayed and in effect for a period of 90 consecutive days; or an order for relief is entered in an involuntary case under the federal bankruptcy laws or other similar laws now or hereafter in effect.
- (d) Company attempts to assign its rights and obligations under this Contract without the express, written consent of the City.
- (e) Company is determined to have made an untrue, false, or misleading statement or provided untrue, false, or misleading information in the procurement, selection or contracting process, prosecution of the Work or its continuing performance obligations under the terms of the Contract Documents.

- (f) Any representation or warranty of either Party hereunder and/or under the Corporate Guaranty was false or inaccurate in any material respect when made, and, as a result, the legality of the Contract or the Corporate Guaranty or the ability of either of the Parties to carry out its obligations thereunder is adversely affected.
- (g) If an event of default arises pursuant to the terms of the Corporate Guaranty and in accordance thereof.

## **SECTION 15. REMEDIES UPON DEFAULT**

**Section 15.1. Opportunity to Cure Defaults.** Each Party shall have a period of thirty (30) days after being notified of an event of default to cure said default, provided that the Party has not already failed to cure a default under the terms of this Contract.

**Section 15.2. Required notice upon default.** A Party which has reason to believe that the other Party is in default under Section 14 of this Contract shall provide written notice to the defaulting Party in accordance with Section 19.10 of this contract. The notice shall contain the nature and extent of the default and the date(s) upon which the default began, to the extent such dates are ascertainable by reasonable effort.

**Section 15.3. Remedies upon Default by City.** If a default by City is not cured in accordance with Section 15.1, Company may, without a waiver of other remedies which exist in law or equity, exercise all 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 City, and/or for damages. Amounts to be paid and recoverable under this Section shall be expressly limited to the amounts due through and upon the Date of Termination and City shall incur no costs for additional Work or performance under the service provisions of the Contract Documents beyond the Date of Termination.

**Section 15.4. Remedies Upon Default by Company.** If a default by Company is not cured in accordance with Section 15.1, City shall have the following remedies in law or equity:

- (a) City may exercise any and all remedies contained in any of the Contract Documents, 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 in exercise of its remedy. City may make all appropriate claims against the Bonds provided in accordance with Section 13.
- (b) City may take any and all steps necessary to cure Company's default including the hiring or contracting of third parties to fulfill Company's obligations as those obligations are defined in and throughout the Contract Documents. In the event

City takes any action to effect such cure, Company shall be obligated to reimburse City for its costs.

## **SECTION 16. ASSIGNMENT**

**Section 16.1. Assignment by Company.** Company acknowledges that City is induced to enter into this Contract by, among other things, the professional qualifications of Company. Neither this Contract nor any right or obligation hereunder shall be assigned in whole or in part to another firm, without the express prior written approval of City.

Notwithstanding the provisions of this section, Company shall remain jointly and severally liable with its assignees(s), or delegee(s) to City for all of its payment obligations under Schedule C, Savings Guaranty.

Notwithstanding the provisions of this section, Company shall remain jointly and severally liable with its assignees(s), or delegee(s) to City for all of its payment obligations under Schedule C, Savings Guaranty, provided, however, that the City shall look first to the assignee(s) for such Savings Guaranty. If the assignee(s) do not properly perform their obligations under the Savings Guaranty within fifteen (15) calendar days from such demand, the City may then seek payment from the Company.

**Section 16.2. Assignment by City.** The City may assign its rights, title and interest in this agreement to any successor in interest who takes legal or beneficial title in the Facilities, or to any governmental or corporate body which assumes the functions of the City by operation of law.

## **SECTION 17. DISPUTE RESOLUTION, JURISDICTION AND VENUE**

The Parties agree that in the event any claim or dispute arise under the terms of this Contract, that they shall use their best efforts to resolve the same. If however, a dispute arising under the Contract remains after the Parties best efforts to resolve it, and either of the Parties elects to bring a claim or file suit or any legal proceeding, the Parties expressly acknowledge and agree that such claim or legal proceeding or cause of action shall be filed, remain, tried and resolved in the State Courts of the State of Florida in St. Lucie County. The Parties expressly waive any right otherwise provided by any applicable law to remove the matter to any other state or federal venue.

## **SECTION 18. REPRESENTATIONS AND WARRANTIES**

**Section 18.1. Mutual Representations.** Each Party warrants and represents to the other that:

- (a) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;

- (b) 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;
- (c) 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
- (d) 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.

**Section 18.2. City Representations.** City hereby warrants and represents that:

- (a) it has provided or shall provide timely to Company, all records relating to energy and/or water usage and energy/water-related maintenance of Facilities requested by Company 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
- (b) it has not entered into any leases, contracts or agreements with other persons or entities regarding the leasing of efficiency equipment or the provision of energy/water management services for the Facilities or with regard to servicing any of the related equipment located in the Facilities except as disclosed to Company otherwise covered by the terms of this agreement.

**Section 18.3. Company Representations.** Company hereby warrants and represents that:

- (a) before commencing performance of this Contract it shall have (i) become licensed or otherwise permitted to do business in the State of Florida, and (ii) provided proof and documentation of required insurance pursuant to Section 12, and (iii) made available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- (b) it shall use qualified subcontractors and delegees, approved by City and licensed and bonded in the State of Florida to perform the Work so subcontracted or delegated in accordance with the contract documents pursuant to the terms hereof;
- (c) it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to perform its obligations under this Contract.

**SECTION 19. MISCELLANEOUS**

**Section 19.1. Waiver of Liens.** Company shall obtain and furnish to City a Waiver of Liens from each subcontractor, vendor, material manufacturer and laborer in the supply, installation and servicing of each CM. Should liens or claims be filed against the Facilities by reason of Company's acts or omissions, Company shall cause same to be discharged by bond or otherwise within ten (10) days after filing.

**Section 19.2. Compliance with Law and Standard Practices.** Company shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, rules, and regulations, in accordance with sound engineering and safety practices, and in compliance with any City safety rules and practices.

**Section 19.3. Hazardous Materials.** Upon discovery of the suspected or real presence of asbestos or other hazardous materials, and upon determining the need by the Company to disturb such asbestos or other hazardous materials as part of the Work, the Company shall immediately notify the City of such discovery. The City will quickly endeavor to identify and, if necessary, remove asbestos, following the City's established procedure, to the extent necessary for the Company to safely perform the Work or to a further extent if the City deems necessary or preferable. In no event shall Company take title to such removal of asbestos or other hazardous materials found while performing Work.

Company shall not use, store, dispose of or otherwise handle any Hazardous Substance (as defined in 42 U.S.C. Sections 9601, 9603, 6921, 7412, 49 U.S.C. Sections 1802 and 33 U.S.C. Sections 1321 and 1317 as now or hereinafter amended) or Hazardous Material in or on the Facilities except in a lawful manner and so as not to cause City any cost, loss, obligation or liability or expose City to any claim or suit with respect to same. "Hazardous Materials" shall mean petroleum, or any fraction thereof, asbestos, polychlorinated biphenyls, or any other substance identified either as a "hazardous substance", "hazardous waste", "pollutant", "contaminant" or other similar term in any applicable federal, state or local law or regulation, as such law or regulations may be now or hereafter amended.

Notwithstanding any other provision of this Contract, it is acknowledged by the Parties that the removal, replacement, or improvement of certain ballasts and lamps containing Hazardous Materials is a known, incident to and included as a part of the Company's performance of the Work as described in the Contract Documents. Nothing in this Section shall relieve the Company of its obligation to properly remove, transport and dispose of such Hazardous Material in accordance with Applicable Law and the requirements of the Contract Documents. The removal, transportation and disposal shall be included within the Cost of the Work under this Contract and subject to the provisions of calculating total Project Costs and the Savings Guarantee.

**Section 19.4. Independent Capacity of Company.** The Parties agree that Company, and any agents and employees of Company, in the performance of this Contract, shall act in an independent capacity and not as officers, employees, or agents of City.

**Section 19.5. No Waiver.** The failure of either Party to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or

relinquishment of either Party's right to thereafter enforce the same in accordance with this Contract. No right of either Party hereto shall be deemed to have been waived by non-exercise thereof, nor shall the exercise of any right of a Party pursuant to this agreement deem to have become effective unless and until such waiver is reduced to writing and executed by the Party entitled to exercise such right.

**Section 19.6. Severability.** In the event that any clause or provision of this Contract or any part thereof shall be declared invalid, void, or unenforceable by any court or agency having jurisdiction, such invalidity shall not affect the validity or enforceability of the remaining portions of this Contract unless the result would be manifestly inequitable or unconscionable.

**Section 19.7. Complete Contract.** This agreement contains all the terms and conditions agreed upon by the Parties. This agreement may only be modified or amended upon mutual written consent of the Parties and subject to all required governmental approvals. No prior, contemporaneous or subsequent oral agreements or representations shall be valid or binding upon the City or the Company, nor shall any written agreements, assurances, memoranda or other documents be binding upon the Parties with respect to the Project unless the same are included within the Contract Documents or incorporated by reference therein clearly on the face of the Contract Document incorporating such written agreements, assurances, memoranda or other document.

**Section 19.8. 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.

**Section 19.9. Applicable Law and choice of venue.** This Contract and the construction and enforceability thereof shall be interpreted under the laws of the State of Florida. The Parties agree without reservation of any rights under federal or state law, that in any litigation arising under this Contract, that the Parties waive the right to a trial before a jury, and all such litigation shall be litigated only in a non-jury hearing in the State Courts of Florida, St. Lucie County.

**Section 19.10. Notice.** Any notice required or permitted hereunder shall be deemed sufficient if given in writing and delivered personally or sent by registered or certified mail, return receipt requested, or delivered to a nationally recognized express mail service, postage prepaid to the address shown below or to such other persons or addresses as are specified by similar notice.

TO COMPANY:                    BGA, Inc.  
2101 W. Dr. Martin Luther King Jr. Blvd, Suite 110  
Tampa, FL 33607  
Attention: Andre Leblanc, Director, Operations

TO CITY:                         Robert J. Bradshaw, City Manager  
City of Fort Pierce  
P.O. Box 1480  
Fort Pierce, FL 34954

**Section 19.11. Legal Requirements.** County shall consider the employment by Company of unauthorized aliens a violation of Section 274A(e) of the Immigration and Nationality Act. Notwithstanding the Events of Default and Termination provisions of this contract, such violation shall be cause for unilateral cancellation of this Contract. An entity or affiliate who has been placed on the public entity crimes list or the discriminatory vendor list may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public Work, may not submit bids on leases of real property to a public entity, may not be awarded or perform Work as a company, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity pursuant to limitations under Chapter 287, Florida Statutes.

Wage rates and other factual unit costs supporting the compensation are accurate, complete, and current at the time of contracting. The original contract price and any additions thereto will be adjusted to exclude any significant sums by which City determines the contract price was increased due to inaccurate, incomplete, or noncurrent wage rates and other factual unit costs. All such contract adjustments must be made within 1 year following the end of this Contract.

Company warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Company to solicit or secure this Contract and that it has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for Company any fee, commission, percentage, gift, or other consideration contingent upon or resulting from the award or making of this Contract. For the breach or violation of this provision, City shall have the right to terminate this Contract without liability and, at its discretion, to deduct from the contract price, or otherwise recover, the full amount of such fee, commission, percentage, gift, or consideration.

**Section 19.12. Public Records.** City shall have the right of unilateral cancellation for refusal by Company to allow public access to all documents, papers, letters, or other material subject to the provisions of Chapter 119, Florida Statutes and made or received by Company in conjunction with this Contract.

**Section 19.13. Force Majeure.** Neither Party will be liable for any default or delay in the performance of its obligations under this Contract to the extent such default or delay is caused by fire, flood, earthquake, elements of nature or acts of God; riots, civil disorders, rebellions or revolutions in the United States; injunctions (provided the injunction was not issued as a result of any fault or negligence of the party seeking to have its default or delay excused); or any other cause beyond the reasonable control of such party (“Force Majeure Events”); provided the non-performing party and its subcontractors are without fault in causing such default or delay, and such default or delay could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing party through the use of alternate sources, workaround plans or other means, including disaster recovery plans. Performance times shall be considered extended for a period of time equivalent to the time lost because of any such delay, provided that in the event Company is delayed in its performance by reason of such cause, no such extension shall be made unless notice thereof is presented by Company to City in writing

within ten (10) business days after the start of the occurrence of such delay, no payment shall be made by City for any fees or expenses incurred by Company by reason of such delay, and Company shall use best efforts to perform its obligations during such period of delay, and notify City of its abatement or cessation.

**Section 19.14. Environmental Incentives.** The monetized value of payments, credits, rebates or other remuneration for any environmental incentive shall inure entirely to the benefit of the City. Grants, incentives, credits or other payments to the City shall not be used to reduce the Cost of the Work or fees paid during the Performance Period of the Contract to the Company nor may the monetary value or equivalent of such grants, incentives or credits be used in the Calculation of the Savings Guarantee pursuant to Schedules C and E of the Contract.

**Section 19.15. Interim Period Savings.** The Company shall provide as Schedule M, (Interim Period Savings Calculation), a methodology for measuring or estimating Interim Period Savings, such methodology and schedule to be approved by the City. The monetized value of the Interim Period savings for each unit of fuel/energy/water saved shall inure entirely to the benefit of the City. Interim Period Savings shall not be counted in any stipulated or measured savings within the Contact year as defined under the terms of this agreement.

**Section 19.16 Transaction Cost and Third Party Services.** The Company shall, upon execution of the Contract, make a payment in an amount not to exceed thirty-five (\$30,000.00) thousand dollars, to fund the cost to the City for services provided by third-party consultants utilized by the City in the process of negotiating and verifying the terms, conditions, Measurement and Verification procedures, technical and legal requirements of the Contract Documents. The City, in its sole discretion, will select the third-party service providers retained pursuant to this section. (REMAINDER OF PAGE INTENTIONALLY BLANK)

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this Contract by their duly authorized officers on the date last executed below

COMPANY:

BGA, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

CITY:

CITY OF FORT PIERCE, FLORIDA

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

SCHEDULE A

DESCRIPTION OF FACILITIES

SCHEDULE B – CONSERVATION MEASURES TO BE  
INSTALLED BY COMPANY

SCHEDULE C – SAVINGS GUARANTEE

## SCHEDULE D – MEASUREMENT AND VERIFICATION FEES

## SCHEDULE E – SAVINGS CALCULATION FORMULA

SCHEDULE F – DESIGN, CONSTRUCTION AND INSTALLATION  
REQUIREMENTS, CONSTRUCTION FEES AND SCHEDULE

SCHEDULE G - BASELINE

## SCHEDULE H – STANDARDS OF COMFORT

SCHEDULE I

COMPANY'S MAINTENANCE  
AND TRAINING RESPONSIBILITIES

## SCHEDULE J – FINANCING AGREEMENT

SCHEDULE K – COMPANY MEASUREMENT AND VERIFICATION PLAN  
TO MONITOR COST SAVINGS

SCHEDULE L

COMPANY TEST AND BALANCE  
AND COMMISSIONING RESPONSIBILITIES

SCHEDULE M  
INTERIM PERIOD SAVINGS CALCULATION

APPENDIX A  
INVESTMENT GRADE ENERGY AUDIT

EXHIBIT I  
EQUIPMENT WARRANTIES

EXHIBIT II  
CORPORATE GUARANTEE

EXHIBIT III  
CERTIFICATE OF ACCEPTANCE