

**FORM**

**INVESTMENT GRADE AUDIT AGREEMENT**

**between**

**[AGENCY]**

**and**

**[CONTRACTOR]**

**Delaware Sustainable Energy Utility  
Version 3.1**

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## INVESTMENT GRADE AUDIT AGREEMENT

This Investment Grade Audit Agreement (the “**Audit Agreement**”) is entered into on \_\_\_\_\_, by and between \_\_\_\_\_ (the “**Agency**”) and \_\_\_\_\_ (the “**Contractor**”). The Agency and the Contractor are referred to herein as the “**Parties**”.

### Background

A. The Agency desires to implement certain energy conservation measures (“**ECMs**”) at its facilities (the “**Agency Facilities**”) described in Exhibit 1 (Agency Facilities).

B. Sustainable Energy Utility, Inc. (the “**SEU**”), a non-profit corporation that was created by the State of Delaware pursuant to the Delaware Energy Act, Del. Code Ann. tit. 29 § 8059(c), has established a program (the “**Program**”) to facilitate the implementation and financing of ECMs by “agencies” as defined in the Energy Performance Contracting Act.

C. The Agency is an “agency” as defined in the Energy Performance Contracting Act (29 Del. C. § 6972) (the “**Energy Performance Contracting Act**”) and the Agency has determined that it would be in its best interest to implement such ECMs by participating in the Program.

D. The Contractor has experience in successfully implementing ECMs in public and institutional facilities and the SEU has determined that the Contractor is a “qualified provider” as defined in the Energy Performance Contracting Act.

E. The Agency has selected the Contractor from the group of energy service companies prequalified by the SEU.

F. A comprehensive investment grade energy and water use and savings analysis (the “**Audit**”) must be performed at the Facility to confirm the feasibility of entering into a guaranteed energy and water savings agreement (“**GSA**”) to provide for the installation and implementation of ECMs at the Facility.

G. If the Proposed Project is demonstrated to be feasible, and if the amount of energy savings guaranteed by the Contractor are sufficient to cover all costs associated with the Project, the Parties intend to enter into a GSA in the form attached as Exhibit 2 (Form of Guaranteed Savings Agreement) pursuant to which the Contractor will design, procure, install, and implement the Proposed Project in accordance with the Scope of Construction Work set forth in Schedule A.

## **Agreements**

In consideration of the Background and the mutual covenants, undertakings and conditions set forth below, the parties, intending to be legally bound, agree as follows:

### **ARTICLE 1**

#### **DEFINITIONS; CONVENTIONS**

**1.1 Definitions.** Unless otherwise expressly defined herein, each capitalized term in this Agreement has the meaning given to it in this Section 1.1.

**Agency** is defined in the first paragraph of this Agreement.

**Agency Conduct Requirements** means the Agency's conduct rules for contractors working at the Agency Facilities as set forth in Exhibit 3 (Agency Conduct Requirements).

**Agency Facilities** means the facilities identified as such in Exhibit 1 (Description of Agency Facility; Pre-Existing Equipment Inventory; Current and Known Future Capital Projects).

**Agency Property** means the property identified as such in Exhibit 1 (Description of Agency Facility; Pre-Existing Equipment Inventory; Current and Known Future Capital Projects).

**Applicable Codes** means codes, standards or criteria promulgated by nationally recognized technical standards institutions, which are applicable to or affect the Work as set forth for each ECM Installation in Schedule A (Scope of Construction Work).

**Applicable Law** means any law, regulation, requirement or order of any federal, state or local government agency, court or other governmental body, or the terms and conditions of any permit, license or governmental approval, applicable from time to time to the Work or the performance of any obligations under this Agreement.

**Audit** is defined in Paragraph F of the Background.

**Audit Agreement** is defined in the first paragraph of this Agreement.

**Audit Fee** is defined in Article 5.

**Audit Report** is defined in Section 2.1.

**Audit Services** means the services provided by the Contractor under this Audit Agreement.

**Base Year** is defined in Section 2.4(a).

**Baseline Energy Consumption** is defined in Schedule G (Baselines).

**Baseline Operating Costs** is defined in Schedule G (Baselines).

**Cash Flow Analysis** means the cash flow analysis in the form required by Schedule J (Project Cash Flow Analysis and Savings Guarantee), developed to demonstrate compliance with the condition in Section 3.2(a).

**Construction Price** is Contractor's price for the installation of the ECMs and completion of the Proposed Project to be developed pursuant to Section 2.7 and set forth in Schedule F (Construction Price and Milestone Schedule).

**Construction Schedule** means the initial construction schedule to be set forth in Schedule C (Initial Construction and Installation Schedule).

**Construction Unit** means one or more ECMs Installations that will be constructed as an integrated unit and are capable of functioning and being tested independent of the balance of the construction work to be set forth in Schedule D (Commissioning and Performance Testing; Operating Parameters of ECMs; Manufacturers Warranties).

**Contractor** is defined in the first paragraph of this Agreement.

**Draft Final Audit Report** is defined in Section 2.11(c).

**ECM** means energy and water conservation measures, including equipment and software foundations and interconnections.

**Effective Date** means the date first set forth above, in the Preamble to this Agreement.

**Energy and Water Savings**, means, for any Savings Year or other period specified in this Audit Agreement or the GSA, the energy and water savings for such Savings Year or other period resulting from the installation and operation of the Project, expressed in dollars, based on the reduction in energy and water use compared with Baseline Energy Consumption using the energy and utility prices and an annual escalation rate for such prices set forth in Schedule I (Measurement and Verification Plan; Methodology to Adjust Baselines), and as calculated in accordance with the Measurement and Verification Plan. Energy and Water Savings may be adjusted in accordance with Schedule I to reflect the impact (positive or negative) of Uncontrollable Circumstances, Change Orders or Material Changes on energy and water reductions to reflect the expected reductions had such impacts not occurred. Energy and Water Savings do not include operational savings, savings from avoided maintenance or capital costs, or savings (or reduced savings) from changes in energy prices as compared to the escalated prices to be set forth in Schedule I (Measurement and Verification Plan; Methodology to Adjust Baselines).

**Energy Performance Contracting Act** is defined in Paragraph C of the Background.

**Good Industry Practice** means those practices, methods and acts that at any particular time, in the exercise of reasonable judgment, and consistent with current utility, telecommunications, data processing and software development industry practices, as applicable, would have been expected to accomplish the desired result in the manner consistent with

Applicable Law, Applicable Codes, and standards of reliability, safety, efficiency and environmental protection in effect at such time, including the exercise of that degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced energy services contractor engaged in the same type of undertaking under the same or similar circumstances.

**GSA** is defined in Paragraph F of the Background.

**Guaranteed Final Completion Date** means the date under the GSA when all construction work on the Project is guaranteed to be complete and the Savings Guarantee takes effect. Contractor will propose this date in Schedule C (Initial Construction and Installation Schedule).

**Guaranteed Savings** means the Energy and Water Savings levels set forth in Schedule J (Project Cash Flow Analysis and Saving Guarantee).

**Hazardous Substance** means any substance, material, gas, or particulate matter that is regulated by any governmental authority as an environmental pollutant or dangerous to public health, public welfare, or the natural environment, including protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (a) defined as “toxic,” “polluting,” “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “solid waste” or “restricted hazardous waste” under any provision of local, state, or federal law; (b) petroleum, including any fraction, derivative or additive; (c) asbestos; (d) polychlorinated biphenyls; (e) radioactive material; (f) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq. (33 U.S.C. § 1251); (g) defined as a “hazardous waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (42 U.S.C. § 6901); (h) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (42 U.S.C. § 9601); (i) defined as a “chemical substance” pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. (15 U.S.C. § 2601); or (j) defined as a pesticide pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq. (7 U.S.C. § 136).

**Installment Payments** means the financing payment to be made to the SEU under the Program to repay the Loan of bond proceeds to be used to pay the Construction Price and other Program costs.

**Interim Audit Report** is defined in Section 2.11(b).

**Issuer** is defined in the Background.

**Measurement and Verification Plan** means the plan by which the Energy and Water Savings will be measured and verified as set forth in Schedule I (Measurement and Verification Plan; Methodology to Adjust Baselines).

**Milestone Schedule** means the schedule to be set forth in Schedule F (Construction Price and Milestone Schedule) of verifiable work segments against which partial payment of the Construction Price is to be made.

**Open Book Basis** means all estimates, bids, quotations, quantities, rates, and calculated build-up methods used to determine price and Overhead developed by the Contractor or any of its subcontractors selected from the list set forth in Schedule E (Approved Subcontractors), shall be provided in a format mutually agreed to by the parties and will be subject to the further review and comment of the parties, as set forth in Section 2.7.

**Operating Period Payments** are to be as set forth in Schedule M (Operating Period Payments).

**Overhead** means overhead and general administrative costs for the Contractor that are non-Site specific (e.g., compensation for research and development, finance, executive management, human resources and information services support for the staff, corporate and division allocations, rent, utilities, and office support costs).

**Parties** is defined in the first paragraph of this Agreement.

**Person** means any individual, partnership, corporation, association, business, trust, government or political subdivision thereof, governmental agency or other entity.

**Preliminary Audit Report** is defined in Section 2.11(a).

**Pricing Proposal** is defined in Section 2.7.

**Profit** means the profit component of Contractor's fee, as set forth in Schedule L.

**Program** is defined in Paragraph B of the Background.

**Project** means the Proposed Project as and when accepted by the Agency and incorporated in the GSA.

**Proposed Project** is defined in Section 2.11(b).

**Savings Year** means the year beginning on the first day of the month following the Guaranteed Final Completion Date and each year thereafter, except that the final Savings Year will end on the last day of the term of the GSA.

**Scope of Work** means the descriptions of, and specifications for, the Project to be set forth in Schedule A (Scope of Construction Work).

**SEU** is defined in Paragraph B of the Background.

**Sites** mean those portions of the Agency Facilities where installations of ECMs will take place as part of the construction of a Project as identified in Schedule B (Description of Agency Facilities; Pre-Existing Equipment Inventory; Current and Known Future Capital Projects).

**Standards of Comfort** means the standards for heating, cooling, hot water and lighting to be described in Schedule H (Standards of Comfort).

**Uncontrollable Circumstance** means, with respect to either party, an act, event or condition that has a material adverse effect on the rights or the obligations of such party under this Agreement and that is beyond the reasonable control of the party relying thereon as justification for not performing an obligation or complying with any condition required of such party under this Agreement, including:

(a) acts of God; labor disturbances; accidents; failure of a governmental entity to issue a permit or approval required for performance; civil disorders; acts of aggression; changes in any law or regulation adopted or issued by a governmental entity after the date of this Agreement; a court order; explosions; failure of utilities; material shortages;

(b) the adoption, promulgation, modification or reinterpretation after the date of this Agreement of any Applicable Law that was not adopted, and/or officially published in The Congressional Record, The Federal Register or the legislative or regulatory publication of the jurisdiction of the Applicable Law on or before the date of this Agreement; and

(c) as to a party, the negligence, willful misconduct or unexcused failure to perform of the other party;

provided that Uncontrollable Circumstance does not include strikes or other labor actions arising from labor relations issues involving the employees of the Contractor or Subcontractors in connection with the performance of the Work.

**1.2 Conventions.** Unless otherwise expressly provided in this Agreement:

(a) references to Persons include their successors and permitted assigns;

(b) the term “include,” “includes” or “including” means include, includes or including without limitation (as the case may be);

(c) references to the Articles, Sections and Exhibits mean the articles and sections of, and the exhibits to, this Agreement;

(d) the term “day” means a calendar day and includes Saturdays, Sundays and holidays, except that, if any obligation for the payment of money under this Agreement falls due on a Saturday, Sunday or a holiday on which Commonwealth banks are not open for business, the payment will be due on the next business day thereafter;

(e) all references to a statute, regulation, law, agreement or instrument mean such statute, regulation, law, agreement or instrument as it may be amended, amended and restated or supplemented from time to time, including (in the case of statutes, regulations or laws) by successor statutes, regulations or laws and (in the case of agreements or instruments) by waiver or consent;

(f) references to a party means a party to this Agreement; an

(g) a reference to a governmental agency, department, board, commission or other public body or to a public officer includes an entity or officer that or who succeeds to or

performs substantially the same functions as those performed by such governmental agency, authority, department, board, commission or other public body or to a public officer.

## **ARTICLE 2**

### **INVESTMENT GRADE AUDIT**

**2.1 Scope of Audit and Audit Report.** The Contractor, with the cooperation of the Agency, will perform a comprehensive Audit and prepare a detailed engineering and economic report (the “**Audit Report**”) that specifically identifies the ECMs that the Contractor recommends to be installed or implemented at the Agency Facility. The Audit Report will contain detailed projections of energy and cost savings to be obtained at the Agency Facility as a result of the installation or implementation of the ECMs. The savings calculations will document and use assumptions, projections, and baselines that best represent the true value of future energy and water savings for the Agency Facility, including accurate marginal cost for each unit of savings at the time the Energy Audit is performed; documented material and non-staff labor costs actually avoided; adjustments to the baseline to reflect current conditions at the Agency Facility compared to the historic base period; calculations that account for the interactive effects of the recommended ECMs; the Measurement and Verification Plan and other relevant information. The Audit Report must clearly describe how utility tariffs were used to calculate savings for all ECMs. The Audit Report must describe the Contractor’s plan for installing or implementing, and commissioning the measures in the Agency Facility, including all anticipated costs associated with the installation and implementation. The primary purpose of the Audit Report is to provide the engineering and economic basis for the GSA. Sections 2.2 through 2.10 below set forth the tasks the Contractor shall perform in performing the Audit and preparing the Audit Report.

#### **2.2 Collect General Agency Facility Information.**

(a) The Contractor shall (i) collect general Agency Facility information, such as size, age, construction type, condition and general use of the Agency Facility, (ii) collect and summarize Agency Facility utility cost and consumption data for the most recent 36-month period and (iii) evaluate the impact on utility cost and consumption of any energy initiatives, currently being installed or currently contemplated to be installed by the Agency in the Agency Facility, which will not be subject to this Agreement.

(b) The Agency shall furnish or cause to be furnished:

(i) all available records and data concerning energy and water usage for the Agency Facility for the most current 36-month period, if available, including utility records; occupancy information; descriptions of any changes in the structure of the Agency Facility or its heating, cooling, lighting or other systems or energy requirements; descriptions of all major energy and water consuming or energy and water saving equipment used in the Agency Facility; any comfort problems, code deficiencies, and a description of current energy management procedures;

(ii) a record of any energy-related improvements or modifications that have been installed during the past three years or are currently being installed or are currently contemplated to be installed by the Agency in the Agency Facility that would not be subject to this Agreement;

(iii) copies of drawings, equipment logs and maintenance work orders to the Contractor; and

(iv) Any constraints that may affect the audit process or savings analysis. This may include potential ECMs that that the Agency does not want considered, the term of this Agreement and anticipated changes in the use, operation, or size of the Agency Facility.

### **2.3 Analyze Existing Systems and Equipment.**

(a) The Contractor shall prepare an analysis and inventory of existing major equipment based on review of documents and a physical inspection of the major electrical and mechanical systems at the Agency Facility, including:

(i) cooling systems and related equipment;

(ii) heating and heat distribution systems;

(iii) automatic temperature control systems and equipment;

(iv) air distribution systems and equipment;

(v) outdoor ventilation systems and equipment;

(vi) kitchen and associated dining room equipment, if applicable;

(vii) laboratories and associated lab equipment, if applicable;

(viii) exhaust systems and equipment;

(ix) hot water systems;

(x) electric motors, transmission and drive systems;

(xi) interior and exterior lighting;

(xii) laundry equipment, if applicable;

(xiii) water consumption end uses, such as restroom fixtures, water fountains, irrigation, etc.;

(xiv) wall/roof/foundation insulation and energy loss through building structures; and

(xv) other major energy using systems, if applicable.

(b) The analysis must address the following considerations:

(i) the loads, proper sizing, efficiencies or hours of operation for each system (where Agency Facility operating or climatic conditions necessitate, engineering estimates may be used, but for fan and pump motors greater than 5 hp and large fluctuating loads with high potential savings appropriate measurements are required unless waived by the Agency); and

(ii) current operating condition for each system.

(c) The Contractor shall conduct interviews with Agency Facility operation and maintenance staff regarding the Agency Facility's mechanical systems operation, occupancy patterns and problems with comfort levels or equipment reliability.

(d) The Contractor shall have satisfied itself as to the suitability and sufficiency of the Agency Facility in its current condition for the performance by the Contractor of the Construction Work.

(e) The Agency acknowledges that the Contractor's scope of work in the conducting the Energy Audit does not include or require the Contractor to identify hazardous substances at the Agency Facility. However, if the Contractor does identify or encounter any hazardous substances while conducting the Energy Audit, it will describe the type and location thereof in the Investment Grade Audit Report.

#### **2.4 Establish Consumption; Normalize, and Reconcile with End Use Consumption Estimates.**

(a) The Contractor shall examine the most recent 36 months of utility bills and establish consumption for electricity, fossil fuels and water by selecting the most representative consecutive 12 months (the "Base Year"). The Contractor shall consult with Agency Facility staff and account for any unusual or anomalous utility bills that may skew consumption from a reasonable representation.

(b) The Contractor shall collect weather data (Heating Degree Days and Cooling Degree Days) representative of the area where the Facility is located, corresponding to the 36 months of utility bills or at a minimum, corresponding to the selected Base Year consumption. Contractor shall conduct a weather normalization process for the Base Year data to determine the significance of weather impacts to the Facility energy use.

(i) Normalization shall be accomplished using regression-based energy modeling using weather and any other independent variables that the Contractor determines are significant. This model can then be used with normal weather data, such as TMY (Typical Meteorological Year), to determine the weather normalized Base Year consumption to be used to calibrate energy models or to use in energy savings analyses. If an Option C (whole facility) measurement and verification option is proposed/selected

for any Agency Facility, this Base Year regression model will be used to define the baseline equation for the energy savings verification.

(ii) If the Contractor determines that there is not a significant weather correlation or other independent variable impact on Facility energy use or if the proposed ECMs are non-weather dependent, the Contractor may request to the Agency to forego the Base Year regression energy model.

(c) The Contractor shall analyze, where reasonably possible, all major end uses representing more than five percent of total Agency Facility consumption including, but not limited to: (i) lighting, (ii) heating, (iii) cooling, (iv) HVAC motors (fans and pumps), (v) plug load, (vi) kitchen equipment, (vii) laboratory equipment, and (viii) other equipment.

(d) Where loading and/or usage are highly uncertain, the Contractor shall employ spot measurement or short term monitoring at its discretion, or at the request of the Agency. Reasonable applications of measurement typically include fan and pump motors greater than 5 hp and variable loads that are likely candidates for conservation measures, such as cooling equipment. If there is limited data available from an existing building control system or other metering systems, the Contractor shall employ sufficient field measurement and monitoring to accurately characterize the baseline operation of the existing equipment and systems in the facility.

(e) Using the EPA's ENERGY STAR™ tools and resources, or other tools and resources approved in writing by the Agency, for each Agency Facility, provide an existing Energy Star Score, or other EUI (Energy Use Index in kBtu/sf/yr) for the Facility and provide a benchmarking analysis of the Agency Facility.

**2.5 Develop List of Potential ECMs.** The Contractor shall:

(a) identify and propose potential ECMs for installation or implementation at the Agency Facility, including cut sheets on proposed equipment;

(b) for non-standard ECMs, provide information regarding product site installations;

(c) provide a detailed estimate of the savings and life expectancy of each proposed ECM;

(d) specify Agency Facility operations and maintenance procedures which will be affected by the installation/implementation of the proposed ECMs;

(e) provide analysis methodology, supporting calculations and assumptions used to derive baselines (e.g., lighting operating hours) and estimate savings, including the disclosure of essential data, assumptions, formulas, etc. used in manual calculations such that a reviewer can replicate the calculations based on the data provided;

(f) provide (i) the existing and proposed air and hot water temperatures, amount of outdoor air ventilation (CFMs) lighting and acoustic levels, and (ii) copies of the utility tariffs and commodity price histories used in savings calculations;

(g) for savings estimates using computer simulations, provide access to the program and all inputs and assumptions used, if requested by the Agency;

(h) provide a detailed preliminary savings measurement and verification plan for each proposed ECM, including a Risk, Responsibilities and Performance matrix in the form described in Schedule I (Measurement and Verification Plan; Methodology to Adjust Baselines);

(i) provide a detailed preliminary commissioning plan for the proposed ECMs;

(j) provide detailed calculations for any rate saving proposals;

(k) provide evidence that proposed ECMs will not result in material increases in maintenance, material or other operational costs;

(l) estimate for informational purposes any environmental costs or benefits of the proposed ECMs (e.g., disposal costs, avoided emissions), and provide (i) emissions reductions data for NO<sub>x</sub>, CO<sub>2</sub> and SO<sub>2</sub>, and (ii) segment emissions data for direct site emissions reductions (e.g., fossil fuels) and indirect emissions reduction data (e.g., electricity/water);

(m) All proposed ECMs must comply with the Standard of Care. As used herein “Standard of Care” means performance of the Work in compliance with all of the following standards:

(i) all Applicable Laws and Applicable Codes applicable to the proposed ECM installations and the Audit Services;

(ii) the application of professional engineering judgment; and

(iii) Good Industry Practice.

If a discrepancy arises between any of the foregoing standards, the most stringent standard will apply.

(n) Provide draft project Cash Flow Analysis in the form provided in Schedule M (Savings Guarantee) under two escalation scenarios:

(i) no escalation (zero percent); and

(ii) NIST/EIA projected escalations. The NIST values are to be considered “not to exceed” escalation values.

**2.6 Select Final Recommended ECMs.** The Contractor shall, in consultation with the Agency, recommend specific ECMs from its preliminary compilation for installation and implementation at the Agency Facility.

**2.7 Construction Price.** Once the Contractor and Agency have agreed on the preliminary list of ECMs in the draft Scope of Construction Work, the Contractor shall deliver a “**Pricing Proposal**”, prepared on an Open Book Basis, for the installation, implementation and commissioning (including training for Agency personnel) of each proposed ECM. The Contractor shall identify, for each proposed ECM, any hard cost that represents 10 percent or more of the proposed fixed price. Project cost data and the resulting Construction Price must be provided in the format included in Schedule F (Construction Price and Milestone Schedule). The Open Book Basis pricing proposal will be subject to review and comment more fully as set forth below:

(a) With respect to all subcontractors listed on Schedule E (Approved Subcontractors) and vendors, Contractor shall deliver competitive bid packages for the Agency’s review and comment prior to solicitation and subcontractors’ and vendors’ responses prior to selection. The Contractor shall take the Agency’s comments into consideration prior to selection of [major] Subcontractors and vendors. The Contractor alone shall make the final selection of Subcontractors and vendors (subject to the Agency’s right to reasonably reject Subcontractors, based on its independent assessment of a subcontractor’s past performance or business practices, or adverse prior relationship with the Agency, and further subject to adjustments to price and schedule), and prices shall be fixed and not subject to further adjustment, except pursuant to Change Orders, as described in Article 5 of the GSA. The parties shall agree on an adjustment to the Scope of Construction Work and any other affected provisions of this Agreement caused by the Agency’s rejection of a subcontractor.

(b) With respect to any Work to be performed or materials to be supplied by an affiliate of the Contractor or other vendor or supplier with whom Contractor has a trade relationship on a sole source basis, Contractor shall develop an open book and transparent pricing that is consistent in principal with this Section 2.7.

(c) The Agency shall have the right to audit all open book data, and, for such purpose, the Contractor shall and shall direct its Subcontractors and vendors to keep and maintain books, records, accounts, and other documents sufficient to reflect accurately and completely the amounts and information that forms the basis for any document used to establish any portion of the Pricing Proposal for a period not less than 30 years.

**2.8 Operating Period Payments.** In addition to the Construction Price, the Contractor shall document the fixed price for the Annual Service Fees in Schedule M (Operating Period Payments).

## **2.9 Savings Estimates.**

(a) The Agency shall endeavor to provide the Contractor with sufficient general and specific guidance pursuant to this Article 2 to develop the savings estimates and Savings Guarantee for the Audit Report. If questions arise as to the calculation of savings or whether certain items will be allowed as savings, the Contractor shall seek written guidance and instructions from the Agency. The Agency may reject items claimed as savings that do not reflect reductions to items currently included in the Agency's budget or that have been claimed contrary to the terms of this Agreement or contrary to the written guidance or instructions provided by the Agency. The Agency may reject the Contractor's calculation of savings if it determines that there is another more suitable or preferable means of determining or calculating such savings.

(b) For the purposes of completing the Cash Flow Analysis in Schedule J (Project Cash Flow Analysis and Savings Guarantee), annual escalation rates for commodity prices used in the development of savings estimates may not exceed:

- (i) NIST projected % for natural gas;
- (ii) NIST projected % for electricity;
- (iii) NIST projected % for oil;
- (iv) NIST projected % for steam based on fuel source;
- (v) 2% for water; and
- (vi) NIST projected % for other fuel type (specify).

(c) The following items will not be credited as savings derived from a proposed ECM: (i) the Agency's in-house labor cost, (ii) the Agency's deferred maintenance cost, (iii) offset of future capital costs of the Agency and (iv) reduced operation and maintenance costs.

## **2.10 Investment Grade Audit Report Format.**

(a) The Contractor shall prepare a two-volume report as follows:

(i) Each volume must be submitted using 8 1/2" x 11" sheets of paper and a font size no smaller than 10 point. The pages in each volume must be numbered sequentially, include a Table of Contents and tabbed with the visible titles of corresponding Schedules (Volume 1) or Sections (Volume 2).

(ii) Volume I shall include the presentation of information in the following schedules in the form to be attached to the GSA.

Schedule A Scope of Construction Work

Schedule B	Description of Agency Facilities; Pre-Existing Equipment Inventory; Current and Known Future Capital Projects
Schedule C	Initial Construction and Installation Schedule
Schedule D	Construction Unit Commissioning and Performance Testing; Operating Parameters of ECMs; Manufacturers Warranties
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Schedule N	Estimated Installment Payments

(b) Volume 2 must include all of the information required in Section 2.5 and the Sections below, and presented in the following format:

(i) *Executive Summary.* Provide an executive summary which describes the Agency Facility, ECMs evaluated, analysis methodology, results and a summary table in the form of Exhibit 5 (Form of Summary Table of Cost and Savings Estimates) presenting the cost and savings estimates for each recommended ECM. The executive summary is to include a summary of the recommended measures and costs.

(ii) *Measures Not Evaluated.* Include a discussion of measures not evaluated in detail and the explanation of why a detailed analysis was not performed.

(iii) *Facility Description and Utility Analysis/Baselines.* Provide written description of each facility including overview of operational characteristics and uses as well as description of major energy/utility using systems (to document results of Sections 2.2 through 2.4). Provide a summary of all utility bills, discussion and presentation of current utility rates and structures, proposed utility baselines and how

they were established, and end use reconciliation with respect to the baselines including a discussion of any unusual characteristics and findings.

(iv) *ECMs*. Provide detailed descriptions for each ECM, including analysis method, supporting calculations (may be submitted in appendices), results, proposed equipment and implementation issues.

(v) *Price*. Provide a fixed price for each proposed ECM.

(vi) *Savings Estimate and Guarantee*. Provide the estimated savings for each proposed ECM and the Guaranteed Savings for the Proposed Project.

(vii) *Term*. Provide a proposed term for this Agreement based on total project cost, proposed Operating Period Payments and Guaranteed Savings.

(viii) *Annual Service Fees*. Provide a proposed annual amount to compensate Contractor for performing the annual services including, but not limited to, M&V services (in accordance with Schedule I (Measurement and Verification Plan; Methodology to Adjust Baselines)), maintenance services (in accordance with Schedule K ([Contractor's and] Agency's Maintenance Responsibilities)), to be set forth in Schedule M (Operating Period Payments) of the Audit Report, together with an inflation adjustment (escalation) factor, and to be payable in equal monthly installments in accordance with Section 2.8 and Schedule M (Operating Period Payments).

(ix) *Milestones*. Describe milestones against which payments for the installation of the ECMs will be made to be set forth in Schedule F (Construction Price and Milestone Schedule) of the Audit Report.

(x) *Appendices*. Provide thorough appendices that document the data relied upon to prepare the analysis and how that data was collected [along with all ECM specific detailed savings calculations. All calculations to be presented for review.]

**2.11 Interim Deliverables.** The Contractor shall submit the following interim deliverables to Agency for review and discussion.

(a) **Preliminary Audit Report.** The intent of this submission is to ensure that the Contractor and Agency are in agreement regarding the facility baseline evaluation and analysis, including measurement and verification approach and related baseline activities. It is highly recommended that the draft Measurement and Verification Plan or approach be submitted to and discussed with the Agency before the Preliminary Audit Report. This submission should reflect results of items in Sections 2.2 through 2.4. It is recommended that the Contractor provide the Preliminary Audit Report consistent with format of IGA report for those facility description and baseline related sections to minimize rework for IGA report submission. Contractor should submit the following sections or equivalent information: Volume 1 draft Schedules B, G and I; Volume 2 Facility description and utility analysis/baselines. Contractor should also provide any other information that would support baseline activities (for example, sample utility bills, detailed utility analysis, measurement and trending/monitoring data, etc.)

(b) **Interim Audit Report.** The intent of this submission is for the Contractor to present the updated list of potential ECMs under development, as described in Section 2.5 (the “**Proposed Project**”), along with a draft Scope of Work and Preliminary Cash Flow Analysis, for discussion with and review by Agency. Contractor should recommend ECMs for further development and inclusion in the Project as provided in Section 2.6. However, Contractor should present all ECMs developed to date to allow Agency to review all ECMs and select recommended ECMs. The Contractor should submit the following Audit Report sections or equivalent information: draft Schedules A and J (including cash flow analysis under the two escalation scenarios: (i) no escalation and (ii) EIA/NIST projected escalations); Volume 2 executive summary draft and ECM summary table.

### **ARTICLE 3**

#### **DELIVERY OF FINAL AUDIT REPORT; GUARANTEED ENERGY SAVINGS AGREEMENT**

##### **3.1 Submission and Acceptance of the Investment Grade Audit Report.**

(a) Contractor must complete and submit the Audit Report incorporating all comments from the Preliminary Audit Report and Interim Audit Report submissions, including the selection of the escalation rates to be used, to Agency within [\_\_\_] days of the date of execution of this Agreement. By delivering the Audit Report, Contractor agrees to enter into a GSA based on the form GSA attached as Exhibit 2 (Form of Guaranteed Savings Agreement) and the Schedules attached to the Audit Report.

(b) The Agency will notify the Contractor in writing of any requested changes in the Investment Grade Audit Report and each party shall exercise good faith and due diligence in endeavoring to complete mutually acceptable Schedules. The Agency will notify the Contractor in writing of its acceptance of the final Investment Grade Audit Report and of its determination regarding whether or not the Agency will enter into a GSA based on the Schedules delivered as a part of the Audit Report within [60] days of its initial receipt of the Audit Report unless the parties agree to an extended period for negotiation.

##### **3.2 Agency’s Right to Terminate Without Execution of a GSA.**

(a) The Agency may terminate this Audit Agreement without any liability to the Contractor if the Audit Report as finally delivered does not (i) offer to guarantee Energy and Water Savings that will result in 10 percent net savings after Installment Payments to the Agency for each year of the program and (ii) provide for Guaranteed Savings for each Savings Year that exceed the amount required to pay all Installment Payments and Operating Period Fees payable with respect to such Savings Year; provided that if the Installment Payment Schedule set forth in Schedule N (Estimated Installment Payment Schedule) is for a period of years less than the term of this Agreement, the condition in this Section 3.2(a) will be measured on an aggregate basis over the term of the GSA and the agreement under which the Agency pays the Installment Payments, respectively, rather than on an annual basis.

(b) If this Agreement is terminated pursuant to this Section 3.2, the Contractor agrees to provide the Agency with copies of any preliminary notes, reports and analyses that were produced prior to the effective date of the termination. Such documentation shall be used by the Agency to help determine the extent of work completed by the Contractor prior to termination and shall become the property of the Agency.

## **ARTICLE 4**

### **TERMINATION PROVISIONS**

#### **4.1 By the Contractor.**

(a) The Contractor may terminate this Agreement prior to the completion of the Audit and Audit Report or subsequent to the completion of the Energy Audit and Report if it determines that it cannot meet the conditions in Section 3.2(a).

(b) If the Contractor terminates this Agreement pursuant to subsection (a), the Agency will not be obligated to pay any amount to Contractor for services performed or expenses incurred by Contractor in performing the Energy Audit and Report required under this Agreement.

(c) Termination under this section shall be effective upon Agency's receipt of written notification from the Contractor stating the reason for the termination and all documents which support termination pursuant to subsection (a).

#### **4.2 By the Agency.**

(a) The Agency may terminate this Agreement by delivering notice to the Contractor if the Contractor fails to complete the Energy Audit and deliver the Report to the Agency by the date established in Section 3.1, above (as such date may be extended in writing by the Agency) and the Contractor does not cure such failure within ten (10) business days after its receipt of such notice. In the event of such a termination, the Agency will not be obligated to pay any amount to the Contractor for services performed or expenses incurred by the Contractor in performing the Energy Audit and preparing the Report.

(b) The Agency may terminate this Agreement if, prior or subsequent to the completion of the Energy Audit, the Contractor notifies the Agency in writing that it is unable to meet the conditions in Section 3.2(a). Termination under this subsection (b) will be effective upon Agency's receipt of written notification from the Contractor. In this event, the Agency will not be obligated to pay any amount to the Contractor for services performed or expenses incurred by the Contractor in performing the Energy Audit and preparation of the Report.

(c) If, prior to the completion of the Energy Audit, the Agency notifies the Contractor in writing that it has elected to terminate this Agreement for its convenience, in which case the Agency shall reimburse the Contractor for actual documented time, material and ancillary expenses incurred, as of the effective date of the termination, but in no event will the Agency's liability exceed the Audit Fee. The Contractor will not be entitled to loss of anticipated profit, loss of use of money, or administrative or overhead costs. Termination under

this subsection (c) will be effective upon the Contractor's receipt of written notification from the Agency.

**4.3 Documents.** The Contractor agrees to provide the Agency with copies any preliminary notes, reports, analyses, that were produced prior to the effective date of the termination. Such documentation shall be used by the Agency to help determine the extent of work completed by the Contractor prior to termination and shall become the property of the Agency.

## ARTICLE 5

### COMPENSATION

The Agency shall pay an audit fee of \$\_\_\_\_\_ (the "**Audit Fee**") to the Contractor for performing its obligations under this Agreement. If the Parties execute a GSA, provisions for payment of the costs incurred to perform the investment grade audit shall be incorporated into the GSA. If the Parties fail to execute a GSA within 120 days from delivery of the Audit Report, and payment is not excused in accordance with Section 3.2(a), 4.1(b) or 4.2(a), the Contractor shall invoice the Agency for the Audit Fee and the Agency shall pay the invoice within thirty days of receipt of the invoice.

## ARTICLE 6

### OTHER AGREEMENTS

**6.1 Hazardous Substances.** The Agency acknowledges that other than identifying Hazardous Substances expected to be encountered in replacing existing equipment as a part of an ECM, the Audit Services do not include the identification, abatement, cleanup, control, removal, or disposal of Hazardous Substances. However, the Contractor represents and warrants that any Hazardous Substances that it identifies or knowingly encounters in conduction the Audit will be reported by the Contractor to the Agency in the Audit Report.

**6.2 Representations and Warranties.**

(a) The Agency represents and warrants that:

(i) it is a [\_\_\_\_\_];

(ii) it has the power, authority and legal right to enter into and perform this Audit Agreement and its execution and delivery of, and its performance under, this Audit Agreement will not violate its [**organizational documents**] or any judgment, order, law or regulation;

(iii) no consent, permission or approval is required for the valid execution and delivery by the Agency of this Audit Agreement or for such party's performance hereunder, except those that have been obtained;

(iv) this Audit Agreement has been duly authorized, executed and delivered by the Agency and constitutes a legal, valid and binding obligation of the Agency, enforceable in accordance with its terms, except to the extent limited by bankruptcy or similar laws or by general equitable principles concerning remedies; and

(v) there is no litigation or proceeding pending or, to the knowledge of the Agency, threatened against or affecting it that (A) seeks to enjoin the performance of its obligations under this Audit Agreement or (ii) if adversely determined, would materially adversely affect its ability to, perform such obligations.

**(b) The Contractor represents and warrants that:**

(i) it is duly organized and in good standing in the jurisdiction of its organization and, if not organized in Delaware, is licensed to do business as a foreign corporation in Delaware;

(ii) it has the power, authority and legal right to enter into and perform this Audit Agreement and the Contractor's execution and delivery of, and its performance under, this Audit Agreement will not violate the Contractor's organizational documents or any judgment, order, law or regulation;

(iii) no consent, permission or approval is required for the valid execution and delivery by the Contractor of this Audit Agreement or for the Contractor's performance hereunder, except those that have been obtained;

(iv) this Audit Agreement has been duly authorized, executed and delivered by the Contractor and constitutes a legal, valid and binding obligation of the Contractor, enforceable in accordance with its terms, except to the extent limited by bankruptcy or similar laws or by general equitable principles concerning remedies; and

(v) there is no litigation or proceeding pending or, to the knowledge of the Contractor, threatened against or affecting it that (i) seeks to enjoin the performance of its obligations under this Audit Agreement or (ii) if adversely determined, would materially adversely affect its ability to, perform such obligations.

**6.3 Uncontrollable Circumstances.**

(a) If, as a result of an Uncontrollable Circumstance, either party is prevented from performing or is delayed in the performance of any of its obligations under this Agreement, such prevention of or delay in performance will, subject to such party's satisfaction of the conditions precedent in subsection (b) below, be excused during any period in which such performance is prevented or delayed by an Uncontrollable Circumstance, and for such period thereafter as necessary to correct the adverse effect of such Uncontrollable Circumstance; provided that the failure to pay any amounts owed hereunder (whether accruing prior to or during the Uncontrollable Circumstance) in a timely manner will not be excused by an Uncontrollable Circumstance unless the electronic payment system is rendered inoperable due to the Uncontrollable Circumstance.

(b) A party will be excused from performance hereunder as a result of an Uncontrollable Circumstance subject to the following conditions:

(i) such party gives the other party prompt notice describing the particulars of the Uncontrollable Circumstance and the potential duration of the prevention of or delay in performance; and

(ii) such party uses its commercially reasonable efforts to (A) mitigate the impact of the Uncontrollable Circumstance on its performance, (B) pursue insurance and any other third-party reimbursement that may reasonably be expected to be obtained with respect to the Uncontrollable Circumstance and (C) overcome the prevention of or delay in performance, and performance is resumed at the earliest practicable time after cessation of the Uncontrollable Circumstance.

## ARTICLE 7

### MISCELLANEOUS

**7.1 Materials, Equipment and Supplies.** The Contractor shall provide or cause to be provided all facilities, materials, equipment and supplies necessary to perform the Audit and prepare the Audit Report.

**7.2 Independent Contractor.** In performing the services required by this Agreement, the Contractor will act as an independent Contractor and not as an employee or agent of the Agency.

**7.3 Compliance With Law and Rules.** The Contractor shall perform its obligations hereunder in compliance with any and all Applicable Laws, Applicable Codes, and this Audit Agreement, and in accordance with Good Industry Practice. The Contractor shall comply with the Agency Conduct Requirements

**7.4 Agency Rights.** The Report and all other documents prepared by the Contractor and submitted to the Agency under this Audit Agreement will be the property of the Agency and the Agency will hold the copyright and all other property rights with respect thereto. The Agency shall have unrestricted authority to reproduce distribute, and use any submitted report, data, or material, and any software or modifications and any associated documentation that is designed or developed and delivered to the Agency as part of the performance of this Audit Agreement. The Contractor will have no responsibility to the Agency under this Audit Agreement for any subsequent use by the Agency or a third party of any information in the Audit Report.

**7.5 Assignment.** This Agreement is not assignable without the written consent of the other party.

**7.6 Complete Agreement; Amendments.** This Agreement constitutes the entire agreement between the Parties relating to the subject matter hereof and supersedes all prior agreements negotiations, discussions and understandings, written or oral, between the Parties as

to the subject matter hereof. This Agreement may not be amended or modified except by a written instrument signed by the Parties.

**7.7 Governing Law.** This Agreement will be governed by, and interpreted and enforced in accordance with, the laws of the State of Delaware (excluding any conflict of laws rule or principle that might refer such interpretation to the laws of another jurisdiction). For any dispute relating to this Agreement, the Parties consent to the jurisdiction in, and the exclusive venue of, the courts in Delaware.

**7.8 Waivers.** Any waiver of, or consent to depart from, the requirements of any provision of this Audit Agreement will be effective only if it is in writing and signed by the party giving it, and only in the specific instance and for the specific purpose for which it has been given. No failure on the part of either party to exercise, and no delay in exercising, any right under this Audit Agreement will operate as a waiver of such right.

**7.9 Severability.** If any provision of this Audit Agreement is determined to be invalid, illegal or unenforceable in any respect, the parties shall negotiate in good faith and agree to such amendments, modifications or supplements of or to this Agreement or such other appropriate actions as may, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the parties as reflected herein, and the other provisions hereof will, as so amended, modified or supplemented, or otherwise affected by such action, remain in full force and effect.

**7.10 Headings.** Headings and subtitles used in this Audit Agreement are for the purpose of convenience only, and no heading or subtitle may be construed to modify or be used to interpret the text of any section.

**7.11 Notice.** Unless otherwise specifically provided in this Agreement, all notices, consents, authorizations and approvals given under this Agreement must be in writing and may be delivered by hand or by certified mail to the addresses noted below:

If to Contractor:

with a copy to:

If to the Agency:

with a copy to:

Each Party may change the address to which its communications are delivered by giving notice to the other Party. Any communication given in accordance with this Section 7.11 will be deemed to have been given to a Party upon its receipt thereof.

**7.12 Counterparts.** This Agreement may be executed in any number of counterparts that, taken together, will constitute one and the same agreement.

[Signature Page to Follow]

**Signatures.**

As evidence of their intent to be legally bound, each of the Contractor and the Agency has caused this Investment Grade Audit Agreement to be executed by its duly authorized representative as of the day and year first written above.

[AGENCY]

[CONTRACTOR]

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

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

**EXHIBIT 1**

**AGENCY FACILITIES**

A. Description of Agency Property

B. Description of Agency Facilities

	Building Name	Sq ft.	Comments

C. Floor plans for each building that delineate the Sites

**EXHIBIT 2**

**FORM OF GUARANTEED SAVINGS AGREEMENT**

**EXHIBIT 3**  
**AGENCY CONDUCT REQUIREMENTS**

## **EXHIBIT 4**

### **REQUIREMENTS FOR AUDIT REPORT SCHEDULES**

Schedule A	Scope of Construction Work
Schedule B	Description of Agency Facilities; Pre-Existing Equipment Inventory; Current and Known Future Capital Projects
Schedule C	Initial Construction and Installation Schedule
Schedule D	Construction Unit Commissioning and Performance Testing; Operating Parameters of ECMs; Manufacturers Warranties
Schedule E	Approved Subcontractors
Schedule F	Construction Price and Milestone Schedule
Schedule G	Baselines
Schedule H	Standards of Comfort
Schedule I	Measurement and Verification Plan; Methodology to Adjust Baseline
Schedule J	Project Cash Flow Analysis and Savings Guarantee
Schedule K	[Contractor and] Agency Maintenance Responsibilities
Schedule L	Contractor [and Agency] Training Responsibilities
Schedule M	Operating Period Payments
Schedule N	Estimated Installment Payments



**EXHIBIT 6**

**FORM OF AUDIT REPORT ACCEPTANCE CERTIFICATE**

**Certificate of Acceptance – Investment Grade Audit Report**

Date \_\_\_\_\_

The Services performed pursuant to the Investment Grade Audit Agreement, dated \_\_\_\_\_, by and between \_\_\_\_\_ (AGENCY) and \_\_\_\_\_ (CONTRACTOR), has been delivered by CONTRACTOR to the undersigned in an Investment Grade Technical Energy Audit Report (Investment Grade Audit Report), dated \_\_\_\_\_, and has been determined to be finally complete. The Issuer, by and through the undersigned duly authorized representative, accepts the Services and the Energy Audit Report as finally complete and assumes full possession thereof.

AGENCY

\_\_\_\_\_

Address 1

City, state zip

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

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

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