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Model ESCO Performance Contracts

Bangladesh

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Section 1 Background on Model Contracts

1.1 Overview of ESCO Services

An energy services company (**ESCO**) is defined as a company engaged in developing, installing and financing comprehensive, performance-based projects centered on improving the energy efficiency of facilities owned or operated by commercial, industrial, institutional, and other types of customers. Projects are performance-based because the ESCO's compensation, and often project-financing, are meaningfully tied to the amount of energy actually saved. For this reason, ESCOs are fundamentally different from consulting engineers specializing in identifying potential efficiency improvements, who are typically paid a fee for their advice and undertake no risk that their recommendations will yield results.

ESCOs are turn-key service providers who are responsible for an unusually wide spectrum of tasks in that they: (a) identify, design and often finance projects, (b) install and supervise the maintenance of most of the equipment involved in their projects, and (c) measure and monitor the project's energy savings. The most important aspect of ESCO projects is that the ESCO typically guarantees that its customer's energy and operating costs will be reduced in an amount sufficient to repay the investment cost. Should the savings be insufficient to repay the investment cost, the ESCO will be responsible for the shortfall.

1.2 Performance-Based Contracts

There are two common types of Performance-based Contract structures used by ESCOs, called "**Guaranteed Savings**" and "**Shared Savings**", are described briefly below.

1.2.1 Guaranteed Savings Contract Structure

The "**Guaranteed Savings**" structure is an arrangement where the commercial/industrial facility owner ("**Host**") makes periodic fixed debt service payments to a third party financial institution ("**Lender**") in the amount required to repay the ESCO's turnkey project price plus the Lender's financing costs. Under this approach, the ESCO guarantees the Host that the project's realized savings will equal all project payments, including debt service to the Lender plus any downstream fees to the ESCO for its ongoing M & V and operational and maintenance services. If the realized savings fall short of the project payments made by the Host, the ESCO will pay the difference between the realized savings and the project payments. If the realized savings exceed the project payments, the Host and the ESCO may share in the excess depending on the risk taken and the extent of services provided by the ESCO.

Under the Guaranteed Savings approach the ESCO bears no direct contractual obligation to repay the Lender with respect to the debt service payment; the Host directly repays the Lender through a separate Loan Agreement between the Lender and the Host. The ESCO's guarantee is not a guarantee of payment to the Lender; it is a guarantee of performance to the Host - a promise that the project, as designed and installed, will pay for itself over the repayment term of the project financing provided by the Lender. This guarantee is provided through a separate contract called an Energy Services Agreement ("**ESA**") between the Host and the ESCO.

ESCOs prefer the Guaranteed Savings structure for four (4) general reasons. First, the Lender, more qualified in credit assessment than most ESCOs, bears the Host credit risk.

Second, this structure keeps the ESCO's own balance sheet clear of project debt. Third, in the US market, this structure provides the lowest interest cost on the debt service because the Lender is providing the funds based on the creditworthiness of the Host and does not increase the interest rate to equity rates of return for having to assume project-related savings risk. Finally, by segregating credit risk from project performance risk for the ESCO, the Guaranteed Savings structure induces the Host to resolve on-going project issues expeditiously and equitably with the ESCO since the Host bears the on-going debt service obligations separately to the Lender.

The primary impediment of the Guaranteed Savings structure to the ESCO is that it is more difficult to sell because it requires the Host to incur a liability and rely solely on the ESCO savings guarantee for repayment of the project investment. This can make it very difficult to sell to some Hosts.

1.2.2 Shared Savings Contract Structure

The "**Shared Savings**" structure refers to an arrangement where the ESCO (as opposed to the Host) finances the ESCO's turnkey project price and bears the obligation to repay the Lender. Under a Shared Savings structure, the Host commits under an ESA to pay a percentage (or a fixed amount) of the project's realized savings to the ESCO, which is an amount sufficient for the ESCO to cover the debt service payments to the Lender plus any downstream fees for its ongoing M & V and operational and maintenance services. Because the Host has no direct contractual obligation to repay the Lender, the ESCO not only assumes the Project performance risk, but also assumes the credit risk of the Host by being obligated to repay the Lender even if the Customer does not pay the ESCO the achieved project savings. Due to the increased risk assumed by the ESCO, the Host is typically charged a higher cost for financing the Project.

Although the Shared Savings is easier to sell to Hosts than Guaranteed Savings, ESCOs prefer the Guaranteed Savings due to the lower Project risks assumed and the substantially lower capitalization required for them versus what is typically required by Lenders looking for them to support their assumption of the Host's Credit Risks. The commercial/industrial customers in the North America also prefer the Guaranteed Savings structure because of the lower interest costs.

1.3 Model Contracts

The Model Contracts for Commercial/Industrial Customers (hereafter called the "**Model Contracts**") pertain to the Guaranteed Savings type of structure described above. The Guaranteed Savings structure is by far the most predominant one used by ESCOs, and is the structure most applicable to Bangladesh. The Model Contracts cover the three (3) phases of the ESCO's relationship with Commercial/Industrial Customers, namely: i) development of projects, which covers technical and project financing, under the Feasibility Agreement, ii) construction of projects under the ESA and iii) calculation, measurement and verification of project savings under project-specific Exhibits attached to the ESA.

1.3.1 Feasibility Agreement

The **Feasibility Agreement** is an initial agreement that covers the terms and conditions for an ESCO to develop a paid-from-savings project at the Host's site, and it provides the ESCO an

ability to recover its engineering and other development costs if the Customer does not proceed to implement the successfully developed project with the ESCO. The "Minimum Criteria" for a "successfully developed project" is clearly articulated in the Feasibility Agreement. The ESCO's deliverable is a report called and **Investment Grade Audit ("IGA")**, which typically includes the following final detailed technical, financial & legal aspects of the project to be implemented by the ESCO:

- Estimated savings and costs
- Savings calculation methodology
- Comfort and operating standards
- Financing options and cash flows
- Construction price details
- Customer and ESCO maintenance responsibilities

The project details in the IGA are incorporated into the implementation contract called an Energy Services Agreement (**ESA**).

1.3.2 Energy Services Agreement (ESA)

The **Energy Services Agreement ("ESA")** is entered into after the Customer approves the IGA, and it specifies all of the terms and conditions under which ESCO finances and implements the project pursuant to the IGA. It covers such things as project financing terms, construction responsibilities, payment terms, savings calculation methodology, ESCO performance guarantees, warranties and other key legal terms relative to the responsibilities of the ESCO and the Customer.

Section 2 Model Performance Contracts for Bangladesh

This report presents model ESCO/EE performance contracts. They are intended to be templates to facilitate the contractual element of ESCO transactions. All parties to ESCO/EE performance contract transactions may make use of them: the ESCO, the customer, and potentially the lender or financial partner as well. (In many cases, the lender may not be a party to the contract, but the contract may be an important element of the financing documents.) The model contracts are templates in the sense that they provide a detailed beginning toward preparation of the documents required for specific transactions. In practice, every ESCO project is unique, and requires a unique set of contract documents with language that responds to a specific situation and project.

Three model ESCO/EE performance contracts are provided, as follows:

- *Feasibility Agreement for Commercial and Industrial Projects*, which is an initial agreement for an ESCO to develop a project concept and investment-grade feasibility study, and allows the ESCO to recover the development costs if the customer does not proceed to implement the project with the ESCO.

- *Energy Services Agreement (ESA) for Commercial and Industrial Projects (Long Form)* is a detailed model performance contract that included all terms and conditions associated with the paid-from-savings project, ESCO and customer responsibilities, financing conditions, M&V, etc. Such a contract is executed between the ESCO and the customer after acceptance of the investment-grade feasibility study that the ESCO develops under the feasibility agreement.

- *ESA for Commercial and Industrial Projects (Short Format)* is a shorter form version of the ESA, which may be more appropriate in practice for performance contracts in Bangladesh.

Appendix A Feasibility Agreement (Commercial/Industrial Projects)

ENERGY SERVICES – FEASIBILITY AGREEMENT

This Feasibility Agreement (herein the "**Agreement**") is made and entered into as of this __th day of ____ 2001 by and between _____("**ESCO**") and _____**(Owner)** for the performance by ESCO of a feasibility analysis of OWNER's facility located in _____(hereinafter "**Facilities**"), to determine the energy consumption characteristics of the Facilities and to identify the equipment, procedures, and other services that could be provided by ESCO in order to reduce OWNER's energy and other operating costs on a guaranteed basis(**"Savings"**).

1.0 Feasibility Analysis

ESCO will undertake an energy and resource utilization evaluation **("Audit")** of the Facilities. OWNER will provide complete cooperation in connection with preparation of the Feasibility Analysis.

1.1 General Scope

The Scope of Feasibility Analysis would be in two parts–

A. Energy audit to identify low cost energy, and other cost saving measures, and assist in their implementation.

B. Investment Grade Audit, to identify those cost saving measures, which require significant capital investment.

The study would also cover any other associated areas, if found necessary.

1.2 Energy Audit (Low Cost Measures)

The focus of the study would be the following energy consuming equipment/systems *(the list of energy consuming equipment/systems will vary as per the requirements of the owners of the facility)*:

- Electrical systems
- HVAC Systems
- Lighting System
- Electric Motors & Drives
- Compressed Air System
- Boilers and Steam Systems
- Any other major energy consuming equipment

Upon completion of the Audit, ESCO will present to OWNER a written report (**"Feasibility Report"**) which will include at least the following information:

- A description of potential low investment energy measures, which ESCO proposes to implement to achieve Savings;
- An estimate of the annual Savings expected from the implementation.

1.3 Investment Grade Audit

The focus of the study under Investment Grade Audit would be the following equipment/systems:

The Investment Grade Audit would include –

- Description of existing equipment or system to be modified or replaced and the aspect of its present condition and operation which offers an opportunity for efficiency improvement;
- Description of type and estimated value of Savings estimated to be generated including the Guarantee Amount;
- Description of the current energy use and operating costs to be improved ("**Baseline**").
- Description of the proposed measurement and verification ("**M&V**") services and method for calculating Savings ("**Savings Calculation Method**");
- Estimate of the Financed Amount to implement the IGA measures;
- Description of potential Owner commitments which may be required to permit implementation of the IGA;
- A financial pro-forma after Construction, Completion, including estimated annual Savings, Owner payments to Lender and ESCO, and the ESCO Guarantee Amount;
- An Energy Services Agreement ("**ESA**") to implement the recommended IGA measures.

All measures identified in the Feasibility Report shall meet the following minimum criteria ("**Minimum Criteria**"),

- total implementation cost including engineering, equipment, construction and ESCO fees plus financing costs (**"Financed Amount"**) can be guaranteed by ESCO to be repaid from Savings over a fixed period of time (**"Loan Term"**) *(time period to be determined by negotiation between ESCO and Owner[1])* based on an acceptable payback period of rate or return calculated based on the annual Savings (**"Guarantee Amount"**) to repay the Financed Amount;
- recommended measures can be implemented without requiring lengthy production shutdowns which would not have otherwise occurred due to OWNER's normal course of business.

[1] The time period over which the investment can be paid back from the savings is dependent on the type and size of project. While most Owners may wish projects requiring relatively lower investments to payback in 1-3 years, projects involving major process changes and large investments may take longer to repay from the savings generated.

2.0 Payments

2.1 Energy Audit (Low-cost Measures)

The plant will pay ESCO X **percent of the agreed/demonstrated energy savings calculated for one year** soon after implementation of the measures.

2.2 Investment Grade Audit

- Upon receipt by OWNER of the IGA Report, OWNER shall either approve the said IGA Report (**"OWNER's Approval"**) within two weeks or recommend in writing changes required for within two weeks. Upon receipt by ESCO of Owner Approval, ESCO will proceed to facilitate and arrange financing, and get an Energy Service Agreement approved and signed by OWNER.

- ESCO will receive payment at the rate of X **percent** of the annual savings achieved over X **years** of the contract period (which may include energy and any other resource) at the rate of X **percent** each year. ESCO will monitor regularly the extent of savings achieved.

- For implementation of these Investment Grade measures / proposals, an Energy Service Agreement would be entered between ESCO and OWNER.

3.0 Client Information

To assist ESCO in preparation of the Feasibility Analysis, OWNER will furnish (or cause its energy suppliers to furnish) to ESCO upon its request, accurate and complete data concerning energy usage for the Facilities This includes the following data for the most current time period[2] actual utility bills (as supplied by utility company) and other relevant utility records; production information descriptions of any changes in the facility structures or its heating, cooling, lighting or other systems or energy requirements; descriptions of energy consuming or saving equipment used in the Facilities; and descriptions of energy management and other relevant operational or maintenance procedures presently utilized. OWNER will share prior energy audits or studies of the Facilities.

4.0 Confidential Data

ESCO acknowledges that all information supplied by OWNER and not already available in the public domain (**OWNER Information**) is and shall remain the property of OWNER. ESCO agrees: 1) to protect the confidential nature of OWNER's Information in the same manner that it protects its own confidential information; 2) to not disclose or provide copies of OWNER Information, or any portion thereof, to any third-parties other than members of the ESCO project team or potential financing sources; 3) upon request of OWNER to return all copies of OWNER Information to OWNER at the termination of this ESA, and 4) to assure that the personnel of ESCO, its engineers, Subcontractors and all other of its

[2] The time period for which utility bills need to be monitored depend on the type of ECRM to be implemented. While a simple lighting retrofit measure may not require scrutiny of bills for several years, projects in facilities with varying production and other parameters may require monitoring of bill over a longer time period. The ESCO should exercise its judgment in determining an appropriate time period. Typically utility bills for 12-36 months may be examined.

representative who become knowledgeable of this OWNER Information form ESCO are bound by the same obligations of confidentiality as ESCO under this ESA.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this instrument on the date and year first written above.

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Name	**Date**	**Name**	**Date**

ENERGY SERVICES AGREEMENT

This Energy Services Agreement ("**ESA**") is made and entered into as of this __ _day of ____ 2001, by and between _____("**Owner**") and _____("**ESCO**"). Both Owner and ESCO shall collectively be referred to as "**Parties.**"

ARTICLE 1 - RECITALS

1.1 WHEREAS, ESCO is in the business of identifying, developing, engineering, procuring, constructing, monitoring and arranging financing for certain improvements known as energy cost reduction measures ("**ECRMs**"), which result in energy, water and/or operating cost reductions and may also result in production efficiencies ("**Savings**");

1.2 WHEREAS, Owner engaged ESCO to develop Savings at its facility by signing a Feasibility Agreement dated _____,2001, which is attached as **Exhibit-A** to this ESA and desires to engage ESCO to monitor and guarantee Savings from the ECRMs described in the Investment Grade Audit (IGA) Report dated _____,2001 and attached to this agreement as **Exhibit-B** ("**Program**") subject to the terms and conditions of this ESA;

1.3 WHEREAS, ESCO is willing to accept such an engagement with Owner subject to the terms and conditions of this ESA, and

NOW THEREFORE, in consideration of these premises and the mutual promises and agreements herein expressed, the Parties intending to be legally bound, hereby agree to the terms and conditions of this ESA.

ARTICLE 2 - IMPLEMENTATION PROCESS

2.1 Implementation Process The Program shall be implemented in the following manner subject to the terms and conditions of this ESA:

- Construction of all the agreed ECRMs by the ESCO; and as defined under Article-3
- Provision of post-construction Operating Services by ESCO pursuant to Article 4.

ARTICLE 3 - CONSTRUCTION

ESCO shall construct the ECRMs in the IGA commencing from _____ 2001 and completing by _____2001 ("**Construction Period**").

3.1 **ESCO Obligations** During the Construction Period, ESCO shall provide the following:

- All necessary services relating to engineering, procurement, construction, startup and commissioning of the ECRMs, and other necessary support in accordance with agreed upon budgets as defined in the IGA;
- Reasonable instruction and training to the person or persons designated by Owner in the proper operation and maintenance of each ECRM in accordance with budgets agreed to in the IGA.

3.2 **Owner Obligations** During the Construction Period, Owner shall:

- Provide necessary assistance in the construction of the ECRMs agreed to in the IGA in accordance with the specifications provided by ESCO to ensure adequate Savings performance;
- Permit ESCO's access to the site for verification of equipment and installation to ensure that the integrity of the Savings planned for in the IGA are achieved following construction;
- Exercise reasonable due diligence and insurance to protect the implemented ECRMs from harm, theft or misuse.

3.3 **Construction Completion** Consequent to completion of construction of all the ECRMs in accordance with the terms of the IGA and the Specifications provided by ESCO, ("***Construction Completion***"), Owner and ESCO have now mutually agreed upon an Effective Date for the operation of ESA.

ARTICLE 4 - ESCO OPERATING SERVICES

Following Construction Completion of each ECRM, ESCO shall provide the following services to the Owner:

4.1 **Savings Guarantee**

A. Guarantee Period

ESCO shall provide a Savings Guarantee for the total of ECRMs implemented under this ESA for _____years from Effective Date ("Guarantee Period").

B. Guarantee Amount

During the Guarantee Period, ESCO guarantees that Owner shall realize Savings in accordance with Article 2.1 of the Feasibility Agreement (Energy, Water and Waste Recovery Audit (Low-cost measures)) and pursuant to the Savings Calculation Method attached as Exhibit-C which amount equals **Rs. ____Lakh Per annum ("Guarantee Amount").**

C. Deficit Savings

For each quarter (three month period), ESCO shall provide Owner with an invoice, which shall calculate in accordance with Exhibit-C a cumulative record of actual Program Savings, achieved on all ECRMs since signing of the ESA or Effective Date, whichever is earlier. To the extent that such cumulative actual Savings are less than the cumulative Guarantee Amount ("Deficit Savings"), ESCO shall reimburse Owner for said Deficit Savings on a semi-annual basis beginning six (6) months from the Effective Date[3].. If Deficit Savings payments have been made to Owner by ESCO and if the cumulative Deficit Savings are reduced in subsequent quarters, Owner shall first reimburse ESCO for the amount of said reduction in Deficit Savings before calculating any Contingent Service Fees.

4.2 **Monitoring** ESCO shall provide the Measurements & Verification services in accordance with the frequency specified in **Exhibit-D**.

ARTICLE 5 - OWNER OPERATING RESPONSIBILITIES

5.1 **Operating Hours** Owner shall abide by the operating hours specified in Program for each of the ECRMs. Even if there is any change in the operating hours of any of the sections, equipment or machinery pertaining to one or more of the ECRMs, the savings calculations will be based on Exhibit-C only.

5.2 **Cost of Energy & Water** Cost of electrical energy is taken as Rs.____ per kWh and cost of water is taken as Rs.____ per kL of water. Even if there is any revision in the cost of energy and water, the above values will be valid during the guarantee period for the calculation of savings. Besides, even if cheap water is available for the plant during the guarantee period, the credit for saving water by reuse should be given to ESCO. *(Add cost of other fuels and utilities, as applicable).*

[3] The actual time frame for payments to the Owner or to the ESCO and the terms of such payment are generally negotiated between the Owner and the ESCO, and follows traditionally accepted practice in the marketplace.

5.3 Notification Owner shall notify ESCO of any known changes in the Facilities and ECRMs by delivering a written notice to ESCO describing and explaining all such actual or proposed changes and their anticipated effect on energy use (if known).

5.4 Reporting of Malfunction and Emergencies Owner shall use its best efforts to immediately notify ESCO or its representative of the occurrence of any significant malfunction, alteration or change in the Facilities, ECRMs or energy supply to the Facilities. If Owner shall negligently delay in so notifying ESCO or its designee of a significant malfunction or emergency, Owner shall be responsible to ESCO for any actual direct loss, or damage, including loss of Savings[4]. Owner's obligation to use its best efforts to notify ESCO as soon as reasonably possible shall be deemed satisfied if Owner notifies ESCO of any said material malfunction within twenty-four (24) hours of Owner's actual knowledge of the occurrence.

5.5 Maintenance Responsibilities Owner shall maintain all ECRMs. In addition, Owner shall maintain the Facilities in good condition and shall use its best efforts to protect and preserve the ECRMs and the operating condition of all-mechanical systems and energy-related systems located in the Facilities. If Owner fails to materially perform its maintenance responsibilities as defined in the Financing Report such that the Savings contemplated to be achieved under this ESA are negatively affected, ESCO shall have the right to perform said maintenance and charge Owner for the cost of such work, and any lost Savings shall be added to actual calculated Savings under this ESA. Owner shall not move, modify, remove, adjust, alter or change in any material way the ECRMs, or any part thereof, after Construction Completion and during the term of this ESA, without prior written direction or approval of ESCO, except in the event of an occurrence reasonably deemed by Owner or ESCO to constitute a bona fide emergency.

ARTICLE - 6 PAYMENT TERMS

6.1 Owner Payments to ESCO Owner agrees to pay ESCO a Contingent Service Fee equal to __% of the Savings achieved each quarter as calculated pursuant to the Savings Calculation Method set forth in Exhibit-C until the end of the Guarantee Period. Time as to payment is of the essence.

6.2 Billing Procedures The amount of Contingent Service Fees shall be calculated and billed by ESCO each quarter under the procedures described below:

- ESCO shall visit the pilot project site for at least two days after each quarter from the effective date (i.e. during second week of _____ 2001 _____ 2002, _____ 2002 and _____ 2002) for monitoring of the ECRMs.

[4] The period for notification is dependent on the ECRM to be implemented and the complexity of the facility. This is generally a negotiated time period between the ESCO and Owner.

- Owner shall provide ESCO with copies of all energy bills and/or other required data (most important being the operating hours for each of the ECRMs) of the preceding months required for ESCO to calculate the Savings pursuant to the Savings Calculation Method in Exhibit-C.
- Upon receipt of the required information and following any further measurements required as defined in Exhibit-C, ESCO shall calculate the Savings in accordance with the Savings Calculation Method and prepare and send to Owner a quarterly invoice which shall document the amount of Savings achieved during the period and the Contingent Service Fees due ESCO.
- All calculations and estimates by ESCO shall follow generally accepted engineering and accounting principles, and shall be submitted in
- writing to Owner. Owner shall make any objections to the calculations and estimates in writing within ten (10) days. If no such objections are raised, Owner shall be deemed to have approved the calculations and estimates.

6.3 **Payment Terms** Owner agrees to pay ESCO all amounts due under this ESA. ESCO has already received Rs. ___ Lakh on account adjustable advance. This amount would be adjusted towards ESCO's payment at the end of the project, i.e. after monitoring and verification of all the ECRMs over the Guarantee Period.

ARTICLE 7 - TERMS

This ESA shall be in force and effect upon its Effective Date and shall terminate when the Guarantee Period ends on _____.

ARTICLE 8 - OTHER TERMS AND CONDITIONS

8.1 **Applicable Law** Nothing contained herein shall be construed as constituting any relationship of partnership within the meaning of that expression under any partnership laws and/or tax laws or joint venture or sharing of profits between the Parties.

8.2 **Notifications** All Notices to be given by either Party to the other shall be in writing and must be either delivered or mailed by registered or certified mail, return receipt requested, to the addresses included on the signature page of this ESA or such other addresses as either may hereinafter designate by a Notice to the other. Notices are deemed delivered or given and become effective upon actual receipt. Notice served by ESCO upon the Owner Representative shall be deemed to be sufficient notice to the Owner.

8.3 **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 ESA in the event of a continuing or subsequent default on the part of the other Party.

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

8.5 **Complete Agreement** This ESA, together with all Schedules and Exhibits incorporated herein and/or attached hereto, shall constitute the entire ESA between the Parties, and this ESA may not be amended or modified except by a writing signed by both Parties; provided that certain Schedules and Exhibits, to the extent permitted by this ESA, may be amended from time to time by mutual agreement of both Parties. This ESA supersedes and replaces any and all prior agreements of the Parties.

8.6 **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 ESA.

8.7 **Headings** Headings and subtitles used throughout this ESA are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this instrument on the date, month and year first written above.

By:	_____	By:	_____
Title:	_____	Title:	_____

Signature:	_____	Signature:	_____
Date:	_____	Date:	_____

EXHIBIT-A
Energy Services - Feasibility Agreement

EXHIBIT-B
Program

EXHIBIT-C
Savings Calculation Method

EXHIBIT-D
Monitoring and Verification (M&V) Protocols.

ENERGY SERVICES AGREEMENT

This Energy Services Agreement ("**ESA**") is made and entered into as of this ..... day of ..... , 2001, ("**Effective Date**") by and between .....("**Owner**") and Energy Services Company ..... ("**ESCO**") Owner and ESCO shall each be referred to as a "Party" or collectively as "Parties".

ARTICLE 1 - PURPOSE

The purpose of this ESA is for ESCO to implement Energy Cost Reduction Measures ("**ECRMs**") as defined in the Feasibility Agreement between Owner and ESCO, dated ..... , 2001.("**FA**"). The location of the facilities **("Facilities")** in which the ECRMs will be installed and a detailed description of the ECRMs is provided in the Investment Grade Audit ("**IGA**") prepared by ESCO which is incorporated herewith as Exhibit A. The ECRMs are anticipated to result in reductions of energy and/or operating costs **("Savings"),** as set forth in the IGA. ESCO shall arrange financing, engineer, procure, construct, monitor, manage, coordinate and guarantee the Savings performance of the ECRMs, (hereinafter referred to as the **("Project"),** subject to the terms and conditions of this ESA.

ARTICLE 2 - IMPLEMENTATION PROCESS

2.1 **Scope** The Project shall be implemented by ESCO in the following two (2) phases :

- Close Project financing pursuant to Article 3, and
- Install the Project pursuant to Article 4.

2.2 **Owner Cooperation** Owner shall provide all information in a timely manner as required for the Project's performance, including, but not limited to:

- Available drawings of the systems and equipment at the facilities which use energy resources or other types of utilities;
- All available records and data concerning energy usage for the Facilities and other relevant information (if not available, Owner shall cause its energy suppliers to furnish);
- Any known special legal or construction requirements relating specifically to the Facilities which differ from those generally applicable to construction;
- Any available prior energy audits of the Facilities and descriptions of energy management procedures presently utilized, and
- Financial, legal and other operating data as may be reasonable required by potential third party financing sources to evaluate the creditworthiness of Owner and finance the Project.

Owner shall cooperate with ESCO in optimizing the Savings achieved from the Project and minimizing implementation costs throughout the term of the ESA. Owner shall also cooperate with the third-party financing sources to consummate the financing of the Project. Owner shall make available its engineers, maintenance and operating staff for interviews with ESCO plus any other knowledgeable officers, employees and agent for consultation as may be required from time to time. Within thirty (30) days of the Effective Date of this ESA, Owner shall have the express authority to approve or authorize on behalf of Owner all Project matters requiring Owner's approval or authorization, including, but not limited to approval of : schedules, changes in the work, and other matters. The Owner Representative shall render such decisions promptly and furnish information expeditiously so as to avoid unreasonable delay in the Project services or work of ESCO.

ARTICLE 3 - PROJECT FINANCING

Owner shall execute the Loan and Security Agreements attached as Exhibit B, which when executed, shall collectively be referred to as the Loan. Execution of the Loan shall hereafter be referred to as "Closing".

ARTICLE 4 - INSTALLATION

Upon Closing, ESCO shall design and build (including engineering, procurement and construction) each ECRM described in Exhibit A pursuant to the terms of this ESA. The period from Closing to Construction Completion shall be referred to as the **"Construction Period"**.

4.1 **ESCO Obligations** During the Construction Period, ESCO shall:

- provide all necessary engineering, procurement, construction, startup and commissioning of the ECRMs, including the negotiation, award and management of all subcontracts;
- promptly inform Owner of matters which may affect ESCO or Owner's obligations under this ESA, or which impact the safe operation of the Facilities;
- coordinate the production of detailed engineering designs and specifications (**"Engineering Designs"**) that conform to the intent of the FA;
- coordinate the Construction schedule of the ECRMs with Owner's personnel and schedule work to minimize disruption;
- assist Owner in obtaining all applicable licenses, permits and approvals reasonably necessary for construction of the ECRMs;
- use its best efforts to supply commercially recognized manufactured equipment compatible with Owner's existing plant so as to keep spare parts, etc., to a minimum;
- where applicable, obtain standard warranties from installers and manufacturers on equipment, materials and workmanship;
- accept delivery of equipment and materials at the Facilities;
- provide reasonable instruction and training to the person or persons designated by Owner in the proper operation and maintenance of each ECRM, and
- provide to Owner all necessary documentation reasonably required by Owner regarding the proper operation and maintenance of each ECRM.

4.2 Owner Obligations During the Construction Period, Owner shall :

- provide daily access to the Facilities for ESCO or its authorized subcontractors, vendors and agents to perform any function related to this ESA during regular business hours, or such other hours as may be reasonably requested by ESCO;
- permit night, weekend and holiday work and strive to permit reasonable and timely access to ESCO and its agents for the purpose of expediting Construction Completion as ESCO may, in its reasonable discretion, determine is needed;
- review and approve Engineering Designs and ECRMs within 15 days;
- approve Progress Payments pursuant to Article 8.1;
- obtain all applicable licenses, permits and approvals for the ECRMs;
- accept certain temporary inconveniences necessary for implementation and commissioning of the ECRMs, and permit performance of the work pursuant to the agreed Construction Schedule in Exhibit C;
- provide electrical power, water, elevating and other service reasonably required for the execution of the work by ESCO and its subcontractor;
- provide sufficient rent free space in the Facilities for the Construction and operation of the ECRMs;
- exercise reasonable due diligence to protect the implemented ECRMs from harm, theft or misuse.

4.3 Subcontractors and Subcontracts ESCO shall perform and execute the provisions of this ESA as an independent contractor to Owner and shall not be an agent or employee of Owner for any purpose. ESCO shall have the right to have any portion of the Project or any other obligation of ESCO undertaken in connection with its performance of this ESA accomplished by subcontractors and vendors other than ESCO ("Subcontractors"), pursuant to written subcontracts between ESCO and such Subcontractors. All such subcontracts shall be subject to, consistent with, and require the Subcontractors to satisfy, all applicable terms and conditions of this ESA and shall be in conformance with all applicable laws, including, without limitation, those regarding the presentation of documents proving payment of taxes and those regarding applicable environmental laws and regulations. Subcontractors shall be selected by ESCO and approved by Owner, and ESCO shall be solely responsible for the satisfactory performance of Subcontractors. No contractual relationship shall exist between Owner and any Subcontractor with respect to the Project work to be performed hereunder.

4.4 Substantial Completion ESCO shall use its best efforts to ensure that Substantial Completion shall occur on or before the date specified in EXHIBIT C. ESCO shall deliver to the Owner a written Notice of Substantial Completion not more than thirty (30) days and not less than fifteen (15) days prior to Substantial Completion. It is agreed by both parties that the definition of Substantial Completion shall be when substantial completion and beneficial use of the ECRMs by the Owner is achieved at a rate of 90% of projected values. If the parties hereto are unable to agree during such good faith negotiations, the matter shall be submitted to arbitration pursuant to Article 15.2 hereof

4.5 Certificate of Substantial Completion and Acceptance

4.5.1 Within thirty (30) days after receipt of ESCO's notice of Substantial Completion, the Owner shall inspect the Project and 1) either prepare and deliver to ESCO a written

Certificate of Substantial Completion and Acceptance (hereinafter known as "COMPLETION"), or 2) if good cause exists for doing so, notify ESCO in writing the Substantial Completion has not occurred. If Substantial Completion has not occurred for good cause, ESCO shall promptly take such corrective action, if any, within thirty (30) days of receipt of such notice, as shall cause Substantial Completion to occur and shall issue to the Owner another written Notice of Substantial Completion. The Owner shall have ten (10) days after receipt of such second written Notice of Substantial Completion to respond, as set forth above, that either the Work is accepted or that Substantial Completion has not been achieved. Such procedure shall be repeated as necessary until the Owner issues a written Certificate of Substantial Completion and acceptance, which Certificate shall not be withheld unreasonably. If, because of ESCO's material failure, the Owner is unable to issue such certificate within six (6) months of the initial submittal of the Notice of Substantial Completion, such failure shall be considered a default under this Agreement. In that event the Owner may enforce any or all of its rights as set forth in Ariticle 12.2) hereof. In the event of a disagreement over whether the material failure was due to ESCO's fault, the Owner and ESCO agree to submit the alleged failures or breaches of ESCO to binding arbitration pursuant to Article 15.2 herein.

4.5.2 If timely written notification is not provided by the Owner that Substantial Completion has not occurred within the thirty (30) day period, as stipulated herein, COMPLETION shall be deemed to have occurred.

4.6 Hazardous Substances It is expressly agreed by Owner that, except for any Hazardous Substances that are brought on site by ESCO or its Subcontractors or as may be otherwise explicitly agreed to in writing by ESCO, ESCO shall have no responsibility and shall bear no cost or liability regarding Hazardous Substances found in the Facilities during performance of any work in the Facilities. Owner will indemnify ESCO for any costs or expenses of any kind which ESCO incurs with respect to pre-existing conditions regarding such Hazardous Substances and shall defend, indemnify and hold ESCO harmless from and against any and all claims, losses, delays, liabilities, costs, expenses and/or damages including, without limitation, legal fees and expenses which ESCO may sustain or incur or which arise out of or relate in any way to Hazardous Substances.

ARTICLE 5 - ESA ADJUSTMENT

5.1 Owner Modifications Owner may at any time by written notice to ESCO, add, suspend or otherwise revise Project work on any ECRM or expand the Project to include additional facilities ("Owner Modification") subject to the following:

5.1.1 The ECRM is still economically and operationally viable based on ESCO's analysis of the revised Savings and Project Costs caused by Owner's change;

5.1.2 The Project is able to be financed pursuant to Article 3 based on any resulting revised Project Savings and Total Construction Cost;

5.1.3 The Project is unable to be financed based on the revised ECRMs pursuant to Article 3 and Owner pays ESCO directly for the Project cost impact caused by the modification.

5.1.4 ESCO shall not be required to implement any Owner Modification until the Parties sign a written agreement with respect to items 5.1.1, 5.1.2, and 5.1.3 above.

5.2 Cost Increases If increases in the total Construction Cost render an ECRM not economically viable, based upon ESCO' analysis of the revised Savings and Project Costs, and such increases are due to: (a) Owner actions or omissions causing additional work, (b) reasons which could not reasonably have been anticipated or controlled by ESCO, (c) wrongful act, omission or breach of ESA by Owner, or (d) delays for which ESCO is entitled to an extension of time as described in Exhibit C, then Owner shall pay ESCO directly for the Project Cost impact caused thereby. If ESCO incurs costs after Completion due to items (a) through (d) herein, such as additional monitoring, baseline adjustments or Programming and engineering analyses, Owner shall pay ESCO for such additional costs.

5.3 Savings Changes ESCO may experience losses of actual or anticipated Savings for reasons which could not reasonably have been controlled by ESCO. The circumstances may include, without limitation, such things as:

- wrongful act, omission or breach of ESA by Owner, or
- delays for which ESCO is entitled to an extension of time as described in Exhibit C, or
- deletion or substantial modification of an ECRM by Owner, or
- changes or damage to the Facilities, or to Owner's equipment and systems or their operation, which impact the ECRMs' performance or ESCO' cost to obtain the original performance relative to the IGA

Such circumstances shall be addressed in the following manner:

- in the event of a temporary loss of Savings (i.e., one lasting less than ninety (90) days), Savings shall be based on an estimate of what would have been achieved had such an event not occurred, or
- in the event of a permanent loss of Savings (i.e., one lasting more than ninety (90) days), ESCO shall adjust the baseline (the energy and operating costs prior to the event of a permanent loss of Savings to be improved by this ECRM) by an amount calculated to offset the effect of such event on the Savings Calculation Method.

5.4 Upgrading or Altering the ECRMs ESCO shall at all times have the right to propose to Owner changes to the ECRMs, revisions of any procedures, or implementation of other energy benefit actions in the Facilities, provided that the standards of performance set forth in the IGA shall not be reduced. Owner agrees to not to unreasonably withhold approval of such changes proposed by ESCO.

5.5 Deletion of ECRMs Owner may, upon written notice to ESCO, delete or withdraw any ECRM or proposed ECRM, subject to payment of the remedies in Article 13.2 and other provisions of this ESA.

ARTICLE 6 - ESCO SAVINGS GUARANTEE

6.1 Guarantee Period ESCO shall provide a Savings guarantee according to Article 6.2 for each ECRM implemented under this ESA from Completion until the conclusion of the repayment term of the Lease ("Guarantee Period").

6.2 Guarantee Amount During the Guarantee Period, ESCO guarantees that the Owner shall realize an amount of Savings according to the Savings Calculation Method in Exhibit D at least equal to the Loan payments required to repay the Construction Costs of the ECRMs (Guarantee Amount). This Guarantee Amount shall apply to all ECRMs implemented by ESCO in this ESA;

6.3 Deficit Savings Each month, ESCO shall provide Owner with an invoice, as described in Article 8.3 which shall calculate a cumulative record of actual Project Savings achieved on all ECRMs since signing of the ESA. To the extent that such cumulative actual Savings are less than the cumulative Guarantee Amount **(Deficit Savings)**, ESCO shall reimburse Owner for said Deficit Savings on an annual basis beginning one (1) year after Construction Completion. If Deficit Savings payments have been made to the Owner by ESCO and if the cumulative Deficit Savings are reduced in subsequent months, Owner shall first reimburse ESCO for the amount of said reduction in Deficit Savings before payment of any Contingent Service fees to ESCO pursuant to Article 8.2.

ARTICLE 7 - OWNER OPERATING RESPONSIBILITIES

7.1 Notification Owner shall notify ESCO of any known changes in the Facilities and ECRMs by delivering a written notice to ESCO describing and explaining all such actual or proposed changes and their anticipated effect on energy use (if known). Said notice shall be delivered to ESCO no less than thirty (30) days before any actual or proposed change occurs except for those changes that occur or may occur because of a boa fide emergency situation or other occurrence not within the control of Owner in which event such notice shall be deemed sufficient if given by Owner within twenty four (24) hours after the occurrence happened or was discovered to have happened.

7.2 Reporting of Malfunction and Emergencies Owner shall use its best efforts to immediately notify ESCO or its representative of the occurrence of any significant malfunction, alteration or change in the Facilities, ECRMs or energy supply to the Facilities. If Owner shall negligently delay in so notifying ESCO or its designee of a significant malfunction or emergency, Owner shall be responsible to ESCO for any actual direct loss, or damage, including loss of Savings. Owner's obligation to use its best efforts to notify ESCO as soon as reasonably possible shall be deemed satisfied if Owner notifies EPS of any said material malfunction within twenty-four (24) hours of Owner's actual knowledge of occurrence.

7.3 Maintenance Responsibilities Except as otherwise specifically set forth in the F.A.,Owner shall maintain the ECRMs in a manner which will assure achievement of the Savings as set for the in the Feasibility Report. In addition, Owner shall maintain the Facilities in good repair and shall use its best efforts to protect and preserve the ECRMs and the operating condition of all mechanical systems and energy related systems located in the

Facilities. If Owner fails to materially perform its maintenance responsibilities as defined in the IGA such that the Savings contemplated to be achieved under this ESA are negatively affected, ESCO shall have the right to perform said maintenance and charge Owner for its cost to perform such work plus its normal overhead and profit markup, and any lost Savings shall be added to actual calculated Savings under this ESA. Owner shall not move, modify, remove, adjust, alter or change in any material way the ECRMs, or any part thereof, after Construction Completion and during the term of this ESA, without prior written direction or approval of ESCO, except in the event of an occurrence reasonably deemed by Owner or ESCO to constitute a bona fide emergency.

ARTICLE 8 - PAYMENT TERMS

8.1 **Lender Payments to ESCO** Upon Closing of the Lender, Lessor shall pay ESCO the fees set out in the IGA construction mobilization advance equal to ..... % of the total Construction Cost of the ECRMs as estimated in the Feasibility Report. During the Construction Period, Lessor shall pay ESCO monthly payments ("Progress Payments") bases on actual work performed versus the schedule of values in Exhibit C.

8.2 **Owner Payments to ESCO** Upon Substantial Completion of the ECRM, Owner agrees to pay ESCO or its assignee the Loan Payments and the Service Fees designated in the IGA.

8.3 **Billing Procedures** The amount of Service Fees in Article 8.2 shall be calculated and billed by ESCO each month under the procedures describe below.

8.3.1 Within ten (10) working days of Owner's receipt, Owner shall provide ESCO with copies of all energy bills, production and sales data, and/or other data of the preceding month required for EPS to calculate the Saving pursuant to the Savings Calculation Method in Exhibit D;

8.3.2 Upon receipt of the required information, ESCO shall calculate the savings in accordance with the Savings Calculation Method and prepare and send to Owner a monthly invoice which shall document the amount of Savings achieved and the Contingent Service fees due ESCO. If Owner disagrees with the invoiced amount, it shall so notify ESCO within (10) ten business days of receipt of ESCO' invoice, giving specific reasons for such disagreement, and the parties shall attempt in good faith to resolve such disagreement. If the parties are unable to resolve the disagreement within forty-five (45) days after ESCO' invoice, the matter shall be resolved pursuant to Article 15.2 of this ESA. Notwithstanding such disagreement, Owner shall pay ESCO any agreed amount due.

8.3.3 If ESCO has not received from Owner the necessary data required in the Savings Calculation Method for any ECRM, within fourteen (14) days after the receipt of such data by Owner, ESCO shall have the right to estimate the amounts due ESCO and bill Owner for the Service Fee amounts expected to be received pursuant to each IGA, and Owner shall pay ESCO such estimated amount. Upon receipt of the data, ESCO shall calculate the actual Savings and make any appropriate adjustment of ESCO's next billing.

8.3.4 All calculations and estimates by ESCO shall follow generally accepted engineering and accounting principles, and shall be submitted in writing to Owner. Any objections to the calculations and estimates shall be made by Owner in writing within fourteen (14) days. If no such objections are raised, Owner shall be deemed to have approved the calculations and estimates.

8.4 **Payment Terms** Owner agrees to pay ESCO all undisputed amounts due under this ESA within thirty (30)days of ESCO' invoice date. Owner agrees to pay ESCO a late payment penalty of 2.0% per month on the outstanding balance of all payments not received within thirty (30)days of the ESCO invoice date.

8.5 **Payment Disputes** Owner shall approve the undisputed part of any invoice or Progress Payment and shall reimburse ESCO for any late payment charges, penalties or other fees imposed on ESCO as a result of any unwarranted delay in making payments or directing payments to ESCO from Lessor. If Owner wrongfully fails to approve any payment when and as due, ESCO may, upon ten (10)days' written notice, suspend further work and services in whole or in part until all payments due are paid in full with any late payment charges, penalties or other fees. The parties will attempt, in good faith, to resolve any problems related to the Progress Payment invoices or direct payments to ESCO. If the parties are unable to resolve any disputed amounts within forty-five (45)days after submission of ESCO' invoice for payment, the matter shall be resolved pursuant to Article 15.2 of the ESA.

ARTICLE 9 - OWNERSHIP

9.1 **ECRMs** Ownership of the ECRMs shall be determined according to the Loan.

9.2 **Ownership of Proprietary Property Rights** Owner shall not, by virtue of this ESA, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyright, patent, other intellectual or proprietary rights, inventions or processes, or similar items of property which are or may be used in connection with the ECRMs.

9.3 **Current Equipment** Notwithstanding any other provision of this ESA, Owner shall retain ownership and possession of all equipment and systems that were on-site prior to the signing of this ESA.

9.4 **Drawings and Specifications** All of the drawings, specifications, computer software and documents, prepared through the efforts of ESCO' staff and Subcontractors remain the property of ESCO, and shall not be disclosed or used by Owner to a third party, without the written consent of ESCO. The drawings, CAD files and specifications shall become the property of the Owner upon Construction Completion.

ARTICLE 10 - FORCE MAJEURE

In addition to the Parties' rights and remedies in this ESA , if ESCO or Owner shall be unable to reasonably perform any of its obligations under this ESA due to "Force Majeure" defined as acts of God, insurrections or riots, fire, flood, earthquakes, explosion, war, sabotage, government decrees, changes in the law or regulations related to the work, subsurface or latent or concealed conditions at the Facilities, any casualty loss or damage, or

other conditions not specifically contemplated by the ESA which, by the exercise of reasonable diligence, could not be prevented, then the Parties may prolong the terms of this ESA by the period of actu4al existence of such conditions. If such conditions exist for more than 180 days, the performing Party may choose to terminate the impacted portion of this ESA by a written notice to the non-performing Party, in which event neither Party shall have any further liability to the other except that EPS shall be entitled to receive all monies due ESCO for work performed to the time of said termination plus reimbursement of any penalties or damages due to others from ESCO as a result of said termination.

ARTICLE 11 - INSURANCE

11.1 **ESCO' Insurance** ESCO agrees to secure, prior to construction commencement and during the Construction Period, **"Builder's Risk"** insurance coverages sufficient to cover actual repair costs and general liability damages caused by ESCO in Owner's Facilities. The total construction costs of the ECRMs under construction. General liability insurance shall include such thing as bodily injury, death, and property damage. ESCO also agrees to provide such other insurance as may be required by a Lender.

11.2 **Owner Insurance** Upon Construction Completion, Owner agrees to provide sufficient "**all risk**" property insurance coverage on the Improvements to repair or replace them in total if destroyed, stolen or damaged until expiration of the Guarantee Period. ESCO shall be named as an additional insured on such "**all risk**" insurance.

ARTICLE 12 - DEFAULT BY ESCO

12.1 **Events** Events which shall be deemed irrefutably to be a default by ESCO:

- ESCO is declared bankrupt and is not a debtor in possession; makes a voluntary assignment for the Benefit of creditors; becomes insolvent; proceeds to voluntary liquidation, or is dissolved;
- Owner has notified ESCO in writing of a material failure by ESCO to perform or comply with the terms and conditions of this ESA; provided that such failure shall not be a default if it is corrected or covered by ESCO within thirty (30) days after written notice has been given to ESCo by Owner demanding that such failure to perform be cured, or if a cure cannot be effected within thirty (30)days, if ESCO is diligently pursuing a cure;
- EPS has knowingly furnished a materially false or materially misleading representation or warranty to Owner.

12.2 **Remedies** In the event of Default by ESCO pursuant to Article 12.1, Owner may, without a waiver of any other remedies which exist in law or equity, exercise any and all remedies at law or equity, or institute other proceedings, including without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for actual damages incurred. In no event, however, will ESCO be liable for any consequential or indirect damages, including without limitation any lost profits or damages for interruption of Owner's business. The Party who shall prevail in any such proceeding shall be entitled to recover all costs and expense

reasonably incurred, specifically including attorneys fees, from the other Party. If such default by ESCO occurs during the Construction Period, Owner may, upon notice to ESCO, perform any work or obligations which ESCO fails to perform and which Owner is capable of performing, and set off any costs so incurred and other damages, costs and expenses against Savings, and any other monies owing by Owner to ESCO. Notwithstanding the foregoing, Owner shall not be obligated to perform any such work or obligations. The performance by Owner of such work or obligations shall not limit the rights and remedies of Owner under this ESA.

ARTICLE 13 - DEFAULT BY OWNER

13.1 **Events** Events which shall be deemed irrefutably to be a default by Owner :

- Owner is declared bankrupt and is not a debtor is possession; makes a voluntary assignment for the Benefit of creditors; becomes insolvent; proceeds to voluntary liquidation, or is dissolved;
- Owner options, agrees to sell, sells loans or otherwise conveys its obligations under this ESA without the written consent of ESCO, such consent not being unreasonably withheld;
- Owner has knowingly furnished a materially false or materially misleading representation or warranty to ESCO;
- ESCO or the Lender is unable to finance or continue financing the Project because of actions or omissions of Owner or Owner's financial inability or lack of funds;
- ESCO has notified Owner in writing of a failure by Owner to pay ESCO, its assignee or the Lender any sums due when due, or to authorize the Lender to pay ESCO or its designee any Progress Payments due pursuant to Article 8.1, or any default by Owner under the term of the Loan;
- any Article 6 deletion or change to an Improvement which causes the Improvement or the total Project to be no longer implemented under the terms of the ESA;
- ESCO has notified Owner in writing of a material failure by Owner to perform or comply with the terms and conditions of this ESA, provided that such failure shall not be a default if it is corrected or cured by Owner within thirty (30) days after written notice has been given to Owner demanding that such failure to perform be cured.

13.2 **Remedies** In the event of Default by Owner pursuant to Article 13.1, ESCO may, without a waiver of any other remedies which exist in law or equity exercise any and all remedies at law or equity, or institute other proceedings, including without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for actual damages incurred. The Party who shall prevail in any such proceeding shall be entitled to recover all costs and expenses reasonably incurred, specifically including, attorneys' fees, from the other Party. In addition to all other claims/remedies for damages, ESCO may obtain the remedies described below in this Article 13 for an individual ECRM being developed, constructed, or operating, with each of articles 13.2.1 through 13.2.3 applying as appropriate for each ECRMs then-current phase of development, should an Owner default occur or as otherwise permitted in this ESA.

13.2.1 **Development Phase** Prior to Closing of Project financing, ESCO may require Owner to pay the termination fees in FA plus all incurred additional costs from the Effective Date of

this ESA, based on the time worked by ESCO personnel multiplied by their respective current published ESCO billing rates, plus all external costs marked up for ESCO' normal profit and overhead and any penalties or other liabilities incurred.

13.2.2 Construction Period During the Construction Period, ESCO may require Owner to pay ESCO the remedies in Article 13.2.1 plus a reasonable estimate of ESCO' lost profits calculated at ten percent (**10%**) of the difference between the construction costs incurred to date and the final estimated costs provided to Owner in the IGA.

13.2.3 Post Construction Period After the Construction Period, ESCO may require Owner to pay ESCO the Termination Fee calculated pursuant to Exhibit E.

13.2.4 Payment The foregoing remedy payments shall become immediately due and payable upon receipt by Owner of ESCO' invoice without any other formality or delay and, upon such payment, the obligations and rights of the parties hereunder shall cease. Any and all reasonable attorney fees incurred by ESCO shall be paid by Owner.

13.2.5 Confidentiality Notwithstanding anything contained herein, it is clearly agreed and understood by parties, that, in the event of any breach of contract related to the confidentiality by the Owner, ESCO, in addition to any other available rights, shall have the right to obtain specific performance by the Owner under injunctive relief. It being understood that any other remedy like liquidity damages etc. shall not be adequate relief available to ESCO under these circumstances.

ARTICLE 14 - TERMINATION

14.1 By ESCO

14.1.1 Development Phase Prior to closing of Closing of the Loan ESCO may at its sole option terminate this ESA by providing written notice to Owner without any further obligations to Owner, and upon such termination Owner shall have no further payment obligations to ESCO and ESCO shall have no further obligations to Owner under this ESA.

14.1.2 Owner Default In the event of a Default by Owner as described in Article 13.1, ESCO may terminate this ESA and exercise the remedies in Article 13.2.

14.2 By Owner

14.2.1 Post Construction Period Subsequent to Completion, Owner may terminate this ESA by paying ESCO the Termination Fee calculated pursuant to Exhibit E.

14.2.2 ESCO Default In the event of a default by EPS as described in Article 12.1, Owner may terminate this ESA and exercise it remedies in Article 12.2.

ARTICLE 15 - DISPUTES

15.1 **Non-technical** The Parties agree to use their best efforts to solve any dispute, controversy, or claim arising out of, in connection with, or relating to this ESA or the breach thereof not involving the application of technical engineering or construction principles or practices, in an amicable way by mutual agreement. If such agreement is not reached, the dispute shall be submitted to arbitration pursuant to the Construction Industry Arbitration Rules of the Arbitration Court located in ..... , and the award of the arbitrators shall be final and binding and shall be enforceable in any court of competent jurisdiction.

15.2 **Technical** The parties agree to use their best efforts to solve any dispute, controversy, or claim arising out of, in connection with, or relating to this ESA or the breach thereof involving the application of technical engineering or construction principles or practices, in an amicable way by mutual agreement. Within ten (10) business days after the filing of a demand of arbitration, either Party may notify the other that the matters stated in the demand involve the application of technical engineering or construction practices or procedures (a "Technical Dispute") and propose the selection of engineer arbitrators pursuant to this paragraph (a "Technical Dispute Notice"). If the other Party disagrees that a Technical Dispute exists, or fails to respond to the technical Dispute Notice within ten (10) business days, the Dispute shall be resolved, and arbitrators shall be selected, in accordance with the procedures set forth in article 15.1. If the Party in receipt of a Technical Dispute Notice agrees that a Technical Dispute exists, it shall so advise the other Party in writing and each Party shall appoint an engineer as arbitrator within ten (10) business days thereafter. If each Party selects a different engineer, the two Party-appointed arbitrators shall select a third engineer mutually acceptable to them and notify the Parties of his appointment in writing. The appointment of arbitrators as set forth above, and the conduct of the arbitration thereafter, shall be governed by the Construction Industry Arbitration Rules of the American Arbitration association then in effect. The award of the arbitrators shall be final and binding and shall be enforceable in any court of competent jurisdiction.

ARTICLE 16 - TERM

This ESA shall be in force and effect upon its Effective Date and shall terminate when the guarantee Period ends on the last ECRM or as otherwise terminated in the ESA.

ARTICLE 17 - ASSIGNMENT

17.1 **By Owner** Owner may transfer or assign this ESA and its rights and obligations herein to a successor or to a purchaser of the Facilities or an interest therein, provided said successor or purchaser is of equal or better financial strength and assumes Owner's obligation under this ESA. In the event ESCO or Lender acts responsibly and does not approve the proposed assignee and Owner elects to proceed with the assignment, this ESA shall be terminated and ESCO shall be entitled to the remedies in Article 13.2 on all ECRMs developed/implemented in the ESA.

17.2 **By ESCO** Other than assignment of its payments and interests under this ESA to the Lender, ESCO shall not assign, delegate, or transfer any of the personal services it is required to perform in this ESA without the express prior written approval of Owner, said consent not to be unreasonably withheld. ESCO shall notify Owner in writing of any assignments of payments, and except for assignment to Lender, Cient shall either approve or notify ESCO of reasons for not approving within ten (10) business days of receipt of such notification. If Owner does not respond in writing within the ten (10) days, the assignment shall be deemed approved.

ARTICLE 18 - INDEMNIFICATION

ESCO and Owner shall indemnify, defend and hold each other harmless form any and all claims, actions costs, expenses, damages and liabilities, including attorneys' fees, arising out of connected with, or resulting from sole negligence or willful misconduct of that party's employees or agents. However, neither party shall indemnify the other against claims, damages, expenses, or liabilities resulting from alleged, claimed or concurrent negligence or misconduct of the other party. The duty to indemnify shall continue in full force and effect notwithstanding the expiration or early termination of this ESA, and shall exist with respect to any claims based on facts or conditions which occurred prior to any said termination. Forthwith upon obtaining knowledge thereof, the indemnified party shall notify the indemnifying party of any claim or demand which the indemnified party has determined has given or could give rise to a claim for indemnification under this Article 18. If such claim or demand relates to a claim or demand asserted by a third party against the indemnified party, then the indemnifying party shall have the right to defend the same at its own cost and expense with counsel of its own selection.

ARTICLE 19 - CONFIDENTAL DATA

19.1 ESCO acknowledges that all information supplied by Owner and not already available in the public domain (Owner Information) is and shall remain the property of Owner. ESCO agrees: 1) to protect the confidential nature of Owner Information in the same manner that it protects its own confidential information; 2) to not disclose or provide copies of Owner Information, or any portion thereof, to any third-parties other than members of the ESCO project team or potential financing sources; 3) upon request of Owner, to return all copies of Owner Information to Owner at the termination of this ESA, and 4) to assure that the personnel of ESCO, its engineers, Subcontractors and all other of its representative who become knowledgeable of this Owner Information form ESCO are bound by the same obligations of confidentiality as ESCO under this ESA.

19.2 Owner hereby acknowledges that the information supplied by ESCO under the performance of its services under this ESA, and all other data prepared and/or provided by EPS to Owner (ESCO Confidential Information) are and shall remain the property of ESCO until Project Completion occurs. Owner agrees : 1) to maintain ESCO Confidential Data in the same confidential manner that it protects it own confidential information; 2) not to disclose, make or provide copies of ESCO Confidential Data or any portion thereof to any third-party without the express written consent of ESCO; 3) not to use such information or any portion thereof for any purpose except for Owner's internal evaluation of the work

performed by ESCO in this ESA; 4) to return all ESCO Confidential Data and copies thereof to ESCO upon ESCO' termination of this ESA or upon written request by ESCO, 5) not to use ESCO Confidential Data or any facts, opinions, conclusions or information taken in any form therefrom, or permit that it be used to implement any portion of the ECRMs in this ESA with any person or company except ESCO, and 6) that, except for Default by ESCO, the condition of confidentiality required of Owner herein shall survive termination of this ESA, irrespective of the cause of such termination.

ARTICLE 20 - REPRESENTATIONS OF BOTH PARTIES

20.1 **General** Each party represents to the other that:

- it has all requisite power, authority, licenses, permits and franchises, corporate or otherwise, to execute and deliver this ESA and perform its obligations hereunder;
- its execution, delivery, and performance of this ESA have been duly authorized by, or are in accordance with its organic instruments and this ESA has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation
- its execution, delivery, and performance of this ESA shall not result in a breach or violation of, or constitute a default under, any agreement, lease, or instrument to which it is a party or by which it or its properties may be bound or affected; and
- 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.

20.2 **Additional Owner Representations** Owner hereby warrants, represents, and promises that it:

- has sufficient authority or title to the Facilities to permit ESCO to implement the Project without incurring liability to any party;
- intends to continue to use the Facilities in a manner substantially similar to its present use, and to same extent for the duration of this ESA, or has advised ESCO otherwise;
- has not withheld any important information from ESCO which might affect the implementation of the Project or ESCO' obligations under this ESA, and has not and shall not enter into an agreement with another party during the term of this ESA which might duplicate or affect the services to be provided under this ESA;
- to the best of its knowledge and ability, has provided or shall provide to ESCO all applicable records reasonably requested by ESCO in a timely manner, and the information set forth therein is, shall be, true and accurate in all material respects;
- to the best of its knowledge and ability, has provided or shall provide to ESCO all applicable records reasonably requested by EPS in a timely manner, and the information set forth therein is, shall be, true and accurate in all material respects;
- shall promptly notify ESCO of any events or circumstances which could materially affect the Project Costs or Savings, or could otherwise affect EPS' services and obligations under this ESA;
- shall not disclose any confidential information obtained by reason of this Project, nor shall it use any such information for any purpose without the written consent of ESCO.

- shall permit ESCO to utilize historic energy cost data and tariffs in effect as of the Effective Date of this ESA as the basis for valuing Savings and for use in the Savings Calculation Methodology for all Measures developed or implemented in the Project.

20.2 Additional Representations ESCO hereby warrants, represents, and promises that it:

- shall carry out its professional duties with care and diligence, and that it shall ensure that all of its subcontractors do likewise;
- shall make available, upon reasonable request, documents and records relating to its performance under this ESA;
- shall use Subcontractors who are qualified to perform the work so subcontracted or delegated pursuant to the terms hereof, as approved by Owner pursuant to each Financing report; and
- shall not disclose any confidential information obtained by reason of the Project, nor shall it use any such information for any purpose other than the completion of the Project without the written consent of Owner.

ARTICLE 21 - OTHER TERMS AND CONDITIONS

21.1 Applicable Law Shall be subjected to the jurisdiction of .....

21.2 Notifications All notices to be given by either party to the other shall be in writing and must be either delivered or mailed by registered or certified mail, return receipt requested, addressed to the Chief Executive Officer of the appropriate party at the address set forth on the signature page of this ESA, or such other addresses as either party may hereinafter designate by a Notice to the other. Notices are deemed delivered or given and become effective upon actual receipt.

21.3 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 ESA in the event of a continuing or subsequent default on the part of the other party.

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

21.5 Complete Agreement This ESA, together with all Schedules, Attachments incorporated herein and/or attached hereto, shall constitute the entire ESA between the parties, and this ESA may not be amended or modified except by a writing signed by both parties; provided that certain Schedules and Exhibits, to the extent permitted by this ESA, may be amended from time to time by mutual agreement of both parties.

21.6 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 ESA.

21.7 Headings Headings and subtitles used throughout this ESA are for the purpose of convenience only, and no heading or subtitle shall modify or be sued to interpret the

text of any section.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto subscribe their names to this instrument on the date and year first written above.

ESCO	**OWNER**
Name	Name .....
Address	Address .....
.....	.....
.....	.....
By:	By: .....
Date:	Date: .....