

**Energy Savings
Performance
Contract**

**City of Cheney
WWTP Solar Array**



DESCRIPTION – Energy Savings Performance Contract

This Energy Savings Performance Contract is for design, construction, guarantee, and follow-up measurement and verification of energy-saving projects. An Investment Grade Audit was previously completed that identified the costs and savings of each project. An Energy Services Proposal provides the basis to develop and negotiate this Energy Savings Performance Contract.

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ENERGY SAVINGS PERFORMANCE CONTRACT

This Energy Savings Performance Contract (the "Contract") is made and entered into as of this day of 2/14/2022, at Cheney, WA, in the County of Spokane, State of WA, by and between Apollo Solutions Group ("ESCO"), having its principal offices at Kennewick, WA, and City of Cheney ("Owner") having principal offices at 609 2nd Street, Cheney, WA 99004, for the purpose of installing certain energy, water, and operating cost saving equipment, described in **Section 3 of the Energy Services Proposal (Equipment to Be Installed by ESCO)**, and providing other services designed to save energy for the Owner's property and buildings, known as WWTP Solar Array located at 112 Anderson Road, Cheney, WA 99004 (the "Project Site(s)").

RECITALS

	Recitals	Establishes rationale for project, establishes contract authority, defines procurement process leading up to the contract, etc.	
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WHEREAS, Owner owns and operates the Project Site(s), and is in need of energy, water and operating cost saving equipment and services designed to save energy and associated energy costs at said Project Sites; and

WHEREAS, Owner has been authorized to enter into a third-party financing agreement for all professional services, equipment and construction for the purchase and installation of energy, water and operating cost savings measures, collectively referred to as the "Work" (as herein after defined); and
WHEREAS, ESCO has developed or become knowledgeable about certain procedures for controlling energy and water consumption and reducing operating costs through services provided and equipment installed and maintained at project sites similar in scope and scale of Owner; and

WHEREAS, ESCO was selected after a determination that its proposal was the most advantageous to Owner pursuant to a Request for Qualifications/Proposal and contract for the Energy Services Proposal and the Energy Services Proposal (as hereinafter defined); pursuant to RCW 39.35A and,

WHEREAS, ESCO has made an assessment of the utility consumption characteristics of the Project Site(s) and existing Equipment described in Section 2 of the Energy Services Proposal, which Owner has approved; and

WHEREAS, Owner desires to retain ESCO to purchase and install certain energy, water and operating cost savings equipment and to provide other services and strategies described in the attached Schedules, for the purpose of achieving energy,

water and operating cost reductions within Project Site(s), as more fully described herein; and

WHEREAS, Owner is authorized under the Constitution and the laws of the State of WA to enter into this Contract for the purposes set forth herein.

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

ARTICLE 1. DEFINITIONS AND APPENDICES

Section 1.1. Definitions.

Certificate of Acceptance and Completion: The date at which the owner accepts that the project is complete, and if applicable the lien period notices begin. The certificate in the form provided in Appendix D.

Contract: This Energy Savings Performance Contract and all Appendices attached hereto.

Contract Sum: The guaranteed maximum cost of the project which including but not limiting to the sum of all materials, labor, auditing, design, engineering, project construction management fees, on-site supervision and administration, travel, general conditions, permits, overhead, profit, contingency, subcontracted services related to the project.

Energy, Demand, Water and Operating Cost Savings: The savings as provided in the Energy Services Proposal – Section 4.

Energy Savings Guarantee: The amount of energy and water in units of energy that the ESCO guarantees the Owner will achieve as a result of the installation and operation of the equipment and systems provided for in this Contract as specified in Section 4 in the Energy Services Proposal (Appendix A).

Equipment: The proposed equipment and systems that are getting furnished and installed are described in detail in Section 3 of the attached Energy Services Proposal.

Event of Default: Those events described in **Section 20 (Events of Default)** hereof.

Acceptance Date: The date the Owner accepts the project/contract being fully completed.

Notice of Substantial Completion: The date of when the construction activities are substantially complete, and the owner is receiving beneficial use of the installed equipment and systems that were installed, exclusive of punch list items identified. The owner shall have 10 working days to review the notice of substantial completion and report any deficiencies to the ESCO that would require corrective action be taken. If the owner does not respond within the 10-working day period the ESCO will consider the project substantially complete. (Appendix C).

Notice of Commencement of Energy Savings, Energy Production, or Revenue Recovery (NCES): This is the notice given to the client of when the guarantee start date is to begin which will be the first day of the month after the notice is given. This

notice is given after each phase of work, the commissioning of the equipment and systems has been performed. The owner shall have 10 working days to review the notice of commencement of energy savings and report any deficiencies to the ESCO that would require corrective action be taken. If the owner does not respond within the 10-working day period, the ESCO will consider the NCEs accepted. (Appendix B).

Construction Period: The period starting from execution of this contract (including signing of the finance agreement if needed) until Substantial Completion acceptance. Substantial Completion shall be achieved in accordance with the calendar day durations proposed in the Energy Services Proposal Project Schedule.

Guarantee Period Start Date: The Date of the Notice of Commencement of Energy Savings acceptance.

Project Site(s): The facilities of the Owner in need of the more efficient energy, demand, water and operating equipment and services designed to reduce consumption and associated costs at said Project Site(s)

Energy Service Proposal: The complete Energy Services Proposal, which has been approved and accepted by Owner as set forth in Appendix A. The proposal includes all measures agreed upon by the parties.

Work: Collectively, the Equipment, professional services and project construction related to the project.

Equipment and Workmanship Warranty Start Period: The date at which the owner has received beneficial use of the equipment and installed components.

Section 1.2. Energy Services Proposal Report.

ESCO has prepared the complete Energy Services Proposal Report of the Project Site(s) set forth in **Appendix A (Energy Services Proposal Report)** which has been approved and accepted by Owner as set forth in Appendix A. The audit includes all measures agreed upon by the parties.

Section 1.3. Energy Services Proposal, Sections, and Appendices

ESCO has prepared and Owner has approved and accepted the following Schedules, copies of which are attached hereto (or will be as provided for in the Contract), set forth in their entirety as Attachment I and made a part of this Contract by reference.

Energy Services Proposal – Section 1, 2, and 3

- Section 1 Executive Summary
- Section 2 Facility Description
- Section 3 Scope of Work per Facility Improvement Measure (FIM)

Energy Services Proposal – Section 4

Savings Guarantee

- Section 4 Savings Guarantee
- Section 4 Baseline Energy Consumption; Methodology to Adjust Baseline
- Section 4 Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements
- Section 4 Data Collection and Reporting –by ESCO.
- Section 4 Compensation to ESCO for Annual Measurement & Verification Services

Payments and Schedule

- Section 6 Final Project Cost & Project Cash Flow Analysis
- Section 6 Financing Agreement and Payment Schedule (If needed)
- Section 6 Compensation to ESCO
- Section 6 Rebates, Incentives and Grants

Design and Construction Phase

- Section 2 Description of Project Site(s)
- Section 3 Equipment to be Installed by ESCO
- Section 5 Construction and Installation Schedule
- Section 5 Systems Start-Up and Commissioning
- Section 4 Operating Parameters of Installed Equipment
- Section 4 Standards of Comfort
- Section 5 ESCO's Training Responsibilities

Appendices

- Appendix A Energy Services Proposal
- Appendix B Notice of Commencement of Energy Savings
- Appendix C Notice of Substantial Completion
- Appendix D Notice of Project Acceptance and Completion

Section 1.4. Other Documents

This Contract incorporates herein and makes a part hereof the entire ESCO Energy Services Proposal for this Project labeled Appendix A respectively. Acceptance by the Owner of the Energy Services Proposal Report is reflected accordingly.

Notwithstanding, the provisions of this Contract and the attached Schedules shall govern in the event of any inconsistencies between the Energy Services Proposal Report and the provisions of this Contract.

ARTICLE 2. GUARANTEED MAXIMUM COSTS; GUARANTEE PERIOD START DATE AND TERMS; CONSTRUCTION PERIOD

Section 2.1. Guaranteed Maximum Cost

The agreed to Contract Sum for the Work is a Guaranteed Maximum Price of **\$ 378,516 (Excludes WSST, TERO Tax, and client Contingency)** as set forth in **Section 6 of the Energy Services Proposal (Open Book Project Cost Summary Table)**. Payment terms are described in **Section 3.3 ESCO Compensation and Fees** below.

ESCO will provide the Work and all related services identified in the Energy Services Proposal as described in **Section 3**. ESCO shall supervise and direct the Work and shall be responsible for the design, day to day construction supervision and administration, construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Contract. ESCO shall be responsible to pay for all labor, materials, equipment, tools, construction equipment and machinery, transportation and other services necessary for the proper execution and completion of the Work.

Owner shall pay ESCO the Contract Sum in accordance with monthly progress billings in accordance with the schedule of values that the ESCO will present once the construction schedule is created and a schedule of values can be determined. Retainage of 5% will be withheld from each payment to ESCO until the construction installation is completed as set forth in **Section 5 of the Energy Services Proposal**. At the ESCO's discretion a retention bond maybe procured in lieu of the 5% retention. **See section 3.3 ESCO Compensation and Fees below.**

Section 2.2. Guarantee Period Start Date

The Guarantee Period Start Date shall be the first day of the month after the Owner has accepted the Substantial Completion and Commencement of Energy Savings documents.

Notwithstanding anything to the contrary in this **Article 2** and **Article 3 (Guaranteed Maximum Cost; Guarantee Period Start Date and Terms; Construction Period)**, the Guarantee Period Start Date shall not occur, and the Owner shall not be required to accept the work under this Contract unless and until all Equipment and installation for the Project Site(s) is completed by ESCO in accordance with the terms and conditions of this Contract. Owner shall have 10 days after notification by the ESCO to inspect and accept the Equipment. Owner reserves the right to reject the Equipment if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract. ESCO shall not be paid in full, including retainage, until after the construction is completed to Owner's satisfaction and ESCO has satisfied any and all claims for labor and materials and the Certificate of Acceptance

has been signed. The Certificate of Acceptance will not be unreasonably withheld by the Owner.

Section 2.3. Term of Contract; Construction and Measurement and Verification Period

Subject to the following sentence, the term of this Contract shall be the number of days for the construction period plus one full year starting on the first day of the month that the Notice of Commencement of Energy Savings is delivered to the Owner. This date will be referred to as the Performance Guarantee Period Start Date. Twelve (12) months from that Performance Guarantee Period Start Date will mark the end of the Measurement and Verification Period. No more than 30 days after this 12-month period will the Measurement and Verification Report be given. Contract shall be effective and binding upon the parties immediately upon its execution, and the period from Contract Execution until the Guarantee Period Start Date shall be known as the Construction Period. All savings resulting from installation of the measures during the Construction Period will be fully credited to Owner. If the owner chooses to extend the guarantee period, then they can negotiate the length of time they wish to extend the guarantee period for. Measurement and Verification services can only be accomplished by Apollo Solutions Group if the Owner chooses to extend the energy guarantee period.

ARTICLE 3. SAVINGS GUARANTEE; ANNUAL RECONCILIATION; PAYMENTS TO ESCO

Section 3.1. Energy and Cost Savings Guarantee

ESCO has formulated and, subject to the adjustments provided for in **ARTICLE 15 (Material Changes)**, has guaranteed the annual level of energy and water savings in units of energy and quantity and calculated the operating cost savings using the existing rates that the client now uses as can be reviewed in **Section 4 of the Energy Services proposal**. The energy and water savings will be achieved as a result of the installation and operation of the Equipment and Systems proposed in the Energy Services Proposal. Section 4 of the Energy Services Proposal proved the methods of savings measurement and verification. **(Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting Requirements)**. The Energy Guarantee and its associated Cost Savings is set forth in annual increments for the term of the Contract as is specified in the Energy Services Proposal. The payment for the Measurement and Verification period will be made no later than 30 days after the Measurement and Verification Report is accepted by the school district. The annual Measurement and Verification period may be extended by the Owner, upon a notice 30 days' notice in advance of the end of the measurement and verification period.

- (i) Apollo will take on going measurements and trends throughout the guarantee period of key variables that will prove out the energy savings as agreed upon in Section 4 of the Energy Services Proposal.

- The client will allow ASG Personnel to have remote access to their energy management control system.
- (ii) Upon receipt of the required information, ESCO shall use the information to verify / calculate the savings in accordance with the agreed-upon criteria set in **Section 4 of the Energy Services Proposal**.
 - (iii) Based upon paragraphs (i) and (ii) above, ESCO shall prepare and send to Owner a \$ 865.00 invoice for the Annual Measurement and Verification Report.

Section 3.2. Annual Review and Reimbursement/Reconciliation

Energy-related cost savings shall be [verified] measured and/or calculated as specified in **Section 4 in the Energy Services Proposal (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Reporting) and (Baseline Energy Consumption; Methodology to Adjust Baseline)** and a report provided within ninety (30) days of the end of the year for the previous year for each anniversary of the Guarantee Period Start Date.

The total savings in energy units resulting from all Facility Improvement Measures (FIMs) will be the metric that the ESCO and Owner will use to determine if the guaranteed savings were achieved. The utility rates at the time of the Investment Grade Audit will be used to determine the cost savings to the Owner.

In the event that the Owner finances the project with a loan, the Owner and ESCO mutually agree upon a Utility Rate Escalation percentage (Section 4 of the Energy Services Proposal).

In the event that the total Energy and Cost Savings achieved during such guaranteed year are less than the Guaranteed Energy and Cost Savings as defined in **Section 4 of the Energy Services Proposal (Savings Guarantee)**, the ESCO shall have an opportunity to investigate why the energy savings short fall occurred. In the event that the energy guarantee shortfall occurred as a result of material changes, actions or inactions by the owner, the ESCO will not be responsible for this short fall. In the event that the equipment and systems are operating in accordance to the agreed upon parameters and the shortfall still occurs, the ESCO will compensate the Owner in an amount equal to the energy savings deficiency.

The ESCO shall remit such payments to the Owner within 60 days of receiving the Annual Measurement and Verification (M&V) Report of such monies due. In no event shall credit for excess savings be used to satisfy saving guarantees in past or future years of the Contract

Section 3.3. ESCO Compensation and Fees

The ESCO will provide monthly progress billings to the Owner. The fixed fees include all ESCO Fees as listed in the Open Book Project Cost Summary Table. The Fixed Fees for the Investment Grade Audit and the Design will be billed Lump Sum plus applicable taxes upon execution of this Contract. The Construction Costs, Project Management, Overhead, and Profit will be billed as a percentage of the Construction Completion. The open book Construction Costs will include all site supervision, general conditions, permits, performance bond, and all subcontractor and supplier costs.

Section 3.4. Billing Information Procedure

Payments due to the ESCO after receipt of a progress invoice for construction, or delivery and acceptance of the annual M&V report shall not be greater than 30 days. If after 30 days, the payment is not received, the ESCO will notify the Owner of their delinquent payment. If no payment is made by the Owner, through no fault or negligence of the ESCO, the penalty of up to 3% monthly interest rate may be applied.

Section 3.5. Open Book Pricing

Contractor substantiation will be provided in the monthly invoices for all construction costs. ESCO will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. Contractor will afford Owner access to these records and preserve them for a period of three (3) years after final payment.

Owner shall have the right to audit all books and records (in whatever form they may be kept, whether written, electronic or other) relating or pertaining to the open book construction costs, kept by or under the control of the ESCO, including, but not limited to those kept by the ESCO, its employees, agents, assigns, successors and subcontractors.

Section 3.6. Open Book Construction Savings:

If at the end of the project there are Construction Costs savings, a deductive change order equal to the amount of the construction savings will be executed. The difference between the Open Book Construction Cost Total and the Actual Construction Cost Total will comprise the amount of construction savings to the owner.

ARTICLE 4. FISCAL FUNDING

Section 4.1. Non-appropriation of Funds

In the event no Owner or other funds or insufficient Owner or other funds are appropriated and budgeted, and funds are otherwise unavailable by any means whatsoever in any fiscal period for which payments are due ESCO under this

Contract, then the Owner will, not less than 10 days prior to end to such applicable fiscal period, in writing, notify the ESCO of such occurrence and this Contract shall terminate immediately and any remaining cost owed to the ESCO shall be paid in full within 30 days.

Section 4.2. Non-substitution

In the event of a termination of this contract due to the non-appropriation of funds or in the event this Contract is terminated by ESCO due to a default by the Owner, the Owner agrees, to the extent permitted by state law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by ESCO under the terms of this Contract for a period of seven hundred thirty (730) calendar days following such default by Owner, or termination of this Contract due to non-appropriations.

ARTICLE 5. ENERGY USAGE RECORDS AND DATA

Section 5.1. Data Provided by Owner

Owner has furnished and shall continue to furnish (or authorize its energy suppliers to furnish) during the Term of this Contract to ESCO or its designee, upon its request, all of its records and complete data concerning energy and water usage and related maintenance and operating costs for the Project Site(s). ESCO will need remote access to the Owner's Energy Management Control System for the purposes of extracting trend data for the energy calculations and during the Measurement and Verification Period.

Owner agrees to provide ESCO direct access to utility bill information, by automated data transfer as feasible.

Section 5.2 Data Collection and Reporting by ESCO

ESCO shall have access to collect and report project data, on behalf of Institution and with approval by Institution, as identified in **Section 4 of the Energy Services proposal**.

ARTICLE 6. LOCATION AND ACCESS

ESCO acknowledges that there exists sufficient space on the Project Site(s) for the installation and operation of the Equipment. Owner shall take reasonable steps to protect such Equipment from harm, theft and misuse after the Notice of Substantial Completion. Owner shall provide access to the Project Site(s) for ESCO to perform any function related to this Contract during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to the Owner. ESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The ESCO's access to Project Site(s) to make emergency repairs or corrections as it may determine are needed shall not be

unreasonably restricted by the Owner. ESCO shall immediately notify the Owner when emergency action is taken and follow up with written notice with three (3) business days specifying the action taken, the reasons therefore, and the impact upon the Project Site(s), if any.

ARTICLE 7. PERMITS AND APPROVALS, COORDINATION

Section 7.1. Permits and Approvals

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

Section 7.2. Coordination during Installation

The Owner and ESCO shall coordinate the activities of ESCO's subcontractors with those of the Owner, its employees, and agents. The Owner shall provide reasonable access to the ESCO and its subcontractors. ESCO shall not commit or permit any act which will interfere with the performance of business activities conducted by the Owner or its employees without prior written approval of the Owner.

ARTICLE 8. CONSTRUCTION SCHEDULE AND EQUIPMENT INSTALLATION; APPROVAL

Section 8.1. Construction Schedule; Equipment Installation

An Overall Construction Schedule will be developed upon execution of this contract and updated at regular intervals.

Section 8.2. Systems Startup and Equipment Commissioning

The ESCO shall conduct or subcontract the commissioning of all equipment and systems installed as a part of this project. All commissioning and testing of these systems will be in accordance with the commissioning plan submitted during the submittal process. Testing and Balancing shall be designed to determine if the Equipment is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if modified building systems, subsystems or components are functioning properly within the new integrated environment. The ESCO shall provide notice to the Owner of the scheduled test(s) and the Owner and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Equipment. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in installed systems and equipment as well as their operations that may be observed during system commissioning procedures.

ARTICLE 9. EQUIPMENT WARRANTIES

ESCO warrants that all equipment sold and installed as part of this Contract is new, will be materially free from defects in materials or workmanship, will be installed properly in a good and workmanlike manner, and will function properly for a period of one (1) year from the date of the Notice of Substantial Completion for the particular energy conservation measure if operated and maintained in accordance with the procedures established per building. Substantial Completion shall be defined as the stage in the progress of the Work where the Work is sufficiently complete in accordance with the Contract Documents so that the Owner can utilize and take beneficial use of the Work for its intended use or purpose. Substantial Completion does not occur until the Equipment or system has been commissioned, accepted, and the "Notice of Substantial Completion" form fully executed. After the Notice of Substantial Completion, the Owner will be responsible for the care and maintenance of the installed Facility Improvement Measures (FIMs) in this project

After the warranty period, ESCO shall have no responsibility for performing repairs, or making manufacturer warranty claims relating to the Equipment.

ESCO further agrees to assign to Owner all available manufacturer's warranties relating to the Equipment and to deliver such written warranties and which shall be submitted in the final O&M Manual. ESCO shall, during the warranty period, notify the Owner whenever defects in Equipment parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO. During this period, the cost of any risk of damage or damage to the Equipment and its performance, including damage to property and equipment of the Owner or the Project Site(s), due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

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

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

The Owner shall notify the ESCO during the Warranty Period, of any defects of the equipment or systems installed. Owner shall have 48 hours to notify the ESCO of any warranty issues, and the ESCO will have 48 hours to respond.

ARTICLE 10. STANDARDS OF COMFORT

ESCO will maintain and operate the Equipment in a manner which will provide the standards of comfort as written in the Energy Services Proposal.

ARTICLE 11. ENVIRONMENTAL REQUIREMENTS

Section 11.1. Excluded Material and Activities

Owner agrees to provide a Good Faith Survey to the ESCO during the Investment Grade Audit or at the very least, before any construction activities commence. The Owner recognizes that in connection with the installation and/or service or maintenance of Equipment at Owner's Project Site(s), ESCO may encounter, but is not responsible for, any work relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, (ii) fungus (any type of form of fungi, including mold or mildew, and myotoxins, spores, scents or by-products produced or released by fungi), (iii) incomplete or damaged work or systems or code violations that may be discovered during or prior to the work of this agreement, or (iv) pollutants, hazardous wastes, hazardous materials, contaminants other than those described in this Section below (collectively "Hazardous Materials"), or the storage, handling, use, transportation, treatment, or the disposal, discharge, leakage, detection, removal, or containment thereof. The materials and activities listed in the foregoing sentence are referred to as "Excluded Materials and Activities". Owner agrees that if performance of work involves any Excluded Materials and Activities, Owner will perform or arrange for the performance of such work and shall bear the sole risk and responsibility, therefore. In the event ESCO discovers Hazardous or Excluded Materials, ESCO shall immediately cease work, remove all ESCO personnel or subcontractors from the site, and notify the Owner. The Owner shall be responsible to handle such Materials at its expense. ESCO shall undertake no further work on the Project Site(s) except as authorized by the Owner in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Owner shall not constitute a default by the Owner. In the event of such stoppage of work by ESCO, the Time for Completion of Work will be automatically extended by the amount of time of the work stoppage and any additional costs incurred by ESCO as a result will be added by Change Order.

If it is agreed to by the ESCO and the Owner, ESCO may be contracted by the Owner to assist with the management and oversight of the removal and disposal of all hazardous or other materials, including, without limitation, those listed in this section that it may bring to the Project Site(s).

Section 11.2. Polychlorinated Biphenyl (PCB) Ballasts; Mercury Lamps

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

the Equipment and shall be limited only until said PCB ballasts are loaded onto an approved PCB ballast disposal ESCO's vehicle for transportation.

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

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

ARTICLE 12. TRAINING BY ESCO

The ESCO shall conduct the training program described in **Section 5 of the Energy Services Proposal (ESCO's Training Responsibilities)** hereto. The training specified in **Section 5 (ESCO's Training Responsibilities)** must be completed prior to Notice of Substantial Completion.

ARTICLE 13. EQUIPMENT SERVICE

Section 13.1. Malfunctions and Emergencies

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

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

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

Section 13.2. Actions by Owner

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

ARTICLE 14. MODIFICATION, UPGRADE OR ALTERATION OF THE EQUIPMENT

Section 14.1. Modification of Equipment

During the Term of this Contract, Owner will not, without the prior written consent of ESCO, affix or install any accessory Equipment or device on any of the Equipment if such addition will change or impair the originally intended functions, value or use of the Equipment without ESCO's prior written approval, which shall not be unreasonably withheld. If prior written approval is not given by the ESCO, the measure and verification period will be terminated.

Section 14.2. Upgrade or Alteration of Equipment

ESCO shall at all times have the right, subject to Owner's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any procedures for the operation of the Equipment or implement other energy saving actions in the Project Site(s), provided that: (i) the ESCO complies with the standards of comfort and services set forth in **Section 4 (Standards of Comfort) in the Energy Services Proposal** herein; (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the guaranteed energy and cost savings at the Project Site(s) and; (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the ESCO.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Owner for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall, unless otherwise agreed, be new and have equal or better potential to reduce energy consumption at the Project Site(s) than the Equipment being replaced. All replacements of and alterations or additions to the Equipment shall become part the Equipment described in **Section 3 in the Energy Services Proposal (Equipment to be Installed by ESCO)**.

ARTICLE 15. MATERIAL CHANGES

Section 15.1. Material Change Defined

A Material Change shall include any change in or to the Project Site(s), whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Owner, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in **Section 4 (Baseline Energy Consumption)** and **Section 4 (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Report Requirements)** Actions by the Owner which may result in a Material Change include but are not limited to the following:

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

Section 15.2. Reported Material Changes; Notice by Owner

The Owner shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Project Site(s) or in the operations of the Project Site(s) at least **10** days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Owner within **24** hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Owner to have occurred.

Section 15.3. Other Adjustments

As agreed in **Section 15.1** Owner will alert ESCO of materials changes as known. Both parties have a vested interest in meeting the guaranteed savings of the Contract. As such, the ESCO will work with Owner to investigate, identify and correct any changes that prevent the guaranteed savings from being realized. As a result of such investigation, ESCO and Owner shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in **Section 4 of the Energy Services Proposal (Savings Measurement and Verification Plan; Post-Retrofit M&V Plan; Annual M&V Report Requirements)** and **(Baseline Energy Consumption)**. Any disputes between the Owner and the ESCO concerning any such adjustment shall be resolved in accordance with the provisions of **Article 27 Dispute Resolution** hereto.

ARTICLE 16. PERFORMANCE BY ESCO

Section 16.1. Corrective Action; Accuracy of the Services

ESCO shall perform all tasks/phases under the Contract, including construction, and install the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Section 4 of the Energy Services Proposal (Standards of Comfort)** and the construction schedule specified in **Section 5 of the Energy Services Proposal (Construction and Installation Schedule)**. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Contract. The Owner reserves the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of the Owner, the structural integrity of the Project Site(s) or its operating system is or will be harmed. All costs associated with such corrective action to damage caused by ESCO's performance of the work shall be borne by ESCO.

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

ARTICLE 17. OWNERSHIP OF CERTAIN PROPRIETARY RIGHTS; EXISTING EQUIPMENT

Section 17.1. Ownership of Certain Proprietary Property Rights

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

versions or enhancements are necessary to achieve the guaranteed utility consumption reductions.

Section 17.2. Ownership of Existing Equipment

Ownership of the equipment and materials presently existing at the Project Site(s) at the time of execution of this Contract shall become the property of the ESCO if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Contract. If applicable, ESCO shall advise the Owner in writing of all equipment and materials to be replaced at the Project Site(s) and the Owner shall within **10** days designate in writing to the ESCO which equipment and materials that should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that the Owner shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The ESCO shall be responsible for the disposal of all equipment and materials designated by the Owner as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

ARTICLE 18. PROPERTY/CASUALTY/INSURANCE; INDEMNIFICATION

Section 18.1 Insurances.

At all times during the term of this Contract, ESCO shall maintain in full force and effect, at its expense: (1) Workmen's Compensation Insurance sufficient to cover all of the employees of (ESCO) working to fulfill this Contract, and (2) Casualty and Liability Insurance on the Equipment and Liability Insurance for its employees and the possession, operation, and service of the Equipment. The limits of such insurance shall be not less than \$2,000,000 for injury to or death of one person in a single occurrence and \$4,000,000 for injury to or death of more than one person in a single occurrence and \$1,000,000 for a single occurrence of property damage. Such policies shall name the Owner as an additional insured.

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

Section 18.2. Damages to Equipment or Property.

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

Section 18.3. Indemnification.

ESCO shall save and hold harmless Owner and its officers, agents and employees or any of them from any and all claims, demands, actions or liability of any nature

based upon breach of contract or negligence arising out of any services performed by ESCO, its agents or employees under this Contract.

Section 18.4. Liabilities.

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

ARTICLE 19. CONDITIONS BEYOND CONTROL OF THE PARTIES

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

ARTICLE 20. EVENTS OF DEFAULT

Section 20.1. Events of Default by Owner

Each of the following events or conditions shall constitute an "Event of Default" by Owner:

- (i) any failure by Owner to pay ESCO any sum due for its services for a period of more than 15 days after written notification by ESCO that Owner is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Contract: or
- (ii) any other material failure by Owner to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein, provided that such failure continues for 15 days after notice to Owner demanding that such failures to perform be cured or if such cure cannot be effected in 15 days, Owner shall be deemed to have cured default upon the commencement of a cure within 10 days and diligent subsequent completion thereof;
- (iii) any representation or warranty furnished by Owner in this Contract which was false or misleading in any material respect when made.

Section 20.2. Events of Default by ESCO

Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

- (iv) the standards of comfort and service set forth in **Section 4 of the Energy Services Proposal (Standards of Comfort)** are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the

Equipment except that such failure, if corrected or cured within 30 days after written notice by Owner to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract.

- (v) any representation or warranty furnished by ESCO in this Contract is false or misleading in any material respect when made;
- (vi) failure to furnish and install the Equipment and make it ready for use within the time specified by this Contract as set forth in **Section 3 of the Energy Services Proposal (Equipment to be Installed by ESCO) and Construction and Installation Schedule;**
- (vii) provided that the operation of the facility is not adversely affected and provided that the standards of comfort in **Section 4 of the Energy Services Proposal (Standards of Comfort)** are maintained, any failure by ESCO to perform or comply with the terms and conditions of this Contract, including breach of any covenant contained herein except that such failure, if corrected or cured within 30 days after written notice by the Owner to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract;
- (viii) any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of ESCO;
- (ix) the filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within 120 days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO.
- (x) failure by the ESCO to pay any amount due the Owner or perform any obligation under the terms of this Contract or the Energy and Cost Savings Guarantee as set forth in **Schedule A (Savings Guarantee).**

ARTICLE 21. REMEDIES UPON DEFAULT

Section 21.1. Remedies upon Default by Owner

- (i) exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by Owner, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy;

Section 21.2. Remedies Upon Default by ESCO

In the Event of Default by ESCO, Owner shall have the choice of either one of the following remedies in law or equity:

- (i) exercise and any 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 damages, which shall include all costs and expenses reasonably incurred, including attorney's fees;

ARTICLE 22. ASSIGNMENT

The ESCO acknowledges that the Owner is induced to enter into this Contract by, among other things, the professional qualifications of the ESCO. The ESCO agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of the Owner.

Section 22.1. Assignment by ESCO

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

Section 22.2. Assignment by Owner

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

ARTICLE 23. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

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

ARTICLE 24. ADDITIONAL REPRESENTATIONS OF THE PARTIES

In addition, the ESCO certifies that before beginning work under this contract it will: have become licensed to business in the state; provide proof of required insurance

and bonds; give Owner access to all document relating to the project (including all contracts and subcontracts) upon request; use licensed and qualified subcontractors; and is financially able to complete the project and perform under the terms of this contract. In addition, the ESCO certifies that the equipment will meet or exceed the functional design tests performed prior to Owner acceptance and the installed equipment will be compatible with existing equipment and building systems.

Owner hereby warrants, represents and promises that:

- (i) it has provided or shall provide timely to ESCO, all records relating to energy usage and energy-related maintenance of Project Site(s) requested by ESCO and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Contract will be true and accurate in all material respects; and
- (ii) it has not entered into any leases, contracts or Contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Project Site(s) or with regard to servicing any of the energy related equipment located in the Project Site(s). Owner shall provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Project Site(s) which may be executed from time-to-time hereafter within 10 days after execution thereof.

ESCO hereby warrants, represents and promises that:

- (i) before commencing performance of this Contract:
 - (a) it shall have become licensed or otherwise permitted to do business in the State of Washington
 - (b) it shall have provided proof and documentation of required insurance and bonds pursuant to this Contract;
- (ii) it shall make available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;
- (iii) it shall use qualified subcontractors who are qualified, licensed and bonded in this state to perform the work so subcontracted pursuant to the terms hereof;
- (iv) The Equipment will meet or exceed the provisions set forth in **Section 8.2 (Systems Start Up and Equipment Commissioning)** and in **Section 4 of Energy Services Proposal (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)**.

- (v) The Equipment is or will be compatible with all other Project Site(s) mechanical and electrical systems, subsystems, or components with which the Equipment interacts, and that, as installed, neither the Equipment nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of Equipment installation or operation;
- (v) that it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Contract.

ARTICLE 25. MICELLANEOUS DOCUMENTATION PROVISIONS

Section 25.1. Further Documents

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

Section 25.2. Owner's Responsibilities

This provision protects both the ESCO and the Owner by establishing a method for the ESCO to supervise the Owner's compliance with the scheduled routine and preventative maintenance activities to be performed by the Owner (either by in-house personnel or existing maintenance contract). This checklist should be developed for both the newly installed and pre-existing energy-related equipment.

(a) Methods of Operation by Owner

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

(b) Owner Maintenance Responsibilities

Owner agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth in the On-Site Training and in the O&M Manuals (**Owner's Maintenance Responsibilities**), to be attached hereto and made a part hereof after Owner's approval, such approval not to be unreasonably withheld, conditioned or delayed.

Section 25.3. Waiver Of Liens

ESCO will obtain and furnish to Owner a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment to extent applicable by law.

ARTICLE 26. CONFLICTS OF INTEREST

Conflicts of interest relating to this Contract are strictly prohibited. Except as otherwise expressly provided herein, neither party hereto nor any director,

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

ARTICLE 27. DISPUTE RESOLUTION

Mediation (Pre-Mediation and Binding Mediation)

Mindful of the high cost of litigation, not only in dollars, but also in time and energy, the parties intend to and do hereby establish the following out-of-court alternate dispute resolution procedure to be followed in the event any controversy or dispute should arise out of or relating to this contract or relating to any change orders or other changes or addendums to this contract.

If a dispute develops between the parties to this contract, they will submit to mediation to address any controversy or claim arising out of or relating to this contract or relating to any change orders or other changes or addendums to this contract. Prior to the beginning of the mediation process, the parties may agree that if there is one or more disputed items that remain unresolved at the end of the mediation, the parties will proceed with binding mediation where the mediator will render a final and binding decision on those unresolved items, or the parties may elect to submit the remaining unresolved items to a mediation procedure where a new and separate binding arbitration session will be scheduled to settle any unresolved issues remaining after the mediation session has been concluded. The parties must mutually agree to utilize binding mediation, or the parties will be bound only to participate in the mediation process. The mediation shall be conducted by and according to the Construction Mediation Rules of the American Arbitration Association. Both parties shall share the cost of the dispute resolution process equally up to and including the mediation settlement agreement although personal attorneys and witnesses or specialists are the direct responsibility of each party, and their fees and expenses shall be the responsibility of the individual parties. As part of the decision of the mediator in binding mediation, the mediator shall award the prevailing party reasonable attorney's fees and reasonable expenses in any manner in which the mediator feels is fair and equitable to the parties. The

Mediation Settlement Agreement shall be binding on the parties and shall be enforceable in any court of competent jurisdiction. The venue for any mediation to enforce the provisions of this Contract shall be brought in Spokane, Washington.

ARTICLE 28. COMPLETE CONTRACT

This Contract, when executed, together with Energy Services Proposal attached hereto or to be attached hereto, as provided for by this Contract shall constitute the entire Contract between both parties and this Contract may not be amended, modified, or terminated except by a written Contract signed by the parties.

ARTICLE 29. APPLICABLE LAW

This Contract and the construction and enforceability thereof shall be interpreted under the laws of the State of Washington.

ARTICLE 30. INTERPRETATION OF CONTRACT

The Parties shall have the authority to determine questions of fact that arise in relation to the interpretation of this Contract and the ESCO'S performance hereunder. However, such determinations are subject to the Alternative Dispute Resolution procedures as described in **Article 27 Dispute Resolution**. Unless the Parties agree otherwise, or the Work cannot be continued without a resolution of the question of fact, such determinations and Alternative Dispute Resolution procedures shall not be cause for delay of the Work. The ESCO shall proceed diligently with the performance of this Contract and in accordance with the Owner's decision whether or not the ESCO or anyone else has an active claim pending. Continuation of the Work shall not be construed as a waiver of any rights accruing to the ESCO.

ARTICLE 31. NOTICE

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

TO ESCO: ***Attention: Dale Hollandsworth
Vice President
Apollo Solutions Group, DBA Apollo Sheet Metal, Inc.
1133 W. Columbia Dr.
Kennewick WA 99336.
Include COPY TO: information for ESCO, if applicable.***

TO OWNER: ***Attention: City of Cheney
Chris Grover, Mayor
609 2nd Street
Cheney, WA 99004***

APPENDICES

Appendix A Energy Services Proposal

Appendix B Notice of Commencement of Energy Savings

Appendix C Notice of Substantial Completion

Appendix D Notice of Project Acceptance and Completion