

Agreement for Guaranteed Energy Savings

Exhibit A Scope of Services

1. The State of New Hampshire, acting through the Department of Administrative Services (“State”), engages _____, (“Contractor”) to perform, and the Contractor shall perform, that work or sale of goods, or both, identified and more particularly described in Exhibits 1-6 incorporated herein (“Services”).

2. Contractor has performed a comprehensive assessment of the Facilities and submitted an Investment Grade Audit to provide certain services and equipment. The Contractor shall perform the Services at the following facilities (each, a “Facility” and collectively, the “Facilities” or the “Project”):

Facility Name	Street	City	Area
ADMINISTRATIVE SERVICES DEPT			343,105
General Services			
Emergency Operations Center	224 Sheep Davis Road	Concord	67,644
Materials & Research, DOT	5 Hazen Drive	Concord	29,318
Mechanical Services, DOT	226 Sheep Davis Rd.	Concord	85,900
Pillsbury Street - Old Labor	19 Pillsbury Street	Concord	9,198
Supreme Courthouse	1 Charles Doe Drive	Concord	41,045
Walker Building	21 S. Fruit Street	Concord	110,000
Grand Total			343,105

3. The Contractor is guaranteeing that the State will realize energy cost savings during each year of the Term, as defined in Section 3.1, calculated and adjusted according to the terms of Exhibit 3, equal or greater than the guaranteed amounts shown in Section 7.

4. The State has accepted the Investment Grade Audit dated _____, as revised _____, and wishes to engage Contractor to evaluate, design, furnish, install, commission, operate, maintain, measure and verify energy efficiency improvements to the Facilities for the purpose of reducing energy consumption and costs.

5. The work to be performed at the Facilities by Contractor (the “Services”) will be performed in two phases. The first phase will be a complete design, installation, commissioning, and initial measurement and verification of the Energy Conservation Measures (ECMs). The second phase will be the periodic measurement and verification of the ECMs and guarantee of energy cost savings. The second phase will also include facility staff training in the operation and maintenance of the installed ECMs. A delineation of Operation, Maintenance Services and Responsibilities for both

the State and Contractor is attached as Exhibit 4.

6. This Project will be financed through a Master Lease Financing Program established by the State. A lease agreement with the financial services provider will be established for this Project.

1. Definitions

Agreement. This Energy Savings Performance Agreement, including all appendices and exhibits attached hereto and all amendments and supplements hereto including the accepted Investment Grade Audit all of which are made part hereof as though herein set forth in full.

Alteration Order. A written agreement between the Contractor and the State that amends the Agreement and identifies Work that affects either the Contract Price, completion date for any Energy Conservation Measure, Credit or any combination thereof.

Baseline Energy Use. A calculation of energy use of a building or piece of equipment for a specified period that is used to project energy use had the Project not been implemented. It is calculated by taking the energy consumption for a similar period prior to Project implementation (as recorded in the Energy Use History) and adjusting it to reflect changes for agreed upon variables, such as degree days, occupancy and building use, energy costs in accordance with a methodology set forth in Exhibit 3. Energy use savings attributable to the Project are determined in accordance with the methodology set forth in Exhibit 3.

Certificate of Project Acceptance. The written Certificate of Final Completion and Acceptance is issued by the State to the Contractor pursuant to Section 7.5 certifying that the State accepts the Project as complete.

Commissioning Report. The report, required by section 7.1 of this Agreement, provided by the Contractor after installation of an ECM to verify that the specified equipment has been properly installed, is functioning properly, and with proper maintenance and operation has the potential to generate the predicted savings. The Commissioning Report includes documentation that provides a description and inventory of the installed energy efficient equipment, performance test results and estimates of energy savings.

Compensation Schedule. The meaning assigned to that term in Exhibit B.

Conditional Nature of Agreement. The meaning assigned to that term in Paragraph 4 of the General Terms and Conditions Form P-37.

Contract Documents. Collectively DAS RFP #2021-254 Performance Contract for six (6) state-owned facilities in Concord, NH, with addendums #1 - X which is incorporated herein by reference, proposal in response to RFP # 2021-254, dated _____, contract performance and payment bond, Specifications, Drawings, and other documents included in the Agreement, and modifications, clarifications, and authorized Alteration Orders, issued after the execution of the Agreement, to complete the Project. All documents shall be written in English.

Contract Price. The meaning assigned to that term in Exhibit B, Paragraph 1.1

Contractor. The Energy Services Company that is responsible to perform according to the requirements set forth in this Agreement and includes all agents, subcontractors, employees and consultants whose services are utilized by the Energy Services Company in the performance of this Agreement.

Credit. Any change that results in a reduction in the Contract Price. All credits shall be processed with an Alteration Order.

Day. Shall refer to calendar day unless otherwise specified.

Drawings (Plans). The graphic and pictorial documents or reproductions thereof, which show the location, character, dimensions, and details of the prescribed work.

Effective Date. The meaning assigned to that term in Section 3.1.

Energy Conservation Measure. Each and all of the new devices or systems; or modifications of existing systems; or revised operations and maintenance procedures; furnished, installed, and/or implemented by the Contractor for the purpose of reducing energy use and achieving the Guaranteed Savings, as described in Exhibit 3.

Energy Conservation Measure Acceptance. The written certification by the State that it has accepted the ECM as complete and installed in accordance with the design, equipment, implementation and commissioning standards as set forth in this Agreement. Further, the Contractor warrants that the ECM will produce its share of the annual Guaranteed Savings.

Energy Conservation Measure Acceptance Date. The date on which ECM Acceptance occurs, which shall be shown on the Certificate of ECM Acceptance to be provided by the State as set forth in Section 7.6.

Energy Savings Performance Agreement. This Agreement which is for an energy cost reduction project where the cost of implementing ECMs and the proposed ongoing energy services, including equipment maintenance, energy savings guarantees, and measurement and verification activities, is recovered through energy and energy-related cost savings. Financing will be provided through Third-Party Financing.

Facility(ies). The buildings, systems, and other energy-consuming or -producing equipment included in the scope of this Agreement, as documented in Exhibit 1 and the Investment Grade Audit.

Force Majeure. The meaning assigned to that term in Section 12.

Guaranteed Savings. The annual energy savings calculated according to the method described in Exhibit 3, which Contractor guarantees will be realized by the State as a result of the Project.

Investment Grade Audit. Also referred to as the “Audit Report” or the “Study Report”. A survey of existing energy systems of a Facility for the purpose of proposing ECMs and verifying that the proposed ECMs have the potential to generate energy savings and meet the financial requirements within the specified term. The results of an Investment Grade Audit are presented in a written report that includes a methodology for the calculation of the Baseline Energy Use and a description of physical conditions, equipment counts, nameplate data and control strategies. For each ECM recommended, the Investment Grade Audit generally provides equipment counts, implementation costs, efficiency levels or performance characteristics of the equipment comprising the proposed ECM, on-going maintenance costs, annual energy and cost savings, the useful life of the ECM and a life-cycle cost analysis. Projected energy savings must account for interaction among recommended ECMs. See Section 4 and the State RFP #2021-254 “Performance Contract for six (6) stated-owned facilities in Concord, NH”.

Measurement and Verification (M&V). The process of monitoring and measuring the energy consumption of a facility or specific equipment or systems, before and after Project implementation, to determine if guaranteed or predicted energy savings are being realized.

Operations and Maintenance (O&M). The process of operating and maintaining newly installed energy saving equipment as further described in Exhibit 4.

Project. The energy and cost reduction program contemplated herein, pursuant to, inter alia, RSA 21-I:19 a-e.

Project Acceptance [“Final Acceptance”]. The written certification by the State that it has accepted the Project as complete and installed in accordance with the design, equipment, implementation and commissioning standards as set forth in this Agreement. Further, the Contractor warrants that the Project will produce the annual Guaranteed Savings.

Project Acceptance Date [“Final Acceptance Date”]. The date on which Project Acceptance occurs, which shall be shown on the Certificate of Project Acceptance to be provided by the State as set forth in Section 7.6.

Punch List. Uncompleted or corrective work that the Contractor is to complete or correct promptly prior to Final Project Acceptance.

Specifications. Exhibit 2 information that consists of written requirements for material, equipment, construction systems, standards and workmanship, and other documents or reports as applicable.

Standards of Service and Comfort. The facility performance requirements to be maintained in accordance with Section 10 and Exhibit 6.

State. State of New Hampshire

Study Acceptance Form. The meaning assigned to that term in Section 4.3.

Substantial Completion. As reasonably determined by an inspection by the State that the work or a portion thereof is substantially complete in accordance with the Contract Documents, such that the State may occupy or utilize the Work for its intended use without disruption or interference by the Contractor in completing or correcting any remaining unfinished or unacceptable Work.

Third Party Financing. Project financing provided to the State by an independent financial institution.

Total Project Cost. All costs associated with the development and implementation of an Energy Performance Contract, including, but not limited to: Investment Grade Audit, ECM design, procurement and installation; construction contract bonds; interest charges; training of facility staff; Technical Assistance and Project Oversight; Measurement and Verification; maintenance and service; project management; and contractor overhead and profit.

Work. The construction and services required by the Contract Documents to furnish all labor, materials, equipment, and incidentals necessary to complete the duties, obligations, and requirements imposed by the Agreement.

2. Project Financing and Contract Bond

2.1 This Project is contingent upon financing being provided by - _____ . The established finance rate at the time of Governor and Council review shall be used to determine whether this Project continues to meet the 20 year payback requirements as stated in RSA 21-I:19 d.

2.2 The successful Contractor shall furnish the State with a Payment and Performance Bond in an amount equal to 100% of the value of the Contract Price. The Payment and Performance Bond shall be in place for the duration of the construction phase of the Project which will conclude at Final Project Acceptance. The Contractor shall bear the full expense of the Payment and Performance Bond. The requirement for the Payment and Performance Bond will be terminated by the State on the Project

Appendix D – Sample Contract

Acceptance Date.

The Payment and Performance Bond shall be in a form and substance satisfactory to the State. The Payment and Performance Bond shall be maintained by the Contractor in full force and effect until Project Acceptance. The Contractor or any of its sureties shall not be released from their obligations under the Payment and Performance Bond from any change or extension of time, or termination of this Contract.

The Payment and Performance Bond shall be issued by a licensed insurance company authorized to do business in the State of New Hampshire and made payable to the State of New Hampshire. The Payment and Performance Bond shall contain the Contract number and dates of performance.

The Contract Bond shall comply with RSA 447:16 and be executed by the Contractor and their Surety or Sureties, guaranteeing complete execution of the contract and all supplemental agreements pertaining thereto including the payment of all legal debts pertaining to the Project.

The State reserves the right to review the Payment and Performance Bond and to require the Contractor to substitute a more acceptable Payment and Performance Bond in such form(s) as the State deems necessary prior to acceptance of the Payment and Performance Bond.

2.3 The Contractor assumes all liability for damage to or loss of Equipment and material directly purchased by the Contractor prior to its installation and Final Completion and Acceptance by the State.

3. Effective Date: Completion of Services

3.1 This Agreement, and all obligations of the parties hereunder, shall become effective on the date the Governor and Council of the State of New Hampshire approve this Agreement ("the Effective Date") and shall continue for a period of 78 months (the "Term"), which is comprised of an estimated eighteen (18) months of construction, followed by sixty (60) months of Metering and Verification Services commencing after the Project Acceptance Date, unless sooner terminated under an Event of Default as described in Exhibit C.

3.2 If the date for commencement in Exhibits 1 through 6 precedes the Effective Date, all services performed by Contractor between the commencement date and the Effective Date shall be performed at the sole risk of the Contractor and in the event that this Agreement does not become effective, the State shall be under no obligation to pay the Contractor for any costs incurred or services performed; provided, however, if this Agreement becomes effective, all costs incurred prior to the effective date shall be paid under the terms of this Agreement. All construction and ECM implementation services must be completed by the date specified for construction completion.

4. Investment Grade Audit and Report

4.1 Investment Grade Audit. Contractor has performed an investment grade audit (the “Study”) of the Facility at its sole expense. The Study has identified all feasible energy conservation, load management, building envelope, water conservation and renewable resource options for which the total savings benefits are expected to exceed Total Project Cost over a period not to exceed twenty (20) years.

4.2 Submittals. The Contractor has furnished a written report of its findings (the “Study Report” contained in Appendices B & C which are incorporated herein by reference) including all of the information listed in Exhibits 1 through 6.

4.3 Review; Acceptance. The State has reviewed the Study Report and executed the Study Acceptance Form.

5. Design

5.1 Within 14 days of written receipt of the Governor and Council’s approval of this Agreement for Guaranteed Energy Savings, Contractor shall commence designing the ECMs. Drawings and specifications for this Project shall be in compliance with all applicable laws, ordinances, rules, codes, regulations and requirements for the ECMs noted in Exhibit 2 and shall be submitted to the State for review and approval, which shall not be unreasonably withheld or delayed.

5.2 The Contractor shall submit all Professional Engineer stamped drawings and specifications for review and approval by the New Hampshire State Fire Marshal. No actual construction shall begin before obtaining approval from the State Fire Marshal.

5.3 Design review meetings shall be held when mutually deemed necessary and at a minimum when design drawings are 50% complete and fully complete. Contractor shall provide six (6) complete sets of documents for State review prior to each review meeting. State shall have 10 business days to review and provide comments after documents are received.

5.4 The Contractor shall not proceed with obtaining or installing any ECM until the State has given written notice that it has reviewed and accepted the design documents for such ECM. Such acceptance shall not be unreasonably withheld or delayed.

5.5 The Scope of Work, including the complete design, engineering, procurement, and installation of the ECMs listed on Exhibit 1 and as further detailed in Appendix C, the Study Report, shall be accomplished in accordance with the requirements outlined in the Study Report and all provisions of this Agreement.

5.6 The drawings and specifications prepared for this Project shall not, without the prior written approval of the State, specify or require any article, design or process which requires payment by the State of royalties for its use.

6. Installation

6.1 Within 14 days of written receipt of notice of State acceptance of the design documents, Contractor shall commence procuring, installing and/or implementing the ECMs.

6.2 Without relieving it of, or in any way limiting, its obligations to the State under this Agreement, the Contractor may enter into purchase orders for the purchase of materials or Equipment in accordance with the provisions of Exhibit 2.

6.3 All Project materials and Equipment installed in the Facilities by the Contractor or its subcontractors shall become the sole property of the State after installation and upon ECM Acceptance.

6.4 During the installation, the Facilities will be occupied. The Contractor shall perform all work with extreme care to avoid damage to existing construction and installations. The Contractor shall make all necessary provisions as to the scheduling of work and storage of materials to minimize interferences and, to the extent practical, shall confine its operations, materials, and equipment within the immediate vicinity of the work. Contractor shall prearrange all disruptive and/or noise-producing construction activities with the DAS staff so as not to unreasonably interfere with ongoing activities within the Facilities. The work shall be coordinated and planned in a manner which will permit normal operation of the facility with minimum interruptions and/or inconvenience.

6.5 Unless otherwise specifically provided for in the design documents, all equipment, materials and articles incorporated in the work covered by this Agreement are to be new and of the specification indicated in the Study Report. All work to be executed shall be of the highest quality and performed by skilled mechanics in the best workmanlike manner. The State may require the Contractor to dismiss from the work any employee, employees, or subcontractors that the State deems incompetent, careless, insubordinate, or otherwise objectionable. The State may reject any equipment and materials if such equipment and materials are inconsistent with the specifications of Exhibit 2. All equipment shall be installed to allow for easy access to perform maintenance and repairs.

6.6 The Contractor shall provide adequate, clearly marked and/or lighted barricades or warning signs at all open trenches, excavation and contract work areas for the protection of the work and safety of the public and occupants.

6.7 Contractor shall acquire and maintain, at its own cost, any and all permits, licenses, easements, waivers, and permissions of every nature necessary to perform the work. This includes any City of Concord building and inspection permits.

6.8 The Contractor shall, as directed during the progress of the work, remove and properly dispose of resultant dirt and debris and keep the premises reasonably

Appendix D – Sample Contract

clean. The Contractor shall take all necessary precautions during the progress of the work to protect the Facility as well as adjoining property, roadways, walkways, trees, lawns, landscape, and buildings from damage and injury and shall promptly repair any such damage to the satisfaction of the State, at no cost to the State.

6.9 The Contractor shall be responsible for quality control during ECM installation. The Contractor shall provide a competent superintendent, satisfactory to the State, on the work at all times during progress of the work with authority to act for the Contractor. The Contractor shall inspect and test all work performed to insure compliance with Agreement requirements. The Contractor shall maintain records of inspections and tests, including inspections and tests conducted by or for utility or other regulatory agencies.

6.10 The Contractor shall provide to the State once each month during the period that design, engineering, procurement, installation, implementation and Commissioning for the ECMs are performed hereunder, brief progress reports comparing actual work progress to the planned work progress as shall be presented in the Exhibit 5 Installation Schedule for the preceding month. Such reports shall describe any difficulties encountered during the reporting period and shall include a statement of the Contractor's Project Coordinator setting forth the costs of the work during the reporting period. Progress Reports shall be submitted in duplicate no later than the 15th of each month. Progress Reports shall be in a letter format and shall include the following subjects, with appropriate explanation and discussion: During construction the Contractor shall hold weekly construction meetings to discuss the progress to date and provide a 2 week look ahead for the project.

- a. Title of project.
- b. Agreement number.
- c. Period of this report.
- d. Actual Progress during reporting period.
- e. Planned progress in the future.
- f. Identification of problems.
- g. Planned solutions.
- h. Ability to meet schedule, reasons for slippage in schedule.
- i. Schedule – percentage completed and projected percentage of completion of performance by months – could be a bar chart or milestone chart.
- j. Analysis of Project cost incurred in relation to the Compensation Schedule, Exhibit B.

The Contractor shall meet with representatives of the State upon reasonable notice to discuss any matters concerning the Project.

6.11 In the event that unknown circumstances or conditions at a Facility (such as the presence of asbestos or faulty wiring) are discovered after the Agreement is signed, and such conditions increase the agreed upon cost of completing an ECM

installation or implementation at a specific facility, work on that ECM shall be immediately suspended until the State and the Contractor mutually determine if or how the installation work shall be completed. The Agreement may be revised by an Alteration Order to incorporate necessary changes in the scope of work, the Equipment, or the costs not to exceed Section 1.8 of the P-37 contract form.

6.12 The State will be responsible for overseeing the actual installation of ECMs to ensure that all identified codes and regulations are met and that the Contractor complies with the Specifications as detailed in Exhibit 2.

6.13 The Contractor and all of its Subcontractors shall follow all applicable Federal, State, and local codes; ordinances; and Health and Safety laws, as required by law.

6.14 The Contractor shall provide two signed affidavits each from the registered design professionals responsible for architecture, mechanical engineering, electrical engineering, structural engineering, and civil engineering. Design affidavits shall be submitted at the conclusion of the design phase, but prior to the beginning of the construction phase, and shall state that the design professionals' respective design meets all applicable state and federal codes. The Installation affidavit shall be submitted after Substantial Completion of the Project for each ECM, but before the issuance of a Certificate of Occupancy, and shall state that the design professionals made periodic visits to the site to observe the work and, to the best of their knowledge, information and belief, the CEMs was constructed in accordance with the design. The frequency of site visits shall be such as to provide the design professionals a reasonable assurance that the work is being done per the design documents.

The design professional shall keep a log of all site visits, noting the dates and times of the visits and all pertinent observations and shall submit monthly reports to the Contractor noting all findings during the site visits of that month. The design professionals shall promptly notify the Contractor of any of the following events or conditions which they observe in the course of performing their duties: code violations; changes which affect code compliance; the use of any materials, assemblies, components, or equipment prohibited by code, major or substantial changes between approved plans and specifications and the work in progress; or any condition which they identify as constituting an immediate hazard to the public.

7. Commissioning, Energy Conservation Measure Acceptance, Project Acceptance

7.1 The Contractor shall deliver to the State a written report (the "Commissioning Report") as each ECM covered by the Agreement is completed. In the Commissioning Report(s), the Contractor shall provide measurement and verification documentation, as applicable in accordance with Exhibit 3, that verifies that the specified equipment or systems have been properly installed, are functioning properly,

Appendix D – Sample Contract

and have the potential to generate the Guaranteed Savings (or that ECM's share of the Project's Guaranteed Savings).

7.2 The Commissioning Report(s) shall include the results of performance tests to verify that the installed ECM(s) will operate as designed, consistent with the standards set forth in the design documents, which shall minimally conform to all applicable codes. The tests shall be conducted in accordance with the methodology prepared for each type of ECM in Exhibit 3 during the installation phase. As mutually agreed upon, the Commissioning Report(s) shall be accompanied by complete reproducible as-built record drawings that are CAD generated in .DWG format, conforming to generally accepted engineering standards of all modified or newly installed equipment including, but not limited to, architectural, mechanical, electrical, and controls, along with manufacturers' operating and repair manuals and parts lists. Manufacturer's warranties shall accompany the Commissioning Report(s) and shall be assigned to the State upon completion and ECM Acceptance.

7.3 Within 10 business days of receiving a Commissioning Report from Contractor, the State shall review the report and inspect the ECM and either (a) deliver to the Contractor a written Certificate of Final Completion and Acceptance of the ECM(s) or (b) provide the Contractor with a written Punch List of corrective action the State deems necessary. If ECM(s) are rejected, the State will set forth the reasons for such rejection and the Contractor shall promptly remedy the deficiencies.

7.4 Upon receipt of a written notice from the Contractor that the Punch List items have been completed, the State shall have ten (10) calendar days to respond. Final Completion and Acceptance shall occur when all reasonable or undisputed Punch List work is complete. If the State fails to respond within the ten-calendar-day period, Final Completion and Acceptance shall be deemed to have occurred.

7.5 Within 15 business days of submission of the final Commissioning Report, Contractor shall deliver to the State notice that the Project is completed and a request for Project Acceptance. In this notice, the Contractor shall warrant that the completed Project will produce the Guaranteed Savings, in accordance with the provisions of Exhibit 3.

7.6 Within 15 business days of receipt of the request for Project or ECM Acceptance, The State shall either deliver to Contractor: a) a written Certificate of Project or ECM Acceptance; b) a written extension of time notice to review for Project and or ECM Acceptance; or c), if good cause exists, a written punch list of the corrective actions it deems necessary. In the event the State delivers a punch list, Contractor shall promptly remedy the deficiencies and the applicable procedures set forth in this Section for notice and Project or ECM Acceptance shall apply again. In the event the State doesn't deliver a), b) or c) above, the ECM shall be deemed accepted.

Appendix D – Sample Contract

7.7 Upon Project Acceptance by the State, all right, title, and interest in and to all improvements and equipment constructed or installed on the premises and additions, shall vest exclusively in the State at no additional cost, free and clear of all and any liens and encumbrances created or caused by the Contractor.

7.8 Contractor guarantees that the State will realize energy and cost savings, calculated and adjusted as set forth in Section 9 and Exhibit 3, each year for five (5) years after the Project Acceptance Date as follows:

Year	Guaranteed Cost Savings
1	
2	
3	
4	
5	

*Note: The Guaranteed cost Savings only applies for those years in which M&V is being performed.

8. Operations, Maintenance, Repairs, and Training

8.1 The Contractor's and the State's responsibilities for operation, maintenance and repair of all installed ECMs are described in Exhibit 4. Maintenance includes all work and costs associated with periodic inspections, tests, calibrations, and adjustments required to sustain and/or restore energy system operational status to as-designed performance and performance requirements of this Agreement. Repair includes all labor, material, equipment, and services required to replace, rebuild, or restore to as-designed performance systems and equipment that have failed, are in danger of failing, or are inadequate. Required response times for repair activities shall be as described in Exhibit 4.

8.2 The State shall perform or cause to be performed all operation, maintenance, and repairs to its unmodified pre-existing equipment necessary to realize the Guaranteed Energy Savings. Such operation, maintenance, and repairs are fully described in Exhibit 4.

8.3 Contractor shall furnish operation and maintenance manuals and recommended spare parts lists for operations and maintenance of the ECMs and modified State equipment. Within 30 days of the Project Acceptance, Contractor shall train State personnel as needed to operate and maintain the ECM(s) in order to perform

any State maintenance responsibilities required under this Agreement or in the event of emergency. During the Term, Contractor shall train State personnel (or State's designee) as needed to operate and maintain the ECM(s) to preserve the ECM(s) energy efficiency performance, as provided for in Exhibit 4.

9. Measurement and Verification of Energy Savings

9.1 The monitoring and measurement of the Energy Savings that result from the ECM(s) shall be as set forth in the Measurement and Verification Plan (M&V Plan) included in Exhibit 3.

9.2 The Measurement and Verification Plan shall be in accordance with concepts and definitions provided in the International Performance Measurement and Verification Protocol (IPMVP).

- a) In the event that the M&V Plan requires the use of Contractor-owned measurement equipment, Contractor shall test such meters, metering devices, and equipment in the manner and frequency described in the M&V Plan and such testing shall be at Contractor's expense. Contractor shall give the State reasonable advance notice of all metering tests and the State shall have the right to observe such tests.
- b) If, upon testing, any measurement equipment is found to be inaccurate by more than the agreed upon level of accuracy as specified in the M&V Plan, then previous recordings of or by such equipment shall be considered inaccurate and will be corrected to zero error. If the period of inaccuracy cannot be accurately determined as a basis for adjustment, then retroactive billing adjustments for errors shall be made for a period equal to one-half of the time elapsed since the previous test, but in no event more than six months. Contractor shall promptly adjust such equipment to record correctly.

9.3 Measurement and Verification of savings shall commence on the Project acceptance Date of the ECM and shall continue for a period of **5 years** after the Acceptance of the ECMs.

9.4 The energy savings shall be determined in the manner described in Exhibit 3 Guaranteed Energy Savings.

9.5 The Contractor will prepare an Energy Cost Savings Report detailing the results of the M&V services based off of the M&V Plan detailed in Exhibit 3.

9.6 Within 150 days from the date of each anniversary of the Final Project Completion and Acceptance Date, the Contractor shall submit a verification of energy cost savings in accordance with the M&V Plan detailed in Exhibit 3. The calculation shall incorporate all adjustments in energy cost savings as provided for in Exhibit 3.

Should the energy savings be less than the annual guaranteed amount of savings, pursuant to the M&V Plan in Exhibit 3, the Contractor shall pay the State an amount equal to the difference. Said check shall be provided to the State with the reconciliation of energy costs savings report.

This Guarantee of Energy Cost Savings only applies for those years in which M&V is being performed, in accordance with Exhibit 3.

10. Standards of Service and Comfort

10.1 Contractor shall design, install, operate, and maintain the ECMs to deliver the facility performance requirements described in Exhibit 6 throughout the Agreement Term.

10.2 The Contractor's services shall be performed in a good, workmanlike manner so that the Equipment will perform consistent with the standards for heating, cooling, hot water, and lighting pursuant to Exhibit 6, Standards of Service and Comfort.

11. Representations and Warranties

11.1 Each party hereby represents and warrants to the other that subject to the requisite approvals of Governor and Council and requisite financing and appropriation:

- a) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligations hereunder;
- b) this Agreement has been duly executed and delivered for it by the signatories authorized, and it constitutes its legal, valid and binding obligation;
- c) its execution, delivery, and performance of this Agreement shall not result in a breach or violation of, or constitute 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
- d) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits, or orders which would materially and adversely affect its ability to perform hereunder.

11.2 Contractor further represents and warrants that:

- a) it is financially capable and technically qualified to perform the Project;

- b) it is familiar with and will comply with all general and special federal, state, municipal, and local laws, ordinances, codes, and regulations, that may in any way relate to or affect the performance of this Project;
- c) the design, supervision, and workmanship furnished with respect to completing the Project shall be in accordance with sound and currently accepted construction and engineering practices; and
- d) all materials, equipment, and workmanship furnished by it and by subcontractors in performance of the Project or any portion thereof shall be free of defects in design, material, and workmanship, and all such materials and equipment shall be in accordance with the requirements of the Agreement, shall conform with all applicable laws, codes, specifications, standards, regulations, rules, and ordinances and shall have service lives and maintenance characteristics suitable for their intended purposes in accordance with sound and currently accepted engineering and construction practices.

12. Force Majeure

12.1 The term “Force Majeure” as used herein means unforeseeable causes beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure. Force Majeure includes acts of God, labor disputes, sudden actions of the elements, actions by federal, state and municipal agencies and actions of legislative, judicial, or regulatory agencies which, in any of the foregoing cases, by exercise of due foresight such Party could not reasonably have been expected to avoid.

12.2 If either Party documents that it is unable to perform its obligations under this Agreement because of Force Majeure, then the affected Party shall be excused from whatever performance is affected by the Force Majeure, to the extent it is affected, except as to obligations to pay money, and shall not be liable in damages or otherwise resulting from the Force Majeure, provided that:

- a) the non-performing Party provides as promptly as possible a written notice to the other Party describing the events of the Force Majeure. In no event shall notification occur later than 30 days after the non-performing Party learns of the event;
- b) the suspension of the performance is of no greater scope and of no longer duration or magnitude than is reasonably required by the Force Majeure;
- c) the non-performing Party uses all reasonable efforts to remedy its inability to perform; and

- d) as soon as the non-performing Party is able to resume performance of its obligations excused as a result of the occurrence, it shall give prompt written notification thereof to the other Party.

13. Environmental Compliance

13.1 Hazardous Materials shall include, without limitation, substances defined or classified as “hazardous substances,” “hazardous waste,” or “toxic substances” under federal, state, or local law, statute, regulation, or ordinance (collectively “Hazardous Materials”). Contractor shall fully comply with all federal, State of New Hampshire, and local laws, statutes, codes, regulations, and ordinances in effect or which shall come into effect during the Term of this Agreement regarding the generation, use, storage, handling, transportation and disposal of Hazardous Materials.

13.2 As part of the Study Report submitted to the State by the Contractor, Contractor has certified in writing that Contractor has a plan to coordinate all activities involving handling, transport, and disposal of Hazardous Materials, including asbestos, affected by the installation of ECMs under this Agreement. Hazardous material abatement and/or disposal, and assumed responsibilities, are contained under “General Assumptions and Clarifications” in Exhibit 2.

13.3 This Project has the potential to develop waste such as, but not limited to, PCB ballasts, mercury-containing lamps, electronic waste (or e-waste), etc. The Contractor is responsible for properly disposing of (i.e. recycling) all waste materials generated from this Project.

14. Personnel

14.1 The performance of the Services shall be carried out by the Contractor. The Contractor shall at its own expense, provide all personnel necessary to perform the Services. The Contractor warrants that all personnel engaged in the Services shall be qualified to perform the Services, and shall be properly licensed and otherwise authorized to do so under all applicable laws.

14.2 The Contractor shall not hire, and shall permit no subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Services, to hire any person who has a contractual relationship with the State or who is a State officer or employee, elected or appointed.

14.3 The Contracting Officer specified, or his or her successor, shall be the State’s representative.

15. Project Suspension

15.1 Stop Work Order. The State may at any time, by written stop work order to the Contractor, require the Contractor to stop all or any part of the work called for by

Appendix D – Sample Contract

this Agreement for a period of up to 90 calendar days after the stop work order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a stop work order; the Contractor shall forthwith comply with its terms and take all steps to minimize the incurrence of costs and public health and safety problems allocable to the work covered by the stop work order during the period of work stoppage. Within a period of 90 calendar days after a stop work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the State shall either:

- a) By written notice to the Contractor, cancel the stop work order, which shall be effective as provided in such cancellation notice, or if not specified therein, upon receipt by the Contractor, or
- b) Terminate the work covered by such order as provided in Exhibit C.

15.2 If a stop work order issued under this section is cancelled or the period of the stop work order or any extension thereof expires, the Contractor shall resume work. An equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, if any, or a combination thereof, and in any other provisions of the Agreement that may be affected, and the Agreement shall be modified in writing accordingly, if:

- a) The stop work order results in an increase in the time required for, or in the Contractor's compensation for, the performance of any part of this Agreement, and
- b) The Contractor asserts a claim for such adjustments within 30 calendar days after the end of the period of work stoppage; provided that, if the State decides the facts justify such action, the State may receive and act upon any such claim asserted at any time prior to final payment under this Agreement.

15.3 If a stop work order is not cancelled and the work covered by such stop work order is terminated, the reasonable costs resulting from the stop work order shall be allowed by equitable adjustment or otherwise.

15.4 Notwithstanding the provision of this Section, the maximum amount payable by the State to the Contractor pursuant to this Section shall not be increased or deemed to be increased except by specific written amendment hereto.

16. Changes

16.1 Emergency Situations: The Contractor and the State shall use their best efforts to notify the respective parties or their designee within twenty-four (24) hours after actual knowledge of an emergency situation or other occurrence that might affect performance including:

Appendix D – Sample Contract

- a) Any malfunction in the operation of the installed Equipment or any pre-existing energy-related equipment;
- b) Any interruption or alteration of the energy supply to the facilities;
- c) Any alteration or modification of the installed Equipment or its operation, and;
- d) Any other emergency situation likely to affect the Project.

16.2 Proposed and Non-Emergency Material Changes. The Contractor and or the State shall report all such changes in the Facilities to the respective party with a written notice describing and explaining all actual or proposed changes in the State's selected Facilities or in their operations and the anticipated effect on energy use. Except as otherwise provided below with respect to the closing of a Facility, notice must be delivered to either party no less than seven (7) calendar days before any actual or proposed change occurs except for Emergency Situations as provided by Section 16.1 hereof. In the event the Facility is contemplated to be closed for a period of three hundred sixty-five (365) calendar days or longer, the State agrees to give the Contractor a minimum of sixty (60) calendar days' notice of the closing of such Facility. In the event of such closing, the State shall pay the Contractor in accordance with Exhibit C, Paragraph 10 Termination, of Form P-37.

16.3 Upon acceptance of the installation by the State and in the absence of any reported Material Changes in the Facility or in its operations, it is agreed energy consumption should not change substantially from year to year. Therefore, beginning one (1) year after installation, if energy consumption for any month increases by 15% percent or more from the energy consumption for the same month of the preceding year, the Contractor shall have the right to investigate the Facilities to ascertain whether or not a Material Change has occurred which may require a change in the Baseline Energy Use data. Any resulting changes shall be subject to State approval, which shall be unreasonably withheld or delayed.

16.4 Fire, Flood, or Other Casualty. Any construction or restoration of a facility following or necessitated by fire, flood, or other casualty, shall be deemed a Material Change, and the provisions of Section 16 hereof and its subparts shall be applicable. If the casualty renders a majority of any facility uninhabitable or unusable and the restoration or reconstruction of the affected portion is not commenced within twelve months from the date of such casualty, the Contractor shall have the option to terminate its Agreement with respect to that site by a written notice to the State. Upon such termination, the State shall pay to the Contractor in accordance with Exhibit C, Paragraph 10 Termination, of Form P-37. The mere occurrence of a fire, flood or other casualty shall not affect, modify, impair or limit the State's obligation to make payments to the Contractor.

17. Entire Agreement

17.1 Contract Documents

This Contract consists of the following Contract Documents:

- a. Form P-37 standard terms and Conditions
- b. Exhibit A Scope of Work
- c. Exhibit B Payment Terms [“Cost Detail” and “Schedule of Values and Expected Monthly Draws”]
- d. Exhibit C Special Provisions
- e. Exhibit 1 Energy Conservation Measures
- f. Exhibit 2 Specifications
- g. Exhibit 3 Guaranteed Energy Savings, Measure and Verification Plan, and Commissioning
- h. Exhibit 4 Operations and Maintenance
- i. Exhibit 5 Installation Schedule
- j. Exhibit 6 Standards of Service and Comfort
- k. Appendix A Specifications
- l. Appendix B Energy Saving Calculations dated _____
(Attached by Reference)
- m. Appendix C Investment Grade Audit dated _____ as revised

(Attached by Reference)

17.2 Order of Precedence. In the event of conflict or ambiguity among any of the text of the Agreement, the following Order of Precedence shall govern:

- a) Form P-37 General Terms and Conditions and Exhibit C
- b) Exhibits A and B, Exhibits 1 through 6 and Appendixes A, B and C.
- c) DAS RFP #2021-254 Performance Contract for six (6) state-owned facilities in Concord, NH, with addendums #1-X which is incorporated herein by reference; then
- d) Proposal in response to RFP # 2021-254, dated _____, which is incorporated by reference herein.

18. Notice

18.1 Any notice by a party hereto to the other party, unless specifically provided for herein, shall be deemed to have been duly delivered, or given at the time of mailing. All notices required or permitted under this Agreement shall be in writing and shall be personally delivered or sent by certified United States mail, postage prepaid, or overnight express mail or courier service addressed as follows:

If to Contractor to:

If to the State Agency to:

Donald Perrin, State Energy Manager
NH- Dept. of Administrative Services
Division of Plant & Property Mgmt
25 Capital Street, Rm. 102
Concord, NH 03301

Appendix D – Sample Contract

or to such other person at such other address as a Party shall designate by like notice to the other Party. Any notices sent by email or facsimile shall also be sent by mail or overnight express or courier service.