Proposed ESSER Funded Construction Projects

Name of School: Pelham Elementary School

LEA #: 28

Purpose
In order for the New Hampshire Department of Education (NHDOE) to determine if a construction project proposed to be funded under the terms of ESSER I and/or ESSER II is allowable, the Local Education Agency (LEA) shall provide the additional information as requested below.

Do you plan to utilize ESSER money for a construction project that aligns to an allowable expenditure?

☑ Yes.
☐ No.

If you answered “No” to Question #1, please do not respond to the remaining questions.

1. Procurement
A. Please describe the procurement process the LEA will utilize in completing the project. For a construction project, both engineering/architectural services and construction phase services will likely be procured separately.

On April 26, 2021, the Pelham School District issued an RFP for Elementary School Air Conditioning Phased Project, soliciting for proposals to install air conditioning through a multi-phased plan within the 133,000 square foot building. The RFP called for a complete design and build of multiple areas of the building, prioritizing operational spaces seriously impacted by COVID-19, specifically the second floor (both wings) and the cafeteria. The proposals were required to include pricing for all proposed equipment, installation and warranty, and to include a performance bond. Vendor tours of interested bidders occurred during the week of May 3, 2021. Following the bid opening on June 10, 2021, the District recommended EEI to provide a multi-phased implementation of air conditioning for Pelham Elementary. As a result of the initial guidance regarding construction and bidding, the District has issued a purchase order for stamped mechanical and electrical drawings for the first phase, funded through the District and not through ESSER. This board action is expected to reduce delays in preparing potentially required documents to be used for grant funding approval.

B. If the LEA will be using an existing procurement agreement that was entered into prior to receiving notification of its ESSER allocation please provide a description of the process used and both the effective dates and scope of the contract.

Please provide the NHDOE copies of any documents that support the method of procurement used and a copy of the executed contract.

Additional Information for ESSER Funded Construction Projects

Please return to: Katie Murphy, Administrator, Susan.K.Murphy@doe.nh.gov
The school board awarded the bid for the Elementary School Air Conditioning Phased Project to Energy Efficient Investments (EEI) at the June 16, 2021 board meeting. The contract for this work has been received by the District and is currently being reviewed, but not signed at this time. The draft agreement is attached.

2. Description of the Proposed Construction

A. Please provide a detailed description of the proposed construction project. The description should identify those components of the project that the LEA believes are in direct response to COVID-19. Such examples of direct response components may include those related to air quality improvements, repair or replacement of windows and/or doors.

The Pelham Elementary School is a two story building with 62 teaching spaces including classrooms, common spaces, special education rooms, a gymnasium and a cafeteria that are not air conditioned. All of the areas and rooms are not air-conditioned and lack the ability to control humidity levels. ASHRAE recommended as part of the COVID-19 Response: If possible, maintain relative humidity between 40% and 60%, to reduce the half-life decay time of the virus.

As part of the response to COVID-19, the Pelham School District seeks to upgrade the existing HVAC systems to accommodate air conditioning/dehumidification in additional parts of the school through a multi-phased approach. The new equipment is expected to be an energy efficient HVAC system that works in conjunction with our current HVAC controls system, provided through Johnson Control Technology. Major equipment will be Daiken VRF units and Daiken ERVS with Dehumidification.

B. Please identify those components of the project that would not be considered to be in direct response of COVID-19. Such examples of indirect project components may include the provision of temporary classrooms due to construction activities, components mandated by code requirements due to the construction of the direct components (i.e., ADA improvements, fire code related upgrades, etc.).

Not applicable
C. Please provide a general cost estimate related to each component of the construction project.

<table>
<thead>
<tr>
<th>Scope</th>
<th>Cost</th>
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<tbody>
<tr>
<td>VRF Classrooms 2nd Floor</td>
<td>$694,000.00</td>
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<td>Cafeteria with AC</td>
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<tr>
<td>Total</td>
<td>$895,991.20</td>
</tr>
</tbody>
</table>

This includes the areas that are board approved for Phase 1, as provided in the awarded Bid documents.

3. Prevailing Wage Compliance
A. Please provide a description of how the LEA will meet its prevailing wage (i.e, Davis-Bacon) compliance requirements for the construction project.

For example, 1) the LEA staff be responsible for the implementation and management of these requirements, or 2) the LEA will contract with an engineering/architectural firm to manage the construction activities to ensure compliance/ Pelham School District will require that EEI maintain prevailing wage reports for its employees and all subcontractors. These will be submitted to the SAU Office of the school district on a monthly basis.

4. Supervision and Inspection by the LEA
A. Please describe how the LEA will meet the requirements of 34 CFR 75.613 requiring the LEA to maintain competent architectural engineering supervision and inspection at the construction site to ensure the work conforms to the approved drawings and specifications.

The District will secure stamped drawings by mechanical and electrical engineers, licensed in the State of New Hampshire. The cost of the required drawings will be funded through the District’s General Fund and not through grant funds.
REQUEST FOR QUALIFICATIONS/PROPOSALS
FOR ELEMENTARY SCHOOL AIR CONDITIONING PHASED PROJECT

PREPARED FOR:

SAU #28 / PELHAM SCHOOL DISTRICT

SUBMITTED ON: 05/20/2021

SUBMITTED TO:
SAU 28/PELHAM SCHOOL DISTRICT
59A MARSH ROAD
PELHAM, NH 03076

SUBMITTED BY:
ENERGY EFFICIENT INVESTMENTS, INC.
& ENE SYSTEMS, INC.
19D STAR DRIVE
MERRIMACK, NH 03054
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</tr>
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<td></td>
<td>d) Removed from RFP on 4/26/21 revision</td>
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<td></td>
<td>e) Price commitments</td>
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<tr>
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<td>f) Responsibility for stamped engineered drawings</td>
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<td></td>
<td>Bond Information</td>
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Brochures (inside back cover)
To: Pelham School District/SAU 28
59A Marsh Road
Pelham, NH 03076
Attn: Megan Barr and Deb Mahoney

Subject: RFP for Elementary School Air Conditioning Phased Project

Date: May 20, 2021

To Whom It May Concern,

Energy Efficient Investments, Inc. (EEI) and our parent company ENE Systems, Inc. (ENE) are proud to present our qualifications and proposal in response to your RFP for the Elementary School Air Conditioning Phased Project for the Pelham School District/SAU 28.

We are also proposing energy performance contracting as an alternative for your consideration when developing this energy savings project for your school district. This is something we offer to all our customers as the best way to undertake a project and achieve energy savings at the lowest possible cost for local taxpayers. Our process involves no cost to the district unless and until an energy project is approved by voters and moves ahead to the design/build stage.

We are excited to offer our services, especially since EEI has previously completed several energy efficiency projects, not only for the school district but for the Town of Pelham as well. Our earlier experience in Pelham and our familiarity with the district’s energy savings needs and requirements makes us, we believe, the best choice moving forward. Your consideration of our proposal is greatly appreciated.

As you know, what makes our team unique is that we have extensive expertise in energy performance contracting with schools and municipalities throughout New England. We have a unique approach to energy services which we refer to as the “Lean ESCO” approach. This approach is focused on cost i.e. effectively reducing operating and energy costs of your buildings. Our “Lean ESCO” approach to energy services starts with a focused team of local energy professionals who will be engaged throughout the life your project while trying to minimize design and development costs by targeting proven measures with strong paybacks.

In the past eight years we have completed or are currently working on projects of a nature quite similar to the project being sought by the the Pelham School District. These include, but are not limited to, those for the City of Franklin, NH and Franklin School District SAU 18, Town of Pelham, NH and Pelham School District SAU 28, Keene School District SAU 29 (NH); Shaker Regional School District SAU 80 (NH); City of Manchester and Manchester School District SAU 37 (NH); Fall Mountain Regional School District SAU 60 (NH); Hanover Schools SAU 70 (NH); City of Portsmouth Schools SAU 52 (NH). Some of our Vermont clients include the Bennington School District, Addison Northwest School District, Mill River School District, the Mount Mansfield Modified Union School District and the Springfield School District.
SECTION 1

This extensive school and municipal experience in New Hampshire, Vermont and throughout New England has prepared us well to design a comprehensive, yet affordable project for your district. We encourage you to reach out to those organizations and ask them what they think about our services and project execution.

EEI/ENE is a midsized local company, with the size and strength to execute a wide range of energy and performance contracting projects, but without the extensive overhead cost of a big, multinational firm. We have close working relationships with some of the best local contractors and we feel those relationships will help reduce the cost of your project.

We look forward to hearing from you and your invitation for an interview, with the chance to discuss this proposal further.

Thank you for considering our team.

Sincerely,

Paul J Murphy
Director of Operations for EEI
EEI & ENE Systems, Inc.
EXECUTIVE SUMMARY AND COMPANY INFORMATION

Energy Efficient Investments, Inc. (EEI) and our parent company ENE Systems, Inc. (ENE), along with subcontractors such as Control Technologies (CTI) are best in class energy efficiency management contractors and service companies. Our greatest asset is our employees and the relationships they have developed with our customers since 1987. ENE is the largest independently owned building controls contractor in New England, and including ENE’s subsidiary companies, we have almost 200 employees and more than 60 service vehicles on the road. This project is not dissimilar to projects we have completed for numerous and similar New Hampshire and Vermont towns and school districts.

EEI is a growing Northern New England based energy services company that has been developing and implementing successful energy savings projects for our customers since 2007.

With our turn-key approach, depth of technical resources, local ownership and management, and customer focus, we are confident EEI can make the future Pelham School District air conditioning phased project a success. Our team includes professional engineers (PE), certified energy managers (CEM), seasoned project managers, and lighting and HVAC experts. We are excited to offer our services.

EEI is fully independent of any manufacturers’ product lines; therefore, if EEI is chosen for the proposed project or any other related energy projects we will select the best products and materials available, without any requirements that use specific products or product lines. We recommend open source, non-proprietary product lines which will give you flexibility in choosing service vendors.

We have implemented some exciting and compelling projects throughout the region such as solar PV installations, oil to propane/gas conversions, building ventilation overhauls, conversion to LED efficient lighting, wood chip and wood pellet boiler conversions, and many more. We can also offer the district the ability to fully host and monitor building controls on-site from our 24/7 facility and provide on-going long-term measurement of energy usage and improvements throughout the life of any project you select. We are confident we can accomplish what the district requires regarding all energy related savings goals; either independently or in cooperation with other engineering or controls companies selected by the district.

Our team has implemented energy performance contracts in the states of New Hampshire, Maine, Massachusetts, Rhode Island, and in Vermont. EEI has become a well-known energy improvement contractor through statewide energy efficient programs such as the NH Public Utility Commission (PUC) grant program and Eversource power company rebates. For example, we obtained
more than $800,000 for Manchester, NH and $425,000 for the Plymouth, NH school district. We have also worked closely with other organizations such as Efficiency Vermont. Because of this we believe we can maximize the scope of your project by seeking similar grants and rebates.

Some of our many clients in New Hampshire include the Town Of Pelham, Pelham School District (SAU 28), City of Manchester and Manchester School District (SAU 37), City of Nashua School District, City of Portsmouth School District (SAU 52), City of Franklin and Franklin School District (SAU 18), Hanover School District (SAU 70), Shaker Regional School District (SAU 80), Fall Mountain Regional School District (SAU 60), the Keene, Nelson and Chesterfield School Districts (SAU 29), SAU 48 in Plymouth, the Common Man Restaurant Group, Concord NH YMCA, the Grappone Conference Center in Concord and the Bedford Village Inn.

Some of our Vermont customers include the Bennington School District, Addison Northwest School District, Mount Mansfield Modified Union School District, the Mill River School District and the Springfield School District. In Maine, we recently completed a project for the Western Foothills Regional School District #10 in Rumford.

This regionwide experience provides us with an intimate understanding of school and local government and a wealth of knowledge to help select for you and local taxpayers those projects and products which generate the greatest possible savings at the lowest possible cost and with minimal service requirements.

As a turn-key energy performance contractor, our firm’s typical services include energy auditing (both initial and investment grade), project engineering and design, programming, HVAC upgrades and fuel conversions, LED lighting improvements, wood chip heating, building envelope solutions, and measurement and verification of energy savings. We also work with our customers to secure financing, energy grants, and rebates.

We understand the three main concerns the district may have in implementing an energy improvements project: 1) cost of construction, 2) accounting for the energy savings over time and, 3) financing the project. Because of this we utilize what we like to call the “Lean Performance Contracting Model” that not only provides energy savings guarantees but allows the customer the flexibility to implement the measures they feel have the most value and we do so at the lowest possible cost using local employees or contractors whenever possible.

At EEI, our construction and engineering teams are both in house and work hand in hand to develop and recommend energy improvements that include accurate and up to date construction pricing. Our team is unique to the marketplace in that we are the only midsized, turn-key performance contracting company based in New England. For example, we implemented the Lean Performance Contracting approach when we were awarded the City of Manchester, NH performance contract. We have worked with the City on a building-by-building basis to implement improvements for the past eight years. In doing so, we have developed a great partnership with the city because we perform initial energy audits, then engineer and budget solutions, project manage the installation,
and guarantee energy savings. Using this model, we have been able to complete energy improvements for over thirty (30) school and city buildings saving the city and school district thousands in design costs, energy costs, and maintenance. Similar multi-year projects are ongoing for the Keene and Portsmouth, NH school districts.

THE STRONGEST TEAM

We believe building a strong team can be the most critical factor for determining project success and failure. As a small company our reputation is vital to our success as is our willingness to work closely, in partnership with each individual client. Key to our business plan is customers asking us back for repeat business. Having a long list of happy customers to which we can refer and for you to contact is the best advertisement.

Our goal is to work closely with you to devise a project and the methods to implement it that will best serve SAU 28 and the Pelham School District. Here flexibility, familiarity, and trust are key. To accomplish this goal, we feel continuity of our team is of the utmost importance. That is why our “Lean Business Model” is set up so that the lead developer of your energy project becomes the lead project manager during construction. This way the district has one point of contact and information conveyed by the district to our team does not get lost during the life of the project. It also helps to ensure measures are implemented correctly as defined in any investment grade audit, so we can ensure the energy savings are obtained. Our project team will be led by Michael Davey. A project manager/engineer will be selected and will work hand and hand with the district from initial energy audit to project completion.

We are first and foremost a service-oriented company and if selected for this project we will work diligently to ensure that the project is managed and scheduled in a manner that does not disrupt the day to day working environment. As performance contractors, our team of professional construction managers and energy engineers has extensive experience working in municipal, educational, and commercial facilities. We will use this experience to develop a comprehensive energy implementation plan based upon the most appropriate designs and construction schedules, with the expectation of completing construction on time and within budget. However, we will also take into consideration the district’s budgetary concerns and the restrictions placed on any recent federal funds that may require project completion by 2023, thereby extending completion of any project over a period of one or more budget years.

CONCLUSION

Our mission is to provide the Pelham School District with an energy project that includes experienced energy auditing, detailed project management and scheduling, superior services, innovative products and a uniquely qualified team.
As a midsized energy performance contractor, we have focused our efforts almost exclusively on municipal buildings and educational facilities. EEI and ENE Systems, Inc. offer the financial strength and experience, combined with the undivided attention of our local staff, to guarantee energy savings and to ensure the district will receive the best value energy solutions.

We hope that you find the information contained in the body of our response enough to warrant our being selected for your project. We look forward to the opportunity of meeting with you to discuss this proposal, our qualifications, and answer all questions you may have and how we can work together to best implement lasting energy solutions.

CONTACT INFORMATION

Thomas E. LoPizzo
Business Development Manager
Energy Efficient Investments, Inc.
19D Star Drive
Merrimack, NH 03054
(603) 423-6000 x300
(603) 440-4480 (cell)
tlopizzo@eeiservices.com

Michael Davey
Business Development Manager and
Senior Energy Project Manager
Energy Efficient Investments, Inc.
19D Star Drive
Merrimack, NH 03054
(603) 423-6000 x500
(603) 234-2689 (cell)
mdavey@eeiservices.com
SECTION 2 – COST PROPOSAL

a) Proposal shall include a complete, itemized price breakdown for each major component contained within the Submitter’s proposal.

<table>
<thead>
<tr>
<th>Item</th>
<th>Scope</th>
<th>OPTION A</th>
<th>OPTION B</th>
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</thead>
<tbody>
<tr>
<td></td>
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<td>Cost Labor, Equipment, and Design</td>
<td>Equipment Only Price</td>
</tr>
<tr>
<td>1a</td>
<td>VRF Classrooms 2nd floor</td>
<td>$694,000.00</td>
<td>$148,730.00</td>
</tr>
<tr>
<td>1b</td>
<td>VRF Classrooms 1st floor</td>
<td>$579,000.00</td>
<td>$148,730.00</td>
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<td>2</td>
<td>AHU Office</td>
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<tr>
<td>3</td>
<td>Library unit with A/C</td>
<td>$113,520.00</td>
<td>$25,000.00</td>
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<td>4</td>
<td>Cafeteria with AC</td>
<td>$193,120.00</td>
<td>$55,000.00</td>
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<tr>
<td>5</td>
<td>Gym with A/C</td>
<td>$347,190.00</td>
<td>$55,000.00</td>
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</table>

|                  | Sub-Total           | $2,060,310.00 | $462,460.00 |
|                  | P&P Bond            | $20,603.10    | $4,624.60   |
|                  | Total               | $2,080,913.10 | $467,084.60 |
b) Proposals shall include all proposed deliverables and shall include any initial delivery costs and shall identify any recurring costs, if applicable.

Included
c) All costs are to be provided for equipment delivered and installed in PES.

Included
d) Removed from Revision 4/26/21
e) Proposal shall provide price commitments for a period of thirty (30) days following the Proposal due date.

Energy Efficient Investments, Inc. acknowledges that pricing included in this proposal will be valid for a period of thirty (30) days from the date of this proposal.

Please be advised that the project completion schedule and deadlines, as noted in the RFP, might not be practicable. Although EEI will make every effort to comply, delays may be inevitable and out of the control of EEI, such as reviews and approvals by authorities having jurisdiction over the project. In addition, the ongoing global pandemic has created an instability in the manufacturing and wholesale markets. This can result in longer lead times on materials which may be required for this project. We will make every effort to complete this installation during the summer break, as requested. However, our ability to meet the goal completion date of August 2021 will be contingent upon equipment lead times.
f) Proposals shall include the bidder’s responsibility to provide stamped engineer drawings to include mechanical, electrical, and structural.

Energy Efficient Investments, Inc. agrees to accept responsibility to provide stamped engineer drawings to include mechanical, electrical, and structural.
SECTION 2 – COST PROPOSAL

g) Proposals shall include the bidder’s responsibility to secure a performance bond in order to protect the district and its constituents.

Energy Efficient Investments, Inc. agrees to accept responsibility to secure a performance bond, assuring protection for both the Pelham School District and its constituents.

Please see section 3 for information concerning Certificate of Insurance and EEI’s bonding company.
SECTION 3 – CERTIFICATIONS AND DISCLOSURES

Good Faith Statement Form

PELHAM SCHOOL DISTRICT

GENERAL CERTIFICATIONS AND DISCLOSURES

FIRM NAME: Energy Efficient Investments, Inc.

BUSINESS ADDRESS: 19D STAR DRIVE, MERRIMACK, NH 03054

TELEPHONE NO (603) 423-6000  DATE OF SUBMISSION: 5/20/2021

I. CRIMINAL AND CIVIL HISTORY. By submission of this form, the Submitter hereby certifies under oath that the firm, its directors, partners, principal officers and key employees have no criminal convictions or adverse civil judgments.

YES ☒  NO

If the answer is “no,” the submittor shall disclose under oath the following:

A. The court, date, docket number and description of any and all misdemeanor convictions involving moral turpitude, conviction of a bidding crime and other felony convictions of the Submitter, or the Submitter’s directors, partners, principal officers or key employees. The term “key employee” for each statement shall include, but is not limited to, any employee who has an ownership interest in the Firm and any employee who shall have contact with the schools, including all delivery personnel. A “bidding crime” is defined as any act in violation of state or federal law including, but not limited to, fraud, conspiracy, collusion, perjury, or material misrepresentation. The Submitter shall not be required to disclose any conviction which has been annulled by a court.

B. A list of all civil cases, identifying the Court, date and docket number in which a final verdict was rendered against the Firm or the Firm’s director’s partners, principal, officers or key employees on the grounds of fraud, misrepresentation, dishonesty, deceit, breach of contract or any other matter involving allegations of failure to perform on a contract.

C. The court, date, docket number and description of any felony convictions whatsoever of the Firm, as well as the Firm’s directors, partners, principal officers or key employees. The Submitter shall not be required to disclose any conviction which has been annulled by a court.

II. CREDITOR RELATIONSHIP AND BUSINESS HISTORY. Submitter hereby certifies that it:

A. Has been in business for ___ years.

B. Is current on all undisputed business debts.

C. Has not filed for bankruptcy protection. In the alternative, Submitter filed for bankruptcy protection on ____________________.
SECTION 3 – CERTIFICATIONS AND DISCLOSURES

Good Faith Statement Form (continued)

III. EQUAL OPPORTUNITY EMPLOYER. Submitter hereby certifies that it is an Equal Opportunity Employer and that it does not engage in any discriminatory hiring or employment practices.

YES ☒ NO ______

IV. SAFETY AND LICENSURE. Submitter certifies that it holds all permits, licenses and certifications, whether federal or state, necessary to provide services to the District and meets all applicable safety standards.

YES ☒ NO ______

V. INSURANCES. Submitter holds all the insurances which shall be required by the District.

YES ☒ NO ______

VI. CRIMINAL RECORDS AND TRAINING. Submitter complies with all criminal records check requirements for its employees and meets all state and federal employee training and licensure requirements.

YES ☒ NO ______

VII. CONTRACT PERFORMANCE. Submitter certifies that it has never had a contract terminated for nonperformance.

YES ☒ NO ______

If the answer is “no” please provide a separate detailed written description of the circumstances giving rise to termination, providing the name, address and contact information of the terminating party.

The District reserves the right, at its sole discretion, to reject any Proposal which fails to contain the above-referenced certifications or disclosures. The District reserves the right, at its sole discretion, to reject any Submitter’s Proposal, on the basis of any criminal history, civil litigation, credit history, or business record which is deemed to be adverse to the interests of the District.

Submitter’s Name: Michael Devy

Signature: 

Title: Business Development

Date: 5-14-21
SECTION 3 – CERTIFICATIONS AND DISCLOSURES

Proof of Insurance

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DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES: ACORD 101. Additional References (required) may be attached if more space is required.

CERTIFICATE HOLDER

Proof of Insurance

CANCELLATION

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

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SECTION 3 – CERTIFICATIONS AND DISCLOSURES

Bonding Company –

Construction Risk Partners, LLC
1250 Route 28, Suite 201
Branchburg, NJ 08876

EEI will bond for the cost of the project once the project cost is determined and the contract has been executed.
ENERGY PERFORMANCE CONTRACT
Phase II BETWEEN

Pelham School District

AND

Energy Efficient Investments, Inc.
Preamble

This Energy Performance Contract (hereinafter “Contract”) is entered into as of (“Effective Date”) by _EEI, Inc._ (hereinafter “ESCO”), a corporation having its principal offices at, with offices at, 19 D Star Drive, Merrimack, NH 03054 and Pelham School District (hereinafter “the Customer”), having its principal offices at 59A Marsh Road, Pelham, NH 03076 for the purpose of furnishing equipment and work specified herein (“Work”) designed to improve energy efficiency and reduce operating costs at Customer properties (hereinafter the “Premises”) listed in the Final Investment Grade Audit in Attachment 1.

This Contract is conditional on the Customer obtaining financing from a reasonably acceptable lender or lessor in an amount not less than the Contract Price in Attachment 3 - Project Cost on terms satisfactory to the Customer, provided Customer shall diligently pursue such financing on such terms as are customary, reasonable and in compliance with pertinent laws and regulations including, without limitation, financing arranged by ESCO.

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1. Definitions
The following terms used within this Contract are defined as follows:

**Energy Baseline** - A calculation or measure of each type of energy consumed (or, as appropriate, water consumed or operating and maintenance costs) in existing facilities at the Premises prior to the installation of energy conservation measures or energy efficiency measures as described in Attachment 4 - M & V Plan.

**Energy Cost Savings Measures (ECMs)/Operating Cost Savings Measures (OCMs)** - A set of activities that result in savings of energy, water or operating and maintenance costs at the Premises and described in detail in Attachment 2 - Maintenance and Service Agreement. OCMs include any measures that eliminate and/or avoid expense as a result of the installation or modification of equipment, or services performed by ESCO. OCMs do not include any measures that produce savings solely because of a shift in the cost of personnel or other similar short-term cost savings.

**Energy Savings** - The reduction in energy consumption or demand resulting from ESCO’s ECMs/OCMs which shall include electric energy savings, gas energy savings, operational savings, maintenance savings, water consumption savings and any other savings achieved as a result of the Work as shall be determined after adjustments for variations in other factors that might substantially affect the data such as weather, changes in operating practices or other external influences.

Energy savings shall be determined by comparing the Energy Baseline with the energy consumed (or demand) after ESCO has implemented ECMs/OCMs. A description of the promised savings and the terms of the Performance Guarantee with respect to promised Energy Savings is included in Attachment 4 - M & V Plan.

**Final Completion** - The date on which ESCO warrants by written notice in the form provided in Attachment 1 - Final Investment Grade Audit and that all Work is completed including all remaining items of Work identified in the notice contained in Attachment 10 – Substantial Completion delivered at Substantial Completion.

**Project Acceptance** - The date when the Customer approves all Work warranted by ESCO to be at Final Completion, including all remaining items of Work identified in the notice delivered at the Substantial Completion date. Project Acceptance will not be made until ESCO has demonstrated, through the Guidelines for Project Acceptance as described in Attachment 11 - Final Acceptance, that all ECMs/OCMs are achieving all of the stated savings in Attachment 4 - M & V Plan. Project Acceptance shall be by written notice in the form provided in Attachment 11 - Final Acceptance.

**Substantial Completion** - The date on which ESCO warrants by written notice in the form provided in Attachment 10 – Substantial Completion that installation of ECMs/OCMs is substantially complete and the Customer has accepted such ECM/OCM as installed.
2. Contract Documents
The Contract consists of this document and all attachments, schedules and any amendments or addenda thereto. In addition, all requirements set forth in the request for proposals/qualifications (RFP) issued by Customer and in ESCO’s response, shall be part of the Contract unless specifically excluded.

Federal Terms

1. All wages paid on the project are subject to Davis-Bacon and related Acts (DBRA), 40 USC § 3141 et seq., wage rates, as stated in the below Article 9.4.
2. ESCO shall, to the extent reasonably possible, sub-contract with minority business, women’s business enterprises, and labor surplus area firms per 2 CFR 200.321.
3. Contract is subject to Anti-Lobbying requirements of 2 CRF 200, Appendix II (J). ESCO shall submit an Anti-Lobbying Certification for contracts exceeding $100,000.
4. Contract may be suspended per 2 CRF 200, Appendix II (1).
5. ESCO may be terminated for cause and for convenience, based on then prevailing industry standards and all applicable laws and regulations in New Hampshire.
6. Remedies for either party to the Contract, including in instances where ESCO breaches this Contract, are provided for in the Contract, including in Article 9.1. The requirements for sanctions and penalties, pursuant to 2 CFR 200, Appendix II(A), are hereby incorporated into Article 9.1 by reference. To the extent any further remedies, whether legal or otherwise, are required by 2 CFR part 200, those requirements are hereby incorporated by reference.
7. ESCO shall comply with the Clean Air Act and the Federal Water Pollution Control Act, pursuant to 2 CFR 200, Appendix II(G).
8. Each Party to this Contract shall maintain all appropriate oversight, standards of conduct, price and costs analyses, and records, sufficient to demonstrate compliance with federal procurement requirements, including all required standards of conduct with respect to federal procurement, and with respect to prohibition on conflicts of interest, as stated throughout this Contract. To the extent any further requirements are needed, those provisions of 2 CFR part 200, including 2 CFR 200.318 and 2 CFR 200.323, are incorporated herein by reference.

For sake of clarity, it is the intent of the Parties for these Federal Terms to be complied with fully by both Parties, and, to the extent any of these Federal Terms conflict with any other terms of this Contract, for these Federal Terms to superseded and replace conflicting terms.

3. Representations and Warranties
3.1 Representations and Warranties of Both Parties
Each party hereto represents and warrants to the other that:
(i) it has adequate power and authority to conduct its business as presently conducted or contemplated hereby to be conducted, to enter into this Contract and to perform its
obligations hereunder;
(ii) It possesses full authority to execute and deliver this Contract and that it does not contravene any applicable law, rule or regulation;
(iii) its execution, delivery and performance of the 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;
(iv) its execution, delivery and performance of this Contract will not result in a breach or violation of, or constitute a default under any agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected; and
(v) it is 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 that would materially and adversely affect its ability to perform hereunder.

3.2 Representations and Warranties of ESCO
ESCO hereby warrants, represents and promises that:
(i) before starting to perform the Contract ESCO shall a) provide proof and documentation that it is qualified, licensed or otherwise permitted to do business in the State of New Hampshire including all required insurance and bonds pursuant to this Contract to the extent not included in Attachment 9 - Corporate Resolution;
(ii) ESCO shall use subcontractors who are qualified, licensed and bonded in this State and approved by Customer in writing to perform the Work so subcontracted pursuant to the terms hereof;
(iii) ESCO has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Contract;
(iv) equipment installed as part of the ECMs/OCMs will meet or exceed the equipment standards set forth in Attachment 5 - Major Equipment List and
(v) ESCO acknowledges that Customer reserves the right to reject all non-conforming goods and to cause their return for credit or replacement at Customer’s option;
(vi) the equipment installed as part of the ECMs/OCMs is or will be compatible with all other Premises’ mechanical and electrical systems, subsystems, or components with which such equipment interacts, and that, as installed, neither such 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;
(vii) ESCO is financially solvent, able to pay its debts as they mature and possesses sufficient working capital to complete the work and perform its obligations under the
(viii) ESCO has not directly or indirectly participated in any collusion or otherwise taken any action in restraint of full competitive bidding with respect to this Contract or the solicitation process leading to this Contract; and
(ix) ESCO has not paid, and agrees not to pay, any bonus, commission, fee or gratuity to any employee or official of the state or municipal government or the Customer for the purpose of obtaining this Contract or any other contract or award and that no commission or other payment has been or will be received from or paid to any third party contingent upon the award of any contract except as previously communicated to the Customer in writing (and ESCO acknowledges that subsequent discovery of non-compliance with this provision constitutes sufficient cause for immediate termination of this Contract and other remedial action).

3.3 Representations and Warranties of the Customer
Customer hereby represents and warrants that:
(i) It is a tax exempt entity and, therefore, the Work required by this Contract may be subject to tax exemption for New Hampshire sales or use tax purposes upon compliance with the appropriate process.

4. Price and Terms
4.1 Contract Price
Lump Sum phasing breakout in Attachment 3. District can authorize each scope separately and issue a notice to proceed as required.

ESCO will submit a schedule of values to Customer for parts of the Work that ESCO shall have performed on a form issued by the American Institute of Architects (“Schedule of Values”). Customer shall approve and authorize release of construction financing less ten percent (10%) retainage from the Escrow Agent/Trustee to the ESCO within thirty (30) days following Customer’s receipt of a Schedule of Values. Customer shall not be required to approve release of construction financing for Work yet to be performed. In the event that the Customer disputes a portion of a Schedule of Values, Customer shall make a timely authorization to release construction financing in an amount equal to the undisputed part of the Schedule of Values.

Upon submittal of any schedule of values for payment, ESCO shall furnish signed lien waivers from ESCO and any subcontractors or material suppliers that contributed to the Work that is the subject of the schedule of values. With respect to such Work, the authorized person executing each lien waiver shall voluntarily and with knowledge of that contractor’s or supplier’s legal rights, waive and release any right that it has or in the future may have to claim a mechanic’s lien or any other lien rights, and waive and release all other claims of any kind against (a) the real property where the Work is located; (b) the improvements and other property located thereon; (c) Customer and, as applicable, its title company and lender and their employees, officers, and agents; and (d) as applicable, the surety or sureties of Customer. In addition, in each of its lien waivers, ESCO shall (i) certify that it has paid all subcontractors, suppliers, and employees for all Work related to the submitted schedule of values, and (ii) agree to indemnify and hold harmless Customer and,
as applicable, its lender and title company for all costs and expenses, including attorneys fees, incurred as a result of claims that any of the subcontractors, suppliers, or employees have not been paid for such Work.
In the event that Customer disputes a Schedule of Values or a portion of the Schedule of Values, Customer shall indicate the reason for the dispute in writing to ESCO within fourteen (14) days of receiving the Schedule of Values and the parties will negotiate in good faith to resolve the dispute prior to the expiration of the thirty (30) day period. If the parties cannot resolve the dispute within such thirty (30) day period, Late Payment interest shall accrue pursuant to section 4.02 hereof but such Late Payment interest shall be released to ESCO only in the event that the dispute is eventually resolved in favor of ESCO in accordance with Section 9.01’s Dispute Resolution procedure.

ESCO shall be responsible for paying all other taxes and tariffs of any sort related to the Work. ESCO shall be responsible to pay for all labor, materials, equipment, tools, construction, equipment and machinery, fuel, transportation and other facilities and services necessary for the proper execution and completion of the Work.

Following Final Acceptance, Customer may terminate this Contract without cause by giving ESCO at least thirty (30) days’ written notice. The Customer shall pay ESCO for management, monitoring and verification services as described in Attachment 3 - Project Cost. The continuing payment for monitoring and verification services and any operating services described in Attachment 2 - Maintenance and Service Agreement shall be a condition for the continuing effectiveness of the Performance Guarantee.

If requested by the customer the ESCO shall provide full disclosure of all costs relating to the Work, including costs to subcontractors and vendors. ESCO shall provide a list of direct costs including copies of purchase orders (PO’s) for vendors and subcontractors and a breakdown of indirect costs associated with the project if requested by the customer.

4.2 Late Payment
Interest shall accrue on any past due balances owed to either party hereunder, including for the Work or pursuant to the Performance Guarantee, at the rate of zero percent (0%) per month (or the highest rate not prohibited by law), whichever is lower. This remedy shall be in addition to, and not exclusive of, any other remedy available under this Contract or applicable law.

4.3 Contract Termination
This Contract shall be effective and binding on the parties when the financing condition in the Preamble is met. Unless otherwise terminated, including pursuant to Section 7.0 of this Contract, or agreed to in writing pursuant to this Contract, this Contract shall terminate upon completion of the Measurement and verification during finance term. Following Project Acceptance, Customer may terminate this contract without cause by giving ESCO at least 30 days’ written notice. Termination of the Contract shall render the Performance Guarantee null and void, and ESCO shall have no further obligation with respect to the M&V Plan and Performance Guarantee.

5. The Work
5.1 Time for Performance and Project Acceptance
Customer shall send the Notice to Proceed to ESCO on closing financing. The Notice to Proceed shall clearly identify which measures, defined in the Final Investment Grade Audit,
the ESCO should proceed with. ESCO shall begin Work within thirty (30) days of receiving the Notice to Proceed. ESCO shall substantially complete the Work consistent with the schedule set forth in Attachment 2 - Maintenance and Service Agreement. Extension of dates to commence or complete Work shall be granted at the sole discretion of the Customer except as otherwise provided herein. Customer shall not unreasonably withhold approval for an extension of dates to commence or complete Work if the cause for an extension is pursuant to Sections 5.03, 5.06, 5.08, 5.12, 5.13, or 9.02.

When all of the ECMs/OCMs are implemented, all items on the Checklist for Project Acceptance in the form provided in Attachment 11 – Final Acceptance are complete, and all items that Customer previously deemed not to be in compliance with the requirements set forth in this Contract have been corrected, ESCO shall submit and deliver to Customer a Delivery and Acceptance Certificate Upon Final Completion in the form provided in Attachment 10 – Substantial Completion evidencing in reasonable detail that all items on the Checklist for Project Acceptance located in Attachment 11 - Final Acceptance are complete and that all items that Customer deemed not to be in compliance with the requirements set forth in this Contract have been corrected and which shall also be accompanied by a Final Commissioning Report.

Upon receipt by Customer of Delivery and Acceptance Certificate Upon Final Completion, Customer shall have thirty (30) days to complete review of the ECMs/OCMs in accordance with the Guidelines for Project Acceptance in the form provided in Attachment 11 - Final Acceptance. The Customer shall notify the ESCO of each item that does not satisfy the Guidelines for Project Acceptance within thirty (30) days of receipt of the Delivery and Acceptance Certificate upon Final Completion Form or Final Completion will be deemed to have been achieved.

The Customer reserves the right to reject the work if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes or is otherwise not in compliance with the terms of this Contract. Upon correcting all items identified by Customer as not satisfying the Guidelines for Project Acceptance, ESCO shall submit and deliver to Customer a new Delivery and Acceptance Certificate upon Final Completion. Customer shall have an additional twenty-one (21) days to complete review of the ECMs/OCMs in accordance with the Guidelines for Project Acceptance upon receipt of a new Delivery and Acceptance Certificate upon Final Completion.

Project Acceptance shall be evidenced by the Customer submitting and delivering to the ESCO the Delivery and Acceptance Certificate Upon Project Acceptance in the form provided in Attachment 11 - Final Acceptance, the delivery of which will indicate that the Final Commissioning Report.

In the event that Attachment 2 - Maintenance and Service Agreement includes a provision for liquidated damages in the event that ESCO does not attain Final Completion by the date of Final Completion, then such liquidated damages shall be Customer’s sole remedy for any such delay in the completion of the Work.

5.2 Specifications of Work
ESCO’s obligations hereunder are specified in Attachment 2 - Maintenance and Service Agreement and related drawings and plans and any subsequent revisions thereto (“Scope of Work”), as approved by the Customer. Any modifications or alterations to the properties not expressly included within the Scope of Work are excluded from the Work. The requirements of all applicable laws, regulations and codes of federal, state, and local town or city government shall be met at all times. Additional construction or operation requirements at the Premises, if any, are described in Attachment 7 - Additional Requirements. All Work shall be performed in a good and workmanlike manner. Time is of the essence with respect to the Work.

5.3 Construction Procedures, Changes to Work and Coordination
ESCO shall supervise, coordinate and direct the Work using ESCO’s best ability, skill, attention, and oversight. ESCO, in consultation with Customer, shall be responsible for the construction means, methods, techniques, sequences, and procedures. Accordingly, no course of conduct or dealings between the parties, nor expressed or implied acceptance of alterations or additions to the Work, and no claim that the Customer has been unjustly enriched by the any alteration or addition to the Work, whether or not there is in fact, any unjust enrichment to the Work, shall be the basis of any claim to an increase in the amounts due under the contract documents or a change in any time period provided for in the contract documents.

Agreement to any change order shall constitute a final settlement of all claims of ESCO relating to the change in Work that is the subject of the change order, including, but not limited to, all indirect and direct costs associated with such change and any and all adjustments to the Contract sum and the construction schedule.

The Customer shall review all proposed modifications to the building and systems and must approve of same before commencement of any Work. Such approval will be made in a timely manner and will not be unreasonably withheld. No change to the scope or specifications of Work shall be made without the written consent of the Customer, in the form of a revision to the Scope of Work.

If ESCO fails to correct Work which is not in accordance with the specifications or persistently fails to meet specifications herein, Customer may order ESCO to stop the Work, or any portion thereof, until the cause for such order has been eliminated. ESCO shall perform the Work in such a manner as not to harm the structural integrity or operating systems of any building and shall repair and restore any damage caused by the Work at ESCO’s expense. ESCO shall not create or allow to continue any condition deemed to endanger health or safety as defined in Section 6.01. If such a condition exists Customer shall have the right to exercise the remedies described therein.

ESCO shall supply to the Customer the telephone number of a responsible person who may be contacted during non-work hours for emergencies arising in connection with or affecting the Work. ESCO shall coordinate any utility hookups provided by others under a separate agreement at no additional cost or expense to the Customer. ESCO acknowledges that there is sufficient space within the Premises for the performance of the Work.

5.4 Relationship with Maintenance Staff
ESCO shall cooperate with Customer’s operating and maintenance personnel, train said personnel in operation and maintenance of any equipment installed as part of the Work, and
coordinate the Work on a planned and programmed basis including the specific actions described in Attachment 2 - Maintenance and Service Agreement. ESCO shall deliver a preventive maintenance schedule and procedures for any equipment installed as part of the Work.

5.5 Material and Equipment Installed
The Customer shall make the final determination whether any material or equipment installed is as specified in the Scope of Work or, if appropriate, ESCO’s Response to the RFP, which is incorporated in this Contract by Section 9.14 below. No substitution of any material or equipment specified shall be made without the written consent of the Customer in the form of a revision to the Scope of Work, and any such substitution shall be at least equal in quality, finish, durability, serviceability and performance for the purpose intended. If alternative material or equipment is proposed, ESCO must update any and all software associated with the ECMs/OCMs, the Work or the measurement of savings. Customer reserves the right to reject all non-conforming goods and services and to direct ESCO to replace or credit the Customer, at Customer’s election. Failure by Customer to discover latent defects or concealed damage or non-conformance shall not foreclose Customer’s right to subsequently reject the goods or services delivered pursuant to this Contract. Formal or informal acceptance by the Customer of non-conforming goods or services shall not constitute a precedent or waiver with respect to successive receipts of goods and services. If ESCO fails to promptly cure the defect or replace nonconforming goods or services, the Customer reserves the right to cancel the Contract, contract with a different entity for the goods and services to be provided herein and to invoice ESCO for any differential in price.

ESCO shall install and, when applicable, operate and maintain, or, if specified in the Scope of Work, train Customer personnel to operate and maintain equipment in a manner that will provide standards of service to meet requirements of Section 5.02 and equipment manufacturers’ literature, specifications and instructions. ESCO will service and maintain the ECMs/OCMs described in Attachment 2 - Maintenance and Service Agreement and Customer shall pay ESCO for such services during the term of this Contract as provided in Attachment 3 - Project Cost. Except for ECMs/OCMs or other equipment that is to be serviced and maintained by ESCO as provided in Attachment 2 - Maintenance and Service Agreement, Customer shall be responsible for servicing and maintaining equipment at the Premises. ESCO shall prepare and furnish at least three (3) maintenance manuals that include product data and which are subject to acceptance by the Customer for all equipment installations at the Premises.

5.6 Asbestos and Hazardous Materials
ESCO will be responsible for proper disposal of construction demolition debris that does not contain Hazardous Materials, as defined herein. ESCO will be responsible for proper disposal of all ballasts containing or suspected of containing PCBs and fluorescent lamps containing mercury. ESCO must prepare and document disposal appropriate transportation and disposal plans and document before disposal begins and document actual disposal to Customer immediately after disposal. ESCO will be responsible for disposal of asbestos containing building material in the boiler rooms related to the demolition of existing boilers and piping. ESCO will use licensed asbestos abatement contractors and 3rd party testing.
Excluded Materials and Activities
The Customer recognizes that in connection with the Work, installation and/or service or maintenance of equipment and/or systems at the Customer’s facilities, ESCO may encounter, but is not responsible for, any Work outside of the boiler rooms relating to (i) asbestos, materials containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, or (ii) mold, materials containing mold, or the existence, use, detection, removal, containment or treatment thereof, or (iii) pollutants, hazardous wastes, hazardous materials, contaminants (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 hereinafter referred to as "Excluded Materials and Activities". The Customer agrees that if ESCO’s performance of any Work under this Contract involves Excluded Materials and Activities, upon receipt of any and all appropriate funding and approval, the Customer will perform or arrange for the performance of such Work and will bear the sole risk and responsibility therefore. In the event ESCO discovers Hazardous or Excluded Materials, ESCO will immediately cease Work, remove all ESCO personnel or subcontractors from the site, and notify the Customer. The Customer will be responsible to handle such Materials at the Customer’s expense. ESCO will undertake no further Work at the facility except as authorized by the Customer in writing. Notwithstanding anything in this Contract to the contrary, any such event of discovery or remediation by the Customer will not constitute a default by the Customer.

ESCO will be solely responsible for any hazardous or other materials, including without limitation those listed in this paragraph, that it may bring to the site.

5.7 Subcontracting and Assignments
1) ESCO may elect to use subcontractors in meeting its obligations hereunder. Customer shall approve all subcontractors and outside professionals in advance which approval shall not be unreasonably withheld or delayed. ESCO shall be responsible for the conduct, acts and omissions, whether intentional or unintentional, of its subcontractors, employees, agents, invitees or suppliers. ESCO agrees to bind each of its subcontractors to the terms of ESCO’s obligations under Sections 5.01 - 5.06, 5.08, 5.09, 5.14 - 5.16, 8.01 - 8.07, 9.03, 9.04, 9.06 and 9.10 of this Contract. Nothing in this Contract shall create any contractual relationship between any subcontractor, employee, agent, invitee or supplier and the Customer.

5.8 Delays
If ESCO is delayed in the commencement or completion of any part of the Work due to events beyond ESCO’s control and without the fault or negligence of ESCO, including but not limited to fire, flood, extended labor disputes, unusual delays in deliveries, unavoidable casualties, abnormal adverse weather, war, and acts of God, or due to Customer’s actions or failure to perform its obligations under this Contract, then ESCO will notify Customer in writing of the existence, extent of, and reasons for such delay. ESCO shall have no claim for additional compensation on account of such delays but ESCO and Customer may extend the contract time by revision to the Scope of Work for such reasonable time as they shall agree. If Customer determines that a delay described in the first sentence of this section will result in ESCO not completing the Work for a period of ninety (90) days or more, then Customer or ESCO may terminate this Contract and the Customer shall pay ESCO for the
portion of the Work completed up to the Contract termination date.

5.9 Equipment Location and Access
The parties understand and agree that the Premises will be occupied during construction. ESCO shall take all necessary precautions to ensure the public safety and convenience of the occupants during construction and Customer shall cooperate with ESCO’s reasonable requirements and related requirements described in Attachments 2 and 4. ESCO shall complete the Work in accordance with the schedule in Attachment 2 - Maintenance and Service Agreement. ESCO shall use sufficient personnel and adequate equipment to complete the Work pursuant to Section 5.01.

The Work must be completed in a continuous uninterrupted operation on the days and between the hours specified in Attachment 7 - Additional Requirements, unless otherwise authorized in writing by the Customer. No Work is to be done on holidays, Saturdays, or Sundays except as contemplated in Attachment 7 - Additional Requirements, the Scope of Work in order to maintain the Standards of Comfort described in Attachment 8 - Standards of Comfort or in the event of emergencies unless otherwise approved by Customer. The Customer will provide access to the Premises at the times agreed upon and make all reasonable provisions for ESCO to enter the Premises where Work is to be performed so that Work may be performed in an efficient manner.

ESCO is responsible for the security of partially completed work and for uninstalled materials or equipment stored at Customer properties. Only materials and equipment intended and necessary for immediate use shall be brought into the buildings. Equipment and unused materials shall be removed from each building by the end of each workday unless overnight storage is provided for within the Scope of Work. The Customer shall provide if available, without charge, a mutually satisfactory location or locations for the storage and operation of materials and equipment and the performance of the Work, including a location for staging and mobilization.

Flammables and combustibles shall be stored only in accordance with the requirements of relevant statutes, regulations, NFPA standards and Customer procedures. In the event that the Customer is unable to provide a satisfactory location for the storage of flammables and combustibles, then ESCO shall provide and pay for suitable storage.

5.10 Permits and Fees
ESCO shall secure and pay for building and other permits and governmental fees, licenses, and inspections necessary for proper performance and completion of the Work that are required by federal, state, or town or city governments. In the event that fees for any permits are reduced or waived by request, standing or intervention of the Customer, then, at the Customer’s option, the amount of the savings of the fee shall be deducted from the line item in the Work budget and added to the contingency line item or the Contract Price reduced by that amount.

5.11 Utilities
The Customer shall provide and pay for water, heat, fuel and utilities consumed by ESCO or in any additional equipment that may be used by ESCO during performance of the Work, including, for example, generators. ESCO shall install and pay for any facilities or modifications not already in existence that are necessary to access such water, heat, and utilities during the Work.
5.12 Concealed or Unknown Conditions
If ESCO finds conditions during the Work that are subsurface or otherwise concealed physical conditions that differ materially from those indicated on the drawings or are unknown physical conditions of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in similar construction activities, ESCO shall notify Customer of such conditions promptly, prior to significantly disturbing the same, and in no event later than one (1) business day after first observing the conditions.

Such conditions may include, but are not limited to, water damage, termite damage, or structural building defects. If such conditions differ materially and cause an increase in ESCO’s cost of, or time required for, performance of any part of the Work, ESCO shall submit a written estimate of the material and labor cost increase and time delay. If the Customer concurs with the need, cost estimate, and time delay, Customer and ESCO shall make an equitable adjustment in the Contract Price or Time for Performance and Final Completion, or both. Pursuant to Section 5.08 above, ESCO shall not be entitled to damages for delay beyond Customer’s control.

5.13 Casualty, Condemnation, Damage
If any fire, flood, other casualty, or condemnation renders a portion of any property described in Attachment 1 - Final Investment Grade Audit unsuitable for habitation or destroys a substantial part of the area within which the Work is to be performed or which the Work affects, the Customer and ESCO may terminate or modify this Contract by mutual agreement. The Customer shall pay ESCO for all Work completed to the date of termination. If any materials or equipment are damaged by the negligence or willful misconduct of an employee, agent or invitee of Customer, Customer shall repair or replace said item within a reasonable period of time, or, adjust the Contract Price to pay for repair or replacement or adjust Time for Performance and Final Completion, or both.

5.14 Standards of Service and Comfort
The facility performance requirements of service and comfort applicable to the Premises for heating, cooling, hot water, ventilation and lighting are stated in Attachment 8 - Standards of Comfort (“Standards of Comfort”) and shall apply throughout the Contract. If ESCO is unable to meet these Standards of Comfort for any reason, the Customer and ESCO shall mutually agree upon an appropriate adjustment to Energy Savings, the price paid for the Work or any corrective measures that shall be provided and paid for by ESCO.

5.15 Shutdown of Services
ESCO hereby acknowledges that continuous operation of services, including but not limited to heat, water, domestic hot water, electricity, gas, sanitary facilities, elevators, fire alarms or protections, and access to the property, or common areas is essential to the operation of the Customer’s properties as reflected in the Standards of Comfort. If any such service, or access to the property, or any common area is to be discontinued for any period of time in order to perform the Work (including actions described within the Scope of Work), ESCO shall give the Customer as much notice in writing as is practicable, but in no event less than seven (7) days in which event the Customer shall, by written response, approve unconditionally or with conditions such shutdown of services and the timing thereof.

The use of any portion of the Premises by ESCO for parking or staging areas for the Work shall be expressly approved by Customer prior to the Commencement of the Work. Such
conditional approval may include a requirement for ESCO to provide and pay for temporary services, may limit the time period for which services or access may be shut down, or may require other actions, accommodations or expenditures on the part of ESCO. With respect to fire alarm or other fire protections, ESCO shall also notify the local fire department of any shutdown of service and notify the fire department when such service is restored.

The Customer acknowledges that such shutdowns may be necessary to perform the Work from time to time and will not unreasonably withhold approval. The Customer agrees to communicate with occupants on plans to shut down services or access and temporary measures, if any, which will be made in such circumstances.

5.16 Indemnification and Limitation of Liability (Non-Patent or Copyright)
ESCO shall be responsible for the Work and take all precautions for preventing injuries to persons and property in or about the Work and shall bear the costs of all losses or damages resulting from or on account of the Work. ESCO shall pay or cause payment to be made for all labor performed or furnished and for all material used or employed in carrying out this Contract. ESCO shall assume the defense of, indemnify and hold harmless the Customer and its officers and agents from all claims relating to:

1) Labor performed or furnished and materials used or employed for the Work;

2) Injuries to any person received or sustained by or from ESCO and its employees, subcontractors and its employees, any agents, suppliers and invitees in doing the Work, or as a consequence of any improper materials, implements of labor used or employed therein; and

3) Any act, omission, or neglect of ESCO and any employees, subcontractors and employees, agents, suppliers and invitees.

5.17 Indemnification (Patent and Copyright)
(a) ESCO will, at its own expense, defend or at its option settle any suit or proceeding brought against Customer in so far as it is based on an allegation that any Work (including parts thereof), or use thereof for its intended purpose, constitutes an infringement of any United States patent or copyright, if ESCO is promptly provided Notice and given authority, information, and assistance in a timely manner for the defense of said suit or proceeding. ESCO will pay the damages and costs awarded in any suit or proceeding so defended. ESCO will not be responsible for any settlement of such suit or proceeding made without its prior written consent. In case the Work, or any part thereof, as a result of any suit or proceeding so defended is held to constitute infringement or its use by Customer is enjoined, ESCO will, at its option and its own expense, either: (i) procure for Customer the right to continue using said Work; (ii) replace it with substantially equivalent non-infringing Work; or (iii) modify the Work so it becomes non-infringing.

(b) ESCO will have no duty or obligation to Customer under Section 5.17(a) to the extent that the Work is: (i) modified by Customer or its contractors after delivery; or, (ii) combined by Customer or its contractors with items not furnished hereunder and by reason of said design, instruction, modification, or combination a suit is brought against Customer. In addition, if by reason of such modification or combination, a suit or proceeding is brought against ESCO, unless expressly prohibited by law, Customer shall protect ESCO in the
same manner and to the same extent that ESCO has agreed to protect Customer under the provisions of Section 5.17(a) above.

(c) THIS SECTION 5.17 IS AN EXCLUSIVE STATEMENT OF ALL THE DUTIES OF THE PARTIES RELATING TO PATENTS AND COPYRIGHTS, AND DIRECT OR CONTRIBUTORY PATENT OR COPYRIGHT AND OF ALL THE REMEDIES OF CUSTOMER RELATING TO ANY CLAIMS, SUITS, OR PROCEEDINGS INVOLVING PATENTS AND COPYRIGHTS. Compliance with Section 5.17 as provided herein shall constitute fulfillment of all liabilities of the parties under the Contract with respect to intellectual property indemnification.

6. Performance and Evaluation Subsequent to Work

6.1 Workmanship and Equipment Warranty
ESCO hereby assigns to the Customer all warranties of all equipment and materials used in the Work. Attachment 2 - Maintenance and Service Agreement lists equipment and material warranties, however, failure to include any equipment or materials having a warranty neither excludes said equipment or materials from the provisions of this section nor ESCO’s responsibilities hereunder. ESCO shall provide Customer with a list of all serial numbered items of equipment installed as part of the Work at or before the Project Acceptance.

ESCO warrants that, for a period of one year from a date of a Certificate of Substantial Completion (“Warranty Period”), the relevant equipment, materials and Work shall be new and free from defects in material, manufacture, workmanship and performance as set forth by the catalogs, bulletins and specifications included within ESCO’s Response to the RFP or the Scope of Work, whichever is appropriate. If such defect occurs within the Warranty Period, ESCO shall correct and pay for correction of all defects including replacement or repair and all parts and labor.

ESCO warrants that, for any equipment or materials used in the Work with a warranty period in excess of one year, ESCO shall correct all defects including replacement or repair provided that ESCO’s obligation is limited to the terms of the warranty and provided further that the Customer, by mutual consent with ESCO, may correct said defect.

No warranty liability shall attach to ESCO until Work has been substantially completed. ESCO’s warranties expressly exclude any remedy for damage or defect caused by the Owner’s abuse, improper operation, unapproved modifications or improper repairs.

Customer may correct any defect and ESCO shall reimburse Customer for its reasonable expenses incurred in performing such correction subject to any limitations contained within this section if ESCO fails to correct defective equipment, materials or Work within a reasonable period of time, but no less than seventy-two (72) hours, upon written notice from the Customer unless such defect is a condition deemed to endanger health or safety, is a fire hazard or would otherwise render the Premises unfit for occupancy.

Conditions which are deemed to endanger health or safety are applicable provisions of the state or local sanitary code, fire hazards under applicable fire prevention regulations and codes and other emergency conditions that shall be addressed promptly and jointly, if necessary, by ESCO and Customer assuring that immediate precautions are taken to avoid risk to persons or property, immediate measures are taken to prevent deterioration of
condition, occupants are alerted to any dangers or hazards, and steps for final correction taken within twenty-four (24) hours. Customer may take reasonable steps to protect the Premises or the Work on an emergency if it is not possible or reasonable to notify ESCO before taking such actions.

THE EXPRESS LIMITED WARRANTIES PROVIDED ABOVE ARE IN LIEU OF AND EXCLUDE ALL OTHER WARRANTIES, STATUTORY, EXPRESS, OR IMPLIED, INCLUDING WITHOUT LIMITATION ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, WHICH, TO THE EXTENT PERMITTED BY LAW, ARE HEREBY EXPRESSLY DISCLAIMED. THE LIMITED EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS CONTRACT MAY ONLY BE MODIFIED OR SUPPLEMENTED IN A WRITING EXECUTED BY A DULY AUTHORIZED SIGNATORY OF EACH PARTY.

6.2 Evaluation of Savings Achieved
ESCO shall also prepare and deliver to Customer an annual report of the savings achieved at the Premises for each of the twelve-month periods specified in Attachment 4 - M & V Plan in a form suitable for review and subsequent forwarding to the Customer and any consultant or auditor designated by Customer. ESCO shall include in such report, to the extent practicable, emissions reduction quantities or similar data attributable to or resulting from the Work and shall advise Customer on opportunities to achieve monetary benefits from such credits or attributes which shall be the property of Customer.

The Customer shall notify ESCO of substantive changes in the properties or the operation or occupancy thereof which could affect energy or water use. Such substantive change shall be agreed upon by the parties and incorporated in the determination and evaluation of savings. The obligations under this Article are also described in Attachment 4 - M & V Plan.

ESCO shall be compensated at the rate described in Attachment 3 - Project Cost for maintaining, monitoring and verification and reporting services.

6.3 Performance Guarantee
ESCO hereby guarantees the level of savings for the time periods and to the level described in Attachment 4 - M & V Plan (“Performance Guarantee”). The Performance Guarantee commencement date shall not occur and the Customer shall not be required to accept the Work unless and until all equipment installation at the Premises and training is completed in accordance with the terms and conditions of this Contract, including, without limitation, the satisfaction of all claims for labor and materials. In the event that Final Acceptance occurs after the commencement date of the Performance Guarantee (See Attachment 4 - M & V Plan), then the parties will mutually agree on a modified Attachment 4 - M & V Plan to accommodate the delay in beginning the Performance Guarantee.

The Performance Guarantee is to be achieved as a result of the Work and the ECMs/OCMs and the resulting savings, if any, shall be calculated in accordance with the procedures described in Attachment 4 - M & V Plan. The Performance Guarantee is subject to the satisfactory performance by Customer of all of its obligations under this Contract. In the event that this Contract is terminated by an uncured Event of Default by Customer, the Performance Guarantee shall be cancelled. The Performance Guarantee shall remain in effect for a term not less than the time required to finance the Work.
The Performance Guarantee shall thereafter terminate. In any event, ESCO and Customer have structured the Energy Savings and the Performance Guarantee to be sufficient so that the conversion to US Dollars results in amounts sufficient to exceed any and all payments required by Customer in connection with the acquisition of equipment to be installed by ESCO pursuant to this Contract, the Customer’s lease or financing obligations and any related agreements associated with the execution of this Contract or the implementation of the Work.

ESCO shall have no liability to continue providing measurement and verification services or to honor the Performance Guarantee with respect to any portion of the Work in the event the Customer: (i) fails to authorize a reacceptance test or recommissioning that ESCO reasonably deems necessary in order to prevent a savings shortfall with respect to such portion of the Work; (ii) fails to provide access to a site where such portion of the Work was performed as required herein; (iii) fails to service and maintain all equipment associated with such portion of the Work in accordance with the manufacturers’ recommendations in order to prevent a savings shortfall; or (iv) cancels or terminates the Performance Assurance TSP.

6.4 Performance Remedies
Energy-related cost savings shall be measured and/or calculated as specified in the measurement and verification plan provided in Attachment 4 - M & V Plan or as may be mutually agreed upon in writing. In the event that the energy and cost savings achieved during such twelve-month period is less than the corresponding Guaranteed Savings for the same annual period as reflected in Attachment 4 - M & V Plan while the Performance Guarantee is in effect, ESCO shall pay to Customer within thirty (30) days of the delivery of such report an amount equal to the deficiency.

In the event of such deficiency, ESCO reserves the right, subject to Customer’s approval, which shall not be unreasonably withheld, to implement additional operation improvements or conservation measures, at no cost to Customer, that will improve energy savings in future years of Performance Guarantee.

All costs associated with having the ECMs/OCMs repaired, replaced, adjusted or re-engineered and re-installed shall be paid by ESCO and presentation of evidence of such payment shall be a condition to any Customer approval of such work. If during any twelve-month period specified in Attachment 2 - Maintenance and Service Agreement and Attachment 4 - M & V Plan the savings achieved are greater than the Guaranteed Energy and Cost Savings, such excess shall be retained by the Customer and not applied to ESCO’s requirement to deliver Energy Savings beyond the stated year.

6.5 Security for Performance Guarantee – Not Included

6.6 Independent Audit – Not Included

6.7 Other Performance Terms and Conditions
All actions taken under Section 6, including but not limited to correction of warranties, remedy of performance shortfalls and maintenance of equipment by ESCO, shall conform with sections 5.02 through 5.17 inclusive.

6.8 Contract Closeout Responsibility
At the termination of the Contract, ESCO shall perform a walk-through survey of the properties covered by this Contract and prepare an assessment of the condition of the equipment and materials installed as part of the Work and subsequent thereto under this Article. This closeout report shall include but not be limited to the following, as appropriate:

1) Operating and maintenance recommendations during the remaining life of equipment installed if different from requirements furnished upon installation or if changes in technology or procedures affecting the equipment could extend the useful life of the equipment or increase the conservation efficiency,

2) An overview of new technology or additional conservation measures for the Customer to consider.

7. Obligations of the Parties

7.1 Obligations of ESCO
ESCO acknowledges and agrees that ESCO’s obligations hereunder are in the capacity of providing professional services for the purposes described in the Preamble to this Contract and in said capacity ESCO is expected to provide energy, water and operational auditing, engineering, design and monitoring services, construction management including general contracting as necessary, and other related services as solicited in the RFP and as may normally be incidental to these types of professional services. ESCO acknowledges and agrees that any other functions, including, but not limited to, manufacturer’s representative, dealer or distributor of equipment, materials or commodity specified herein or as subcontractor, or any ownership interest in whole or in part, or financial affiliation with a company that performs such other function shall constitute a conflict of interest which shall constitute a material breach of this Contract unless 1) fully disclosed in ESCO’s Response to the RFP, and 2) accepted by the Customer under terms which are specified in the Scope of Work. ESCO acknowledges and agrees that this paragraph applies to all its officers and employees.

The following events or conditions shall, without limitation, constitute a breach by ESCO and shall give the Customer the right, without an election of remedies, to proceed pursuant to Section 9.01 and/or terminate this Contract by delivery of written notice declaring termination, upon which event ESCO shall be liable to the Customer for any and all damages sustained by the Customer:

1) Any attempt by ESCO to increase the Contract price for reasons other than those related to changes in the Work pursuant to Section 5.03;

2) Any failure by ESCO to provide annual monitoring reports pursuant to Section 6.02 provided that such failure continues for ten (10) days after notice from Customer;

3) Any failure by ESCO to make payments pursuant to the Performance Guarantee provided that such failure continues for three (3) business days after notice from Customer;
4) Any representation or warranty furnished by ESCO in ESCO’s Response to the RFP, the Scope of Work or this Contract which is false or misleading in any material respect when made;

5) Any state, county or federal license, authorization, waiver, permit, qualification or certification by statute, ordinance, law or regulation to be held by ESCO to provide the goods or services required by this Contract is denied, revoked, debarred, excluded, terminated, suspended, lapsed or not renewed;

6) The filing of bankruptcy by ESCO or by ESCO’s creditors, an involuntary assignment for the benefit of creditors, or the liquidation of ESCO;

7) Any failure by ESCO to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to ESCO demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, ESCO fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible;

8) Any failure to maintain the Standards of Comfort and service set forth in Attachment 8 - Standards of Comfort due to the failure of ESCO to properly design, install, maintain, repair or adjust the equipment installed and maintained as part of the Work except that such failure, if corrected or cured within seven (7) days after written notice by Customer to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Contract;

9) Any failure to furnish and install the equipment or ECMs/OCMs or perform the Work and make it ready for use within the time specified by this Contract as set forth in Attachment 2 - Maintenance and Service Agreement;

10) Any lien or encumbrance upon the equipment or the Premises by any subcontractor, laborer or material man of ESCO which is not released in thirty (30) days;

11) Any failure by ESCO to pay any amount due or perform any material obligation under the terms of this Contract; and

12) It is determined that ESCO has failed to disclose a material conflict of interest relative to the performance of this Contract or if it is found that any gift or gratuity were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Customer with a view toward securing a contract or favorable treatment with respect to performance of the Contract.

7.2 Obligations of the Customer
Customer shall respond to all audits, proposed revisions and related requests on a timely basis for the expeditious design, implementation and monitoring of conservation measures. Furthermore, Customer shall comply with the Customer Responsibilities as are detailed in Attachment 2 - Maintenance and Service Agreement.
Each of the following events or conditions shall constitute a breach by Customer and shall give ESCO the right, without an election of remedies to proceed pursuant to Section 9.01 and terminate this Contract by delivery of written notice declaring termination, upon which event the Customer shall be liable to ESCO for all Work furnished to date:

1) Any failure by the Customer, without cause, to authorize payment due more than thirty (30) days after receipt of notice that the Customer is delinquent in making payment;

2) Any representation by Customer in the RFP and this Contract is false or misleading in any material respect when made; and

3) Any failure by the Customer to perform or comply with any other material term or condition of this Contract, including breach of any covenant contained herein, provided that such failure continues for thirty (30) days after written notice to the Customer demanding that such failure be cured or, if cure cannot be effected in thirty (30) days, the Customer fails to begin to cure and proceed to completion thereof as quickly as is reasonably possible.

8. Insurance and Bond Requirements

8.1 Worker’s Compensation Insurance
ESCO shall provide during the life of this Contract Worker’s Compensation Insurance as follows:

1) Workers Compensation Coverage A Statutory Minimum
   Employer’s Liability Coverage B $500,000 each accident
2) $500,000 disease per employee
3) $500,000 disease policy

8.2 Comprehensive General Liability
ESCO shall provide Comprehensive General Liability with the following minimum coverage with respect to the Work and other operations performed by ESCO and its employees, subcontractors, supplier’s agents and invitees:
1) Bodily Injury and Property Damage $1,000,000 each occurrence, $1,000,000 aggregate
2) Products and Completed Operations $1,000,000 each occurrence, $1,000,000 aggregate
3) Contractual Liability and Property Damage $1,000,000 each occurrence, $1,000,000 aggregate

8.3 Vehicle Liability
ESCO shall provide the following minimum coverage with respect to the operations of the any employee, including coverage for owned, non-owned, and hired vehicles:
Bodily Injury $1,000,000 each occurrence
Property Damage $1,000,000 each occurrence
Combined Single Limit $1,000,000

8.4 Property Coverage
ESCO shall provide the following coverage against loss or damage by fire and against loss or damage covered by the special perils insurance endorsement on all Work:
All Risk 80% of Contract Price minimum
Upon completion of Work at Customer buildings, ESCO shall provide an installation floater, in the full amount of the Contract Price, for the requirements set forth above. The policy or policies shall specifically state that they are for the benefit and payable to the Customer, ESCO, and all persons furnishing labor or labor and materials for the Work, shall be listed as loss payee as their interests may appear.

8.5 Professional Liability Insurance
ESCO shall maintain in full force and effect, at ESCO’s expense, an Errors and Omissions or Professional Liability Insurance Policy in the amount of $1,000,000 minimum coverage. The policy shall remain in effect for the duration of the applicable statute of limitations for claims against construction professionals.

ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys fees, arising out of or resulting from the performance of professional services contemplated by this Contract, provided that any such claim is attributable to bodily injury or death, or injury to or destruction of tangible personal property, or to failures of the Work, including the loss of use resulting therefrom, and is caused, in whole or in part, by any negligent act, error or omission of ESCO, any consultant or associate thereof, anyone directly or indirectly employed by ESCO. ESCO shall submit a Certificate of Insurance and policy endorsement verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.

8.6 Environmental Impairment Liability Insurance
ESCO shall maintain in full force and effect, at ESCO’s expense, a Sudden & Accidental Environmental Impairment Liability Insurance Policy in the amount of $1,000,000 minimum coverage unless comparable coverage is provided pursuant to the policy required in Section 8.05. The policy shall remain in effect for the duration of the applicable statute of limitations for claims against construction professionals.

ESCO shall be responsible for all claims, damages, losses or expenses, including attorneys fees, arising out of or resulting from the cleanup, removal, and handling of hazardous materials contemplated by this Contract and is caused, in whole or in part, by any negligent act, error or omission of ESCO, any consultant or associate thereof, anyone directly or indirectly employed by ESCO. ESCO shall submit a Certificate of Insurance and policy endorsement verifying said coverage upon execution of this Agreement and also any notices of renewals of such policy as they occur.

8.7 Customer as Additional Insured
The Customer shall be named as additional insured on ESCO’s Liability Policies.

8.8 Certificates of Insurance, Policies
Certificates of insurance and policy endorsements, acceptable to the Customer, shall be submitted to the Customer upon the execution of this Contract and shall be renewed upon expiration of the policies. Certificates shall indicate that the coverage required by section 8.01 through 8.06 is in effect. If the Customer is damaged by ESCO’s failure to maintain such insurance, then ESCO shall be responsible for all reasonable costs or damages attributable thereto. Certificates shall note the thirty (30) day cancellation notice requirement of Section 8.09. All policies shall be issued by companies authorized to write that type of insurance under the laws of the State of New Hampshire. Any and all deductibles and self-
insured retention contained in any insurance policy shall be assumed by and at the risk of ESCO.

8.9 Cancellation
Customer shall be provided notice of cancellation at least thirty (30) days prior to the effective date thereof for any insurance policy required of ESCO by this Contract.

8.10 Bonds
ESCO shall provide a performance and payment bond of $1,556,977.76 through a treasure listed company licensed to do business in the State of New Hampshire with a Best Rating of not less than A or a comparable rating from a recognized financial rating firm on AIA bond forms. All bonds must remain in effect for a period of not less than 2 years following the final completion or the time required to resolve any items of incomplete work and the payment of any disputed amounts, whichever period of time is longer. Each bond must display the surety’s bond number. Also, a rider including the following provision shall be attached to each bond or included directly in the bond: “Any addition, alterations, omission, change, extension of time, or other modification of the ESCO documents, or a forbearance on the part of either ESCO or the Customer to the other, shall not release the surety of its obligations hereunder, and notice to the surety of such matters is hereby waived.” The performance and payment bond will solely apply to the Work performed during the Construction Period and to the required statutory lien filing period thereafter. The performance and payment bond will not apply to any of the obligations included in the Performance Guarantee. Furthermore, the Customer’s funding source may be named as “Co-Oblige” on the performance bond if so requested by the Customer.

9.1 Dispute Resolution

Disputes regarding changes in and interpretations of the terms or scope of the Contract and denials of or failures to act upon claims for payment for extra work or materials shall be resolved according to the following procedures:

1) All claims by ESCO shall be made in writing and submitted to the Customer for a written decision.

2) ESCO shall not delay, suspend, or curtail performance under the Contract as a result of any dispute subject to this section.

3) Within sixty (60) days of submission of the dispute to the Customer, the Customer shall issue a written decision stating the reasons therefor, and shall notify the parties of their right of appeal under this section. If the official of the Customer is unable to issue a decision within sixty (60) days, he shall notify ESCO in writing of the reasons and of the date by which the decision shall issue.

4) Failure to issue a decision within one hundred and twenty (120) day period or within the additional period specified in such written notice shall give the petitioner the right to pursue any legal remedies available to him without further delay.

5) ESCO and Customer agree that all disputes relating to this Contract and performance thereunder shall be resolved through courts in the State of New Hampshire and any appellate court from which an appeal may be taken therefrom. To the fullest extent permitted by law, the parties irrevocably and unconditionally submit to the exclusive jurisdiction of said court.

9.2 Conditions Beyond Control of the Parties

Except as otherwise provided herein, if either party shall be unable to carry out any material obligation under this Contract due to events beyond its control, such as acts of God, governmental or judicial action, insurrections, riots, extended labor disputes, fires, explosions or floods, this Contract shall remain in effect but the affected party’s obligations shall be suspended until the uncontrollable event terminates or is resolved, unless the Contract is terminated by either party following a ninety (90) day delay, in which event, Customer shall pay ESCO for all parts of the Work furnished to the date of termination or as otherwise agreed.

9.3 Labor Laws

ESCO shall obey and abide by all laws and regulations of the State of New Hampshire relating to the employment of labor and public work, including, without limitation, the State’s drug-free workplace policy (ESCO shall deliver to Customer a certificate of compliance with such policy).

ESCO shall comply with all federal and state laws, rules and regulations promoting fair employment practices or prohibiting employment discrimination and unfair labor practices. ESCO shall not discriminate in the delivery of services against any person who otherwise meets the eligibility criteria for services, or in the hiring of any applicant for employment nor
shall any qualified employee be demoted, discharged or otherwise subject to discrimination in the tenure, position, promotional opportunities, wages, benefits or terms and conditions of their employment because of race, color, national origin, ancestry, age, sex, religion, disability, status as a Vietnam Era Veteran, sexual orientation or for exercising any rights or benefits afforded by law including the requirements of Federal Executive Orders 11246, 11625, 11375 and 11830 and Title 28 Chapter 5.1.

9.4 **Prevailing Wage Rate**

All wages paid to laborers by ESCO, and/or sub-contractors, with respect to the Project will conform with Davis-Bacon and related Acts (DBRA), 40 USC § 3141 et seq., requirements. ESCO shall furnish a wage determination for corresponding classes of laborers and mechanics, based on wages and fringe benefits found to be prevailing for laborers and mechanics employed on similar projects in the area, upon the Customer’s request.

9.5 **Appropriations**

The Customer reasonably believes that funds can be obtained sufficient to make all payments due to ESCO under this Contract. The Customer hereby covenants that it will make reasonable and diligent efforts to obtain and maintain funds from which such payments may be made, including making provisions for such payments to the extent necessary in each annual or supplementary budget submitted for the purpose of obtaining funds, and using reasonable efforts to have such portion of the budget approved. Nothing herein shall obligate the Customer to institute legal action before any court, to commence proceedings before any forum, or to institute proceedings in the nature of mandamus against any public official in attempting to obtain said funds.

9.6 **Laws, Regulations, Ordinances and Standard Practices**

ESCO shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, regulations, ordinances and by-laws, including applicable licensing and permitting requirements, in accordance with sound engineering and safety practices, and in compliance with any and all reasonable rules or policies of the Customer relative to the properties. ESCO shall be responsible for obtaining all governmental permits, licenses, consents, and authorizations as may be required to perform its obligations hereunder (see also Section 5.10 regarding permits and fees pertaining to the Work).

9.7 **Access and Inspection**

Customer shall have access to inspect, upon reasonable notice, the Work and the books, records, and other compilations of data which pertain to this Contract. Records shall be kept on a generally recognized accounting basis and calculations kept on file in legible form. Records shall be saved or archived by ESCO for a period of three (3) years after the termination of this Contract and shall be kept or made available within New Hampshire.

ESCO shall have access, upon reasonable notice to the Customer, to inspect the property to assess the condition and operation of material and equipment installed.

9.8 **Ownership Rights**

All drawings, reports and other materials prepared by ESCO specifically in performance of this Contract shall become the property of the Customer as needed or upon the termination of the Contract. Customer shall be entitled to any currently or future available credits other
than those agreed to by the Parties to be assigned to the ESCO, i.e. utility rebates, or rights of use associated with the reduction of energy use, particular technologies employed in or any attributes associated with the Work.
9.9 Certificates
ESCO certifies as follows:

1) Certificate of Authorization: If ESCO is a corporation, each person executing this Contract on behalf of ESCO hereby covenants, represents and warrants that ESCO is a duly incorporated or duly qualified (if foreign) corporation and is authorized to do business in the State of New Hampshire (a copy of evidence thereof to be supplied to the Customer upon request); and that each person executing this Contract on behalf of ESCO is an officer of ESCO and that he or she is duly authorized to execute, acknowledge and deliver this Contract to the Customer, a copy of a corporate resolution to this effect is attached hereto as Attachment 9 - Corporate Resolution.

2) Tax Compliance Certification: Each person signing this Contract on behalf of ESCO hereby certifies, under the penalties of perjury, that to the best of his/her knowledge and belief, ESCO has complied with any and all applicable state tax laws.

3) Certificate of Non-collusion: The undersigned certifies under penalties of perjury that this Contract has been made in good faith and without collusion or fraud with any other person. As used in this certification, the word “person” shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity of group of individuals.

4) Foreign Corporation: ESCO, if a foreign corporation, hereby certifies that it is in compliance with Title 7 Chapter 1.1 of the General Laws of New Hampshire and that the name and address of the resident agent is included with Attachment 9 - Corporate Resolution.

9.10 Assignment
ESCO shall not assign, transfer, convey, or otherwise dispose of this Contract, or any part hereof, or its right, title or interest in the same or any part thereof, without the prior written consent of the Customer provided, however, that Customer may not unreasonably withhold or delay its consent to an assignment of its interest in this Contract to a corporate affiliate and provided further that ESCO may without the consent of Customer assign its rights for payments under this Contract to any financial institution, lender or investor in connection with a leasing or financing arrangement for the ECMs/OCMs. ESCO shall not otherwise assign by power-of-attorney, or otherwise, any of the moneys due or to become due and payable under this Contract, without the prior written consent of the Customer.

9.11 Applicable Law and Severability
This Contract is made and shall be interpreted and enforced in accordance with the laws of the State of New Hampshire without regard to its conflict of laws provision. If any provision of this Contract shall be determined to be invalid or unenforceable under applicable law, such provision shall, insofar as possible, be construed or applied in such manner as will permit enforcement; otherwise this Contract shall be construed as if such provision had never been made part thereof.

9.12 Independent Contractor
The Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither the Contractor nor any agent or employee of the Contractor shall be deemed to be an agent or employee of the State of New Hampshire or any agency of subdivision thereof. Contractor shall be responsible for all payroll taxes and benefits for its employees and the acts and omissions of its employees, agents, contractors, and subcontractors.

9.13 Complete Contract
This Contract, together with any documents incorporated herein by attachment as an exhibit or by reference, shall constitute the entire and exclusive Contract between both parties, except as may be provided by relevant law or regulation, and supersedes and terminates all prior or contemporaneous arrangements, understandings and agreements, whether oral or written, and this Contract may not be amended or modified except in writing and executed by the Customer and ESCO. The RFP and ESCO’s response thereto are incorporated by reference to the extent not superseded by the Scope of Work or this Contract.

The failure of either ESCO or the Customer to insist upon the strict performance of any term or condition hereof shall not constitute or be construed as a waiver or relinquishment of either party’s right to thereafter enforce the same in accordance with this Contract.

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

9.15 Counterparts
This Contract may be executed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument, and in making proof of this Contract it shall not be necessary to produce or account for more than one such counterpart.

9.16 Enforceability
ESCO acknowledges that Customer is a government entity that enjoys limited immunity and other protections under state law from tort claims. As a result, any language in the Contract that provides for indemnification by Customer, including but not limited to Section 5.17, shall be enforceable only to the extent permitted by law and shall be limited to the extent of available proceeds under the insurance policies actually maintained by Customer. Further, no indemnification by Customer under the Contract shall be deemed or construed to operate in practical effect to waive any statutory immunity or statutory limitation of liability of Customer from claims of any third party, or to impose any further or additional liability to ESCO, that Customer is or would be subject to in a direct claim by such third party.
10. Contract Signatures
IN WITNESS THEREOF, the parties have each caused this Contract to be executed in counterparts on the dates set forth below (the last of which shall be considered the date of execution hereof) by their duly authorized representatives.

Company: Pelham School District
Name: __________________________
By: __________________________
Title: __________________________
Date: __________________________

Company: Energy Efficient Investments inc.
Name: Paul Murphy
By: __________________________
Title: Director
Date: __________________________
Attachment 1 - Final Investment Grade Audit
Attachment 2 - Maintenance and Service Agreements

To ensure the guarantee School District must maintain equipment as required by Operational and Maintenance Manuals / Manufacturer Recommendations.
Attachment 3 - Project Cost

*AS directed by school each phase may be issued with LOI.*

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Attachment 4 - Measurement and Verification Plan
Attachment 5 - Major Equipment List (Bill of Materials)

Daiken VRF units and Daiken ERVS with Dehumidification
Attachment 6 – Scope of Work and Project Schedule

Schedule

Sign Contract 6-16-21
Design complete 7-1-2021
Install HVAC over school breaks
Commission System complete 11-15-2021
Punchlist and owner acceptance 6-30-2022

Attachment 7 - Additional Construction or Operational Requirements

At the time of this document engineering and design of the project was not 100% complete. There may/will be some modifications in the project design and the selected materials for the project. These modifications need to be accepted by both parties prior to implementation. Funds for these changes will utilize the Design and Construction Contingency funds that have been set aside for this project.

The customer will be required to provide the ESCO access to the work site during normal business hours. Some of the work activities may require the Customer to work around the contractors performing the work. Scheduling and coordination of construction activities will take place on a weekly basis to avoid unnecessary delay or disruptions to the contractors work and that of the Customer.
Attachment 8 – Standards of Comfort

See M&V Report
Attachment 9 - Corporate Resolution, Certificate of Foreign Corporation

N/A
Attachment 10 - Substantial Completion
Date: xx/xx/xx

To: Pelham Substantial Completion Subject:

Substantial Completion of Work

To Whom it May Concern,

This letter is to inform you that, in accordance with our ESCO Contract Section 5.01, work has been substantially complete and Customer is receiving benefits of the heating systems. Attached is a punchlist of remaining items that will be completed for Final Acceptance. These punchlist items will be completed in an expeditious manner.

Please let us know if you have any concerns.

Sincerely,

Michael Davey, CEM
Business Executive/Project Manager
Energy Efficient Investments, Inc.

Letter of Substantial Completion of Work received and acknowledged by

Signed

Print name Date
Attachment 11 - Final Acceptance
Date: xxxx

To: Pelham School

Subject: Letter of Final Acceptance

To Whom it May Concern,

This Letter of Final Acceptance signifies that all work has been complete and all punchlist items have been addressed to the customers’ satisfaction. Please sign and return to our office as an acknowledgement that you accept completion of our work.

Sincerely,

Michael Davey, CEM
Business Executive/Project Manager
Energy Efficient Investments, Inc.

Letter of Final Acceptance received and acknowledged by

__________________________
Signed

__________________________
Print name Date