***<Agency/company may vary the terms and conditions according to its specific requirements>***

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This Guaranteed Energy Savings Performance Contract (the “GESP Contract" or “Contract”) is made the ……………….……………. day of …………………………………………………………………………between.…………………………………………………………………………………………………………..

of…..…………………………………………………………………………………………………………….

…………………………………………………………………………………………………………………..

(hereinafter called "the Agency/company") of the one part and

……………………………………………………………………………….…………………………………... of………………………………………………………………………………………………………………………………………………………………………………………………………………………………….….

(hereinafter called the "the ESCO") of the other part for the implementation of certain energy and water saving measures, described in Schedule A (Equipment to Be Installed by ESCO), and for the provision of other services described in the GESP Contract. The energy and water saving measures and the services to be provided are designed to save energy and water and reduce related costs for certain property and buildings owned by the Agency/company (the “Premises”) as described in Appendix E (Description of Premises; Pre-Existing Equipment Inventory).

**WITNESSETH**

**WHEREAS**, the ESCO has developed or become knowledgeable about certain procedures for controlling energy and water consumption through the use of engineering analyses and devices installed and maintained on the premises of its customers; and

**WHEREAS**, the ESCO has made an assessment of the energy consumption characteristics of the Premises, which the Agency/company has approved; and

**WHEREAS**, the Agency/company operates the Premises, and is in need of energy and water saving equipment and services designed to reduce consumption and associated costs at said Premises; and

**WHEREAS**, the ESCO has prepared a complete Investment Grade Energy Audit attached as **Appendix C** and dated ***<date>,*** which has been approved and accepted by the Agency/company as set forth in **Exhibit III (i) (Certificate of Acceptance – Investment Grade Energy Audit);** and

**WHEREAS**, the Agency/company desires to retain the ESCO to implement the energy saving measures described in Schedule A “Equipment to be Installed by ESCO” (hereinafter referred to as the “Works”) and to provide other services for the purpose of achieving energy cost reductions within the Premises, as more fully set forth herein; and

**WHEREAS**, the ESCO has selected the energy and water saving measures in Schedule A on the basis of reasonable quality and compliance with the ESCO’s specifications; and

**NOW, THEREFORE**, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, the Agency/company and the ESCO hereto agree as follows:

**1 DEFINITIONS**

1.1 **Definitions**

***<Agency/company may include other words and expressions according to its specific requirements>***

The following words and expressions shall have the meanings hereby assigned to them except where the context otherwise requires:

"Agency/company’s Representative" means the person or persons, firm or corporation appointed as such by the Agency/company for the purposes of the Contract.

"Construction Equipment" means all equipment, apparatus and things of whatsoever nature required for the execution and completion of both the Temporary Works and the Permanent Works and the remedying of any defects therein, but does not include Plant, materials, goods or work or other things intended to be part of the Works.

"ESCO’s Representative" means the person duly appointed pursuant to **Clause 11.2** of the Conditions.

“Date of Acceptance” means the date stated in a certificate issued pursuant to **Clause 17.1** or **Clause 17.3**.

"Defects" means any part of the Works not executed, provided or completed in accordance with the Contract. For the avoidance of doubt and without limiting the generality of the expression the term shall be taken to include any item of Plant, material, goods or work incorporated or used in the Works which does not or may not conform to the relevant quality standards or pass the tests prescribed in or to be inferred from the Contract.

“Defects Liability Period” shall have the same duration as ‘The Term’ set out in **Clause 17.5**, calculated from the Performance Commencement Date certified by the Agency/company in accordance with Clause 17.4.

"Drawings" means the drawings referred to in the Contract including such drawings which have been prepared by the ESCO and accepted by the Agency/company pursuant to **Clause 6.2** and such other drawings as may from time to time be issued or accepted in writing by the Agency/company.

“ESCO’s Proposals” means all the submissions and proposals from the ESCO in relation to the GESP Contract.

“Contract Price” shall have the meaning given to it in **Schedule C (Contract Price)**

"Loss and Expense" means:

1. the direct relevant costs of labour, Plant, materials, or goods actually incurred; and
2. costs of an overhead nature actually and necessarily incurred but in either case only in so far they would not otherwise have been incurred and which were not and should not have been provided for by the ESCO; and
3. 15% of the costs in clause (i) and (ii) above, such 15% to be inclusive of and in lieu of any profits, head office or other administrative overheads, financing charges (including foreign exchange losses) and any other costs, loss or expense of whatsoever nature and howsoever arising, including (without limitation) any claims or demands made against the ESCO by sub-contractors or other third parties for losses, expenses, fees or otherwise.

“Measurement and Verification Services” shall mean those works and services carried out by the ESCO as set forth in **Schedule L (Measurement and Verification Plan)** under the heading M&V Services.

“Metering Equipment” shall have the meaning given to it in **Clause 24.8**.

“Performance Commencement Date” shall have the meaning given to it in C**lause 17.4**

"Permanent Works" means the works of a permanent nature (including Plant/equipment) to be supplied, installed, designed, executed and completed (including the remedying of any Defects therein) in accordance with the Contract, and shall include the works and equipment set forth in **Schedule A (Equipment to be Installed by ESCO)**.

"Plant" means equipment, machinery, apparatus and the like intended to form or forming part of the Permanent Works.

“Premises” means the lands and other places as defined in **Appendix E (Description of Premises; Pre-Existing Equipment Inventory)**.

"Specifications" means all specifications contained in the Contract including any modifications or additions thereto as may from time to time be issued or approved in writing by the Agency/company, and where the context permits, such specifications as maybe prepared and submitted by the ESCO in his Tender or at any time before the Contract.

"Temporary Works" means all works of a temporary nature of every kind (other than Construction Equipment) required or provided in or about the design, execution and completion of the Works and the remedying of any Defects therein.

"Time for Completion" means time or times for the completion of the Works or any phase or part of the Works set out in **Schedules F and H** subject to such extension or extensions of time (if any) as the ESCO may be allowed under the Contract.

"Works" means the Temporary Works and the Permanent Works, and where the context requires, a phase or part of the Works as defined in **Schedules A, F and H**.

**2 AGENCY/COMPANY'S REPRESENTATIVE**

2.1 **Authority of Agency/company’s Representative**

(1) The authority of the Agency/company’s Representative shall be that stated in or necessarily to be implied from the Contract.

***<State any limitations on the authority of the Agency/company’s Representative here.>***

(2) Except as expressly stated in the Contract, the Agency/company’s Representative shall have no authority to relieve the ESCO of any of his obligations under the Contract.

2.2 **Appointment of Assistants**

The Agency/company’s Representative may appoint in writing any number of persons to assist the Agency/company’s Representative in the carrying out of his duties. The ESCO shall be notified in writing of the names, duties and authority (if any) of such assistants. Unless authorised in writing by the Agency/company’s Representative, such assistants shall have no authority to issue any instructions to the ESCO save insofar as such instructions may be necessary to enable them to carry out their duties and to secure that the Plant, materials, goods or work are in accordance with the Contract.

2.3 **Instructions by Agency/company’s Representative**

Instructions given by the Agency/company’s Representative shall be in writing. Provided that if for any reason the Agency/company’s Representative considers it necessary to give any such instruction orally, the ESCO shall comply with such instruction. Confirmation in writing of such oral instruction given by the Agency/company’s Representative, whether before or after the carrying out of the instruction, shall be deemed to be an instruction within the meaning of this Clause. Provided further that if the ESCO, within 7 days, confirms in writing to the Agency/company’s Representative any oral instruction of the Agency/company’s Representative and such confirmation is not contradicted in writing within 7 days by the Agency/company’s Representative, it shall be deemed to be an instruction of the Agency/company’s Representative. The provisions of this Clause shall equally apply to instructions given by the Agency/company’s Representative and any assistants of the Agency/company’s Representative.

2.4 **Failure to Comply with Instructions from Agency/company’s Representative**

If the ESCO, after receipt of an instruction from the Agency/company’s Representative which expressly cites this clause, fails to comply with it within 14 days (or within such period as may be stipulated in the instruction):

(a) the Agency/company may employ and pay other persons to do whatever may be necessary to give effect thereto and may recover the amount of any cost, loss and expense and damage incurred or suffered in connection therewith;

(b) the amount of any other loss or damage suffered or incurred by the Agency/company as a result of the ESCO's default shall be recoverable from the ESCO.

2.5 **Urgent Repairs**

If by reason of any accident or failure or other event occurring to or in connection with the Works or Services after the GESP Contract has come into force but prior to the expiry of the Term, any remedial or other work shall in the opinion of the Agency/company’s Representative be urgently necessary and the ESCO is unable or unwilling at once to do such remedial or other work, the Agency/company’s Representative may authorise the carrying out of such remedial or other work by a person other than the ESCO. If the remedial or other work so authorised by the Agency/company’s Representative is work which in the opinion of the Agency/company’s Representative the ESCO was liable to do or for which he was otherwise responsible under the Contract, the amount of any cost, loss expense or damage incurred in carrying out the same shall be recoverable by the Agency/company from the ESCO.

2.6 **No Obligation to Exercise Powers**

(1) The Agency/company’s Representative or any assistant appointed pursuant to **Clause 2.2** shall at no time be under any obligation or duty to the ESCO either on behalf of the Agency/company or his own account to exercise or not to exercise any of his powers under the Contract, nor shall any failure to do so on his part in any way prejudice the rights of the Agency/company against the ESCO or render the Agency/company liable to the ESCO.

(2) The provisions of this Clause shall not affect the liability of the Agency/company for any act or omission of the Agency/company’s Representative or any assistant appointed pursuant to Clause 2.2 acting on behalf of the Agency/company within the scope of the authority conferred on that person.

**3 CONTRACT DOCUMENTS**

3.1 **Contract Documents to be Taken as Mutually Explanatory**

The following documents shall be deemed to form and be read and construed as part of the GESP Contract:

**a. Schedules**

Schedule A Equipment to be Installed by ESCO

Schedule B Energy and Water Savings Guarantee

Schedule C Contract Price

Schedule D Energy Use Baseline Consumption

Schedule E Savings Measurement & Calculation Formulae; Methodology to Adjust Baseline; Annual Reconciliation

Schedule F Construction and Installation Schedule

Schedule G Standards of Comfort and Quality Assurance

Schedule H Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment

Schedule I ESCO’s Training Responsibilities

Schedule J Agency/company’s Operation Responsibilities

Schedule K Facility Maintenance Checklist

Schedule L Measurement and Verification Plan

Schedule M [Not used]

Schedule N Insurance

Schedule O Special Conditions

Schedule P Specifications for Measurement Systems of Central Chilled-water Plant

**b. Exhibits**

Exhibit I [Not used]

Exhibit II Equipment Warranties

Exhibit III (i) Certificate of Acceptance—Investment Grade Energy Audit

Exhibit III (ii) Certificate of Acceptance—Installed Equipment

Exhibit IV Operations and Maintenance Manuals

**c. Appendices**

Appendix A Tender for the Provision of Guaranteed Energy Performance Contracting Services

Appendix B ESCO’s Tender Proposal

Appendix C Investment Grade Energy Audit

Appendix D Pre-existing Service Contracts

Appendix E Description of Premises; Pre-Existing Equipment Inventory

Appendix F Current and Known Capital Projects at Facility

The **General Conditions *<Conditions defined by Agency/Company in their tender document>*** and the conditions of contract in this document**,** together with all the schedules, appendices and other documents attached shall be read together as part of the GESP Contract. However, in the event of any inconsistency, the documents shall, unless otherwise specified for any particular provision, be given precedence in the following order (item 1 to take precedence over item 2 and so on):

1. Special Conditions (Schedule O)

2. Conditions of GESP Contract

3. General Conditions

4. Schedules A to N of GESP Contract

5. the Exhibits to GESP Contract

6. the Appendices to GESP Contract

3.2 **Custody and Supply of Drawings and Documents**

The ESCO shall supply to the Agency/company’s Representative two copies of all Drawings, Specifications and other documents submitted by the ESCO in accordance with **Clause 6.2**, together with a reproducible copy of any material which cannot be reproduced to an equal standard by photocopying. In addition, the ESCO shall supply at its own cost such further copies of such Drawings, Specifications and other documents as the Agency/company’s Representative may request in writing for the use of the Agency/company.

3.3 **Use of ESCO’s Proposals and Agency/company’s Requirements**

As between the parties, copyright and other intellectual property rights in the ESCO’s Proposals shall remain with the ESCO. However, the ESCO shall be deemed to have given to the Agency/company a non-terminable transferable non-exclusive royalty-free licence to copy, use and communicate the ESCO’s Proposals, including making and using modifications of them, for the purposes of completing, operating, maintaining, altering, repairing and demolishing the Works or of providing the Services.

The ESCO hereby grants to the Agency/company a perpetual, irrevocable, royalty-free license to any and all software or other intellectual property or proprietary rights necessary for the Agency/company to continue to use, operate, maintain, improve and repair the Works and Services in a manner that will yield maximal energy consumption reductions. This license shall continue subsequent to any termination or expiration of this Contract other than termination due to breach by the Agency/company.

All drawings, reports and materials prepared by the ESCO specifically in performance of this contract shall become the property of the Agency/company. Unless waived by the Agency/company in writing, within thirty (30) days following the Performance Commencement Date, the ESCO shall provide the Agency/company as-built record drawings of the Works installation and all specifications therefor. “Drawings” shall include ***<No. of sets desired>*** sets of corrected prints, and electronic files in compliance with the Agency/company’s CAD standards ***<insert desired format for electronic drawings>.***

**4 GENERAL OBLIGATIONS OF THE ESCO**

4.1 **ESCO's General Responsibilities**

(1) The ESCO shall, with due care and diligence, design, execute, complete and perform the Works and the Services (including all the monitoring and maintenance requirements under the Contract) and remedy any Defects, in accordance with the GESP Contract and to the satisfaction of the Agency/company. The ESCO shall provide all superintendence, labour, Plant, Construction Equipment, materials, goods and all other things, whether of a temporary or permanent nature required in and for such design, execution and completion of the Services and the Works and the remedying of any Defects, and shall be solely responsible for all means, methods, techniques, sequences and procedures, and for coordinating all portions of the Works and the Services under the Contract. Nothing in this Clause shall affect the ESCO's responsibilities under common law to complete the Works and the Services.

(2) Without prejudice to the generality of paragraph (1) of this sub-clause, and to the ESCO's obligations under the Contract,

(a) the ESCO shall be fully responsible for the design of the Works, and shall complete the design in accordance with **Schedules A, F** and **H**;

(b) the ESCO shall be fully responsible for the choice of equipment, materials, goods, plants, workmanship to enable the Works and Services to be constructed and completed and/or be fully operational and confirms that it has considered the design and performance of existing equipment and their limitations in his selection of equipment for the implementation of the energy efficiency measures;

(c) the ESCO shall be fully responsible for the preparation, development and coordinating of all design works and construction at all stages of the Works from design stage to completion and use of the Works, including the obtaining of all necessary licenses and approvals as may be required by the authorities or under any enactment, order, ruling or regulation;

(d) the ESCO shall be fully responsible for the adequacy, stability and safety of all site operations and methods of construction, and for the removal, if so required under the Contract or by the Agency/company’s Representative, of all Temporary Works;

(e) the ESCO shall be fully responsible for the adequacy and integrity of the design and the Works, and for the Works being suitable or fit in all respects for the purpose for which the Works are constructed, and in accordance with **Schedules A, F** and **H**.

(f) The ESCO shall perform its obligations hereunder in accordance with sound engineering and safety practices and in compliance with any and all reasonable rules of the Agency/company relative to the Premises.

(g) The ESCO shall perform all the Services in a professional manner, in accordance with and subject to the Schedules.

(h) The ESCO shall be responsible for payment of all labor, materials, equipment, tools, construction equipment and machinery, transportation and other facilities and services necessary for the proper execution and completion of the Work and the Services.

4.2 **Employment of Qualified Personnel and Licensed Workers**

(1) The ESCO shall comply with the Building Control Act and any other applicable statute, and if required, nominate and engage the following personnel:

(a) any suitably qualified Accredited Checker;

(b) any suitably qualified Registered Inspector;

(c) any suitably qualified Resident Engineer; and

(d) any other suitably qualified personnel as may be required under any statute, by law or regulation;

for all Works and the Services under the Contract including but not limited to the design of engineering systems, structures, equipment and engineering modifications. All fees, costs and expenses so incurred shall be borne by the ESCO.

The ESCO shall perform all tasks/phases under this Contract, including construction, and shall perform the Services and install the Works in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in **Schedule G (Standards of Comfort and Quality Assurance)** and **Schedule F (Construction and Installation Schedule)**. The ESCO shall repair and restore to its original condition any area of damage caused by the ESCO’s performance under this Contract. The Agency/company reserves the right to review the work performed by the ESCO and to direct the ESCO to take certain corrective action if, in the opinion of the Agency/company, the structural integrity of the Premises or its operating system is or will be harmed. All costs associated with such corrective action caused by the ESCO’s breach of its obligations under this Contract shall be borne by the ESCO. All construction and installation by the ESCO shall be in compliance with applicable building, fire and other codes in existence as of the date of this contract.

(2) The Agency/company shall have the authority to object to the continued engagement of any qualified personnel under Clause 4.2(1) at any time. The ESCO shall, upon receiving notice in writing of such objection, cease to engage or allow the qualified personnel from carrying out any work or undertaking any duties in any capacity with respect to the Contract and shall promptly replace him with other suitably qualified personnel.

(3) All services called for under this Contract which constitute the practice of architecture or the practice of engineering shall be performed by qualified personnel employed by the ESCO and shall be performed in accordance with applicable laws and regulations. No person shall be engaged by the ESCO under **Clause 4.2(1)** if the Agency/company objects to the engagement of such qualified personnel, in which event the ESCO shall promptly nominate and engage other suitably qualified personnel.

(4) Upon the engagement of the qualified personnel under **Clauses 4.2(1), (2) or (3)**, the ESCO shall not replace such persons as the qualified personnel without the prior written concurrence of the Agency/company.

(5) Information on underground services obtained from the relevant service providers may be provided by the Agency/company. The provision of the information on underground services shall not relieve the ESCO from the responsibility of engaging licensed cables/services detection workers to carry out all cables/services detection work. In the event of any damage to the underground services, the ESCO shall be liable for all costs and charges incurred.

4.3 **Responsibility for Identifying Ambiguities, Discrepancies, etc**

(1) The ESCO shall forthwith notify the Agency/company in writing of any ambiguity, discrepancy, conflict, inconsistency or omission in or between any of the Contract documents that may at any time be found. The Agency/company insofar as it may affect the execution or completion of the Works shall then explain and adjust it and may issue to the ESCO an instruction so as to resolve the ambiguity, discrepancy, conflict, inconsistency or omission. If, in the opinion of the ESCO, compliance with any such instruction is likely to or has involved the ESCO in any Loss and Expense which could not have been reasonably foreseen by an experienced ESCO (assuming a diligent perusal of the documents submitted prior to Contract), the ESCO shall forthwith notify the Agency/company in writing and subject to compliance by the ESCO with **Clauses 14, 23** and **33**, the Agency/company may grant an extension of time pursuant to **Clause 14** and may certify pursuant to **Clause 33** such sum as may be reasonable in respect of such Loss and Expense.

(2) Nothing in Clause 4.3(1) or the Contract shall entitle the ESCO to an extension of time or Loss and Expense or any other compensation or remedy whatsoever (whether pursuant to the Contract or as damages or otherwise in law) for any ambiguity, discrepancy, conflict, inconsistency or omission in any of the documents which could have been found prior to the date of this Contract and the ESCO shall be deemed to have found it and to have entered into the Contract with full knowledge of it and of any resolution of it.

(3) For the avoidance of doubt, any ambiguities, discrepancies, conflict, inconsistencies or omissions in the Schedules, Exhibits and Appendices shall be resolved at the ESCO’s own expense.

4.4 **[Not used]**

4.5 **Security Deposit**

(1) Within 14 days of the commencement of the GESP Contract, the ESCO shall deposit with the Agency/company ***<5 – 10>***% of the Contract Price specified in Schedule C and by way of security for the due performance of and observance by the ESCO of his obligations under the Contract.

(2) The ESCO may, in lieu of the cash deposit in Clause 4.5(1) and for the same purposes, provide a guarantee for an equivalent amount from a Monetary Authority of Singapore (MAS)-approved bank or MAS-approved insurance company and in the prescribed form.

(3) The term “Security Deposit” shall hereafter refer to:

1. the cash deposited under Clause 4.5(1); or
2. the cash proceeds of any or all demands on the guarantee provided pursuant to Clause 4.5(2).

The Agency/company may utilise the Security Deposit to make good any shortfall in savings (pursuant to **Clause 33.2**) or loss or damage sustained or likely to be sustained as a result of any breach of contract whatsoever by the ESCO, including any liquidated damages. If the amount of the Security Deposit utilised by the Agency/company to make good any such shortfall in savings or loss or damage is found to be greater than the amount of shortfall in savings or loss or damage actually sustained by the Agency/company, then the Agency/company shall pay the balance of the amount utilised by the Agency/company without the addition of interest to the ESCO or to the bank or insurer, as the case may be, within 30 days after the expiration of the Defects Liability Period. Where the Security Deposit is made in cash, the Agency/company shall pay to the ESCO the unutilised amount without interest within 30 days after the expiration of the Defects Liability Period.

(4) The provisions of this Clause shall not affect the rights and remedies expressly reserved herein to the Agency/company or bar the Agency/company from claiming loss, shortfall in savings, expense, costs or damages incurred or sustained or likely to be sustained by the Agency/company as a result of any breach of contract of whatsoever nature by the ESCO.

4.6 **Design, Specifications and Other Information**

The ESCO shall design and provide all necessary specification for the Works and the Services in accordance with the site plans and requirements of the Agency/company. Any design detail, plan, drawing, specification, note, annotation and information required shall be provided by the ESCO in such sufficient format, detail, extent size and scale and within such time as may reasonably be required to ensure effective execution of the Works and the Services.

4.7 **Prior Written Acceptance**

The ESCO shall not make any material deviation, alteration, addition and/or omission from the accepted design, revise any procedures for the operation of the equipment or implement other energy and water saving measures in the Premises without the prior acceptance in writing by the Agency/company, which acceptance shall not be unreasonably withheld. No such step or omission shall be taken unless:

(1) the ESCO complies with the standards of comfort and services set forth in **Schedule G (Standards of Comfort and Quality Assurance)** herein;

(2) such modifications or additions to, or replacement of the Works, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the Annual Guaranteed Savings and Guaranteed ROI at the Premises and;

(3) the ESCO bears any cost incurred relative to such step or omission.

All modifications, additions or replacements of the Works or the Services or revisions to operating or other procedures shall be described in a supplemental Schedule(s) to be provided to the Agency/company for approval, which shall not be unreasonably withheld, provided that any replacement of the Works shall be new, and any such change shall have equal or better potential to reduce energy consumption at the Premises than the Works or Services being modified, added on to, replaced or revised. The ESCO shall update any and all software to be used in connection with the Works and the Services accordingly. All such changes to the Works and Services shall become part the Works and Services described in **Schedule A (Equipment to be Installed by ESCO)** and the other relevant Schedules and shall be covered by the provisions of this Contract. Any acceptance or approval by the Agency/company of such submission shall not relieve or in any way limit the responsibility of the ESCO under the Contract.

4.8 **Care of the Works**

(1) From the date of commencement of the Works until the Performance Commencement Date, the ESCO shall take full responsibility for the care of the whole Works.

(2) In the event of any damage, loss or injury to the Works or parts of the Works from any cause whatsoever (except the "excepted risks" as defined in **Clause 25 (1)**), the ESCO shall, at his own cost, make good with all reasonable expedition such damage, loss or injury to the satisfaction of the Agency/company. In the event the damage, loss or injury is caused by the Agency/company and the ESCO did not cause or contribute to such damage, loss or injury, the ESCO shall, if directed by the Agency/company, proceed to make good with all reasonable expedition such damage, loss or injury to the satisfaction of the Agency/company, but shall be entitled to claim Loss and Expense from the Agency/company.

4.9 **Equipment Warranties**

1. The ESCO shall warrant that all equipment installed under this Contract is new, will be free from defects in materials or workmanship and will be installed properly in a good and workmanlike manner. The ESCO shall be responsible for maintaining, repairing, making manufacturer warranty claims (where necessary) and ensuring that the equipment continue to function properly and efficiently for the duration of the Term, except where provided otherwise in **Schedule J (Agency/company’s Operation Responsibilities)**.

(2) The ESCO shall ensure that all warranties relating to the Works either (a) entitle the Agency/company to exercise all the rights under the warranty, or (b) are assigned to the Agency/company. A list of all such written warranties are attached and set forth as **Exhibit II** (Equipment Warranties). The ESCO shall also, on behalf of the Agency/company, pursue all rights and remedies against manufacturers and contractors of the equipment under the warranties in the event of equipment malfunction, or defects in parts, workmanship or performance arising, and shall notify the Agency/company whenever (a) defects in equipment parts or performance occur which give rise to such rights and remedies and (b) those rights and remedies are exercised by the ESCO. The cost of any risk of damage or damage to the equipment and its performance, including damage to property and equipment of the Agency/company or the Premises, due to the ESCO's failure to exercise its warranty rights shall be borne solely by the ESCO.

(3) All equipment installed under this Contract shall be warranted against failure over the Term.

(4) The warranties shall specify that only new, not reconditioned, parts may be used and installed when repair is necessitated by malfunction.

(5) Notwithstanding the above, nothing in this clause shall be construed to alleviate or relieve the ESCO from any liabilities under, or complying with its obligations to perform in accordance with, all the terms and conditions of this Contract.

4.10 **Equipment Maintenance**

(1) During the Term, the ESCO shall (except where the responsibility has been expressly undertaken by the Agency/company under Schedule J) provide all maintenance required for the Works. The maintenance work expected of the ESCO includes all work and costs associated with maintaining the energy producing and consuming systems. The maintenance work also includes periodic equipment inspections, tests, calibrations, preventative maintenance tasks, and corrective maintenance actions required to ensure systems operate as intended. The ESCO shall also provide all maintenance for those portions of equipment belonging to Agency/company that have been modified or replaced to achieve proposed energy and water savings.

(2) The ESCO shall provide all calibration and recalibration services for control and monitoring equipment and sensors throughout the Term.

(3) For avoidance of doubt, in addition to Clause 4.10(1) and 4.10(2), the ESCO shall provide all maintenance required for all chilled-water plant equipment, regardless whether the equipment is installed by the ESCO.

4.11 **Training And Follow-Up Activities By ESCO**

The ESCO shall conduct the training program described in **Schedule I (ESCO's Training Responsibilities)**. The ESCO shall provide ongoing training whenever needed with respect to updated or altered Works or Services, including upgraded software. Such training shall be provided at no charge to the Agency/company.

4.12 **Energy and Water Savings Guarantee**

1. The **Average Annual Chilled-water Plant Specific Consumption** shall refer to the measured chilled-water plant specific consumption averaged over every twelve month period during the Term, where the chilled-water plant is inclusive of, but not limited to, the chillers, chilled-water pumps, condenser water pumps, cooling towers, cooling fans, associated piping, electrical systems, cabling, control and instrumentation. The computation of the Average Annual Chilled-water Plant Specific Consumption shall not be restricted to equipment installed or replaced by the ESCO for the purpose of the GESP Contract.
2. Subsequent to the Performance Commencement Date and throughout the Term, the ESCO guarantees that the Annual Realised Savingswill be equal to or greater than the Annual Guaranteed Savings described in **Schedule B (Energy and Water Savings Guarantee)** and undertakes to pay the Agency/company any shortfall between the annual Realised Savings and the Annual Guaranteed Savings in accordance with **Clause 33**.

(2) Subsequent to the Performance Commencement Date and throughout the Term, the ESCO guarantees that the Average Annual Chilled-water Plant Specific Consumption will meet the Declared Chilled-water Plant Specific Consumption described in **Schedule B (Energy and Water Savings Guarantee)**. In the event that the Average Annual Chilled-water Plant Specific Consumption is poorer than the Declared Chilled-water Plant Specific Consumption, the ESCO undertakes to pay the Agency/company the shortfall in savings as a result of the poorer chilled-water plant Specific Consumption in accordance with **Clause 33**.

(3) In the event that the Agency/company exercises the option to terminate the Contract before the end of the Term, the Energy and Water Savings Guarantee shall be cancelled.

4.13 **Open Book Pricing**

Open book pricing will be required, such that the ESCO will fully disclose all costs. The ESCO will maintain cost accounting records on authorized work performed documenting actual costs for labor and material, or other basis agreed to by the Agency/company. The ESCO will afford the Agency/company access to these records and preserve them throughout the duration of the GESP Contract. If these costs records are required for purposes of the Contract, the Agency/company is not obliged to accept the costs as reflected in these records for any purpose whatsoever, but may review and evaluate the costs through price analysis, compare the costs with reasonable criteria such as established catalog and market prices or historical prices and arrive at its own conclusion as to the reasonable costs incurred.

**5 [Not used]**

**6 WORKS DESIGNED BY THE ESCO**

6.1 **ESCO's Warranty for the Design and Services**

(1) The ESCO shall be fully responsible for the suitability, adequacy, integrity, durability and practicality of the energy and water saving measures in Schedule A.

(2) The ESCO warrants, absolutely and independent of fault, that the measures meet the requirements of this Contract and are fit for the purpose thereof.

(3) The ESCO shall indemnify the Agency/company against any damage, expense, liability, loss or claim which the Agency/company might incur, sustain or be subject to arising from any breach of the ESCO's design responsibility and/or warranty set out in this Clause and under common law.

(4) The ESCO further accepts and is deemed to have checked and accepted full responsibility for the measures, and warrants, absolutely and independent of fault, that the same will achieve the energy and cost savings guaranteed:

(a) notwithstanding that such design may be or may have been prepared, developed or issued by the Agency/company, any of the ESCO's consultants, his sub-contractors and/or his qualified professionals/persons or caused to be prepared, developed or issued by others;

(b) notwithstanding any warranties, guarantees and/or indemnities that may be or may have been submitted by any other person; and

(c) notwithstanding that the same may have been accepted by the Agency/company.

(5) The ESCO shall be fully responsible for the choice of Plant, materials, goods, workmanship, preparing, developing and coordinating all design works to enable that part of the Works to be constructed and/or be fully operational in accordance with the Contract requirements (including but not limited to the securing of all approvals that may be required by the authorities or under any enactment, order ruling or regulation).

6.2 **Submission of Documents Prior to Commencement**

The ESCO shall not proceed with the execution of any part of the Permanent Works until he has submitted to the Agency/company such Drawings, Specifications, manuals, calculations and other information as shall be necessary to demonstrate the suitability, adequacy, integrity, durability and practicality of such design. Submission to the Agency/company shall not relieve or in any way limit the responsibility of the ESCO under Clauses 4.1 and 6.1.

6.3 **Submission of Documents after Completion**

Upon the Date of Acceptance, the ESCO shall submit for the acceptance of the Agency/company operation and maintenance manuals together with Drawings of the Permanent Works designed by the ESCO as completed in sufficient detail to enable the Agency/company (if necessary) to operate, maintain, dismantle, reassemble and adjust the Permanent Works incorporating such design.

6.4 **Amendment and Modification of Accepted Design**

The Agency/company may instruct the ESCO at any time, before, during or after the Date of Acceptance to amend or modify the design provided by the ESCO in respect of any deficiency of any kind or nature discovered by the Agency/company and to carry out such work as is necessary to give effect to such amended or modified design in accordance with the Agency/company's instruction. All work necessary (including re-design work) or variations required, and all consequences (including the effect on cost savings), as a result of such an instruction and their costs shall be the entire responsibility of and shall be borne by the ESCO.

6.5 **Standards Of Comfort and Quality Assurance**

(1) During the Construction of the Works as well as the Term of this Contract, the ESCO shall maintain and operate the Works and Services in a manner that will provide the standards of comfort and quality assurance as described in **Schedule G (Standards of Comfort and Quality Assurance)**. The ESCO shall carry out annual measurements at such time and by such third party independent verifier as may be approved by the Agency/company, to verify that the standards described in **Schedule G** are being met in so far as these measurements are not already available.

(2) The ESCO shall on the instruction of the Agency/company also undertake to engage an independent verifier to undertake such measurements on an ad-hoc basis. If the measurements show that the standards of comfort and quality assurance defined in Schedule G (Standards of Comfort and Quality Assurance) are not met, the ESCO shall bear the cost of the measurements. If the standards of comfort and quality assurance are met, the Agency/company shall reimburse the ESCO for the services of the independent verifier when the scheduled payments are made to the ESCO.

(3) In addition, the ESCO shall ensure that the energy saving measures implemented and any adjustments made to equipment in the Agency/company’s facilities do not result in a deterioration of the standards of comfort and quality assurance below the level defined in Schedule G.

7 **NOTICES AND FEES**

7.1 **Generally**

The ESCO shall comply with and give notices required by any law, regulation or bylaw, or by any public authority or public service company, relating to the Works or the Services or, in the case of a public authority or public service company, with whose systems the same are or will be connected. The ESCO shall pay and indemnify the Agency/company against any fees or charges imposed by law, regulation or by-law, or by any public authority or public service company in respect of the Works or the Services.

7.2 **Variations Arising from Compliance**

The ESCO shall, before making any variation from the proposals contained in Schedule A necessitated by the compliance with **Clause 7.1**, give to the Agency/company notice in writing specifying and giving the reasons for such variation and applying for instructions in reference thereto. Provided that if the ESCO does not receive instructions from the Agency/company within 7 days from the date of the receipt of his application by the Agency/company, he shall proceed with the works conforming to the law, regulation, by-law or requirements of the public authority or public service company in question. If the variation necessitated as aforesaid could not have been reasonably foreseen by an experienced ESCO at the time of submission of the Tender (and if it is not required by or in consequence of any deficiency or fault in the design), the ESCO shall be entitled to the Loss and Expense incurred by him in performing the variation.

7.3 **Cost of Compliance**

The ESCO shall be wholly responsible for compliance with the requirements of any law, regulation, by-law or public authority as stipulated in **Clause 7.1** notwithstanding that such written law is enforced by the Agency/company or that such public authority is, or is part of, the Agency/company. The Agency/company shall be deemed not to be responsible or liable for:

(a) any costs imposed by any requirements of any law, regulation, by-law or public authority; or

(b) any default or delay by any public authority in the enforcement or implementation of any law, regulation or by-law.

**8 SETTING OUT**

8.1 **Accurate Setting Out**

The ESCO shall be responsible for:

1. the accurate setting out of the Works

(b) the correctness of the position, levels, dimensions and alignment of all parts of the Works; and

(c) the provision of all necessary instruments, equipment, apparatus and labour in connection with the foregoing responsibilities.

8.2 **Errors in Setting Out**

If at any time during the execution of the Works, any error appears in the positions, levels, dimensions or alignment of any part of the Works, the ESCO shall, at his own cost, rectify such error.

**9 PROGRAMME FOR THE WORKS AND SERVICES**

9.1 **Construction Schedule**

Construction and equipment installation shall proceed in accordance with the construction schedule approved by the Agency/company and attached hereto as **Schedule F (Construction and Installation Schedule)**.

9.2 **Revision of Programme**

Should it appear to the Agency/company at any time that the actual progress of the Works does not conform with the programme accepted under **Clause 9.1**, the Agency/company may instruct in writing the ESCO to supply additional particulars or to submit a revised or modified programme (or both) in order to show and to ensure completion of the Works within the Time for Completion. The ESCO shall comply with such an instruction within 7 days or such other period as the Agency/company may specify in the instruction.

9.3 **Acceptance of Programme**

The acceptance by the Agency/company of any revised or modified programme shall not relieve the ESCO of any of his obligations to execute and complete the Works in accordance with the Contract and by the Time for Completion, and such acceptance shall not be construed as the grant of an extension of time under **Clause 14** or as a waiver of or fetter on the exercise by the Agency/company of its powers under **Clause 15** or **Clause 31**.

**10 QUALITY IN THE WORKS AND SERVICES**

10.1 **Plant, Materials, Goods and Workmanship**

(1) All Plant, materials, and goods shall be of good quality and of their respective kinds described in the Contract, be suitable and fit for the purpose for which they are required under the Contract and shall in all cases conform with any contractual description or specification contained in the Contract.

(2) All workmanship and Services provided shall be of a good standard and without prejudice to the aforesaid, of the standard contained or referred to in the Contract.

(3) All Works and Services shall be carried out in a good and workmanlike manner.

(4) All Plant, materials, goods, workmanship and Works shall be subjected from time to time to such tests as the Agency/company may by instruction require at the place of manufacture, fabrication or preparation, or on the Premises or at such other place or places as may be specified in the Contract, or at all or any of such places.

(5) No manufactured Plant, goods or equipment shall be modified or varied in any way unless:

(a) such modifications will not affect the manufacturer’s warranty given; and

(b) the ESCO obtains the approval in writing of the Agency/company for the carrying out of such modifications.

(6) The ESCO hereby warrants, represents and promises that:

(a) it has all requisite authority to license the use of proprietary property, both tangible and intangible, contemplated by this Contract;

(b) the Works will meet or exceed any acceptance testing standards set forth in this Contract; and

(c) the Works is or will be compatible with all other mechanical and electrical systems, subsystems, or components in the Premises with which the Works interacts, and that, as installed, neither the Works nor such other systems, subsystems, or components will materially adversely affect each other as a direct or indirect result of the Works installation or operation.

10.2 **ESCO to Provide Everything Necessary for Testing**

The ESCO shall provide everything necessary as are required for examining, measuring and testing any Plant, materials goods or workmanship and shall supply samples of materials, before incorporation in the Works, for testing as may be selected and required by the Agency/company based on good engineering and commercial practices.

10.3 **Cost of Samples**

Save as otherwise expressly provided in the Contract, samples shall be supplied by the ESCO at his own cost.

10.4 **Cost of Test**

The cost of making any test required by the Agency/company shall be borne by the ESCO if the need for such a test is provided in the Contract (unless the Contract provides otherwise for the particular test concerned) or if the test is in the opinion of the Agency/company required in consequence of some prior failure or breach of contract or other default of the ESCO. The cost of making any test which is not so required shall be borne by the ESCO only if the test shows that the relevant Plant, materials, goods or workmanship were not in accordance with the Contract or did not meet the Agency/company's instructions or satisfaction. If the test shows otherwise, then subject to compliance by the ESCO with **Clauses 14, 22, 23** and **33** the Agency/company may grant an extension of time pursuant to **Clause 14** and may certify pursuant to **Clause 33** the cost of the test and/or for any Loss and Expense which the ESCO may have incurred as a result of such test.

10.5 **Examination and Measurement of Works before Covering Up**

No Works shall be covered up or put out of view without the approval of the Agency/company's Representative and the ESCO shall afford full opportunity for the Agency/company's Representative to examine any of the Works which is about to be covered up or put out of view. The ESCO shall give due notice to the Agency/company's Representative whenever any such Works are ready or about to be ready for examination and the Agency/company's Representative shall without unreasonable delay, unless he considers it unnecessary and advises the ESCO in writing accordingly, attend for the purpose of examining such Works. If the ESCO shall fail and/or neglect to comply with the provisions of this Clause:

(a) the Agency/company may require the ESCO to uncover any part or parts of the Works or to do all such things as are necessary for the Agency/company's Representative to inspect the Works as constructed and the cost of such requirements as directed by the Agency/company shall be borne by the ESCO whether or not such part or parts uncovered are found to be executed in accordance with the Contract and the ESCO shall not be entitled to any extension of time for any delay thereby caused; and

(b) the additional cost of any measures or requirements carried out by or directed by the Agency/company shall be borne by the ESCO.

10.6 **Uncovering and Making Openings**

The ESCO shall uncover any part or parts of the Works or make openings in or through the same as the Agency/company may from time to time instruct in writing and shall reinstate and make good such part or parts to the satisfaction of the Agency/company. If any such part or parts have been covered up or put out of view after compliance with the requirements of **Clause 10.5** and are found to be executed in accordance with the Contract, then subject to compliance by the ESCO with **Clauses 14, 22, 23** and **33** the Agency/company may grant an extension of time pursuant to **Clause 14**, and may certify pursuant to **Clause 33** such sum as may be reasonable to cover the costs of uncovering, making openings in or through, reinstating and making good the same and any Loss and Expense but in any other case all such costs and any Loss and Expense shall be borne by the ESCO and the ESCO shall also not be entitled to any extension of time for any delay caused by such instruction.

10.7 **Defects during the Progress of the Works**

If the Agency/company during the progress of the Works finds any Defects, he may instruct the ESCO in writing to do any or all of the following:

(a) To demolish and reconstruct any work so that it is in accordance with the Contract.

(b) To remove from or not to bring to the Premises any materials or goods which in the opinion of the Agency/company are or may not be in accordance with the Contract and to replace such materials or goods with materials or goods which are in accordance with the Contract.

(c) To remove from the Premises any Plant which in the opinion of the Agency/company is not or may not be in accordance with the Contract and to provide Plant which is in accordance with the Contract by the provision of new or alternative or repaired Plant.

The Agency/company's instruction may specify the time or times within which the ESCO is to comply with the instruction. If the ESCO disputes the instruction of the Agency/company, he shall nevertheless comply with it but he may take action in accordance with and subject to **Clauses 14, 23, 33** or **34**. If the an arbitrator should decide that the Agency/company was not justified either wholly or in part in giving the instruction, then provided that the ESCO shall have complied with **Clauses 14, 23** and **33** the Agency/company may certify (or the arbitrator may award) any Loss and Expense incurred by the ESCO and may grant an extension of time pursuant to **Clause 14**.

10.8 **Default of ESCO in Compliance**

If the ESCO should fail or refuse to comply with an instruction of the Agency/company pursuant to **Clause 10.7**, the Agency/company shall be entitled without prejudice to any other rights and remedies to employ and pay others to carry out the subject-matter of the instruction and the amount of any loss, expense, costs or damages suffered or incurred by the Agency/company shall be recoverable from the ESCO.

**11 ADMINISTRATION**

11.1 **Days and Hours of Working**

Subject to any provision to the contrary contained in the Contract, no work shall be carried out during the night or on Sundays or on public holidays without the written permission of the Agency/company’s Representative except when such work is rendered unavoidable or necessary for the saving of life or property or for the safety of the Works, in which case the ESCO shall inform the Agency/company’s Representative at the earliest possible opportunity of the same. For the purposes of this Clause, the term "night" shall mean the period from 6.00 p.m. to 8.00 a.m.

***<Agency/company to amend as necessary>***

11.2 **ESCO's Representative**

(1) The ESCO shall appoint a competent and authorised person to represent him (hereinafter called the "ESCO's Representative") and shall notify in writing the Agency/company and the Agency/company’s Representative of the name of such person. The ESCO's Representative shall be constantly on the Premises during normal working hours when construction and installation works are being carried out and shall give his whole time to the superintendence of such work including the remedying of any Defects after the Date of Acceptance. Any instructions given to him by the Agency/company or the Agency/company’s Representative shall be deemed to have been given to the ESCO.

(2) The Agency/company shall be empowered to object to the appointment or employment or continued employment of any person appointed or employed as the ESCO's Representative and upon receipt from the Agency/company of a notice of objection in writing, the ESCO shall forthwith remove him from the Premises provided always that the Agency/company shall not issue such a notice of objection unreasonably or vexatiously.

* 1. **ESCO’s Key Personnel**

In the event that the key person designated by the ESCO resigns from his position before the completion of the Works or Services, the ESCO shall appoint another key person to take over the duties and oversee the Works and Services. The replacement of the key person shall not hinder the progress of the Works and the ESCO shall ensure that the Works and Services are completed on time pursuant to **Clause 14.1**. The newly appointed key person shall have the necessary expertise and experience as stated in the **Evaluation Criteria *<Agency/company shall define and include its own set of evaluation criteria in the tender document>*** and his appointment is subject to approval from the Agency/company.

11.4 **Access for Agency/company and Agency/company’s Representative**

The Agency/company’s Representative and any person authorised by the Agency/company to examine or inspect the Works shall at all reasonable times have access to the Works and to the factories, workshops or other places where any Plant, materials, goods or work are being fabricated, prepared or stored for the Contract. The ESCO shall ensure that sub-contracts shall contain provisions entitling the Agency/company and any person authorised by it to have such access.

**12 COMMENCEMENT OF WORKS AND SERVICES AND ACCESS TO PREMISES**

12.1 **Commencement of Works and Services**

The ESCO shall commence the Works and Services:

(a) on the date specified in **Schedule F**; or

(b) if no date is specified in **Schedule F**, on the date specified in an instruction in writing to that effect from the Agency/company’s Representative.

Thereafter the ESCO shall proceed with due diligence and expedition and without delay in accordance with the Contract and in accordance with the programme or any revised or modified programme accepted by the Agency/company pursuant to **Clause 9**. The Time for Completion shall run from the date on which the ESCO is to commence the Works under this Clause.

12.2 **ESCO Access**

The Agency/company shall provide access to the Premises for ESCO to perform any function related to the Contract during the Agency/company’s regular office hours, or such other reasonable time as may be requested by the ESCO and agreed to by the Agency/company. The ESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed. The ESCO’s access to the Premises to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by the Agency/company. The ESCO shall immediately notify the Agency/company when emergency action is taken and follow up with written notice within three (3) business days specifying the action taken, the reasons therefor, and the impact upon the Premises, if any.

12.3 **[Not Used]**

12.4 **[Not Used]**

12.5 **Other Contractors**

(1) The Agency/company reserves the right to employ or otherwise engage any persons to carry out on the Premises, work which does not form any part of the Works, whether or not information with respect to such work is provided in the Contract. Every person so employed shall be deemed to be a person for whom the Agency/company is responsible and not to be a subcontractor. The ESCO shall permit the execution of any work by any such person employed or engaged by the Agency/company. For the avoidance of doubt, any properly authorised authority or statutory boards who may be employed in the execution on or near the Premises of any work not in the Contract shall not be regarded as contractors of the Agency/company and shall not be deemed to be a person for whom the Agency/company is responsible.

(2) If any part of the Works depends for proper execution or results upon the work of any such person employed or engaged by the Agency/company as aforesaid, the ESCO shall inspect and promptly report in writing to the Agency/company’s Representative any apparent discrepancies or defects in such work that may materially and adversely affect the execution of the Works. Failure of the ESCO so to report to the Agency/company’s Representative shall constitute acceptance by the ESCO of such person's work as fit and proper to receive into the Works.

12.6 **Waiver Of Liens**

The ESCO will obtain and furnish to the Agency/company a Waiver of Lien from each vendor and sub-contractor in the furnishing, installation and servicing of each piece of equipment of the Works as additional protection against unpaid labor or materials.

**13 SUSPENSION**

13.1 **Suspension of Work or Services**

(1) The ESCO shall, on the instruction in writing of the Agency/company, suspend the progress of the Works or Services or any phase or part of the Works or Services for such time or times and in such manner as the Agency/company may consider necessary and shall, during such suspension, properly protect and secure the Works or such phase or part of the Works so far as is necessary in the opinion of the Agency/company.

(2) Subject to **Clauses 13.2, 22, 23** and **33**, the Agency/company may certify any Loss and Expense which the ESCO may have incurred in giving effect to the instruction beyond any loss, expense, costs or damages which would have been incurred or for which the ESCO had or ought to have allowed in the Tender and, subject to **Clause 14**, may grant the ESCO an extension of time unless such instruction, loss, expense, costs or damages or extension is:

(a) otherwise provided for in the Contract; or

(b) necessary by reason of some default on the part of the ESCO or is caused by an event which it was or would have been the ESCO's responsibility to have overcome; or

(c) necessary for the proper execution of the Works or for the safety of the Works or any part of the Works.

13.2 **Suspension Lasting More than 90 Days**

If the progress of the Works or any part of the Works is suspended on the instruction in writing of the Agency/company for more than 90 days, the ESCO may, unless such suspension is otherwise provided for in the Contract, or continues to be necessary by reason of some default on the part of the ESCO, or for the proper execution of the Works, or for the safety of the Works or any part of the Works, serve a notice in writing on the Agency/company requiring permission within 30 days from the receipt of such notice to proceed with the Works or that part of the Works which is suspended. If such permission is not granted within such period of 30 days, the ESCO may by a further notice in writing so served elect to treat the suspension as if the Agency/company had at the expiry of such period of 30 days given a Notice of Termination pursuant to **Clause 32.4** in which event the ESCO shall be entitled to be paid in accordance with the provisions of **Clause 32.4(2)**.

**14 TIME FOR COMPLETION**

14.1 **ESCO to Complete on Time**

The ESCO shall complete the Works and Services and any phase or part of the Works and Services within the Time or Times for Completion stated in **Schedule F (Construction and Installation Schedule)**. Time for completion of work is of the essence in this Contract.

14.2 **Extension of the Time for Completion**

The time within which the Works or Services or any phase or part of the Works or Services is to be completed may be extended by the Agency/company either prospectively or retrospectively and before or after the Time for Completion by such further period or periods of time as may reasonably reflect delay in completion of the Works or Services which, notwithstanding due diligence and the taking of all reasonable steps by the ESCO to avoid or reduce such delay, will or might be or has been caused by any of the following events:

(a) Force majeure.

(b) Exceptionally adverse weather conditions the assessment of which shall be in accordance with the relevant provision in **Schedule O (Special Conditions)**.

***<Note to Agency/company: Agency/company to insert relevant clauses in Schedule O)***

(c) Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the Works or Services or in the preparation, manufacture or transportation of materials or goods required for the Works or Services and provided the same are not due to any unreasonable act or default of the ESCO or of any subcontractor or of any person employed or engaged upon or in connection with the Works or Services or who may be on site in connection with the Works or Services. Provided that this event shall only apply if the industrial action by workmen, strike, lock-out or embargo causing the delay is in Singapore.

(d) One or more of the "excepted risks" referred to in **Clause 25**.

(e) Compliance with the requirements of any law, regulation, by-law or public authority or public service company as stipulated in **Clause 7.1**.

(f) Fire, storm, lightning, high winds, earthquake or flooding.

(g) Ordering of test by the Agency/company which is not provided by the Contract pursuant to **Clause 10.4** and the uncovering or making openings for inspection of any work pursuant to **Clause 10.6**, unless the test or inspection showed that the Plant, materials, goods or workmanship had not been in accordance with the provisions of the Contract.

(h) [Not used]

(i) Failure of the Agency/company to give access to the Premises or any part of the Premises to the ESCO as required by **Clause 12.2**.

(j) Subject to **Clause 13.1** an instruction by the Agency/company to suspend any work.

(k) Acts or omissions of other contractors engaged by the Agency/company in executing work not forming part of the Contract.

(l) Any act of prevention or breach of contract by the Agency/company not mentioned in this Clause.

(m) [Not used]

(n) Any other ground for extension of time expressly mentioned in the Contract and not mentioned in this **Clause 14.2**. Provided always that the ESCO shall not be entitled to any extension of time where the instructions, or acts of the Agency/company or the Agency/company’s Representative are necessitated by or intended to cure any default of or breach of contract by the ESCO and such disentitlement shall not set the Time for Completion at large.

14.3 **Notice**

(1) If the ESCO is of the opinion that the progress or completion of the Works or Services is or will be or has been delayed by any of the events stated in **Clause 14.2**, he shall forthwith notify the Agency/company in writing of such event and shall in any case do so within 60 days of the occurrence of such event. If the ESCO is of the opinion that the event is one which entitles him to an extension of time under **Clause 14.2**, he shall in that notice and in any case not later than the 60 day period set out above inform the Agency/company, together with the appropriate Contract references, of the reasons why there will or may be delay to the completion of the Works or Services or any part or section of the Works or Services, the length of the delay and of the extension of time required, and the effect of the event on the programme accepted under **Clause 9**. Both the submission of a notice in writing and of the further information within the 60 day period set out above shall be conditions precedent to any entitlement to an extension of time. Subject also to compliance with **Clause 14.3(2)** hereof, the Agency/company shall notify the ESCO in writing within 60 days of the receipt of the notice in writing whether in his opinion the event is one which does or might entitle the ESCO to an extension of time.

(2) If the Agency/company is of the opinion that the notice given by the ESCO or the accompanying references or reasons are insufficient to enable him to decide on the ESCO's application, the Agency/company may require the ESCO to provide within 14 days or such other period as may be required by the Agency/company such further particulars concerning any event and the circumstances of the delay, the measures planned and/or taken to prevent or minimise delay and any further information which the Agency/company may reasonably require.

(3) When the Agency/company has received sufficient information to enable it to decide the ESCO's application, it shall, within a reasonable time, make in writing to the ESCO such extension of time, if any, of the whole or any phase or part of the Works or Services (as the case may be) as may in its opinion be fair, reasonable and necessary for the completion of the Works or Services. The Agency/company shall take into account the effect, or extent, of any work omitted under the Contract and shall also take into account whether the event in question is one which will delay completion of the Works or Services. The Agency/company shall also take into account any delays which may operate concurrently with the delay due to the event or events in question and which are due to acts or default on the part of the ESCO.

(4) Provided that the ESCO shall have complied with the requirements of **Clause 14.3(1)**, if the ESCO shall not have provided the Agency/company with sufficient information to enable it to decide the ESCO's application, the Agency/company may nevertheless make in writing to the ESCO such extension of time of the whole or any phase or part of the Works or Services (as the case may be) as may in its opinion appear to be fair, reasonable and necessary for completion of the Works or Services on the information available to it, taking into account all the matters set out in **Clause 14.3(3)**.

(5) Provided that the ESCO shall have complied with the requirements of **Clause 14.3(1)**, if the ESCO is dissatisfied with any extension of time made or not made by the Agency/company and shall dispute it, he shall not in any reference to any technical expert or arbitrator pursuant to **Clause 34** or otherwise (or to any other tribunal) claim a greater extension of time than that notified pursuant to **Clause 14.3(1)** or advance new or additional grounds not submitted to the Agency/company before it made its decision, nor shall the technical expert or the arbitrator (or any other tribunal) in considering the dispute make a decision taking into account information which was not available to the Agency/company at the time when the Agency/company made its original decision to make or not to make an extension of time.

# 15 EXPEDITING PROGRESS OF WORKS OR SERVICES

15.1 **Notification to Expedite**

If for any reason which does not entitle the ESCO to an extension of time, the rate of progress of the Works or Services or any phase or part of the Works or Services is at any time, in the opinion of the Agency/company, too slow to achieve completion by the Time for Completion of the Works or Services or the relevant phase or part of the Works or Services, the Agency/company shall notify in writing the ESCO accordingly. The ESCO shall thereupon take such steps as are necessary to expedite progress and to complete the Works or Services or the relevant phase or part of the Works or Services in accordance with the Contract. Such steps shall include, if required by the Agency/company, the preparation of a revised or modified programme for acceptance pursuant to **Clause 9.**

15.2 **Work to Expedite Progress**

If, as a result of any notice given by the Agency/company under **Clause 15.1**, the ESCO considers that it is necessary to do any work at night or on Sundays or on public holidays, he shall be entitled to seek the consent of the Agency/company’s Representative so to do, which consent shall not be unreasonably withheld.

**16 LIQUIDATED DAMAGES**

16.1 **Payment by the ESCO**

If the Works or Services shall not have been completed within the Time for Completion or any extended time made pursuant to **Clause 14**, the ESCO shall pay or allow to the Agency/company liquidated damages calculated at the rate or rates stated in **Schedule F (Construction And Installation Schedule)** hereto for the period during which the Works or Services shall so remain incomplete and the Agency/company may recover the amount of such liquidated damages from the ESCO. The payment or deduction of such damages shall not relieve the ESCO from his obligation to complete the Works and Services or from any other of his obligations and liabilities under the Contract.

16.2 **Reduction of Liquidated Damages**

If, before the Time for Completion has expired, the Agency/company has issued a Certificate of Acceptance in respect of any part of the Works or Services, or, where applicable, in respect of any part of any phase or part of the Works or Services set out in **Schedule F (Construction and Installation Schedule),** the ESCO shall nevertheless remain liable for liquidated damages for any failure to complete the remainder of the Works or Services by the Time for Completion but such liquidated damages in respect of the remainder of the Works or Services (or, where applicable, in respect of the remainder of that particular phase or part of the Works or Services) shall, for any period of delay after the date stated in such certificate, and in the absence of alternative provisions in the Contract, be reduced in the proportion which the cost to the ESCO of the part so certified bears to the cost to the ESCO of the whole of the Works or Services (or, where applicable, of that particular phase or part of the Works or Services). The onus shall be on the ESCO to prove the proportion of reduction of the liquidated damages he is entitled to.

16.3 **Agency/company's Common Law Rights for Damages**

In the event that the Agency/company for whatever reason shall not be entitled in law to recover liquidated damages, the Agency/company shall remain entitled to recover such loss, expense, costs or damages as he would have been entitled under common law as if the provisions in this Clause relating to the payment of liquidated damages had not formed part of the Contract. The ESCO's liability to pay the Agency/company such loss, expense, costs or damages shall not be limited in any way whatsoever by the amount of liquidated damages for which he might otherwise have been liable.

16.4 **Extension of Time During Delay Period**

For the avoidance of doubt, if the ESCO shall have failed to complete the Works or Services or any phase or part of the Works or Services by the Time for Completion and the execution of the Works or Services thereafter is delayed by any of the events set out in **Clause 14.2 (g)** to **(m)** inclusive, the Agency/company's right to liquidated damages shall not be affected thereby but, subject to compliance by the ESCO with **Clause 14**, the Agency/company shall grant an extension of time pursuant to **Clause 14**. Such extension of time shall be added to the Time for Completion of the Works or Services (or of the relevant phase or part).

**17 ACCEPTANCE AND PERFORMANCE COMMENCEMENT DATE**

17.1 **Certificate of Acceptance**

(1) The ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed Works in accordance with the procedures specified in **Schedule H (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment)** and prior to the issue of a Certificate of Acceptance by the Agency/company’s Representative as specified in **Exhibit III (ii) (Certificate of Acceptance - Installed Equipment)**. Testing shall be designed to determine if the Works is functioning in accordance with both its published specifications and the Schedules to this Contract, and to determine if all building systems, subsystems or components are functioning properly within the new integrated environment. The ESCO shall provide notice to the Agency/company’s Representative of the scheduled test(s) and the Agency/company’s Representative or his assistants shall have the right to be present at any or all such tests conducted by the ESCO and/or manufacturers of the Works. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in systems and equipment operations that may be observed during system testing and commissioning procedures. Prior to the issue of a Certificate of Acceptance by the Agency/company’s Representative, the ESCO shall also provide the Agency/company with satisfactory documentary evidence that the equipment installed is the equipment specified in **Schedule A (Equipment to Be Installed by ESCO)**.

(2) When the ESCO considers that the whole of the Works have been substantially completed, he may give notice in writing to that effect to the Agency/company’s Representative accompanied by an undertaking, in the prescribed form, to complete any outstanding work during the Defects Liability Period. Within 21 days of the receipt of such notice and undertaking the Agency/company’s Representative shall either:

(a) issue to the ESCO a Certificate of Acceptance stating the date on which in his opinion the Works were completed in accordance with the Contract; or

(b) give instructions in writing to the ESCO specifying all the works which in his opinion are required to be done by the ESCO before the issue of a Certificate of Acceptance.

Provided that the Agency/company’s Representative may, at his discretion and without the receipt of any notice or undertaking from the ESCO, exercise either of the powers given to him in **Clause 17.1(2)(a)** and **Clause 17.1(2)(b)**.

(3) If the Agency/company’s Representative has given instructions pursuant to **Clause 17.1(2)(b):**

(a) he may notify the ESCO of any defects in the Works affecting completion that may appear after such instructions and before completion of the works specified therein and such defects shall comprise part of the said instructions; and

(b) the ESCO shall not be entitled to be issued the Certificate of Acceptance until the works specified in the said instructions have been completed to the satisfaction of the Agency/company’s Representative.

17.2 **[Not used]**

17.3 **Completion of Phase or Part**

(1) In accordance with the procedure set out in **Clause 17.1**, the ESCO may request the Agency/company’s Representative to issue a Certificate of Acceptance in respect of any phase or part of the Works in respect of which a separate Time for Completion is provided in Schedule F and Schedule H

(2) The provisions of **Clause 17.1** shall apply mutatis mutandis to the provisions of **Clause 17.3(1)**.

17.4 **Performance Commencement Date**

(1) The Performance Commencement Date shall be the first day of the month after the month in which all Certificates of Acceptance are in final form and accepted by the Agency/company’s Representative, and when the ESCO shall have delivered a notice to the Agency/company’s Representative that it has installed and commenced operating all of the Works specified in Schedule A (Equipment to be Installed by ESCO) and Schedule H (Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment) and in accordance with Schedule F (Construction and Installation Schedule), and the Agency/company’s Representative has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance as set forth in Exhibit III (ii) (Certificate of Acceptance—Installed Equipment).

(2) The Performance Commencement Date shall not occur and the Agency/company shall not be required to accept the work under this Contract unless and until all equipment installation for the subject Premises is completed by the ESCO in accordance with the terms and conditions of this Contract. The Agency/company shall have fifteen (15) days after notification by the ESCO to inspect and accept the Works. The Agency/company reserves the right to reject the Works if installation fails to meet reasonable standards of workmanship, does not comply with applicable building codes, or is otherwise not in compliance with this Contract.

17.5 **The Term**

(1) Unless otherwise terminated pursuant to the terms of this Contract, the Term shall begin with the Performance Commencement Date and continue for ***<to be filled in by Agency/company, recommended not more than seven years>*** years.

(2) For the avoidance of doubt, during the period from contract execution until the Performance Commencement Date, any energy and cost savings achieved shall not be considered to form any part of the guarantees provided by the ESCO in **Schedule B (Energy and Water Savings Guarantee)**.

**18 DEFECTS**

18.1 **Completion of Outstanding Works and Remedying Defects**

To the intent that the Works shall be in the condition required by the Contract and shall meet all other requirements of the Contract, the ESCO:

(a) shall complete with due expedition and without delay any work outstanding at the Performance Commencement Date (whether or not the subject of any undertaking to do so) and as may be instructed by the Agency/company’s Representative; and

1. shall execute all such works of amendment, reconstruction and remedying defects, shrinkages or such other faults of whatever nature as the Agency/company’s Representative may at any time during the Defects Liability Period instruct the ESCO to execute.

For the avoidance of doubt, the obligation of the ESCO to comply with this Clause shall not in any way prejudice the Agency/company's rights under the provisions of any guarantee relating to the Works or any phase or part of the Works required by the Contract or provided by any supplier or sub-contractor.

18.2 **Cost of Remedying Defects**

All work referred to in **Clause 18.1(b)** shall be executed by the ESCO at his own cost if the necessity for such work is in the opinion of the Agency/company’s Representative, due to:

(a) the fact that it is a Defect; or

(b) any fault in the design of the whole or any part of the Works; or

1. the neglect or failure on the part of the ESCO to comply with any obligation, expressed or implied, on the ESCO's part under the Contract.

If the necessity for the execution of any work is other than one of the causes set out in paragraphs (a) - (c) above, subject to compliance by the ESCO with **Clause 23**, the ESCO shall be entitled to Loss and Expense for such work.

18.3 **Diminution in Value of Works**

If any Defect which the ESCO would otherwise have been liable to rectify at his own cost is such that in the opinion of the Agency/company it will be impracticable or inconvenient to rectify, the Agency/company shall ascertain the diminution in the value of the Works to the Agency/company due to such Defect and the amount of the diminution shall be recoverable by the Agency/company.

18.4 **ESCO to Search**

If any Defect, shrinkage or other fault in the Works appears at any time from the commencement of Works to the end of the Defects Liability Period, the Agency/company may instruct the ESCO to search under the direction of the Agency/company’s Representative for the cause of the Defect, shrinkage or other fault. If such Defect, shrinkage or other fault is one for which the ESCO is liable under the Contract or the necessity for such a search is caused by the ESCO or arises from some default by the ESCO, the cost of the work carried out in searching as aforesaid shall be borne by the ESCO and the ESCO shall in such case remedy such Defect, shrinkage or other fault at his own cost.

18.5 **Liability at Common Law**

The provisions of Clause 18.1 to 18.4 shall not derogate in any way whatsoever from the ESCO’s liability under the Contract or otherwise for defective work at common law.

**19 AGENCY/COMPANY'S COMPLIANCE WITH CHECKLIST**

19.1 **Agency/company’s Compliance with Checklist**

a) The Agency/company agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation set forth in **Schedule J (Agency/company's Operation Responsibilities)**.

b) The Agency/company agrees that the ESCO shall have the right once a month, with prior notice, to inspect the Premises to determine if the Agency/company is complying, and has complied with its obligations. For the purpose of determining the Agency/company's said compliance, the checklist as set forth in **Schedule K (Facility Maintenance Checklist)** as completed and recorded by the ESCO during its monthly inspections, shall be used to measure and record the Agency/company's said compliance. The Agency/company shall make the Premises available to the ESCO for and during each monthly inspection, and shall have the right to witness each inspection and the ESCO’s recording on the checklist.

**20 [Not used]**

**21 MATERIAL CHANGES, DEVIATION IN PERFORMANCE, MALFUNCTION AND EMERGENCIES**

21.1 **Material Changes**

A Material Change shall include any change in or to the Premises or Works, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the Agency/company, to increase or decrease energy consumption in accordance with the provisions and procedures set forth in **Schedule D (Energy Use Baseline Consumption)** and **Schedule E (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline; Annual Reconciliation)** by at least five (5) %. Adjustments to the baseline shall be made in accordance with the provisions set forth in **Schedule E (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline; Annual Reconciliation)** and **Schedule D (Energy Use Baseline Consumption)** if there is a Material Change. Actions by the Agency/company that may result in a Material Change include but are not limited to the following:

1. manner of use of the Premises or Works by the Agency/company; or
2. hours of operation for the Premises or for any equipment or energy using systems operating at the Premises; or
3. permanent changes in the comfort and service parameters set forth in **Schedule G (Standards of Comfort and Quality Assurance)**; or
4. occupancy of the Premises; or
5. structure of the Premises; or
6. types and quantities of equipment used at the Premises or
7. modification, renovation or construction at the Premises; or
8. the Agency/company's failure to operate the Works in accordance with **Schedule J (Agency/company's Operation Responsibilities)**; or
9. casualty or condemnation of the Premises or Works, or
10. any other conditions other than climate affecting energy or water use at the Premises.

21.2 **Reported Material Changes; Notice by the Agency/company**

The Agency/company shall notify the ESCO in writing all actual or proposed Material Changes to the Premises or in the operations of the Premises at least 21 days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the Agency/company within seventy-two (72) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by the Agency/company to have occurred.

21.3 **Deviation in Performance**

1. In the event that the equipment and systems installed by the ESCO deviate in their performance from the design values, resulting in high energy consumption at the Premises, the ESCO shall identify the cause of the deviation and report its findings to the Agency/company in a timely manner. If no Material Change is identified by the ESCO then no adjustments to the baseline will occur.
2. In the event that the measuring equipment and systems installed by the ESCO for the purpose of measuring and monitoring the performance of the chilled-water plant is found to be ineffective or out of calibration, the efficiency of the chilled-water plant shall be assumed to be at the efficiency level prior to any Works carried out for the chilled-water plant retrofit, as determined by the ESCO during the Investment Grade Energy Audit. This efficiency level will be used in the calculation of the Average Annual Chilled-water Plant Specific Consumption, from the time the measuring equipment and systems is found out to be ineffective or out of calibration, to the time the Agency/company-approved replacement measuring equipment is installed.

21.4 **Malfunctions and Emergencies during Term**

(1) The Agency/company shall use its best efforts to notify the ESCO or its designated sub-contractor within twenty-four (24) hours after the Agency/company's actual knowledge and occurrence of:

1. any malfunction in the operation of the Works or any pre-existing energy related equipment that might materially impact the savings or savings guarantee,
2. any interruption or alteration to the energy supply to the Premises, or
3. any alteration or modification in any energy-related equipment or its operation.

(2) The ESCO shall respond to any such notice within twenty-four (24) hours and shall promptly thereafter proceed with corrective measures. Any communication of such conditions by the Agency/company to the ESCO shall be followed within three working days by written notice to the ESCO by the Agency/company. If the Agency/company unreasonably delays in so notifying the ESCO of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied, the ESCO may claim against the Agency/company for any loss in remuneration under this Contract for the period of the delay, provided that the ESCO is able to show the direct causal connection between the delay and the loss.

(3) For malfunction or interruption in the operation of the critical equipment listed in **Schedule G (Standards of Comfort and Quality Assurance)**, the ESCO shall respond to any such notice within the periods stated in Schedule G and promptly rectify the malfunction or interruption.

(4) Where the Agency/company exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify such conditions and not at fault for any material impact upon the savings.

21.5 **Actions by the Agency/company**

(1) During the Term of this Contract, the Agency/company shall not move, remove, modify, alter, or change in any way the Works or any part thereof without the prior written approval of the ESCO except as set forth or as required (expressly or by implication) in **Schedule J (Agency/company's Operation Responsibilities)**. Notwithstanding the foregoing, the Agency/company may take reasonable steps to protect the Works if, due to an emergency, it is not possible or reasonable to notify the ESCO before taking any such actions. In the event of such an emergency, the Agency/company shall take reasonable steps to protect the Works from damage or injury. The Agency/company agrees to maintain the Premises in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Works, all in accordance with the same standard of care the Agency/company applies to the Premises generally.

(2) During the Term, the Agency/company shall not, without the ESCO’s written consent which shall not be unreasonably withheld, affix or install any accessory equipment or device on any of the Works if such addition will change or impair the originally intended functions, value or use of the Works.

**22 CLAIMS FOR LOSS AND EXPENSE**

22.1 **Reasons for Loss and Expense**

The ESCO shall be entitled to recover as Loss and Expense sustained or incurred by him and for which he would not be reimbursed by any other provision of the Contract, all loss, expense, costs or damages of whatsoever nature and howsoever arising as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by:

1. failure of the Agency/company to give access to the Premises to the ESCO in accordance with **Clause 12.2**;
2. the suspension by the Agency/company of any work for a cause which entitles the ESCO to recover Loss and Expense;
3. the issue of an instruction by the Agency/company under any of **Clauses 4.3, 10.4, 10.6** and **25** but only if the Agency/company is liable to pay to the ESCO any Loss and Expense by reason of such an instruction;
4. acts or omissions of other contractors engaged by the Agency/company in executing work not forming part of this Contract; or
5. any act of prevention or breach of contract by the Agency/company not mentioned in this Clause. Provided always that the ESCO shall not be entitled to any such Loss and Expense where it arises from or is necessitated by or is intended to cure any default or breach of contract by the ESCO.

22.2 **Sufficiency of Loss and Expense**

The ESCO shall not be entitled to recover any loss, expense, costs or damage whatsoever resulting from any disruption, prolongation or other material effect to the regular progress or completion of the Works or any phase or part of the Works except in accordance with the express provisions of the Contract.

**23 PROCEDURE FOR CLAIMS**

23.1 **Notice of Claims**

(1) Whenever the ESCO intends to claim any payment pursuant to the Contract, he shall give notice in writing of his intention to do so to the Agency/company within 60 days after the event giving rise to his claim has first arisen and shall comply with **Clause 23.2** to **23.4**. The notice shall specify the event and its consequences, and the giving of such a notice shall be a condition precedent to any entitlement that the ESCO may have.

23.2 **Contemporary Records**

Upon the happening of any event in respect of which the ESCO may intend to make a claim, the ESCO shall keep such contemporary records as may reasonably be necessary to support any claim he may subsequently wish to make. Without necessarily admitting the Agency/company's liability, the Agency/company or the Agency/company’s Representative may, on receipt of a notice under **Clause 23.1**, inspect such contemporary records and may instruct the ESCO to keep any further contemporary records which he considers to be material to the claim of which notice has been given. The ESCO shall permit the Agency/company to inspect all records kept pursuant to this Clause and shall supply it with copies of such records as and when the Agency/company so instructs.

23.3 **Substantiation of Claims**

Within 30 days, or such other time as may be agreed by the Agency/company, of giving notice under **Clause 23.1**, the ESCO shall send to the Agency/company an account in writing giving detailed particulars of the amount claimed and the grounds upon which the claim is based, together with particulars of any claim for extension of time made pursuant to **Clause 14** and for any Loss and Expense associated therewith (where applicable). Where the event giving rise to the claim has a continuing effect, such account shall be considered to be an interim account and the ESCO shall, at such intervals as the Agency/company may require, send such further interim accounts giving the accumulated amount of the claims and any further grounds upon which they are based. Within 30 days of the end of the effects resulting from the event, the ESCO shall send to the Agency/company a final account of the claims. The obligation to give particulars of any claim for an extension of time under this Clause shall not release the ESCO from his obligations under **Clause 14.3(1)**.

23.4 **Access to ESCO's Books and Documents**

In order to verify any claim submitted under this Clause, the Agency/company shall have access to all books, documents, papers or records in the possession, custody or control of the ESCO that are material to the claim for the purpose of making audit, examination, excerpts and transcriptions. Such books, documents, papers or records shall remain available in accordance with this Clause until all claims, arbitration or litigation have been finally disposed of. The ESCO shall use his best endeavours to ensure that all books, documents, papers or records in the possession custody or power of a subcontractor or supplier where material to the claim are similarly made available.

23.5 **Payment of Claims**

(1) Subject to compliance with **Clause 23.1** to **Clause 23.4**, the ESCO shall be entitled to payment pursuant to **Clause 33** of such amounts in respect of any claim as the Agency/company may consider due to the ESCO.

(2) If the ESCO fails to supply the Agency/company with sufficient substantiation of the whole of any amount claimed, the ESCO shall only be entitled to payment in respect of such part of the amount as may have been substantiated to the satisfaction of the Agency/company.

(3) The inclusion by the Agency/company of any amount in respect of any claim or any payment by the Agency/company in respect of any such amount shall not:

(a) prejudice the Agency/company’s right to dispute the ESCO's entitlement to the amount either in principle, or as to its quantification or from referring such dispute for decision pursuant to **Clause 34**; and

(b) be taken into account by any arbitrator (or other tribunal) in deciding whether the ESCO shall repay to the Agency/company the whole or any part of such amount.

23.6 **Failure to Comply**

If the ESCO shall have complied with **Clause 23.1** but shall not have complied fully or at all with any of the provisions of **Clause 23.2** to **23.4**, the Agency/company shall be entitled to make such assessment, valuation or opinion as shall be reasonable on the basis of the information available to him. If the ESCO should dispute such an assessment, valuation or opinion, such dispute shall be decided by the arbitrator (or other tribunal) on the basis only of the information available to the Agency/company at the time when it made its assessment, valuation or opinion and no account shall be taken of any information which the ESCO did not supply to the Agency/company, whether or not he could have done so.

**24 PLANT, CONSTRUCTION EQUIPMENT, TEMPORARY WORKS, MATERIALS AND GOODS**

24.1 **Exclusive Use for the Works**

All Construction Equipment, Temporary Works, Plant, materials and goods provided by the ESCO shall, when brought on to the Premises, be deemed to be exclusively intended for the execution of the Works and the Services and the ESCO shall not remove the same or any part of such Construction Equipment, Temporary Works, Plant, materials or goods except for the purpose of moving it from one part of the Premises to another, without the consent in writing of the Agency/company’s Representative. Provided that consent shall not be required for vehicles engaged in transporting any staff, labour, Construction Equipment, Temporary Works, Plant, materials or goods to and from the Premises.

24.2 **Vesting**

All Construction Equipment, Temporary Works, Plant, materials and goods owned by the ESCO, or by any company in which the ESCO has a controlling interest, shall, when on the Premises, be deemed to be the property of the Agency/company. Provided always that the vesting of such property in the Agency/company shall not prejudice the right of the ESCO to the sole use of the said Construction Equipment, Temporary Works, Plant, materials and goods for the purpose of the Works or the Services nor shall it affect the ESCO's responsibility to operate and maintain the same under the provisions of the Contract.

24.3 **Agency/company not Liable for Damage**

The Agency/company shall not at any time be liable for loss or damage to any of the said Construction Equipment, Temporary Works, materials or goods nor for any loss, expense, costs, damages, liability or claim arising from the presence or use of the said Construction Equipment, Temporary Works, materials or goods.

24.4 **[Not used]**

24.5 **Revesting and Removal**

Upon the removal, with the consent of the Agency/company’s Representative under **Clause 24.1**, of any such Construction Equipment, Temporary Works, materials or goods as have been deemed to have become the property of the Agency/company under **Clause 24.2**, the property therein shall be deemed to revest in the ESCO and, upon completion of the Works and the making good of all Defects, the property in the remainder of such Construction Equipment, Temporary Works and materials shall be deemed to revest in the ESCO.

24.6 **Incorporation of Clause in Subcontracts**

The ESCO shall, where entering into any subcontract for the execution of any part of the Works, incorporate in such subcontract (by reference or otherwise) the provisions of this Clause in relation to the Construction Equipment, Temporary Works, materials or goods brought on to the Premises by the subcontractor.

24.7 **Ownership of Existing Equipment**

Ownership of the equipment and materials existing at the Premises at the time of execution of this Contract shall remain the property of the Agency/company even if it is replaced or its operation made unnecessary by work performed by the ESCO pursuant to this Contract. If applicable, the ESCO shall advise the Agency/company in writing of all equipment and materials to be replaced at the Premises and the Agency/company shall within fifteen (15) days designate in writing to the ESCO which equipment and materials should not be disposed of off-site by the ESCO. The Agency/company shall designate the location and storage for any equipment and materials that should not be disposed of off-site.

24.8 **Ownership of Measurement and Verification Equipment**

The Agency/company agrees to provide rent-free space for the location of equipment required to provide the ongoing measurement of energy and water savings (the “Metering Equipment”) if requested by the ESCO. The Agency/company shall not by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the verification of savings by the ESCO. The ESCO shall insure such Metering Equipment at its own cost and the Agency/company shall have no liability for such Metering Equipment except in the event of damage arising from the fault of the Agency/company.

24.9 **Ownership of Equipment Installed**

Except for the Metering Equipment, ownership of all Plant, all measuring instruments specified in Schedule P, equipment and other items installed under the GESP Contract and accepted by the Agency/company shall pass absolutely to the Agency/company from the Performance Commencement Date. The ESCO shall take all necessary steps (if any is required) to facilitate and ensure the transfer, and the ESCO shall have no further claim on such Plant, equipment or other items. Ownership over such Plant, equipment and other items shall remain with the Agency/company from then on notwithstanding the termination or expiry of the Contract.

**25 EXCEPTED RISKS**

* 1. Excepted risks

(1) The "excepted risks", insofar as they occur in Singapore and directly affect the execution of the Works or the provision of the Services, are:

(i) war and hostilities (whether war be declared or not), invasion, act of foreign enemies;

(ii) rebellion, revolution, insurrection or military or usurped power or civil war;

(iii) riot, commotion or disorder, unless solely restricted to employees of the ESCO or of his sub-contractors and arising from the conduct of the Works;

(iv) ionising radiations, or contamination by radio activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive, toxic, explosive, or other hazardous properties of any explosive, nuclear assembly or nuclear component;

(v) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;

(2) In the event of any damage, loss or injury to the Works happening from any of the "excepted risks", the ESCO shall, if and to the extent required by any written instructions by the Agency/company, rectify and make good the same. Subject to compliance by the ESCO with **Clause 23**, the Agency/company shall allow for any Loss and Expense claims incurred by the ESCO in complying with the instructions of the Agency/company.

(3) In the event of damage, loss or injury to the Works happening from an excepted risk and also from a risk for which the ESCO is responsible under **Clause 4.9 (1)** and **4.9 (2)**, the Agency/company shall make a fair apportionment of the costs so that the Agency/company shall not be obliged to pay costs for which the ESCO was responsible under the Contract.

**26 INDEMNITY PROVISIONS**

26.1 **Injury to Persons**

(1) The ESCO shall be liable for and shall indemnify the Agency/company against any loss, expense, costs, damages, liability or claim whatsoever in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or by reason of the carrying out of the Works or the Services, unless the same is shown to be due solely to any negligent or willful act of the Agency/company or of any person for whom the Agency/company is responsible.

(2) For the avoidance of doubt, the indemnity provided by the ESCO under **Clause 26.1** shall include any damages or compensation payable at common law or under any statute in respect of or in consequence of any accident, illness or injury to any workman or other person in the employment of the ESCO or any subcontractor or any person employed or engaged upon or in connection with the Works or Services or who may be on site in connection with the Works or Services, save and except an accident, illness or injury resulting solely from any act or default of the Agency/company, or of any person for whom the Agency/company is responsible.

26.2 **Damage to Property**

Without prejudice to his liabilities in regard to completing the Works and Services under the Contract, the ESCO shall be liable for and shall indemnify the Agency/company against any loss, expense, costs, damages, liability or claim due to injury or damage of any kind to any property real or personal (including any property of the Agency/company other than the Works) insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works or Services, unless the ESCO proves to the satisfaction of the Agency/company that it was not due to any negligence, omission, breach of contract or default of the ESCO, or of any person for whom the ESCO is responsible including the ESCO's servants or agents or any subcontractors and their servants or agents.

26.3 **ESCO to Rectify Damage**

Without prejudice to the provisions of **Clause 26.2**, where injury or damage of any kind arises to any property out of or in the course of or by reason of the carrying out of the Works or Services, the Agency/company shall be entitled to instruct the ESCO to rectify any such injury or damage at any time before the issue of the Certificate of Acceptance and the ESCO shall upon receipt of such an instruction forthwith comply with the same. If the ESCO later establishes that he would not be liable for such injury or damage by virtue of **Clause 26.2** or otherwise, the ESCO shall be entitled to Loss and Expense for the rectification and a reasonable extension of time for the completion of the Works.

**27 INSURANCE FOR PERSONAL INJURY, WORK INJURY COMPENSATION AND PROPERTY DAMAGE**

27.1 **The Policies**

(1) Without prejudice to his liability to indemnify the Agency/company under **Clause 26**, the ESCO shall, before commencement of any work under the Contract, maintain:

(a) such insurances (subject to any limitations expressly permitted by any Contract documents) as are necessary to cover the liability of the ESCO or, as the case may be, of any such subcontractor, in respect of personal injuries or death arising out of or in the course of or by reason of the carrying out of the Works or the Services or the subcontract works including any liability of the ESCO under the Work Injury Compensation Act or any subsequent modification or re-enactment of such Act; and

(b) such insurances as may be specifically required by the Contract in respect of injury or damage to property real or personal (other than the Works) arising out of or in the course of or by reason of the carrying out of the Works or the Services and caused by any negligence, omission, breach of contract or default of the ESCO, his servants or agents or any person employed or engaged upon or in connection with the Works or Services or who may be on site in connection with the Works or Services. Such insurances shall be subject to such limitations as to the extent of liability for any one accident as may be set out in **Schedule N (Insurance)** hereto. The ESCO's insurances shall provide for the Agency/company's interests to be noted as "Principal" (for Work Injury Compensation/Agency/company's Liability) or as an "Additional Insured" with a "cross liability" provision (for Third Party Liability).

***<Note to Agency/company: this sub-clause (b) does NOT state that the insurance set out in it is required. Whether the insurance will be required or not will fall under other parts of the Contract eg. by insertion into Schedule N>***

(2) Any such insurance as is referred to in **Clause 27.1(1)** shall be placed with an insurer approved by the Agency/company and the ESCO shall deposit with the Agency/company before the commencement of any work on the Premises a copy of the policy or policies of insurance and no later than 14 days thereafter the receipts in respect of the premiums paid under such policy or policies.

27.2 **Damage to Property when ESCO Not Negligent**

(1) The ESCO shall, before commencement of any work under the Contract, maintain in the joint names of the Agency/company and the ESCO such insurances for such amounts of indemnity as may be specified in the Contract documents in respect of any loss, expense, costs, damages, liability or claim which the Agency/company may incur or sustain due to injury or damage of any kind to property real or personal (including property of the Agency/company but not the Works themselves) caused by collapse, subsidence, vibration, weakening or removal of support or lowering of ground water arising out of or in the course of or by reason of the carrying out of the Works except injury or damage:

(a) caused by any breach of contract, negligence, omission or default of the ESCO, his servants or agents or of any subcontractor, his servants or agents or any other person responsible for the provisions of any Plant, materials, goods or work for the Works or Services; and

(b) from any of the "excepted risks" as defined in **Clause 25**

***<Note to Agency/company: Clause 27.2 does NOT state that the insurance set out in it is required. Whether the insurance will be required or not will fall under other parts of the Contract eg specific insertion into Schedule N>***

(2) Any such insurance as is referred to in **Clause 27.2(1)** shall be placed with an insurer approved by the Agency/company and the ESCO shall deposit with the Agency/company before the commencement of any work on the Premises a copy of the policy or policies of insurance and no later than 14 days thereafter the receipts in respect of the premiums paid under such policy or policies.

27.3 **Default in Insuring**

Should the ESCO or any subcontractor default in taking out or maintaining the insurance policies as stipulated in **Clauses 27.1** and **27.2**, the Agency/company (without prejudice to any other rights and remedies available) may itself insure against any risk with respect to which the default has occurred and the amount paid by him in respect of premiums shall be recoverable from the ESCO.

**28 INSURANCE OF THE WORKS**

28.1 **Risks to be Insured**

(1) Without limiting his obligations or responsibilities under **Clause 4**, the ESCO shall, before commencement of any work under this Contract, in the joint names of the Agency/company and the ESCO, insure against all damage, loss or injury from whatever cause arising (other than the "excepted risks" as defined in **Clause 25**) for which he is responsible under the terms of the Contract, the Permanent Works, any Temporary Works and all unfixed Plant, materials and goods delivered on or adjacent to the Premises for incorporation into the Works (but excluding tools and Construction Equipment owned or hired by the ESCO or any subcontractors) and any structures or other works erected on or adjacent to the Premises to the value of not less than the total of all projected Payments to ESCO shown in **Schedule C (Contract Price)**. The ESCO shall keep such Permanent Works, Temporary Works, materials, goods, structures or works so insured until the expiry of the Term, or such other period as the Agency/company may agree to in writing. .

(2) Such insurance shall be effected with an insurer in terms approved by the Agency/company and the ESCO shall deposit with the Agency/company before the commencement of any work on the Premises a copy of the policy or policies of insurance and no later than 14 days thereafter the receipts in respect of the premiums paid under such policy or policies. Each policy taken out pursuant to **Clause 28** shall provide expressly for the payment in the first place to the Agency/company of any insurance moneys due under the policy.

(3) In the event that the ESCO defaults in taking out or maintaining such insurance policies as aforesaid, the Agency/company (without prejudice to any other rights or remedies available) may itself insure against any risk in respect of which the default has occurred and any amount paid by it in respect of premiums shall be recoverable from the ESCO.

(4) Where the ESCO maintains a general policy of insurance with insurers approved by the Agency/company covering contracts as well as the Contract against the aforesaid insured risks, and in the like terms as to payment of insurance moneys to the Agency/company, then the maintenance by the ESCO of such policy shall, if the Agency/company's interest is endorsed thereon, be a discharge of the ESCO's obligations to insure in joint names. In such a case, the production by the ESCO, as and when required by the Agency/company, of current certificates of insurance from the insurers confirming the existence and continuance of the relevant cover required by this Clause shall be a sufficient discharge of the ESCO's aforesaid obligation to deposit the policy or policies and receipts for premiums paid with the Agency/company. Such certificates shall state expressly any exclusions or limitations of liability or insurance excesses under the policy.

28.2 **Application of Insurance Moneys**

(1) Upon the occurrence of any damage, loss or injury to the Works or unfixed Plant, materials or goods at any time prior to the expiry of the Term from any cause whatsoever the ESCO shall subject to the ESCO’s general obligations and responsibilities for the care of the works, proceed immediately to rectify and make good the same free of charge. Any moneys, if and when received under the policies of insurance under this Clause shall be paid in the first place to the Agency/company and then released to the ESCO.

(2) The amount to release as aforesaid shall be calculated as from the date of receipt of the moneys in proportion to the extent of the work of restoration, replacement or repair previously carried out by the ESCO.

**29 DAMAGE TO PROPERTY OF AGENCY/COMPANY OR GOVERNMENT**

29.1 **Costs of Making Good Damage, Loss or Injury**

(1) In the case of damage, loss or injury to property belonging to the Agency/company (other than property forming part of the Works) or the government or any other statutory or public authority (hereinafter called the "relevant authority") caused by the ESCO, or any person for whom the ESCO is responsible including the ESCO's servants or agents or any subcontractors and their servants or agents arising directly or indirectly out of or in relation to or in connection with the design, construction or completion of the Works or Services under the Contract, the cost of making good such damage, loss or injury shall be recoverable by the Agency/company from the ESCO on presentation of an itemised certificate from the Agency/company or the relevant authority specifying the amount payable save and to the extent that the ESCO may prove to the satisfaction of the Agency/company that the amount or any part of it was not caused by any negligence, omission, breach of contract or default of the ESCO, or any person for whom the ESCO is responsible as set out above. The cost of making good such damage, loss or injury shall be recoverable by the Agency/company from the ESCO whether or not the Agency/company is liable in law to the relevant authority for the damage, loss or injury.

(2) Provided always that:

(a) Upon payment or deduction of such cost being made, the Agency/company shall, where the property does not belong to the Agency/company, pay the amount to the relevant authority and furnish to or procure for the ESCO such discharge or release as the ESCO may reasonably require.

(b) If the cost which the ESCO is liable to pay has not been ascertained at the time any moneys payable to the ESCO are due for release to him, then the Agency/company may withhold a sum which is, in the opinion of the Agency/company, sufficient to cover such liability. As soon as the cost payable by the ESCO has been ascertained and deducted from the sum retained, the balance if any shall be released to the ESCO.

(3) Nothing herein shall affect in any way any other remedy at law that the owners of the property which has suffered damage, loss or injury may have against the ESCO.

**30. [Not used]**

**31. TERMINATION BY ESCO**

31.1 **Event that Constitutes an “Event of Default” by Agency/company**

The following event shall constitute an "Event of Default" by the Agency/company:

(a) any failure by the Agency/company to pay the ESCO any sum due hereunder for a period of more than thirty (30) days after written notification by the ESCO that the Agency/company is delinquent in making payment;

31.2 **ESCO’s Options**

If an Event of Default by the Agency/company occurs, the ESCO may, without a waiver of other remedies that exist in law:

1. exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by the Agency/company, and/or for damages which shall include all costs and expenses reasonably incurred;
2. terminate this Contract.

**32 TERMINATION BY THE AGENCY/COMPANY**

32.1 **Termination for Default**

(1) If in the opinion of the Agency/company the ESCO:

(a) has abandoned the Contract;

(b) has, without reasonable cause, failed to commence or continue the Works or the Services in accordance with the Contract;

1. has persistently failed to remove Plant, materials, goods or work from the Premises or to pull down and replace work following the expiry of 14 days from receipt by the ESCO of a written notice by the Agency/company’s Representative to the effect that the Plant, materials, goods or work have been condemned and rejected by the Agency/company’s Representative;
2. has either assigned his interests, rights or benefits under the Consultancy Agreement or GESP Contract or transferred his liability or made arrangements for the vicarious performance of such functions by any other person or make arrangements whereby the execution of the Consultancy Services or GESP Services is carried out by another person or persons without the prior written consent of the Agency/company, which consent shall not be unreasonably withheld;
3. has engaged or permitted the engagement of any subcontractor without the prior written consent of the Agency/company, which consent shall not be unreasonably withheld;
4. has persistently refused or failed to comply with a written instruction from the Agency/company or the Agency/company’s Representative which the Agency/company or the Agency/company’s Representative is empowered to give under the Contract;
5. fails to provide the standards of comfort and service set forth in **Schedule G (Standards of Comfort and Quality Assurance)** due to failure of the ESCO to properly design, install, maintain, repair or adjust the equipment;
6. furnishes any representation or warranty in relation to this Contract that is false or misleading in any material respect when made;
7. fails to furnish and install the equipment and make it ready for use within the time specified by this Contract as set forth in **Schedule A (Equipment to be Installed by ESCO)** and **Schedule F (Construction and Installation Schedule)**;
8. [Not used]
9. fails to secure the release of any lien or encumbrance upon the equipment by any sub-contractor or employee of the ESCO within thirty days from the Performance Commencement Date;
10. fails to pay any amount due, or to perform any other obligation under the Contract;

then the Agency/company may issue a certificate (called hereafter a “Termination Certificate”) to the ESCO identifying the nature of the default to the Agency/company.

(2) If the ESCO:

(a) has committed an act of bankruptcy or becomes bankrupt or insolvent or makes a composition with creditors or if, being a company, any winding up order of any kind is made, or a receiver or manager or judicial manager of the ESCO’s undertaking or assets is appointed, or possession taken or execution levied by creditors or debenture holders or under a floating charge;

(b) has offered or given or agreed to give to any person, any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any action in relation to the obtaining or execution of this Contract with the Agency/company, or for showing or forbearing to show favour or disfavour to any person in relation to this Contract or any other contract with the Agency/company, or if any of the like acts shall have been done by any person employed by the ESCO or acting on his behalf (whether with or without the knowledge of the ESCO), or if in relation to this Contract or any other contract with the Agency/company the ESCO or any person employed by him or acting on his behalf shall have committed any offence under the Penal Code or the Prevention of Corruption Act or any re-enactment or modification of such Code or Act or shall have abetted or attempted to commit such an offence or shall have given any fee or reward the receipt of which is an offence under the said Acts;

(c) [Not used]

(d) has failed to insure the Works or to deposit insurance policies or receipts for premiums as required by **Clauses 27** and **28**;

(e) shall have been issued with a Termination Certificate or a copy thereof and either:

(i) the default in the Termination Certificate has not been made good within 7 days; or

(ii) the said default has been repeated within 30 days of the Termination Certificate; or

(iii) any other default such as would entitle the Agency/company to issue a Termination Certificate has been committed by the ESCO within 30 days of the issue of the original Termination Certificate,

then the Agency/company, without prejudice to any other rights and remedies available to him, may give to the ESCO notice in writing of the termination of this Contract. Upon receipt of the Agency/company's notice, the ESCO shall immediately vacate the Premises, leaving all Plant, Temporary Works, temporary buildings, structures, tools, goods, equipment (whether installed or not) and unfixed materials upon the Premises, other than those which the ESCO may be specifically directed in writing by the Agency/company to remove.

32.2 **Effects of Termination for Default *prior to* Performance Commencement Date**

(1) In the event the Contract is terminated pursuant to **Clause 32.1** at any time prior to the Performance Commencement Date, each of the following shall apply:

(a) Unless otherwise directed by the Agency/company (in which case the specific directions of the Agency/company should be complied with), the ESCO shall, at its own cost, expeditiously and as far as is possible, restore the Premises to the condition and state it was in prior to the commencement of the GESP Contract (including by removing all structures, equipment, fixtures and fittings made, supplied or installed pursuant to the GESP Contract and reinstating the original structures, equipment, fixtures and fittings);

(b) If it so wishes, the Agency/company may employ its own qualified professionals/persons and energy service company(ies) to continue with the design, execution and completion of the Works or Services. In this respect:

(i) The ESCO shall, upon request by the Agency/company, furnish such letter of release and hand over such information, drawings, specifications, designs and other documents and information as the Agency/company shall require to enable the Agency/company to continue with the design, execution and completion of the Works or Services;

(ii) The Agency/company or any other energy services company appointed by him may use for completion of the Works or Services any of the Plant, Temporary Works, temporary buildings, structures, tools, goods, equipment (whether installed or not) and unfixed materials left upon the Premises pursuant to **Clause 32.1** as the Agency/company may think proper;

(iii) If the Agency/company decides to use:

- any such Plant, Temporary Works, temporary buildings, structures, tools, goods, equipment (whether installed or not) and unfixed materials left upon the Premises pursuant to **Clause 32.1**; or

- any works already performed by the ESCO;

for the purpose of completing the Works or Services, the Agency/company shall give credit to the ESCO for the actual cost (without any mark-ups) of such items or works, which actual cost the Agency/company may set off against any damages, loss, costs or expense owed by the ESCO to the Agency/company which has or may be suffered or incurred by the Agency/company as a result of the termination.

and

(iv) where necessary, the ESCO shall take all steps to pass to the Agency/company, without any encumbrances whatsoever, ownership and possession of any such Plant, equipment or other item required by the Agency/company for this purpose.

(c) the Agency/company shall have a lien over all Plant, Temporary Works, temporary buildings, structures, tools, goods, equipment (whether installed or not) and unfixed materials left upon the Premises pursuant to **Clause 32.1** and may sell any of the same and apply the proceeds of sale in or towards the satisfaction of any sums due or becoming due to him from the ESCO under the Contract;

and

(d) the Agency/company shall be entitled to recover from the ESCO any damages, loss, costs and expenses which the Agency/company may sustain or incur arising from or as a result of the termination.

32.3 **[Not used]**

32.3A **Provisions applicable to Clause 32.2**

(1) For the avoidance of doubt the damages referred to in **Clause 32.2** may also include (without limitation):

a) the loss to the Agency/company of the Annual Guaranteed Savings for the duration of the Term;

b) the rectification or other costs and expenses incurred or required to maintain the standards of comfort and quality assurance expected under the Contract including under **Clause 6.5** and **Schedule G (Standards of Comfort and Quality Assurance)**.

(2) No credit shall be given to the ESCO for any costs incurred under **Clause 32.2(1)(b)(iii)** unless the ESCO is able to prove to the Agency/company’s satisfaction that the cost has been actually and reasonably incurred.

32.4 **Termination Without Default Before Performance Commencement Date (Termination for Convenience)**

(1) The Agency/company may at any time give the ESCO a written Notice of Termination before the Performance Commencement Date. This shall have the effect of immediately terminating the Contract and the ESCO shall immediately thereafter vacate the Premises, remove all his Construction Equipment and labour force from the Premises.

(2) In the event of a Notice of Termination under **Clause 32.4(1)** or where **Clause 13.2** is applicable, the Agency/company shall subject to compliance by the ESCO with **Clause 23** certify payment to the ESCO:

(a) for all work executed prior to the date of termination, the actual costs incurred by the ESCO such as:

(i) the cost of the Construction Equipment, Temporary Works and the like;

(ii) the cost of Plant, materials or goods reasonably ordered for the Works which have been delivered to the ESCO or of which the ESCO is legally liable to accept delivery, and where such Plant, materials or goods will become the property of the Agency/company upon such payments made by him; and

(b) any direct Loss and Expense suffered by the ESCO in connection with or as a consequence of the termination.

The Agency/company shall expeditiously certify the amounts payable to the ESCO under this Clause, and the ESCO shall provide all reasonable assistance to the Agency/company. In the event that the ESCO does not submit the necessary information required, the Agency/company shall make his certification on the information available. The amount certified shall be paid by the Agency/company less any sums previously paid or due to or recoverable by the Agency/company from the ESCO. Apart from the payment to be certified under **Clause 32.4(2)**, the ESCO shall not be entitled to any other fees, compensation, damages, quantum meruit or payments of any sort with respect to the termination under this **Clause 32.4**.

32.5 **Termination of Guarantee**

Any time after the Performance Commencement Date, the Agency/company may terminate the Guarantee described in Schedule B pursuant to Clause 4.12 by giving thirty (30) days notice. If the Guarantee is terminated, the ESCO shall not be entitled to any further payments, fees, compensation, damages, quantum meruit of any sort including fees for Measurement and Verification Services, the GESP Contract Guarantee Fee and the Maintenance Fee in **Schedule C (Contract Price)**.

**33 PAYMENTS**

33.1A **Contract Price**

The Agency/company will pay the ESCO the Contract Price as set out in **Schedule C (Contract Price).**

33.1 **Annual Report**

(1) During the Term, the Agency/company shall provide the ESCO with monthly copies of all energy and water bills for the Premises that the Agency/company receives within 14 days of receipt of the bills;

(2) Within thirty (30) days after the end of every twelve month period during the Term, and at the end of the Term, the ESCO shall carry out the Measurement and Verification Services described in **Schedule L (Measurement and Verification Plan)**. Based on the results of the measurements carried out, the ESCO shall compute the Realised Savings and the chilled-water plant specific consumptionbased on **Schedule D (Energy Use Baseline Consumption)** and in accordance with the agreed-upon calculation formulae in **Schedule E (Savings Measurement and Calculation Formulae; Methodology to Adjust Baseline; Annual Reconciliation).**

(3) The detailed results and computations from the activities of the previous paragraph as well as a statement showing the amounts to which the ESCO considers himself to be entitled to shall be compiled into an Annual Report and submitted to the Agency/company within forty (40) days after the end of every twelve month period during the Term, and at the end of the Term.

(4) Upon delivery of the Annual Report and all supporting documentation, the Agency/company shall have thirty (30) days to accept or reject the Annual Report. The Agency/company shall provide written notice of such rejection, within the stated acceptance period, specifying the basis of the deficiency. The ESCO shall have twenty (20) days to cure such deficiency and deliver to the Agency/company a corrected Annual Report.

(5) Within 14 days of receipt of the approved Annual Report, the Agency/company shall certify the amounts to which the ESCO is in its opinion due in respect of each of the amounts in the Annual Report.

33.2 **Shortfall in Savings**

(1) If the Realised Savings as a result of energy conservation measures excluding chilled-water plant retrofit in the Agency/company-accepted Annual Report is less than the corresponding Annual Guaranteed Savings specified in **Clause 1** ofSchedule B, the ESCO shall make up for such shortfall, and shall pay the Agency/company the amount required to achieve the corresponding Annual Guaranteed Savings within thirty (30) days of the delivery of the Annual Report.

(2) If the Average Annual Chilled-water Plant Efficiency is poorer than the corresponding Declared Chilled-water Plant Specific Consumption specified in **Clause 2** of Schedule B, the ESCO will have to pay the Agency/company the shortfall in savings based on the following formula, within thirty (30) days of the delivery of the Annual Report:

Shortfall in savings = <***amount to be filled in,*** ***e.g. 0.001 kWhE/ kWhT* x *operational hours per year* x *average annual cooling demand (kWT)* x *unit cost of electricity per kWhE* x *multiplier>***for each 0.001 kWhE/ kWhT above the Declared Chilled-water Specific Consumption specified in **Clause 2** of Schedule B.

***< Note to Agency/company: Agency/company to insert a multiplier which they deemed as reasonable and economical. It is recommended that the Agency/company specifies the minimum Average Annual Chilled-water Plant Efficiency in their tender document.>***

33.3 **Compensation at the end of the Term**

In the event that the Average Annual Chilled-water Plant Specific Consumption measured over the final twelve (12) months of the Term of the GESP Contract is higher than the Declared Chilled-water Plant Specific Consumption, the ESCO shall pay the Agency/company <***amount to be filled in, e.g. 0.001 kWhE/ kWhT* x *operational hours per year* x *average annual cooling demand (kWT)* x *unit cost of electricity per kWhE*** **x *Y***> for each 0.001 kWhE/ kWhT above the Declared Chilled-water Plant Specific Consumption specified in **Clause 2** of Schedule B, in addition to the shortfall in savings the Agency/company is entitled to pursuant to **Clause 33.2**.

<***Note to Agency/company: Considering that the average overall lifespan of chilled-water plant is 10 years, the Agency/company shall be compensated by the ESCO for the remaining lifespan of Y = (10 – “Term”) years after the expiration of the GESP Contract if the chilled-water plant specific consumption in the final year of the Term fails to meet the Declared Chilled-water Plant Specific Consumption>***

33.4 **Period for Honouring Payments**

(1) The amount due (if any) to the ESCO pursuant to **Clause 33.1** or any other term of the Contract shall (subject to the Agency/company's right to deduct or set-off any sum or damages for which the ESCO is or may be liable under the Contract or in any other way) be paid by the Agency/company to the ESCO within 14 days of the date of the Agency/company’s certification of the amount due. In the event that the Agency/company fails to make payment within the times stipulated, the Agency/company shall pay to the ESCO interest at the rate of ***<Agency/company to state acceptable interest rate, suggest 5% a year>*** upon all sums unpaid from the date by which the same should have been paid.

(2) The amount due (if any) to the Agency/company pursuant to **Clause 33.2** or any other term of the Contract shall be paid by the ESCO to the Agency/company within 14 days of the date of the Agency/company’s certification of the amount due. In the event that the ESCO fails to make payment within the times stipulated, the ESCO shall pay to the Agency/company interest at the rate of ***<Agency/company to state acceptable interest rate, suggest 5% a year>*** upon all sums unpaid from the date by which the same should have been paid.

33.5 **Claim and Payment of Goods and Services Tax**

Unless the ESCO is not a taxable person under the Goods and Services Tax Act, the Agency/company shall reimburse the ESCO the GST charged on the Works or Services performed by the ESCO (if any is chargeable).

33.6 **Effective Date of Payment Obligation**

Notwithstanding anything in the Contract, the Agency/company shall not be required to begin any payments to the ESCO in relation to costs savings unless and until all equipment installation is completed by the ESCO in accordance with the provisions of **Clause 17**, and accepted by the Agency/company as evidenced by the signed Certificate of Acceptance as set forth in **Exhibit III (ii) (Certificate of Acceptance—Installed Equipment)**, and unless and until the said equipment is fully and properly functioning.

**34 SETTLEMENT OF DISPUTES**

34.1 **Reference to the Technical Expert**

(1) If a dispute or difference of a technical or engineering nature shall arise between the Agency/company and the ESCO in connection with or arising out of the Contract whether before or after any termination of the Contract, including any dispute or difference as to any opinion, instruction, determination, decision, certificate or valuation of the Agency/company or the Agency/company's Representative, it shall in the first place be referred by either party in writing to a technical expert mutually acceptable by both the Agency/company and the ESCO for his decision. Such reference shall state that it is made pursuant to this Clause and a copy shall be sent to the other party to the Contract.

(2) No later than the expiry of 30 days after the date upon which such reference has been made, the technical expert shall give notice of his decision in writing to the Agency/company and to the ESCO and shall for information state therein that it is given pursuant to this Clause. Such decision shall identify the reference pursuant to which it is made and shall be final and binding on the parties to this Contract unless, as hereinafter provided, either party shall require that the decision should be referred to arbitration.

(3) Unless the Contract has already been terminated or the carrying out of the Services completed, the ESCO shall, in case of any reference, continue to proceed with the Services in accordance with his obligations under the Contract and the ESCO and the Agency/company shall give effect forthwith to every decision of the Agency/company unless and until the same shall be revised by an arbitrator as hereinafter provided (or as may be otherwise ordered by a Court of competent jurisdiction).

34.2 **Reference to Arbitration**

If the parties cannot agree on who should be appointed as the technical expert or if either the Agency/company or ESCO is dissatisfied with the decision of the technical expert made pursuant to **Clause 34.1** hereof, or if the technical expert fails to give notice of his decision on or before the expiry of the 30 day period following the date on which the technical expert received the reference, then the Agency/company or the ESCO may, within 90 days from the date of receipt of the aforesaid decision of the technical expert, or within 90 days from the date of expiry of the aforesaid 30 day period (as the case may be) give notice to the other party of his intention to refer the decision or the dispute or difference that had not been decided to an arbitrator. The arbitrator may be agreed upon by the parties or failing such agreement, shall be a person to be nominated on the application of either party by the Chairman of the Singapore International Arbitration Centre (“SIAC”). Any such reference shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act or any re-enactment or modification thereof.

34.3 **Arbitration in Event of Termination**

Any dispute or difference raised by the ESCO in connection with the termination, repudiation or abandonment of the Contract by the Agency/company shall be referred to arbitration within 60 days of the notice of termination or act of repudiation or abandonment. Failure to do so within such period shall bar the ESCO absolutely from pursuing such dispute or difference in any arbitration or court proceedings whatsoever.

34.4 **Powers of the Arbitrator**

An arbitrator appointed pursuant to **Clause 34.2** or **Clause 34.3** hereof shall have full power to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute or difference which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given, subject to any provision of the Contract which may constitute a decision or certificate or other document as final or binding or any document or event or omission as barring or preventing a claim being advanced by one party against the other.

**35 RECOVERY BY THE AGENCY/COMPANY**

35.1 **Recovery By The Agency/company**

Wherever in the Contract provision is made for the Agency/company to recover any amount from the ESCO such amount may be deducted from or reduced by any sum due or to become due at any time thereafter from the Agency/company to the ESCO under the Contract or may be recovered by the Agency/company from the ESCO as a debt.