

Sample Draft Energy Performance Contract

This is a sample template for an Energy Performance Contract (EPC). The EPC is one of two typical contracts that the PPESCO enters into with the Client. The other is the Contract for Building Energy Audit and Project Proposal. This template does not, and is not intended to, provide legal advice. Instead, this sample Contract is intended only to provide a general guide of one possible way to structure a PPESCO Energy Performance Contract. It contains provisions that might or might not be suitable for a particular application. This sample template cannot substitute for the advice of a licensed legal professional. Any entity that seeks to enter a PPESCO energy performance contract is advised to consult with a licensed attorney with expertise in energy performance contracts. A qualified attorney can provide advice relating to the particular circumstances and needs of the entity, the client, and the project. The advice includes, but is not limited to, contract provisions that might be dependent on the market sector and legal jurisdiction.

ENERGY PERFORMANCE CONTRACT

for

PROJECT DESCRIPTION/NAME/ADDRESS

This Energy Performance Contract ("Agreement") is made and entered into as of **[DATE]**, in **[CITY AND STATE]**, by and between the **[NAME OF PPESCO]** ("PPESCO"), having its principal offices at **[ADDRESS]** and the **[NAME OF CLIENT]** ("CLIENT"), having its principal offices at **[ADDRESS]**, for the purpose of providing services and installing equipment and other measures designed to reduce energy use and cost, and to reduce future energy-related maintenance and capital expenditures for the following CLIENT property: **[DESIGNATION OF PROJECT LOCATION,**

INCLUDING ADDRESS] (the "Facilities"). This Agreement consists of this Agreement and all attachments and schedules.

WHEREAS, CLIENT owns and operates the Facilities, and would benefit from services and equipment and other measures designed to lower energy costs, as well as to reduce energy-related maintenance and capital expenditures, at the Facilities; and

WHEREAS, PPESCO has completed an "Energy Study," dated **[DATE]**, of the Facilities, and has determined the potential for reducing both future energy costs and future maintenance and capital expenditures, and has also determined the approximate cost of the measures necessary to achieve such savings; and

WHEREAS, CLIENT desires to make improvements to the Facilities, which would result in the conservation of energy, as well as a reduction in anticipated future maintenance and capital expenditures associated with energy use, and intends to use PPESCO's design, engineering, project management, maintenance training, and energy use monitoring services to accomplish this end; and

WHEREAS, PPESCO has skills and experience in providing services of the type described in this Agreement; and

WHEREAS, PPESCO and CLIENT agree that the energy conservation measures shall be designed and installed by contractor(s) with skills and experience in the design and installation of such measures (hereafter the "Contractor"); and

WHEREAS, CLIENT is relying upon PPESCO's skills and experience in connection with PPESCO's responsibilities under this Agreement; and

WHEREAS, CLIENT and PPESCO wish to establish an arrangement whereunder PPESCO will provide the following services: assist CLIENT in securing Project Financing (as hereafter defined); serve as Construction Manager for energy-related work; and, for the life of the loan (a) guarantee the level of savings that will result from the improvements, (b) monitor the energy savings, and (c) ensure the performance of the energy conservation measures; and thus serve as "Performance Contractor";

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, CLIENT and PPESCO hereto covenant and agree as follows:

I. THE PROJECT

A. The Project. PPESCO and CLIENT mutually agree to the "Project," which is hereafter

defined as the provision of services and installation of equipment described in detail in Schedule A (Scope of the Project). In the event of any changes to the Project, the estimated costs of the Project, projected energy savings, or the projected maintenance and capital expenditure savings, PPESCO shall, in consultation with CLIENT, amend accordingly the affected schedules, including, but not necessarily limited to Schedule B (Additional Maintenance and Service Activities), Schedule C (Fixed Base Year Energy Use), and Schedule G (Cash Flow Projection), attached hereto.

B. Adjustments to Schedules. Adjustments to the Schedules shall be made prior to the execution of the Construction Contract and at the completion of the design phase. In the event that CLIENT fails to approve such adjustments, then CLIENT shall have the right to terminate this Agreement at that time. CLIENT's approval of such adjustments to the Schedules shall not be unreasonably withheld. Following execution of the Construction Contract, the Schedules to this Agreement may be amended only by mutual agreement of the parties, except as otherwise expressly provided in this Agreement.

C. Final Budget. PPESCO shall develop a final Project budget (the "Final Budget") immediately prior to the execution of the Construction Contract. The Final Budget shall project all costs associated with the Project (including, without limitation, Project Financing) and with this Agreement for the term of the Agreement ("Annual Project Costs"). The Project shall be deemed "financially viable" if the projected Excess Energy Cost Savings are greater than zero during each year of the term of this Agreement. In the event that the Final Budget shows that the Excess Energy Cost Savings are less than zero in any year during the term of this Agreement, then the Project shall be deemed to be not financially viable, and CLIENT shall have the right to terminate this Agreement.

D. Disagreement over Final Budget. In the event of a disagreement between PPESCO and CLIENT concerning the Final Budget, the parties shall make a good-faith effort to resolve their disagreement. If the parties are unable to resolve their disagreement, then either party may terminate this Agreement, and CLIENT shall pay PPESCO a \$[INSERT AMOUNT] termination fee.

E. HUD Approval. [DELETE IF NOT APPLICABLE] CLIENT shall also have the right to terminate this Agreement if CLIENT is unable to obtain any approval needed for the Project from the United States Department of Housing and Urban Development ("HUD").

II. PROJECT FINANCING

A. Project Financing. PPESCO shall assist CLIENT in securing a loan for the purpose of financing the Project, a lease / purchase of the Project equipment, or some other form of financing

acceptable to CLIENT (the "Project Financing"). The Project Financing shall be equal to the total up-front cost of the services and equipment and other measures required for the Project, minus any Funding Assistance, as described in Section II.B, that is actually received. Any such Project Financing must authorize prepayment of all or part of the loan or lease / purchase without prepayment penalty. The term of the Financing shall not exceed **XX** years **[IDENTIFY TIME PERIOD]** from the Commencement Date, as defined in Section XVII. The closing on the Project Financing shall not occur unless and until a Final Budget has been prepared that demonstrates that the Project is financially viable, as described in Section I. Such financial viability of the Project shall be a contingency of any Project Financing agreement. In addition, the provisions for payments of the Project Financing shall be in such amounts and shall be payable at such times as to permit CLIENT to both (1) make all such payments and (2) meet its financial obligations to PPESCO under this Agreement, from sums that are available to CLIENT in both time and amount (calculated over each calendar year) from the "Annual Project Benefits." The Project Financing shall contain such other terms and conditions as are acceptable to CLIENT.

B. Funding Assistance. PPESCO shall assist CLIENT in applying for energy utility rebates and any other supplemental funding assistance from appropriate sources ("Funding Assistance"). It is estimated that **[\$INSERT AMOUNT]** in Funding Assistance will be available for providing services and installing equipment and other measures described in the Project. This value is reflected in the estimate of CLIENT's cost of improvements shown in the Cash Flow Projection (Schedule G). To the extent that the amount of the Funding Assistance actually received is less than **[\$INSERT AMOUNT]**, CLIENT shall make up any project shortfall and PPESCO shall revise the Cash Flow Projection accordingly, in consultation with CLIENT.

Any Funding Assistance shall be finalized prior to the execution of the Construction Contract by means of one or more written agreements with the funding source(s). All adjustments to the Cash Flow Projections shall also be finalized at that time. In the event PPESCO is unable to secure Funding Assistance, then CLIENT shall have the right to terminate this Agreement without payment to PPESCO, in accordance with the termination provisions of Section I of this Agreement.

C. Capital Investment by the CLIENT. In recognition of the fact that this project provides significant non-energy conservation improvements to the facilities, the CLIENT agrees to invest **[\$INSERT AMOUNT]** in the implementation of the project.

D. Energy Use Records and Data. CLIENT has furnished or shall furnish (or cause its energy suppliers to furnish) to PPESCO, upon PPESCO's request, all of its records and complete

data concerning energy use for the Facilities, including the following data for the most recent thirty-six (36) months: utility and other energy use records; occupancy information; descriptions of any changes in the building structure or its heating, cooling, lighting, or other systems or energy requirements; descriptions of all energy-consuming or energy-saving equipment used in the Facilities; and descriptions of energy management procedures presently in use. If requested, CLIENT shall also provide any prior energy audits of the Facilities, and copies of CLIENT's financial statements and records related to energy use for said thirty-six- (36-) month period at said Facilities, and shall make agents and employees familiar with such records available for consultations and discussions with PPESCO.

III. CONSTRUCTION MANAGEMENT SERVICES

[NOTE – THIS TEMPLATE ASSUMES THE PPESCO WILL PROVIDE CONSTRUCTION MANAGEMENT SERVICES, RATHER THAN BE DIRECTLY RESPONSIBLE FOR CONSTRUCTION AND INSTALLATION OF THE PROJECT. IF THE LATTER APPROACH IS PREFERRED, THE AGREEMENT SHOULD BE MODIFIED ACCORDINGLY]

PPESCO shall provide Construction Management Services, as hereafter described, in connection with the design and installation of the Project. PPESCO has prepared the complete Building Energy Audit Report of the Project Site(s) set forth in **Appendix D (Audit Report)**, which has been approved and accepted by CLIENT as set forth in Exhibit III (i) (**Certificate of Acceptance—Audit Report**). The Audit Report contains a list of all building energy improvement measures agreed upon by the parties.

A. Pre-Construction Phase

1. Preliminary Steps.

- a. PPESCO shall provide a preliminary evaluation of the Project, including a preliminary schedule and construction budget.
- b. PPESCO shall prepare and review with CLIENT alternative conceptual approaches to design and construction of the Project.
- c. Based on the mutually agreed-upon programs, schedules, and construction budget requirements, PPESCO shall prepare, for approval by CLIENT, Outline Specifications as necessary to define the parameters of one or more alternate programs for which contractor proposals will be solicited.

2. Solicitation Documents. Based on the approved Outline Specifications and any adjustments authorized by CLIENT in the schedule or construction budget, PPESCO shall prepare for approval by CLIENT a solicitation package adequate to secure proposals from qualified Contractors to complete the agreed-upon Project. The Project design as reflected in the drawings and specifications shall ensure that the Project will provide standards of heating and water temperature in accordance with the Standards of Comfort specified in Schedule K to this Agreement. The solicitation package to be prepared by PPESCO shall also include all other documents necessary to complete the bidding process by qualified Contractors. The solicitation documents shall notify bidders that CLIENT's ability to enter into a Construction Contract is contingent on its ability to secure Project Financing and Funding Assistance on terms that will permit the Project to be financially viable. A sample Construction Contract shall be included in the solicitation package. PPESCO shall assist CLIENT in preparing this sample Construction Contract.

3. Bid Solicitation. Bidding shall be open to pre-qualified bidders. PPESCO shall pre-qualify bidders, subject to approval of CLIENT, and shall arrange and conduct the bidding process on behalf of CLIENT. PPESCO shall receive bids, prepare bid evaluations, and make recommendations to CLIENT for CLIENT's award of the Contract or rejection of the bids. Selection of the Contractor shall be the responsibility of CLIENT. The bid documents shall provide that CLIENT has the right to reject any and all bids, and shall emphasize that qualifications and experience with the type of design and installation similar to the Project shall be a key consideration in the selection of a bidder.

4. Permits, Approvals, Consents, and Notices. CLIENT is responsible for obtaining all approvals, permits, and consents from, and providing any notices to, government authorities and others as may be required for performance of the Work. CLIENT is also responsible for furnishing copies thereof to PPESCO, except for such approvals, permits, and consents that PPESCO has expressly agreed in writing to obtain, and such notices that PPESCO has expressly agreed in writing to provide.

B. Requirements for the Construction Contract

1. Design of the Project. The parties acknowledge and agree that the Construction Contract shall provide for the design and construction of the Project on a "design / build" basis. This means that the Contractor will be responsible for the design of the Project, using the services of a professional, licensed engineer and will thereafter construct

the Project in accordance with the design plans and specifications. Unless otherwise agreed to by CLIENT (in consultation with PPESCO), the Project design prepared by the Contractor shall be consistent with the design concept contained in the bid package.

2. The Construction Contract. The bid package shall provide that the bidder is expected to enter into a fixed-price contract for construction, substantially in the form included in the bid documents (hereafter the "Construction Contract"). The Construction Contract shall contain **[DELETE IF NOT APPLICABLE: Form HUD-5370 --General Conditions of the Contract for Construction-Public and Indian Housing Programs -- and shall also contain Supplementary]** General Conditions, which shall include at least the following provisions:

a. The design provided by the Contractor shall be prepared, approved, and stamped by a registered and licensed engineer employed or retained by the Contractor with specific skill and experience in designing equipment and systems similar to the Project (hereafter the "Design Engineer").

b. The design of the Project must conform to the design contained in the bid package and shall require that (1) the Project be designed to ensure that it shall provide standards of heating and water temperature which conform to the Standards of Comfort (Schedule K), and (2) with the exception of routine maintenance and routine repairs of the mechanical system, the Project has been designed to provide service for a minimum of 15 years, in accordance with the standards contained in Schedule K.

c. A requirement that both (1) the Contractor and (2) its Design Engineer certify in writing to CLIENT that the Project is designed to meet the requirements and standards set forth in the preceding paragraph (b).

d. The Design Engineer shall be responsible for monitoring and inspecting the installation of the Project to ensure that the installation meets the intent of the design documents and the Construction Contract, and for certifying the same in writing to CLIENT.

e. An Acknowledgment of Plans and Specifications, signed by the Contractor and its Design Engineer. The Acknowledgment shall affirm that the listed Plans and Specifications that bear the seal or signature of the Design Engineer are true, complete, and adequate for construction of the Project. The signed Acknowledgment, along with two complete sets of approved and stamped Drawings and two sets of final Specifications, shall be delivered to CLIENT prior to the start of construction.

f. A requirement that the Contractor (1) bears the risk for all work performed under the Construction Contract, including all associated activities on the Premises, and (2) must carry and maintain appropriate categories and levels of insurance to cover such risk.

g. In addition to worker's compensation, completed operations, comprehensive public liability insurance, and such other insurance as CLIENT may require, the Contractor shall provide the Owner with a certificate of insurance reflecting the provision of professional liability insurance covering its engineering work in an amount not less than Two Hundred Fifty Thousand Dollars (\$250,000) and an agreement that such professional liability insurance shall remain in effect for a period of not less than two years following Final Completion of the Project.

h. Such provisions as are necessary to ensure compliance by the Contractor and any subcontractors with the requirements of any agreements between CLIENT and any entity providing Funding Assistance.

i. A requirement that the Contractor obtain a performance bond at 100% of the Construction Contract price, as well as a payment bond at 100% of the Construction Contract price. Both bonds shall be for the benefit of CLIENT. The bonds shall include the consent of the surety and the principal to an assignment by CLIENT of its interest in the bonds to CLIENT's lender.

Subject to CLIENT's approval, the Contractor may provide different security such as an irrevocable letter of credit, bank deposit, or other security as a substitute for performance bonds or payment bonds.

[DELETE IF NOT APPLICABLE j. Any provisions required by the United States Department of Housing and Urban Development ("HUD").]

k. A requirement that responsibility for the design of the Project shall at all times be vested exclusively with the Contractor.

3. Preconditions for Execution of the Construction Contract. The Construction Contract shall not be executed prior to (a) execution of an agreement for Project Financing; (b) execution of an agreement for Funding Assistance; [DELETE IF NOT APPLICABLE (c) the receipt of all needed approvals from HUD]; and (d) the receipt of all other permits and approvals needed for the Project from any entity with jurisdiction, except for permits which are to be obtained by the Contractor.

C. Construction Management Phase

1. Project Schedule. PPESCO shall prepare and periodically update a Project Schedule for CLIENT's acceptance. In the Project Schedule, PPESCO shall coordinate and integrate PPESCO's services, the requirements of any entity providing Funding Assistance and CLIENT's responsibilities with anticipated construction schedules, highlighting critical and long lead time items. The Project Schedule shall be included in the solicitation package and included in any construction contract with such modifications as may be agreed to by CLIENT, Contractor, and PPESCO. PPESCO shall also monitor the construction schedule, prepared by the Contractor. The construction schedule shall provide for the components of the construction work, phasing of construction, times of commencement, and completion and ordering of products requiring long lead time. PPESCO shall promptly advise CLIENT and Contractor in writing of any deviation from the construction schedule.

2. Location and Access. CLIENT shall provide sufficient rent-free space on the Facilities for the installation and operation of the equipment and other measures and shall take reasonable steps to protect such equipment from harm, theft, and misuse. CLIENT shall provide full access to the Facilities for PPESCO and the Contractor to perform any function related to this Agreement during regular business hours (8:00 a.m. - 5:00 p.m.) and such other hours as may be requested by PPESCO or the Contractor, and agreed to by CLIENT. PPESCO shall be granted immediate access to make emergency repairs or corrections as it may, in its discretion, determine are needed for the duration of the contract period.

3. PPESCO shall determine that the work of the Contractor is being performed in accordance with the requirements of the Construction Contract, endeavoring to protect CLIENT against defects and deficiencies in the work. PPESCO shall inspect the work at least once per week. As appropriate, PPESCO shall have authority, upon written authorization from CLIENT, to require additional inspection or testing of the work in accordance with the provisions of the Construction Contract, whether or not such work is fabricated, installed, or completed. PPESCO, in consultation with CLIENT, may reject work that does not conform to the requirements of the Construction Contract.

4. PPESCO shall review requests for changes, assist in negotiating Contractor's proposals, submit recommendations to CLIENT, and, if they are accepted, prepare Change Orders that incorporate the Contractor's modifications to the Documents.

5. PPESCO shall monitor compliance by the Contractor with all conditions contained in any permits or approvals for the Project. PPESCO shall promptly notify Contractor and CLIENT, in writing, of any deviation from the conditions of any permit or approval.

6. PPESCO shall monitor and record the progress of the Project. PPESCO shall submit written progress reports to CLIENT. PPESCO's reports shall include a description of the Contractor's work on the site, number of workers, work accomplished, problems encountered, and other similar relevant data as CLIENT may require. PPESCO's reports shall be submitted weekly unless a less frequent reporting interval is approved by the CLIENT.

7. PPESCO shall track all Project expenses and shall provide CLIENT with reports that summarize the Construction Budget, Contractor payments to date, remaining amounts due under the Construction Contract, Change Orders and addenda, and the balance available for contingencies.

8. PPESCO shall schedule and conduct job meetings to discuss matters such as procedures, progress, problems, and scheduling. The meetings shall be held weekly, unless otherwise approved by the CLIENT. PPESCO shall prepare and promptly distribute minutes to CLIENT and Contractor.

9. PPESCO shall endeavor to obtain satisfactory performance from the Contractor. PPESCO shall promptly recommend courses of action to CLIENT when requirements of the Construction Contract are not being fulfilled.

10. Based on PPESCO's observations and evaluations of the Contractor's Application for Payment, PPESCO shall review and certify the amounts due the Contractor.

11. PPESCO shall prepare Project Certificates for Payment based on the Contractor's Applications for Payment.

12. Each of PPESCO's Certificates for Payment shall constitute a separate representation to CLIENT based on PPESCO's determinations at the site, as provided in Section C.5 and on the data comprising the Contractors' Applications for Payment, that, to the best of PPESCO's knowledge, information, and belief, the work has progressed to the point indicated and the quality of the work is in accordance with the Construction Contract. The foregoing representations are subject to an evaluation of the work for conformance with the Construction Contract upon Substantial Completion, to results of subsequent tests and inspections, to minor deviations from the Construction Contract correctable prior to completion, and to specific qualifications expressed by PPESCO. The issuance of a

Certificate for Payment shall further constitute a representation by PPESCO that the Contractor is entitled to payment in the amount certified. Payment shall not issue to the Contractor unless CLIENT approves PPESCO's Certificate for Payment. Such approval shall not be unreasonably withheld.

13. With CLIENT's maintenance personnel, PPESCO shall observe the Contractor's final testing and start-up of utilities, operational systems, and equipment. CLIENT and PPESCO shall state in writing that they have observed the Contractor's final testing and start-up of the utilities, operational systems, and equipment.

14. When PPESCO considers Contractor's work or a designated portion thereof substantially complete, PPESCO shall prepare a list of incomplete or unsatisfactory items and a schedule for their completion. PPESCO shall conduct inspections to determine whether the work or designated portion thereof is substantially complete. PPESCO shall secure any final approvals required by any governmental entity with jurisdiction prior to issuing a Certificate of Substantial Completion.

15. PPESCO shall coordinate the correction and completion of the work. Following issuance of a Certificate of Substantial Completion of the Work or a designated portion thereof, PPESCO shall evaluate the completion of the work of the Contractor and determine when the work is ready for final inspection. PPESCO shall conduct the final inspection. Any entity providing Funding Assistance shall be invited to participate in the final inspection.

16. PPESCO shall secure and transmit to CLIENT warranties, lien waivers, and similar submittals required by the Construction Contract for delivery to CLIENT and deliver all keys, manuals, record drawings, and maintenance stocks to CLIENT. PPESCO shall forward CLIENT a final Certificate for Payment upon compliance with the requirements of the Construction Contract.

17. Waiver and Release of Lien. The Contract shall require the Contractor to provide lien releases and affidavits from the Contractor and all laborers, suppliers, and subcontractors verifying that the Contractor, as well as all suppliers, laborers, and subcontractors, have been paid in full, as applicable.

18. One-Year Warranty. PPESCO shall require the Contractor to provide to CLIENT materials and labor guarantees and warranties for a period of not less than one (1) year on all improvements installed at the Facilities.

19.. Maintenance Training: PPESCO shall require the Contractor to provide

training to CLIENT's operation and maintenance staff on the proper operation and maintenance of the improvements made on the premises, including all new equipment installed and all existing equipment that was reconditioned pursuant to the Project and / or the Construction Contract.

IV. COMPENSATION FOR PROJECT DEVELOPMENT AND CONSTRUCTION MANAGEMENT

A. Fee Amount. Subject to Section I.E., for and in consideration of PPESCO performing those services listed in Sections I-III, above, CLIENT shall pay PPESCO according to Schedule I (PPESCO Fee Schedule). Any fees paid pursuant to this paragraph shall be known as "Project Development and Construction Management Fees."

B. Interim Payment. Upon execution of this Agreement and procurement of the Project Financing, CLIENT shall pay PPESCO for eligible costs incurred during completion of work in the Audit Phase (Phase 1) and the Pre-Construction Phase (Phase 2) up to the maximum fees indicated in Schedule I. Upon completion of fifty percent (50%) of the Construction Project and inspection by CLIENT, CLIENT shall pay PPESCO for eligible costs incurred to that date as Construction Management Fees (Phase 3), but not to exceed 50% of the maximum amount listed for Phase 3 in Schedule I. The Project shall be deemed to be 50% complete when CLIENT's cumulative payment of Contractor invoices, excluding stored materials, totals 50% of the sum due under the Construction Contract.

C. Final Payment. The final payment to PPESCO for Project Development and Construction Management Fees shall be made upon completion of installation of all improvements listed in Schedule A, and upon written acceptance of completion by PPESCO, CLIENT, and, if required, any entity providing Funding Assistance. The date by which all such approvals are in place shall be called the "Final Completion Date." All payments to PPESCO for Project Development and Construction Management Fees shall be paid from either the Project Financing or funds made available to the Project from Funding Assistance.

D. Fee in the Event of Termination. Should the Project be terminated for any reason after execution of this contract, other than PPESCO's failure to perform its obligations in a timely and satisfactory manner, CLIENT's payment of the Project Development and Construction Management Fees to PPESCO shall be limited to the hours PPESCO has worked between [INSERT DATE] and the date PPESCO receives or issues written notice of termination, times PPESCO's normal hourly

billing rate per employee, as set forth in Schedule J (PPESCO Hourly Billing Rates), plus all reimbursable expenses incurred by PPESCO on the Project as of that date. In no event shall (a) PPESCO charge for any category of employee not listed in Schedule J; or (b) total fees and expenses exceed the "not to exceed" amount listed in Schedule I.

E. Fees for Additional Services. CLIENT may request that PPESCO perform services in addition to those described above. Any such additional services, including redesign or rebid of portions of the Project, shall be evidenced by a written change order or addendum approved by CLIENT, and shall be paid for by CLIENT at a mutually agreeable fixed fee amount, or, if the parties agree, at PPESCO's current hourly billing rate for each employee, as set forth in Schedule J. CLIENT shall also pay for any reimbursable expenses incurred by PPESCO in conjunction with such additional services. Any redesign or rebid of the Project that is necessitated because the bids received exceed the Project's construction budget, or because any governmental agency with jurisdiction declines to approve PPESCO's design concept, shall not be considered an Additional Service under this paragraph.

F. Late Payment. PPESCO Project Development and Construction Management Fees, reimbursements for expenses, and fees for any agreed-upon additional services are due and payable within thirty (30) days from the date of acceptance of the invoice. CLIENT shall not unreasonably withhold acceptance or payment. Payments past 30 days shall be subject to a late charge of one percent (1.0%) of the invoice amount per month.

G. Monthly Statements. In addition to its invoice for an interim and final payment of Project Development and Construction Management Fees, PPESCO shall provide CLIENT with monthly statements of its work, describing its activities and the time spent on each activity. The monthly statement shall also include a summary of all out-of-pocket expenses, along with a copy of the actual invoices for such expenses, paid by PPESCO during the period covered by the statement. The monthly statements are intended to provide information to CLIENT and do not constitute invoices, which shall be provided to CLIENT in conjunction with the requests for the interim and final payments only.

H. Reimbursement of Costs. As specified above, the reimbursement of costs incurred by PPESCO is included within the not-to-exceed amount of \$[INSERT AMOUNT] set forth in Schedule I. Subject to the foregoing, costs shall include such items as transportation, reproduction of documents, copying, facsimile transmissions, postage and express delivery, reasonable petty cash expenses, fees, and assessments for permits that PPESCO is obligated to pay, and any such other

costs that are reasonable under the circumstances and properly related to the efficient and prompt execution of the Project.

The following costs shall be paid only as part of PPESCO's hourly rate as set forth in Schedule J:

- a. Salaries and other compensation for PPESCO's personnel
- b. Expenses of PPESCO's principal office.
- c. Overhead and general expenses.
- d. PPESCO's capital expense, including interest on PPESCO's capital employed for the work.

I. Changes in the Work. In consultation with PPESCO, CLIENT may, without invalidating this Agreement, order changes in the Project within the general scope of the Project documents consisting of additions, deletions, or other revisions. The consent of PPESCO shall be needed if any such change is likely to materially affect the energy cost savings (as described in Section V), which is expected to be generated by the Project. Such consent by PPESCO shall not be unreasonably withheld. To the extent that such changes substantially increase PPESCO's responsibilities, there shall be an equitable adjustment of the amount of compensation due and owing to PPESCO.

V. CASH FLOW

A. Debt Service and Energy Payments. CLIENT shall continue to be responsible for, and pay directly, all utility and other energy bills. In addition, the CLIENT shall be responsible for all debt service payments on the Project Financing.

B. Annual Reconciliation Period. For each year during the term of this Agreement, the Total Energy Cost Savings, the Excess Energy Cost Savings, and the Annual Project Benefits will be calculated on a calendar-year basis. The "Annual Reconciliation Date" shall be the first day of the following February, at which time the calculation of the Total Energy Cost Savings, the Excess Energy Cost Savings, and the Annual Project Benefits shall take place. The first reconciliation will be for a partial year from the Commencement Date through the following year. Partial year reconciliations shall be prorated over the period for which energy savings are calculated.

C. **Energy Bills.** The CLIENT agrees to provide, each month, consumption and billing data for electric and gas utilities and all other energy suppliers to PPESCO. Copies of energy bills shall be provided to PPESCO within seven days of their receipt by the CLIENT.

VI. CALCULATION OF ENERGY AND COST SAVINGS

Energy and Cost Savings shall be calculated as provided in Schedule D (Energy and Cost Savings Guarantee).

VII. ADJUSTMENTS TO BASE ENERGY USE

A. Adjustments Resulting from Material or Operational Changes in Condition or Use of Facilities. PPESCO has made projections of savings in good faith, based upon the current condition of the Facilities, and based upon information and data supplied to PPESCO by the CLIENT. If inaccurate information, or any material or operational changes in condition or use of the properties leads to a change in energy use (and, therefore, a decrease in the energy savings), PPESCO shall, in consultation with CLIENT, adjust the Fixed Base Year Energy Use (Schedule C) accordingly. CLIENT shall notify PPESCO of any material or operational change within thirty (30) days of such change. A Material or Operational Change is defined as any of the following changes to the:

1. manner or frequency of use of the Facilities;
2. hours of operation of any equipment contained in the Facilities;
3. occupancy;
4. structure of the Facilities;
5. types of equipment used on the premises;
6. conditions affecting energy use in the Facilities, other than those caused by the installation of measures set forth in this Agreement, which reasonably could be expected to change the amount of energy used at the Facilities.

B. Adjustments Resulting from Failure to Perform Adequate Maintenance.

During the period of this Agreement, CLIENT shall be responsible for, and incur the cost of, properly maintaining and servicing the existing and new equipment and systems on the premises. For purposes of this Agreement, "Proper Maintenance and Servicing" of equipment and measures installed or reconditioned under this Agreement shall include:

1. such preventive maintenance measures as may be recommended or required

- by the respective equipment or systems manufacturer;
- 2. such additional maintenance measures recommended by contractors or PPESCO during training of maintenance and operation staff for the Facilities immediately following completion of all improvements included in the Project for this Agreement;
- 3. such additional measures that may be recommended by PPESCO during its semi-annual assessment of maintenance needs, as described under Section IX.D., below; and
- 4. any "Additional Maintenance and Service Activities" outlined in Schedule B.

Both CLIENT and PPESCO acknowledge that proper maintenance of the equipment is essential for achieving the projected energy savings. Should CLIENT fail to perform Proper Maintenance and Servicing, and should such failure reduce the level of utility savings during the loan repayment period, PPESCO shall, in consultation with CLIENT, adjust the Fixed Base Year Energy Use (Schedule C) accordingly.

VIII. ENERGY AND COST SAVINGS GUARANTEE

- A. Guaranteed Savings.** PPESCO guarantees the level of energy savings as provided for in Schedule D (Energy Cost Savings Guaranty), which will be achieved each year as a result of the performance by PPESCO of the services specified in this Agreement, using the Methods of Savings Measurement and Verification set forth in Schedule E (Methods of Savings Measurement and Verification).
- B. Annual Review and Reimbursement.** Energy savings achieved at the Facility shall be reported, reconciled, and verified pursuant to the provisions of Schedule E (Methods of Savings Measurement and Verification). If said annual review, reconciliation, and verification of energy savings discloses that PPESCO has failed to achieve the annual guaranteed energy savings set forth in Schedule D (Energy Savings Guaranty), and provided CLIENT has satisfactorily discharged its material obligations under this Agreement, PPESCO will pay the CLIENT or the CLIENT'S designee, as may be directed by the CLIENT, the difference between the annual amount guaranteed and the amount of actual annual energy and operating cost savings achieved at the Facility. PPESCO shall remit such payments to the CLIENT within thirty (30) days of written demand therefore by the CLIENT. When the total energy savings in any one year during the guarantee period exceed

the Energy Savings Guarantee as set forth in Schedule D (Energy Savings Guarantee), such excess savings shall first be applied to reimburse PPESCO for any payment PPESCO made to CLIENT to meet PPESCO's guarantee for previous years in which the energy savings fell short of PESCO's Energy Savings Guarantee, under the terms as set forth in Schedule D (Energy Savings Guarantee). Any remaining excess savings will be credited toward satisfying performance guarantees in future years of the Agreement.

- C. In recognition that an insufficiency in savings as described in the preceding paragraph for a given year may be a transient condition, such payments from PPESCO will be considered a no-interest loan. PPESCO shall be repaid any sums paid under Section VIII.A to the extent Total Energy Cost Savings in subsequent years produce an excess of savings that allows such repayment (see Section XII).
- D. PPESCO Account for the Benefit of CLIENT. PPESCO shall, during the term of this Agreement, maintain a line of credit with a financial institution with sufficient funds to cover a sum that equals 30% of the current year's projected Annual Project Benefits. Under no circumstances shall the 30% be considered a maximum on the amounts that may be due to CLIENT under the Savings Guarantee described in Section VIII. At least annually, and more often upon request of CLIENT, PPESCO shall provide documentation from financial institution of the current status of this account.

IX. ENERGY MANAGEMENT SERVICES

PPESCO shall perform the following "Energy Management Services" during the term of this Agreement.

A. Monitoring and Calculation of Savings. PPESCO shall monitor the energy use and savings for the Facilities and shall issue reports no less frequently than annually to CLIENT which summarize such use and savings and the associated cost savings.

B. Review Use of Controls. PPESCO shall routinely monitor equipment controls, such as thermostats, to ensure that they are being used in a manner consistent with this Agreement.

C. Energy Training. PPESCO shall provide periodic training and information sharing to building managers, and occupants when appropriate, to further reduce energy use and costs.

D. Assessment of Maintenance Needs. PPESCO shall inspect the operating condition of energy systems in the Facilities as necessary, and no less than twice a year for the duration of the Project Financing. As part of such inspections, PPESCO will identify and notify CLIENT of

outstanding maintenance needs.

X. PERFORMANCE CONTRACT SERVICE FEE

A. Amount. In consideration of the savings guarantee described in Section VIII, and the services described in Section IX, PPESCO shall receive monthly and annual payments (the "Performance Contract Fees") as described in Schedule I. Fees for the partial year from the Final Completion Date shall be based on the hourly rates per employee listed in Schedule J, up to an annual maximum listed in Schedule I. For the first full year and subsequent years, the hourly rates and the annual maximums for the Performance Contract Fees shall each rise based on the standard accepted rate of inflation and Cost-of-Living adjustment.

B. Payment. The Performance Contract Fee shall be payable to PPESCO only to the extent that there are funds available from the Annual Project Benefits after the debt service payments on the Project Financing have been made. Any unpaid Performance Contract Fees due for any year shall be carried forward and added to the Performance Contract Fees due for the following year, but shall still be payable only to the extent that there are savings available from the Annual Project Benefits after the debt service payments on the Project Financing have been made. Notwithstanding the preceding two sentences, in the event that there are Excess Energy Cost Savings, as described in Section XI, then any past unpaid Performance Contract Fees may be payable out of the Excess Energy Cost Savings.

XI. DISTRIBUTION OF EXCESS ENERGY COST SAVINGS.

A. "Excess Energy Cost Savings" shall be equal to the Total Energy Cost Savings minus the debt service payments for the Project Financing and the Performance Contract Fees paid for a given year. As part of the Annual Reconciliation, described in Section VI, above, there shall be a determination of the amount of Excess Energy Cost Savings, if any, for the preceding year. Any such Excess Energy Cost Savings shall then be distributed in the following manner and order:

1. First, to pay PPESCO any unpaid Performance Contract Fees from the current or previous years, as described in Section X.B.;
2. Second, to repay any outstanding no-interest loans that PPESCO may have provided to CLIENT as a part of the Savings Guarantee described in Section VIII.
3. Third, to pay for maintenance costs incurred by the CLIENT in fulfilling their obligations described in Section VI.B.

4. Fourth, to reinvest in any efficiency measures in the facilities mutually agreed upon by PPESCO and CLIENT.

5. Fifth, any remaining balance after payment for each of the five items listed above shall be retained in its entirety by CLIENT.

B. Insurance.

During all phases of this Agreement, PPESCO shall purchase and maintain the following types and amounts of insurance coverage with respect to its work and services under this Agreement. Before commencing work and services under this Agreement, PPESCO shall provide Certificates of Insurance to show that the following minimum coverages are in effect. All policies shall be non-cancellable, without 30 days' prior written notice from the insurance carrier to PPESCO.

Workers' Compensation: With respect to all operations performed under this Agreement, PPESCO shall carry, if applicable, workers' compensation insurance in accordance with the laws of any state in which it is performing the work under this Agreement.

General Liability Insurance: With respect to all operations performed under this Agreement, PPESCO shall maintain commercial general liability written on an occurrence form, with limits of not less than:

\$1,000,000 Each Occurrence
 \$1,000,000 General Aggregate
 \$1,000,000 Products / Completed Operations Aggregate
 \$50,000 Damages for Premises Rented to You

Commercial general liability insurance shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal and advertising injury, and liability assumed under an insured contract.

On the date of execution of this Agreement, and on each anniversary date thereafter, PPESCO shall provide CLIENT with certificates of insurance showing the coverage described above. The Certificates of Insurance shall name CLIENT as additionally insured party as its interests may appear.

XIII. ADDITIONAL SERVICES

The following additional services are not included in the scope of this Agreement, but are available from PPESCO for additional fees:

A. Investigation of opportunities for making additional cost-effective energy efficiency

improvements in the Facilities. The decision of whether to pursue such improvements shall be mutually agreed upon by PPESCO and the CLIENT.

B. Analysis, design, and construction management of additional energy efficiency improvements to be funded by excess savings.

XIV. ACCESS TO PROJECT RECORDS

PPESCO shall provide and shall ensure that the Contractor provides CLIENT and any of its duly authorized representatives, reasonable access to books, documents, papers, and records for the purpose of making audit, examination, excerpts and transcriptions, and shall retain required records for three years after final payments have been made by CLIENT.

XV. HOLD HARMLESS CLAUSE

In the event that either party hereto suffers any claim, action, loss, damage, or expense (including reasonable attorney's fees and court costs) in connection with the loss of life, personal injury, or damage to property caused in whole or material part by any negligent act or omission of the other party (hereafter the Responsible Party, which shall be deemed to include the employees, agents, and contractors of said Responsible Party) arising out of or otherwise related to the Responsible Party's activity pursuant to this Agreement, the Responsible Party shall indemnify and hold such first party harmless therefrom. In the event that the Responsible Party shall fail or refuse to indemnify and defend, then the first party shall have the right to defend any claim to which the aforesaid indemnification and hold harmless agreement applies, and may defend or settle any such claim in any manner as in its sole discretion it may determine appropriate and may seek to be indemnified and held harmless pursuant to this provision by the Responsible Party.

XVI. HAZARDOUS MATERIALS

- A. For purposes of this Section, "Hazardous Material" means (A) any substance that is listed, defined, designated or classified under any state, federal, or local law relating to the protection of the environment or human health as a (i) hazardous material, constituent, or waste, (ii) toxic material, substance, constituent, or waste, (iii) radioactive material, substance, constituent, or waste, (iv) dangerous material, substance, constituent, or waste, (v) pollutant, (vi) contaminant, or (vii) special waste; or (B) petroleum,

petroleum products, radioactive matters, polychlorinated biphenyl, pesticides, asbestos, or asbestos-containing materials.

- B. PPESCO's obligations under this Agreement do not include, directly or indirectly, the detection, testing, handling, storage, removal, treatment, transportation, disposal, monitoring, abatement, or remediation of any contamination by Hazardous Materials, including but not limited to contamination of soil or groundwater, of any location or facility at which work under this Agreement is performed. The foregoing sentence includes, without limitation, asbestos, PCBs, refrigerants, mercury bulb thermostats, mercury in lighting, used oil, ionization smoke detectors, and ballasts.
- C. CLIENT warrants that, prior to the execution of this Agreement, it notified PPESCO in writing of any and all Hazardous Materials, to the best of its knowledge following due inquiry, known to be present, potentially present or likely to become present at the Project site(s) and provided PPESCO a copy of any Project site(s) safety policies and information.

XVII. TERM OF AGREEMENT

A. Commencement Date. The "Commencement Date" shall be the first day of the month after the month in which the CLIENT executes the final Certificate of Substantial Completion, which indicates that the construction period is complete.

B. Term of Agreement; Interim Period. Subject to the following sentence, the term of this Agreement shall be XXX and consistent with the loan term's years, measured from the beginning of the Commencement Date. Nonetheless, the Agreement shall be effective and binding upon the parties immediately upon its execution, and the period from contract execution until the Commencement Date shall be known as the "Interim Period."

C. Termination for Cause. This Agreement may be terminated for "cause," which is defined as a material breach of this Agreement or default by either party and which remains uncured for more than 60 days after the terminating party's notice to the defaulting party describing the nature of such alleged default or breach. In the event of such breach or default, any amounts owed prior to the date of such breach or default shall then be paid. The parties shall make good-faith efforts to resolve any disagreements through negotiation. Should good-faith negotiation fail to resolve any disagreement, either party may, at its option, submit any issues not so disposed of to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American

Arbitration Association or may, without waiver of other remedies which exist in law or equity, exercise any and all remedies available at law or in equity, including bringing an action or actions from time to time for recovery of amounts due and unpaid by the defaulting party, and / or for damages, which shall include all costs and expenses (including reasonable attorney's fees) reasonably incurred in exercise of its remedy. The parties expressly agree that the provisions for arbitration contained in this paragraph are not binding upon either party, unless the terminating party submits the issue to arbitration. The terminating party shall have the absolute right and option to pursue judicial remedies instead of arbitration. The Acknowledgment of Arbitration at the end of this Agreement is entered into with the express understanding and agreement of the parties of this right of the terminating party to pursue judicial remedies in lieu of arbitration.

D. Termination for Convenience. This Agreement may also be terminated for convenience by CLIENT upon sixty (60) days' written notice to PPESCO. Upon such termination, CLIENT shall pay PPESCO any sums that are due and owing to PPESCO, up to the date of termination. Upon such termination, all rights and obligations thereafter arising under this Agreement shall be null and void.

E. Final Reconciliation. In the event that any termination of this Agreement occurs at other than an Annual Reconciliation Date, a "final Reconciliation" shall take place, including the pro-rated Calculation of Energy Cost Savings, Adjustment to Total Energy Cost Savings, Cash Flow, Savings Guarantee, Performance Contract Service Fee, and Distribution of Excess Project Benefits, all as defined above in Sections V, VI, VII, VIII, X, and XI. Any amounts owed to either party to this Agreement at the date of termination under the terms of the Agreement shall be determined at the Final Reconciliation and shall be promptly paid, if due.

Nothing in this Agreement is intended to relieve either party for any acts, omissions or breaches that may have occurred prior to the date of termination of this Agreement, irrespective of the basis for such termination.

XVIII. BINDING EFFECT; SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Wherever the words "CLIENT" or "PPESCO" are used herein, they include their several successors, grantees, and assigns subject to the limitations of law and of this instrument. Nothing in this Agreement is intended, nor shall anything in this Agreement be deemed to create any rights on behalf of any person or persons not parties hereto, including, without

limitation, any energy supplier. This Agreement may not be assigned, delegated, or otherwise transferred without written approval of both PPESCO and CLIENT.

XIX. [INSERT STATE] LAW

This Agreement shall be governed by and construed in accordance with the laws of the [INSERT OFFICIAL NAME OF THE STATE] (excluding the choice of law rules thereof).

XX. REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

(i) it has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Agreement and perform its obligation hereunder;

(ii) its execution, delivery, and performance of this Agreement have been duly authorized by, or are in accordance with, its organic instruments, and this Agreement has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

(iii) its execution, delivery, and performance of this Agreement will not result in a breach or violation of, or constitute a default under, any agreement, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or

(iv) it has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

XXI. ADDITIONAL REPRESENTATIONS OF THE PARTIES

A. CLIENT hereby warrants, represents and promises that:

(i) it has provided or shall provide in a timely manner to PPESCO, all records relating to energy use of the Facilities requested by PPESCO, and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Agreement will be, true and accurate in all material respects; and

(ii) it has not entered into any leases, contracts, or agreements with other persons or entities regarding the leasing of energy efficiency or renewable energy equipment or the provision of energy management services for the Facilities or with regard to servicing any of the energy-related

equipment located in the Facilities. CLIENT shall provide PPESCO with copies of any successor or additional leases of energy efficiency or renewable equipment and contracts for management or servicing of pre-existing equipment at the Facilities that may be executed from time to time hereafter within thirty (30) days after execution thereof.

B. PPESCO hereby warrants, represents and promises that:

(i) before commencing performance of this Agreement:

(a) it shall have become licensed or otherwise permitted to do business in the **[INSERT OFFICIAL NAME OF STATE]**;

(b) it shall have provided proof and documentation of liability insurance pursuant to Section XII.A.I;

(ii) it shall make available, upon reasonable request, documents relating to its performance under this Agreement, including contracts and sub-contracts it shall enter into;

(iii) it shall use subcontractors and delegates who are qualified, licensed, and bonded in this state to perform the work so subcontracted or delegated pursuant to the terms hereof.

XXII. WAIVER OF LIENS

PPESCO will obtain and furnish to CLIENT a Waiver of Liens from each vendor, material supplier, and laborer in the furnishing, installation, and servicing of each piece of Equipment.

XXIII. INDEPENDENT CAPACITY OF THE CONTRACTOR

The parties hereto agree that PPESCO, and any agents and employees of PPESCO, in the performance of this Agreement, shall act in an independent capacity and not as officers, employees, or agents of the CLIENT.

XXIV. NO WAIVER

The failure of PPESCO or CLIENT to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of either party's right to thereafter enforce the same in accordance with this Agreement in the event of a continuing or subsequent default on the part of PPESCO or CLIENT.

XXV. SEVERABILITY

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

XXVI. ACKNOWLEDGMENT OF ARBITRATION

I understand that this Agreement contains an agreement to arbitrate. After signing this Agreement, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement, unless it involves a question of constitutional or civil rights. Instead, I agree to submit any such dispute to an impartial arbitrator.

[PPESCO]

BY: _____

[name]

[TITLE] & Duly Authorized Agent

[CLIENT]

By: _____

[name]

[TITLE] & Duly Authorized Agent

Signed under and as of the day and year first written above.

[PPESCO]

By: _____

[name]

[TITLE]. & Duly Authorized Agent

[CLIENT]

By: _____

[name]

[TITLE]. & Duly Authorized Agent

Index of Schedules

Schedule A - Scope of the Project: Description of the scope of the energy conservation and related work to be performed at [PROJECT LOCATION]

Schedule B - Additional Maintenance and Service Activities

Schedule C - Fixed Base Year Energy Use

Schedule D - Energy and Cost Savings Guarantee

Schedule E - Methods of Savings Measurement Verification

Schedule F - Energy Rates for Savings Calculations

Schedule G - Cash Flow Projection

Schedule H - (not used)

Schedule I - PPESCO Fee Schedule

Schedule J - PPESCO Hourly Billing Rates

Schedule K - Standards of Comfort