Energy Performance Agreement

The State of Victoria represented by:

[Department/Agency Name]

ACN:

And

[Insert name of ESCO]

ACN:

[This agreement contains user notes in yellow highlighting. These should be removed before finalising the agreement]

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The State of Victoria represented by:

[Department/Agency Name]

of

(Agency)

and

[Insert name of ESCO]

of

(ESCO)

Background

1. The Victorian Government is seeking to progressively achieve utility consumption and operational cost savings through the use of energy performance contracting. Energy Service Companies (**ESCO**) have entered the Victorian Government's energy performance contracting Panel and are pre-qualified to deliver Energy Performance Contracts.
2. The Victorian Government, through its program Greener Government Buildings, aims to improve the energy efficiency of existing government buildings to reduce operating costs and greenhouse gas emissions.
3. The Agency wishes to install Energy Conservation Measures (**EPC Solutions**) at the Premises in order to achieve reductions in energy and water consumption, and cost savings from improvements in the operation and maintenance of Equipment at the Premises.
4. The ESCO has expertise in the design, installation, implementation, operation and measurement and verification of the EPC Solutions.
5. The ESCO has performed a Detailed Facility Study (**DFS**) dated [insert date] and attached at Annexure 2 specifying energy usage on the Premises and identifying strategies for the delivery of energy savings and other operational and environmental benefits.
6. The Agency has reviewed the DFS and has agreed to appoint the ESCO to design, install and monitor the operation of the EPC Solutions at the Premises throughout the Term and in accordance with the terms of this Agreement**.**
7. The parties agree to work together throughout the Term and in accordance with the terms of this Agreement.

Agreed terms

* 1. Definitions and Interpretation
     1. Definitions

In this agreement, unless the context otherwise requires:

1. **Acceptance Certificate** means the certificate to be issued by the ESCO to the Agency for its execution upon completion of the installation of the EPC Solutions which certificate shall itemise the completion of each task specified in a Works Specification.
2. **Agency** means the organisation with which the ESCO has entered into this Agreement.
3. **Agreement** means this Agreement, including any Schedules and any annexures to the Schedule or any item incorporated by reference.
4. **Apprentice** means a person whom an employer has undertaken to train under a Training Contract.
5. **Approvals** means the laws relating to the Services, the EPC Solutions, the Premises or the work under the Agreement (including the Building Code of Australia), relevant Standards Australia standards, and the lawful requirements of any person or authority having jurisdiction in connection with such matters.
6. **Base Year Energy Period** means the twelve (12) month period of consumption (expressed in units such as kilowatt hours of electricity, megajoules of natural gas, pounds of steam and litres of oil) of each Energy Source used at the Premisesas set out in the DFS, and as modified from time to time in accordance with Clause 9.
7. **BPG-MPV**means the AEPCA Best Practice Guide to Measurement and Verification of Energy Savings as set out in Annexure 1.
8. **Business Day** means a day which is not a Saturday, Sunday or a Public Holiday.

**Cadet** means those persons enrolled in a recognised tertiary level organisation and who receive structured learning opportunities as part of their engagement to a Local Jobs First project (e.g. cadets in architecture, quantity surveying, or engineering) but which is not under a Training Contract.

**Commencement Date** means the date on which this Agreement is to start, as specified in Schedule 1

1. **Completion** **Date** means the date of the Acceptance Certificate (unless the Agency gives notice under clause 5.1(b)(ii) in which case the date shall be the date of any acceptance certificate which the Agency signs and returns).

**Confidential Information** means any technical, scientific, commercial, financial or other information of, about or in any way related to, the Agency, including any information designated by the Agency as confidential, which is disclosed, made available, communicated or delivered to the ESCO in connection with this Agreement, but excludes information which:

* 1. is in or which subsequently enters the public domain, other than as a result of a breach of an obligation of confidentiality;
  2. the ESCO can demonstrate was in its possession before the date of this Agreement;
  3. the ESCO can demonstrate was developed by it independently of any disclosures previously made by the Agency; or
  4. is lawfully obtained by the ESCO on a non-confidential basis from another person entitled to disclose it.

1. **Consequential Loss** means:
   1. any loss of income, profits, revenue, business, business reputation, access to markets, denial of business opportunity or anticipated savings;
   2. any loss of or damage to goodwill; or
   3. any business interruption, damage to credit rating or payment of liquidated sums or damages under any other agreement.
2. **Contractual Completion Date** means the date specified in Schedule 1 on or before which completion must occur.
3. **Contract Manager** means the person (however described) appointed by the Agency as its representative for all communication and liaison with the ESCO for the purposes of this Agreement.
4. **Core Business**means the Core Business, functions and activities undertaken by the Agency at the Premises.
5. **Defects Liability Period** means the period which:
   1. commences on the Completion Date; and
   2. continues for a period of 12 months, subject to clause 5.4.
6. **Deficiencies** means defects or omissions, or any other non-compliance with this Agreement.
7. **Department** has the meaning given in section 3(1) of the *Local Jobs First Act 2003*.
8. **Detailed Facility Study (DFS)** means the document prepared by the ESCO dated [insert date] and attached at Annexure 2.
9. **DFS Fee** means any fee payable by the Agency to the ESCO as set out in Schedule 1.
10. **Energy Consumption** means the consumption of an energy source.
11. **Energy Cost Savings** means the reduction in costs associated with the EPC Solutions at a Premises in a guarantee year determined on the basis of the base energy rates.
12. **Energy Savings** means the reduction in Energy Consumption of each Energy Source used at the Premises during the Performance Guarantee Period which result from the work undertaken by the ESCO to install the EPC Solutions. The reduction in Energy Consumption for each Energy Source during each guarantee year must be calculated as follows:
    1. total Energy Consumption of that Energy Source during the Base Year Energy Period less actual Energy Consumption of each Energy Source during that Guarantee Year.
13. **Energy Source** means electricity, natural gas propane, fuel oil, coal or water.
14. **EPC Solutions** means the energy conservation measures (including energy, water and other associated utility cost savings) specified in a Works Specification, the subject of an instruction under Clause 4(b) or approval under Clause 43, consisting of the installation of Equipment and the development and implementation.
15. **EPC Solutions** **Works** means the work undertaken by the ESCO to install the EPC Solutions.
16. **EPC Solutions** **Works Contract Sum** means the total cost of performing the EPC Solutions Works as agreed by the Agency as part of the Works Specification and specified in Schedule 1. If there are changes to the Works Specification subsequent to the execution of this Agreement, the price specified in the agreed Works Specification shall supersede the price specified in Schedule 1,to the extent that they are different.
17. **EPC Solutions** **Works Security** means security in the amount calculated as specified in Schedule 1.
18. **ESCO** means an Energy Services Company.
19. **Equipment** means all items of Equipment specified in a Works Specification.
20. **Good Industry Practice** means with the standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent expert and experienced provider, regularly undertaking services of the same or similar scope and complexity as the Agreement;
21. **Guaranteed Energy Savings** means the sum of the reduction in consumption of each Energy Source used at the Premises during each Guarantee Year as specified in Schedule 1, or such sum as amended by the ESCO in accordance with Clause 9, for each of the EPC Solutions.
22. **Guaranteed Energy Cost Savings** means agreed Guaranteed Energy Savings multiplied by the base energy rates as specified in Schedule 4
23. **Guarantee Year** means any period of one year beginning on the performance guarantee commencement date or on any anniversary of that date during the Performance Guarantee Period.
24. **ICN** means Industry Capability Network (Victoria) Limited of Level 11, 10 Queens Road, Melbourne VIC 3004 ACN 007 058 120.
25. **Information Privacy Principles** means the information privacy principles set out in the schedule to the *PDP Act*.

**Insolvency Event** means, in relation to the ESCO, any of the following:

* + - 1. anything that reasonably indicates that there is a significant risk that the ESCO is or will become unable to pay debts as they fall due, including:
         1. execution or distress being levied against any income or assets of the ESCO;
         2. a meeting of the ESCO's creditors being called or held;
         3. a security becoming enforceable or being enforced in relation to any of the ESCO's assets or undertakings;
         4. a step being taken to make the ESCO bankrupt or to wind the ESCO up;
         5. the appointment to the ESCO of a controller or administrator as defined in section 9 of the *Corporations Act 2001* (Cth);
         6. the ESCO entering into any type of agreement, composition or arrangement with, or assignment for the benefit of, all or any class of its creditors; or
         7. the ESCO being made subject to a deed of company arrangement;
      2. a step being taken to have a receiver, receiver and manager, liquidator or provisional liquidator appointed to the ESCO or any of its assets; or
      3. the ESCO ceasing, or indicating that it is about to cease, carrying on business.

1. **Installation Period** means the period during which the EPC Solutions are installed by the ESCO at the Premises.
2. **Intellectual Property** means all intellectual property rights at any time recognised by law, including all present and future copyright, all proprietary rights in relation to inventions (including patents), registered and unregistered trademarks, trade secrets and know how, registered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.
3. **Latent Conditions** means
   1. physical conditions on the Premises or its surroundings, including artificial things, but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by an experienced, prudent and competent ESCO engaged in respect of works of a similar nature to the Works and that it should have reasonably anticipated in preparing its tender; or
   2. are any other conditions which the Agreement specifies to be Latent Conditions.
4. **Laws** means:
   1. the law in force in Victoria, including common law, legislation and subordinate legislation; and
   2. lawful requirements of any government or government department or other body or a governmental, semi-governmental, judicial, municipal, statutory or public entity or authority (including a statutory authority or a State-owned enterprise), a self-regulatory authority established under statute or a stock exchange (wherever created or located) or a person (whether autonomous or not) who is charged with the administration of a law.
5. **LIDP** means the Local Industry Development Plan submitted by the ESCO at the time of the proposal and certified by Industry Capability Network (Victoria) by providing an acknowledgement letter.
6. **LIDP Commitments** means the obligations and undertakings of the ESCO as detailed in its LIDP.
7. **LIDP Monitoring Table** means the table of milestones and LIDP Commitments contained in the LIDP.
8. **Liquidated Damages Rate** means the rate specified in Schedule 1.
9. **Local Content** has the meaning given in section 3(1) of the *Local Jobs First Act 2003*.
10. **Local Jobs First Commissioner** means the person appointed under section 12 of the *Local Jobs First Act 2003*.

**Local Jobs First Policy** means the means the policy of the Victorian Government made under section 4 of the *Local Jobs First Act 2003*.

1. **Notice** means a notice given, delivered or served in accordance with this Agreement.
2. **Maintenance Services Fee** means:
   1. the amount set out in Schedule 1; or
   2. an amount specified by the ESCO relating to the provision of Maintenance Services for additional EPC Solutions.
3. **Measurement and Verification Fee** means the ESCO’s fee for performing measurement and verification activities under this Agreement and is the amount set out in Schedule 1.
4. **OHS Legislation** means all statutes, regulations and other legislation in Victoria in respect of occupational health and safety including the *Occupational Health and Safety Act 2004* (Vic) as amended from time to time, including the relevant Regulations.
5. **PDP Act** means the *Privacy and Data Protection Act 2014* (Vic).
6. **Performance Guarantee Period** means the period of years set out in Schedule 1, commencing on the Performance Guarantee Commencement Date.
7. **Performance Guarantee Security** means security in the amount set out in Schedule 1.
8. **Personnel** of a party means the officers, employees, agents, contractors and subcontractors of that party.
9. **Practical Completion** means the stage in the execution of the Works under this Agreement when:
   1. the Works are complete except for minor omissions and minor defects which do not prevent the Works from being reasonably capable of being used for their intended purpose;
   2. the ESCO has delivered to the Agency the following:
      1. all original warranties;
      2. all notices, permits, approvals and certificates required to be obtained from relevant authorities;
      3. documents and other information required under this Agreement which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works; and
      4. where required by this Agreement, as-built drawings of the Works; and
   3. The ESCO has:
      1. thoroughly cleaned the Site and the Works;
      2. connected or reconnected all services relevant to the Works; and
10. complied with all relevant aspects of any quality management system for the Works under this Agreement, including having undertaken all final inspections and testing of the work under this Agreement.
11. **Premises** means the property of the Agency inclusive of the existing Equipment and systems on the property as set out in Schedule 1, and where more than one property is specified in Schedule 1, the terms and conditions of this Agreement shall apply to each property jointly and severally.
12. **Procedures** means all systems and procedures to be implemented by the Agency at the Premises, including energy efficient methods of operating Equipment and other energy efficient operational procedures, as described in a Works Specification.
13. **Project** means the design, installation, implementation, operation and measurement and verification of the EPC Solutions by the ESCO in accordance with this Agreement.
14. **Responsible Minister** means the Minister with responsibility for administering the *Local Jobs First Act 2003*.
15. **Security** means either:
    1. a cash deposit; or
    2. an unconditional undertaking for the relevant period specified in Clause 8 issued by an Australian trading bank acceptable to the Agency’s Representative.
16. **Site Conditions** meansthe physical and artificial conditions and characteristics of, under, over, near and adjacent to the Premises, including:
    1. disposal, handling and storage of material;
    2. matters affecting transportation and access;
    3. existing utilities and services, above or below ground level and the location of all facilities with which such systems and services are connected;
    4. physical conditions above, upon and below the site including weather conditions;
    5. all known asbestos;
    6. known contamination of any kind;
    7. Equipment and facilities needed preliminary to, and during the performance of the works; and
    8. all other matters which may in any way affect the performance of the ESCO under the EPC but does not include Latent Conditions.
17. **State** means the Crown in the right of the State of Victoria.
18. **Statutory requirements** means the Laws relating to the EPC Solutions, the Equipment, the Premises, or the work under the Agreement (including without limitation the current Building Code of Australia, the Victorian Code of Practice for the Construction Industry and the current relevant Australian Standards), or the lawful requirements of any authority having jurisdiction over the EPC Solutions, the Equipment, the Premises or the work under the Agreement.
19. **Trainee** means an employee engaged by an employer (other than an Apprentice or Cadet) employed under a National Training Contract registered with VRQA that combines training with paid employment in an entry level role related to a Local Jobs First applicable project.
20. **Training Contract** has the meaning given in the *Education and Training Reform Act 2006*.
21. **Victorian Management Centre (VMC)** is a cloud based secure online platform that enables the registration of projects and associated tenders, the submission of LIDPs, collection, analysis and reporting of local content and jobs data, including, MPSG (if applicable) and, supply chain monitoring and reporting.
22. **VRQA** means the Victorian Registration and Qualification Authority.
23. **Works** means both, the Works Specification and EPC Solutions Works.
24. **Works Specification** means the scope of works submitted to the Agency by the ESCO for the design and installation of EPC Solutions, consistent with the DFS (unless otherwise agreed by the Agency):
    1. sets out the tasks involved (and a timetable for completing them) in relation to the design and installation of the EPC Solutions;
    2. specifies the EPC Solutions works contract sum, broken down into a schedule of progress claims corresponding to the tasks relating to the installation of the EPC Solutions;
    3. in the case of additional EPC Solutions, specifies the works specification fee for the additional EPC Solutions;
    4. specifies the guaranteed energy savings for the EPC Solutions, as identified in the DFS or pursuant to Clause 4(a)(ii);
    5. includes any other information the ESCO considers necessary, including plans, specifications, engineering designs and drawings relating to the proposed facility upgrade;
    6. includes a listing and description of the Equipment that needs to be upgraded or replaced;
    7. includes a detailed listing of all maintenance programmes, training programmes and schedules for the Equipment; and
    8. includes a detailed list of criteria prepared by the Agency to control and define performance of the works by the ESCO, as specified in the Request for Proposals.
25. **Works Specification Fee** means the ESCO’s fee for the preparation of a Works Specification for the installation of the EPC Solutions pursuant to Clause2or additional EPC Solutions pursuant to Clause 4 provided that the fee charged for the preparation of a Works Specification for the installation of additional EPC Solutions shall be limited to ten percent (10%) of the project cost of any such additional EPC Solutions.
    * 1. Interpretation

Unless expressed to the contrary, in this Agreement:

* + - 1. words in the singular include the plural and vice versa;
      2. any gender includes the other genders;
      3. if a word or phrase is defined its other grammatical forms have corresponding meanings;
      4. 'includes' and 'including' are not words of limitation;
      5. no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
      6. the obligations of the ESCO, if more than one person, under this Agreement are joint and several and each person constituting the ESCO acknowledges and agrees that it will be causally responsible for the acts and omissions, including breaches of this Agreement, of the other as if those acts or omissions were its own;
      7. the rights of the ESCO, if more than one person, under this Agreement, including the right to payment, jointly benefit each person constituting the Supplier;
      8. if the date on or by which any act must be done under this Agreement is not a Business Day, the act must be done on or by the next Business Day;
      9. a reference to:
         1. a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
         2. a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
         3. any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
         4. '$', 'dollars' or 'AUD' is a reference to the lawful currency of the Commonwealth of Australia and all amounts payable under this Agreement are payable in Australian dollars; and
         5. a party or parties is a reference to the Purchaser and the Supplier (as the case requires).
  1. Design and Installation of EPC Solutions
     1. Submission of the Works Specification
        1. Within ten (10) days of the Commencement Date, the ESCO and the Agency must meet to discuss the preparation of a Works Specification for completion of the design and installation of the EPC Solutions.
        2. Within the time period specified in Schedule 1, the ESCO must submit to the Agency a Works Specification for completion of the design and installation of the EPC Solutions.
        3. The Works Specification must include the information as required by this Agreement, Schedule 2 and Schedule 3 and be fit for the purpose of ensuring achievement of the Guaranteed Energy Savings and other benefits identified in the DFS.
        4. The Works Specification and any additional Works Specification must comply with the DFS, any Laws, this Agreement, standards of proper and tradesman-like workmanship and Good Industry Practice.
     2. Proceeding with or changing a Works Specification
        1. Within thirty (30) days of receipt of a Works Specification, the Agency may:
           1. instruct the ESCO to proceed with the installation of the EPC Solutions in accordance with the Works Specification; or
           2. notify the ESCO of any non-conformance between the Works Specification and this Agreement requiring rectification or of changes the Agency otherwise requires to the Works Specification.
        2. If the Agency rejects the Works Specification because it does not comply with this Agreement or is not fit for its intended purpose and requires any changes to the Works Specification under Clause 2(a)(ii), the ESCO and the Agency must:
           1. discuss the changes required; and
           2. resubmit the Works Specification within a further fourteen (14) days (or at a date agreed to by both parties) for the Agency's further consideration and instruction in accordance with Clause 2.2(a).
        3. If the parties do not agree on the Works Specification within thirty (30) days of the resubmission to the Agency (or at a date agreed to by both parties) such that the installation of the EPC Solutions does not proceed, the ESCO may issue the Agency with an invoice for the DFS Fee and the Works Specification Fee, to be paid by the Agency in accordance with Clause 10.
     3. Installation Timetable
        1. The Works Specification submitted by the ESCO to the Agency must include and specify the date(s) for:
           1. the completion of the design of the EPC Solutions;
           2. the commencement of the installation of the EPC Solutions;
           3. progress claims to be made by the ESCO during the Installation Period, subject to achievement of the benchmarks to be identified in the Works Specification;
           4. completion of the installation of the EPC Solutions; and
           5. must be consistent with any corresponding dates identified in the DFS unless the Agency agree otherwise.
        2. The ESCO must complete the installation of the EPC Solutions on or before the Contractual Completion Date unless agreed otherwise.
     4. Installation of VPC Solutions
        1. On receipt of the Agency's instructions under Clause 2.2 or approval under Clause 3, the ESCO must install the EPC Solutions or any additional EPC Solutions at the Premises in accordance with the Works Specification by the Contract Completion Date.
        2. During the installation period, the ESCO must:
           1. give the Agency reasonable prior notice of its requirements for access and storage;
           2. meet regularly with the Agency to provide progress reports on the installation procedure and keep the Agency informed of all matters it ought reasonably to be made aware of;
           3. not cause or permit any act which may unreasonably interfere with the use of the Premises or the Core Business of the Agency;
           4. provide qualified Personnel, supervision, tools and materials, Equipment and plant to install the EPC Solutions at the Premises;
           5. use suitable new materials which are fit for purpose in the installation of the EPC Solutions where the nature of the materials to be used is not specified in the Works Specification;
           6. ensure that the EPC Solutions works are at all times adequately protected and kept secure until the Completion Date;
           7. not allow for the delivery of any plant, material or other things before reasonably required in connection with the EPC Solution Works by the ESCO, its employees, agents or contractors;
           8. ensure that utility services to or from the Premises are not disconnected or disrupted at any time without the Agency's prior consent and are promptly reinstated; and
           9. ensure that all necessary remedial action required by the Agency is taken to rectify any damage done to any of the Agency's Premises (including chattels) by the ESCO's Personnel in the performance of the EPC Solutions works.
        3. The Agency, at its own cost, must:
           1. provide the ESCO with reasonable access to the Premises in accordance with this Agreement including after-hours access where required by the Agency;
           2. provide appropriate storage space and facilities required for the implementation of the Works Specification; and
           3. remove or render safe any asbestos or other toxic or hazardous material of which it is or becomes aware in any part of the Premises where the ESCO may be required to undertake work.
     5. Site Conditions
        1. The ESCO must:
           1. undertake all enquiries and research in relation to the existence of and nature of any Site Conditions;
           2. examine all documents relating to the construction of the EPC Solutions works upon the Premises and the Site Conditions; and
           3. satisfy itself that the EPC Solutions Works are performed according to this Agreement.
        2. Failure to comply with clause 2.5(a) will not relieve the ECSO from performing its obligations under this Agreement.
        3. The ESCO must not:
           1. claim an extension of time as a result of any Site Condition unless agreed by both parties;
           2. claim any adjustment to:

the EPC Solutions Works Contract Sum;

the Measurement and Verification Fee;

the Works Specification Fee;

to any amounts under Clause 7; or

* + - * 1. make any claim for payment whether under the Agreement or otherwise at Law by reason of the occurrence of a site condition.
      1. The ESCO agrees that the Agency is not liable in respect of any error or omission in any information supplied by the Agency or its Personnel in relation to the Premises or any Site Conditions. The ESCO acknowledges that this information is provided for its assistance only and does not form part of this Agreement.
    1. Latent Conditions
       1. If the ESCO considers it has encountered or found a Latent Condition, during the installation of the EPC Solutions, that will affect the completion of the installation, the ESCO must immediately, and before the Latent Condition is disturbed, give written notice to the Agency.
       2. The Agency must, within 14 days of receipt of the ESCO's notice:
          1. Notify the ESCO as to whether a Latent Condition has been encountered or found; and
          2. Instruct the ESCO as to the course it must adopt insofar as the Works under the Agreement are affected by the Latent Condition; or
          3. Instruct the ESCO to cease the EPC Solutions Works or Works Specification.
       3. If the Agency determines a Latent Condition has been found and it requests the ESCO to proceed under Clause 2.6(b)(ii), the ESCO will be entitled to:
          1. Claim a reasonable extension of time to the Completion Date; and
          2. Claim increased costs reasonably incurred by the ESCO for work undertaken after giving notice, which costs arise directly from the Latent Condition and the Agency's instruction under clause 2.6(b)(ii).
    2. Fees
       1. The ESCO must submit progress claims to the Agency for the EPC Solutions Works Contract Sum payable in respect of the installation of the EPC Solutions, subject to achievement of the benchmarks set out in the timetable detailed in the Works Specification relating to those EPC Solutions.
       2. To be valid, each progress claim must:
          1. Set out the value of the work performed;
          2. Certify that the benchmarks for payment of the amount claimed have been achieved;
          3. Comply with all the statutory requirements applicable to any such claim; and
          4. Set out all relevant information necessary to particularise the items of work undertaken and the amount payable for each item.
       3. The Agency must pay the ESCO's progress claims in accordance with the terms of payment set out in Clause 10.
       4. The ESCO may invoice the Agency for the DFS Fee on the Commencement Date.
       5. The ESCO acknowledges that it has calculated the EPC Solutions Works Contract Sum, the Measurement and Verification Fee and the Works Specification Fee with due care and skill and taken into account all risks reasonably identified in relation to the works and made full allowance for those risks in the EPC Solutions Works Contract Sum and the Measurement and Verification Fee and the Works Specification Fee.
    3. Sub-contracting
       1. The ESCO must not sub-contract any part of the Works under this Agreement without the prior written approval of the Agency, which will not be unreasonably withheld.
       2. The ESCO must consult with the Agency on the selection of any sub-contractors for the Project and give the Agency no less than fourteen (14) days' notice of its intention to select a particular sub-contractor.
       3. The Agency, at its discretion, may approve or reject the sub-contractor selected or request further information, within twenty one (21) days of being notified under Clause (b). The ESCO will not, as a result of any sub-contracting arrangement, be relieved from the performance of any obligation under this Agreement and will be liable for all acts and omissions of the sub-contractor as if they were the actions of the ECSO.
       4. Approved sub-contractor's details must be recorded in Schedule 1.
       5. The ESCO and approved sub-contractors must comply with all policies of the Agency as notified by the Agency from time to time.
  1. Approval and Consents
     + 1. The ESCO acknowledges and agrees that in performing its obligations under this Agreement it has, or will be able to, obtain all the necessary consents, permits, approvals or authorities necessary in order for the ESCO to carry out the Works under this Agreement.
       2. The Agency must assist the ESCO, using its reasonable endeavours, to obtain necessary consents, permits, approvals or authorities.
       3. The ESCO must not install any EPC Solutions until all necessary approvals and consents are obtained.
       4. The Agency must pay the costs reasonably incurred by the ESCO obtaining the approvals and consents in accordance with Clause 2.7.
  2. Additional EPC Solutions
     + 1. The ESCO may, with the prior written approval of the Agency, change replace, remove, alter or add to the Equipment or the procedures, provided that:
          1. the guaranteed energy savings are not diminished; and
          2. the change is explained in writing to the Agency.
       2. The Agency must not unreasonably withhold its approval.
       3. The ESCO must submit an additional Works Specification in respect of the proposed change and, following receipt by the Agency, Clause 2 shall apply to the additional Works Specification.
  3. Commissioning Procedure
     1. Acceptance Certificate
        1. Where the ESCO is of the opinion that the Works under this Agreement have reached a stage of Practical Completion, the ESCO must provide to the Agency an Acceptance Certificate before the completion of the EPC Solutions.
        2. Within thirty (30) days of receipt of the Acceptance Certificate, the Agency must:
           1. if it is satisfied that the Works under this Agreement have reached a stage of Practical Completion, notify the ESCO in writing of its acceptance of the EPC Solutions by signing and returning the Acceptance Certificate to the ESCO; or
           2. if it is not satisfied that the Works under this Agreement have reached the stage of Practical Completion advise the ESCO, in writing, of any deficiencies in the installation of the EPC Solutions which it reasonably requires the ESCO to rectify before it will accept the EPC Solutions.
        3. Where the Agency is not satisfied and gives notice under Clause 5.1(b)(ii), the ESCO must promptly rectify any deficiencies in the installation and re-issue the Acceptance Certificate for the Agency’s further consideration pursuant to Clause 5.1.
        4. If the Agency fails to issue a notice under Clause 5.1(b)(i) or 5.1(b)(ii)within the thirty (30) day period specified and a further five business days has elapsed following written notice from the ESCO to the Agency of such failure, the Agency will be deemed to have accepted the completion of the installation of the EPC Solutions as of the date of the Acceptance Certificate.
        5. Once the Agency has returned the Acceptance Certificate in accordance with Clause 5.1(b)(i) or Clause 5.1(d) applies (as the case maybe), the ESCO must provide to the Agency:
           1. any third party warranties, relevant manuals, performance test reports, drawings and parts lists in relation to the operation or maintenance of Equipment; and
           2. a dilapidation report in relation to the Premises sufficient to demonstrate compliance with this Agreement and a schedule listing all items of Equipment installed at the Premises, which the ESCO must review and update periodically during the performance guarantee period (but not less often than every two (2) years).
     2. Title to the Equipment

Subject to the terms of this Agreement, the Equipment is at the sole risk of the ESCO until the Agency has approved the Acceptance Certificate. Ownership of the Equipment shall pass to the Agency upon payment, in full, of the EPC Solutions Works Contract Sum.

* + 1. Loss of or damage to the Equipment

Subject to Clause 14, the ESCO remains liable for loss of or damage to the Equipment until such time as the Agency approves the Acceptance Certificate, unless loss of or damage to the Equipment is a direct result of a wilful or negligent act or omission of the Agency.

* + 1. Defects Liability Period
       1. Upon the approval of the Acceptance Certificate, the Defects Liability Period will commence.
       2. The ESCO must, during the Defects Liability Period, rectify at its own expense all Defects which exist at the commencement of the Defects Liability Period or as notified in writing by the Agency.
       3. The ESCO is required to rectify the Defect within the time stated by the Agency.
       4. If the ESCO is required to rectify a Defect, the Agency may extend the Defects Liability Period for a further 12 month period. If the work of rectification is not commenced or completed by the stated time the Agency may itself, or by engaging a third party, rectify the Defect at the ESCO's expense.
       5. The reasonable cost incurred by the Agency in respect of the Defects will be a debt due and payable from the ESCO and at the Agency’s discretion be payable within ten (10) business days of invoice by the Agency or set-off against any monies payable by the Agency to the ESCO in connection with this Agreement.
       6. Despite this Clause 5.4, the ESCO will not be responsible for the effects of normal wear and tear during the Defects Liability Period.
  1. Equipment Maintenance
     1. Equipment maintenance by the Agency
        1. The Agency must notify the ESCO as soon as possible, but not later than twenty four (24) hours after the Agency or an employee or agent of the Agency becomes aware of:
           1. any material malfunction, interruption, alteration or modification in the operation of any item of the Equipment or any other energy related plant or Equipment on the Premises;
           2. the existence of any emergency or urgent or dangerous condition or situation affecting any item of Equipment;
           3. significant interruption or alteration of an energy supply to the Premises.
        2. Where an item of Equipment needs to be repaired or maintained due to:
           1. the wilful or negligent act or omission of the Agency or any of its employees, agents, subcontractors or invitees;
           2. failure by the Agency to maintain the Equipment to specification or other breach by the Agency of this Agreement; or
           3. any act which would customarily be covered by a standard property or casualty insurance policy,

the Agency may request the ESCO to undertake the repair or maintenance of the Equipment at the Agency’s expense.

* + 1. Equipment maintenance by the ESCO
       1. If the ESCO is to service and maintain the Equipment, it must provide all labour, materials, service and Equipment necessary and perform the maintenance services identified in Schedule 3 to specification, and for the duration of the agreed maintenance period.
       2. If any Equipment is materially modified, except by or with the agreement of the ESCO or persons authorised by the ESCO, or is sold by the Agency, the ESCO’s maintenance obligations for that Equipment will immediately cease to that extent, unless the parties agree to a change to the Maintenance Services Fee as a consequence.
    2. Payment for maintenance services
       1. The Agency must pay the ESCO for the Maintenance Services in the amount and frequency specified in Schedule 1
       2. Upon each anniversary of the Performance Guarantee Commencement Date the amount of the Maintenance Services fee payable for the following year will be adjusted by the percentage specified in Schedule 1.
       3. Additional maintenance (including other miscellaneous services) requested by the Agency outside the scope of Schedule 1 will be separately invoiced by the ESCO and payable by the Agency in accordance with the terms of this Agreement.
    3. Training
       1. The ESCO must provide the Agency and its Personnel with adequate training to effect the ongoing operation and maintenance of the EPC Solutions, as identified in the DFS.
       2. The ESCO must complete the training for the EPC Solutions prior to the Performance Guarantee Commencement Date and any additional EPC Solutions or for ongoing training requirements, as and when reasonably required by the Agency.
       3. The Agency must pay, on receipt of a valid invoice, any costs relating to the re-training or ongoing training required by the ESCO.
  1. Performance Guarantee
     1. Measurement and Verification
        1. All measurement and verification activities shall be in accordance with the Measurement and Verification Plan specified in Annexure 1.
        2. The Agency is to use its best endeavours to ensure that all necessary suppliers’ metering is installed at the Premises and is operating correctly and accurately.
        3. At the end of each quarter during the Performance Guarantee Period or any other period as is agreed in writing by the parties, the Agency must arrange for any necessary readings to be taken of all meters at the Premises and must provide a copy of those meter readings to the ESCO.
        4. Within thirty (30) days of the end of each Guarantee Year, and subject to having received all information referred to in Clause 7.1(f), the ESCO will calculate, in good faith and in accordance with this Agreement, the Energy Savings and Energy Cost Savings realised at the Premises in that year as a result of the installation of the EPC Solutions and provide to the Agency an audit report setting out the results for that year.
        5. The Agency will provide reasonable assistance in the preparation of that audit report by providing to the ESCO, subject to any Laws:
           1. copies of all bills, invoices or other records of expenditure relating to Energy Consumption incurred in that Guarantee Year within fourteen (14) days of receipt;
           2. any accounting records to the extent that they relate to Energy Consumption; and
           3. any other assistance the ESCO may reasonably require.
        6. The ESCO will make available to the Agency (or to any independent contractor engaged by the Agency to review the audit report) all data and calculations it uses in the preparation of the audit report and provide any explanations or clarification the Agency may reasonably request to assist in its interpretation of the audit report.
        7. The Agency must notify the ESCO within thirty (30) days of receiving the audit report whether it approves the audit report or requires further correction, explanation or clarification. Where the Agency requests a correction, notification or clarification, the ESCO must provide the Agency an amended audit report within (fourteen) 14 days. The Agency must notify the ESCO if it accepts the amended audit report within fourteen (14) days of receiving it. In the event that no notice is provided within the specified timeframe and is not rectified within five (5) days of a request by the ESCO to do so, the report will be deemed to have been accepted by the Agency.
        8. The ESCO represents, warrants and guarantees that the content of the audit report is true and correct in every particular and that it has been prepared with a duty of care. The ESCO acknowledges that it is liable (under contract, tort or otherwise) to the Agency, for loss, damage or replacement where the audit report is inaccurate and or does not provide the Guaranteed Energy Savings.
     2. Calculation of Guaranteed Energy Savings
        1. The Methodology for Energy Data Verification set out in Annexure 1 details the process for calculating savings. Energy cost savings are determined by calculating and comparing the cost of Energy Consumption at the Premises for each Guarantee Year based on the base energy rates for the Premises.
        2. The Guaranteed Energy Savings and the Guaranteed Energy Cost Savings for each Guarantee Year are considered satisfied if the actual savings in Energy Consumption and energy cost for that year, as determined by the audit report, which has been accepted by the Agency, in accordance with Clause 8.2, is equal to or exceeds the adjusted Guaranteed Energy Savings and the Guaranteed Energy Cost Savings, regardless of how those savings are achieved.
        3. Where the DFS specifies that Option A in Annexure 1 shall be used for measurement and verification of the guaranteed energy savings for a particular EPC Solution the Agency may instruct the ESCO that there is no requirement for the measurement of energy use specified in sub-clause 8.2 for the relevant EPC Solutions.
     3. Savings Shortfalls
        1. Subject to Clause 7.4, if the Guaranteed Energy Savings or the Guaranteed Energy Cost Savings are not achieved in any Guarantee Year, the ESCO shall pay to the Agency the amount of the shortfall within fourteen (14) days of the date of acceptance of the audit report by the Agency for that year. The ESCO agrees that the amount of the shortfall has been negotiated on an arm's length basis by the parties and represents a genuine pre-estimate of the loss that the Agency will suffer as a result of the Guaranteed Energy Savings not being achieved.
        2. Without in any way limiting the Agency’s other rights under this Agreement, the payment obligation specified in Clause 7.3(a) shall be the ESCO’s sole liability to the Agency for any shortfall in Guaranteed Energy Savings or the Guaranteed Energy Cost Savings.
        3. Where the ESCO can correct a shortfall through an operational improvement at no material expense or material inconvenience to the Agency and with no future operational expenses and the Agency declines to allow such operational improvement any future savings shortfalls that the improvement would have corrected will be negated.
     4. Excess Savings
        1. If the ESCO has made shortfall payments to the Agency under Clause 7.3(a) in any Guarantee Year and the actual savings in Energy Consumption or the savings in operational costs in any subsequent Guarantee Year exceed the Guaranteed Energy Savings or the Guaranteed Energy Cost Savings for that year then the Agency will reimburse the ESCO for the shortfall payments up to the amount of the excess. Payment will be made within thirty (30) days of notice being given by the ESCO to the Agency of the excess in actual savings.
        2. If a payment is due by the Agency under Clause 7.4(a), the ESCO must submit a valid invoice to the Agency for the amount owing which shall be paid in accordance with Clause 10.1.
        3. Energy and operational savings or cost savings achieved during the first year of the Performance Guarantee Period, that in total exceed the Guaranteed Energy Savings or Guaranteed Energy Cost Savings for that year, will be offset against any shortfalls in subsequent guarantee years.
     5. Measurement and Verification Fee

The Agency must pay the Measurement and Verification Fee to the ESCO as specified in Schedule 1

* 1. Security
     1. Security for EPC Solutions Works

As security for the ESCO’s performance of the EPC Solutions Works the ESCO must provide to the Agency the EPC Solutions Works Security within fourteen (14) days after the Agency accepts the Works Specification.

* + 1. Recourse to EPC Solutions Works Security

The Agency may at any time, use the EPC Solutions Works Security to pay itself any amount claimed by the Agency from the ESCO arising from or in connection with the non-performance of the EPC Solutions Works in accordance with this Agreement, but the Agency must have first given the ESCO an opportunity to pay the amount claimed within a period of seven (7) days after the Agency notifies the ESCO. The ESCO disputing the amount claimed does not preclude the Agency from drawing on, or the relevant EPC Solutions Security provider paying under, the EPC Solutions Works Security.

* + 1. Release of EPC Solutions Works Security

Subject to the Agency's rights to use the EPC Solutions Works Security, the ESCO will be entitled to the release of the EPC Solutions Works Security (or the balance remaining after an exercise of the Agency's rights) upon expiry of the last Defects Liability Period to expire and the rectification of all defects for which the ESCO is responsible.

* + 1. Security for Performance Guarantee Period
       1. As security for the Guaranteed Energy Savings the ESCO shall provide to the Agency, within 30 days of the Performance Guarantee Commencement Date the Performance Guarantee Security.
       2. The Agency may at any time, use the Performance Guarantee Security to pay itself any amount claimed by the Agency from the ESCO, arising from or in connection with the non-payment of the Guaranteed Energy Savings in accordance with this Agreement, but the Agency must have first given the ESCO an opportunity to pay the amount claimed within a period of seven (7) days after the Agency notifies the ESCO. The ESCO disputing the amount claimed is not to preclude the Agency from drawing on the Performance Guarantee Security or the relevant Performance Guarantee Security provider paying under the Performance Guarantee Security.
    2. Release of Performance Guarantee Security

Subject to the Agency's rights to use the Performance Guarantee Security, the Agency shall release the Performance Guarantee Security (or the balance remaining after an exercise of the Agency's rights) within fourteen (14) days of the expiration of the Performance Guarantee Period.

* 1. Base Year Energy Adjustments
     1. Agency to provide a quarterly report on changes affecting base year energy
        1. Subject to the requirements of the Measurement and Verification Plan, at the end of each quarter, during the Performance Guarantee Period, the Agency must provide to the ESCO a report which details any significant change, the date of the change, any factor which may result in a change in Energy Consumption or the timing of Energy Consumption at the Premises, including changes in the following factors:
           1. the size, construction, condition and state of repair of the Premises;
           2. the use of the Premises, including the hours and level of occupancy of the Premises and the number of employees of the Agency employed on the Premises;
           3. the lighting, temperature, humidification and ventilation levels of the Premises and any operational procedures in relation to these;
           4. the heating and air conditioning Equipment and other energy-consuming Equipment at the Premises, and the general level of repair and efficiency of this Equipment;
           5. material alteration, modification or change to the Premises including the date of the alteration, modification or change;
           6. any failure by the Agency to comply with the procedures; and
           7. maintenance of the Equipment by the Agency (or a third party engaged by it) other than to specification.
        2. To the extent that the cause of any such change is beyond the ESCO's reasonable control and not a Foreseeable Change, the ESCO is entitled to adjust the base year energy and/or the Guaranteed Energy Savings to account for the change.
     2. ESCO to determine effect on base year energy and Guaranteed Energy Savings
        1. The ESCO must, acting in good faith and in accordance with this Agreement, determine the effect on the base year energy or the Guaranteed Energy Savings of:
           1. any change notified by the Agency under Clause 9.1; or
           2. any change required as a result of an additional Works Specification requested by the Agency; or
           3. any other similar matter coming to the attention of the ESCO and notified promptly in writing to the Agency which may result in a variation in Energy Consumption or the timing of Energy Consumption at the Premises.
        2. If the ESCO determines in accordance with Clause 9.2(a) that the base year energy or the Guaranteed Energy Savings should be changed, it must notify the Agency in writing and provide to the Agency the detailed reasons and calculations upon which it bases its determination. Any such change to the base year energy shall be based on the Methodology for Energy Data Verification set out in Annexure 1.
        3. The ESCO must obtain the Agency's consent, in writing, to the change before it can take effect. If the Agency does not provide its consent in writing within thirty (30) days of its receipt of the said calculations, then a dispute will be taken to exist for the purposes of Clause 16.
        4. If the resolution of the dispute requires an adjustment to the base year energy or the Guaranteed Energy Savings as re-determined by the ESCO under Clause 9.2(b), then that adjustment, together with any necessary reimbursements, will be made with effect from the date of the ESCO's original redetermination.
     3. Energy saving procedures and methods of operation
        1. The Agency must develop the Procedures relating to any EPC Solutions installed in accordance with Clause 2.4
        2. The ESCO acknowledges and agrees that the Procedures shall not exceed the requirements set by manufacturers or relevant statutory requirements.
        3. Without limiting the operation of this Clause 9, the ESCO will not be liable to the Agency for any failure to realise the Guaranteed Energy Savings in any Guarantee Year to the extent that such failure is attributable to default or failure by the Agency to perform fully any of its obligations under this Agreement and which failure directly causes the ESCO to fail to realise the Guaranteed Energy Savings in any Guarantee Year, provided that the ESCO has first provided the Agency with written notice of the default and the Agency has failed to rectify the default within thirty (30) days of the notice and provided that the ESCO has taken all reasonable steps to mitigate the effects of such default.
        4. If this Agreement is terminated before the end of the Performance Guarantee Period, the Guaranteed Energy Savings shall be recalculated for the current Guarantee Year on a pro rata basis to the date of termination. In recalculating the Guaranteed Energy Savings, the ESCO may make adjustments in good faith for seasonal variations in Energy Consumption.
  2. Invoicing and Payment
     1. Invoicing
        1. The ESCO must submit valid Tax Invoices to the Agency in respect of the Works under this Agreement as soon as practicable after the performance of the Works, or at a time otherwise agreed by the Parties.
     2. Payment of Invoices
        1. Subject to this Clause 10.2, the Agency will pay each undisputed invoice, less any amount required by Law, to the ESCO within 30 days of receipt of a valid invoice.
        2. If the Agency disputes the invoiced amount (whether in whole or in part) for any reason, the Agency must pay the undisputed amount of such invoice (if any), and notify the ECSO of the amount the Agency believes is due for payment. If the Agency and the ECSO are unable to agree on the balance of the invoiced amount, the dispute will be referred for determination in accordance with Clause 16 If requested, the Supplier will withdraw the disputed Tax Invoice and issue a replacement Tax Invoice for the undisputed amount.
        3. Payment of an invoice is not to be taken as:
           1. evidence or an admission that the Services have been provided in accordance with the Specifications, Service Level Requirements or otherwise in accordance with this Agreement;
           2. evidence of the value of the Works;
           3. an admission that the Works were satisfactorily performed;
           4. an admission of liability; or
           5. acceptance or approval of the ESCO's performance,

but must be taken only as payment on account.

* + 1. Fair Payments Policy
       1. The Agency will, on demand by the ESCO, pay simple interest on a daily basis on any overdue amount, at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* (Vic).
       2. For the purposes of this Clause, an overdue amount means an amount (or part thereof) that:
          1. is not, or is no longer, disputed in accordance with this Agreement;
          2. is due and owing under a Tax Invoice properly rendered by the ESCO in accordance with this Agreement; and
          3. has been outstanding for more than 10 Business Days from the date of receipt of the invoice or the date that the amount ceased to be disputed, as the case may be.
    2. Warranties

The ECSO warrants to the Agency that:

* + - 1. it has the right to enter into this Agreement and perform the Works;
      2. in executing this Agreement, delivering and performing the Works, it does not contravene any contractual, legal or other obligation that applies to it;
      3. it holds all licences, permits, consents and authorisations required under any Law in relation to the performance of the Works;
      4. it is entitled to use and deal with any Intellectual Property Rights, and has obtained all necessary consents to use and deal with any Moral Rights, which may be used by it in connection with the Works and is entitled to grant to the Agency the licences contemplated by this Agreement;
      5. the receipt of the Works by the Agency will not infringe the Intellectual Property Rights or other rights of any person or any Laws;
      6. the Works will be:
         1. provided with due care and skill;
         2. provided in accordance with all applicable Standards, principles, practices and in accordance with the requirements of this Agreement (including the Works Specifications); and
         3. completed within a reasonable time.
      7. it has the accreditation or membership of professional or other bodies in relation to the provision of the Works and that it will use its best endeavours to maintain such accreditation or membership during the Term;
      8. it and its Personnel are appropriately qualified and have the requisite knowledge, skill and expertise to undertake the Works in accordance with this Agreement;
      9. whilst on the Premises owned or controlled by the Agency, the ESCO and its Personnel will at all times comply with the Agency's lawful directions and policies, of which the ESCO is notified or is otherwise aware, including any applicable occupational health and safety and security policies;
      10. where the Agency has, either expressly or by implication, made known to the ESCO any particular purpose for which the Works are required, the Works will be performed in such a way as to achieve that result;
      11. it will not vary the Works Specification without first obtaining the written consent of the Agency;
      12. it will realise Energy Savings and Energy Cost Savings at the Premises in each Guarantee Year of not less than the Guaranteed Energy Savings and the Guaranteed Energy Cost Savings.
      13. that the Equipment: -
          1. is fit for the purpose as specified in the Works Specification and for the purpose of achieving the Guaranteed Energy Savings;
          2. is of good quality and free from defects in materials and workmanship; and
          3. operates effectively under normal and reasonably foreseeable use.
  1. Intellectual Property
     + 1. If the ESCO provides any material to the Agency that contains the ESCO's Intellectual Property, the Agency acknowledges that the ESCO will retain right, title and interest to that Intellectual Property.
       2. The ESCO hereby irrevocably and unconditionally grants to the Organisation, free of additional charge, a non-exclusive, royalty-free, worldwide, transferable, licence (including the right to sub-license) to exercise all Intellectual Property Rights.
       3. Subject to the specific provisions of any licence accompanying software forming a part of the EPC Solutions, the ESCO grants to the Agency a licence (with a right to sub-licence) to use the software forming part of the EPC Solutions for the purpose for which the software is supplied to the Agency.
       4. The rights and obligations set out in this Clause 11 survive the expiry or earlier termination of the Agreement.
  2. Greener Government Buildings
     + 1. The Agency authorises Greener Government Buildings and its Personnel to reasonably request documents relevant to the Services provided under this Agreement from the ESCO.
       2. The ESCO must deliver copies of any requested documents to Greener Government Buildings and its Personnel within ten (10) business days or any date as agreed by the parties.
  3. Insurance
     + 1. The ECSO must (and must ensure that any sub-contractors appointed by it) obtain and maintain, to the satisfaction of the Agency, and for the duration of the Term, and if requested by the Agency, for a period up to seven years after the provision of the Works, the insurances specified in Schedule 1.
       2. The ESCO must, within 10 Business Days of a request of the Agency, produce written evident of such insurances, at any time (including certificates of currency of insurance from the insurer).
       3. Where any insurance the ESCO is required to obtain and maintain is due to expire, the ESCO must, on request by the Agency, provide the Agency with evidence of the currency of relevant replacement insurance prior to the expiration.
       4. Any insurance obtained pursuant this clause must be:
          1. taken out with an insurer acceptable to the Agency; and
          2. on terms (including any excess) which are acceptable to the Agency.
  4. Limitations on Liability
     + 1. The ESCO indemnifies, and will at all times keep the Agency and each of its Personnel indemnified, against any liabilities, losses, damages, costs and expenses (including all legal and settlement costs determined on a full indemnity basis) or compensation arising out of, or in any way in connection with, any:
          1. personal injury, including sickness and death;
          2. property damage;
          3. breach of an obligation of confidence or privacy, whether under this Agreement or otherwise;
          4. fraudulent acts or omissions;
          5. wilful misconduct or unlawful act or omission;
          6. breaches of logical or physical security;
          7. loss or corruption of Data;
          8. third party claims arising out of a breach of the Agreement by the ESCO or its Personnel (including breach of warranty) or any negligent act or omission of the ESCO or its Personnel; or
          9. infringement or alleged infringement of the Intellectual Property Rights or any other rights of any person, including any third party,

which was caused, or contributed to by, any act or omission by the ESCO or any of its Personnel.

* + - 1. The ESCO's liability to indemnify the Agency under Clause 14(a) is reduced to the extent that any wilful, unlawful or negligent act or omission by the Agency or its Personnel contributed to the liability, loss, damage, cost, expense or compensation.
    1. Damage or destruction of Premises
       1. The Agency must immediately notify the ESCO if any part of the Premises or the Equipment is damaged or destroyed.
       2. Where the Premises is significantly damaged or destroyed so as to render it substantially unfit for occupation and the affected part is not repaired or reconstructed within one hundred and twenty (120) days of the date of such damage or destruction, either party may terminate this Agreement by written notice to the other.
    2. Suspension
       1. Subject to Clause 14.3 , the ESCO may, by written notice served on the Agency, suspend any work under this Agreement following notice to the Agency of the event and failure by the Agency to remedy the event within five (5) days after receipt of the notice:
          1. if the Agency has not given safe access to the Premises or any Equipment in accordance with Clause 2.4(b)(i)as required by this Agreement; or
          2. if there are any toxic or hazardous materials discovered in areas where the ESCO is required to work which renders such work unsafe; or
          3. where the Agency is in breach of any other material obligation under this Agreement, which materially affects the continued provision of the work.
       2. Where there is a suspension of work by the ESCO pursuant to Clause 14.3(a):
          1. such suspension shall cease immediately upon:

pursuant to Clause 14.3(a)(i), provision by the Agency of written confirmation of compliance with all applicable occupational health and safety legislation; or

pursuant to Clause14.3(a)(ii)(a)(ii), provision by the Agency of written notification stating that the affected area is clear of toxic or hazardous materials.

* + - * 1. the Agency must pay to the ESCO:

any agreed amount of additional payment in respect of additional costs caused by such suspension; or

if no agreement has been reached, any reasonable costs, directly incurred, which have arisen from the suspension but which shall not include consequential losses or loss of profits;

and any such payment shall be made in accordance with Clause 10.

* + 1. Suspension by Agency
       1. The Agency may direct t**he** ESCO to suspend the carrying out of the whole or part of the installation of the EPC Solutions for such time as the Agency thinks fit, if the Agency, acting reasonably, forms the opinion that it is necessary:
          1. because of an act, default or omission of:

the Agency or its Personnel; or

the ESCO or a person authorised by the ESCO or the ESCO’s Personnel.

* + - * 1. for the protection or safety of any person or property;
        2. to comply with a court order; or
        3. because suspension of work under a contract upon which the installation of the EPC Solutions depends, prevents the carrying out of the installation of the EPC Solutions.
      1. Where there is a suspension of work by the Agency under Clause 14.4 other than under Clause 14.4(a)(i)(B) or due to an act or omission of the ESCO, the Agency must pay to the ESCO:
         1. any agreed amount of additional payment in respect of additional costs caused by such suspension or
         2. if no agreement has been reached, any reasonable costs, directly incurred, which have arisen from the suspension but which shall not include consequential losses or loss of profits;

and any such payment shall be made in accordance with Clause 10.

* 1. Delays and failure to perform
     1. Duty to warn of delays and failures to perform
        1. If the ESCO is aware of any actual or possible delay in the provision of the Works, including any failure to complete the Works by the Contractual Completion Date, the ESCO:
           1. must advise the Agency by written notice immediately upon becoming aware of such delay; and
           2. may include in the notice a request for an extension of time.
        2. The notice given under Clause 15.1(a) must set out:
           1. the circumstances giving rise to the delay or possible delay, including the cause of the delay;
           2. the likely length of the actual or possible delay; and
           3. the steps the ESCO intends to take to prevent the delay from occurring to minimise the delay.
        3. The Agency may, in its absolute discretion and by written notice to the ESCO, extend any delivery dates or the Contractual Completion Date.
     2. Liquidated Damages payable for failing to meet required dates
        1. If the ESCO fails to complete the Works by any delivery date under this Agreement or by the Contractual Completion Date, the Agency may recover from the ESCO (or deduct from money owed to the ESCO) liquidated damages.
        2. Liquidated damages are due and payable on demand and will be payable at the rate specified in Schedule 1 for each day that the ESCO does not complete the Works.
     3. Scope of Liquidated Damages

The parties agree that the liquidated damages provided for by this Clause represent a genuine pre-estimate of the Agency’s damages arising from delays in the installation of the EPC Solutions works after the Contractual Completion Date, and are not the Agency's sole remedy in relation to the circumstances giving rise to the liquidated damages.

* + 1. Extension of Time Claimed by ESCO
       1. The ESCO agrees to bear the risk of all delays to or disruption of the carrying out of the installation of the EPC Solutions from any cause and will not be entitled to any extension of the Contractual Completion Date except that if all of the following conditions in (a) to (e) below are met (as conditions precedent):
          1. the ESCO is delayed so as to prevent it from achieving completion by the by either:

a breach of the provisions of the Agreement by or any other act or omission of the Agency, the Agency's representative or any of the Agency's Personnel, whenever occurring (not permitted or authorised by this Agreement); or

any of the following events occurring before the Contractual Completion Date:

state-wide or national industrial disputes not caused or contributed to by the ESCO;

inclement weather, but excluding the effects of inclement weather which does not prevent the completion of any work by the ESCO; or

authority delays not caused or contributed to by the ESCO; or

a variation of the EPC Solutions works under Clause 20.2

* + - * 1. the cause of the delay is beyond the reasonable control of the ESCO;
        2. the ESCO has demonstrated to the satisfaction of the Agency's representative that the delay has affected the ESCO’s critical path;
        3. the ESCO has taken all reasonable measures to avoid or minimise the delay; and
        4. the ESCO gives the Agency written notice of:

the occurrence and cause of the delay, within 5 days after the delay commences; and

the total period of the delay for which the ESCO seeks an extension of time together with evidence satisfactory to the Agency that as a result of the delay the ESCO will be delayed in achieving completion, within 14 days after the end of the period of delay.

* + - 1. In the event that the conditions in Clauses 14(a)(i)(a)(v) above are met, the Agency shall, by notice in writing to the ESCO within seven (7) days of the receipt by the Agency of the ESCO's notice given, grant a reasonable extension to the Contractual Completion Date.
    1. Workers and subcontractors

The ESCO must pay all moneys due and payable to workers and subcontractors in respect of work under the Agreement as and when due. If required by the Agency, the ESCO shall, with each progress claim and, to the extent not prohibited by law, as a precondition to the Agency becoming obliged to make any payment to the ESCO arising out of such progress claim, give. in respect of a progress claim. a statutory declaration by the ESCO or, where the ESCO is a corporation, by a representative of the ESCO who is in a position to know the facts declared, that all workers and subcontractors have been paid all moneys due and payable to them in respect of work under this Agreement.

* + 1. Withholding payment
       1. The Agency may withhold monies due and payable in respect of the progress claim until the ESCO complies with Clause 15.5
       2. The Agency shall not withhold payment of such moneys in excess of the moneys evidenced pursuant to Clause 15.5 as due and payable to workers and sub-contractors.
    2. Termination for Cause
       1. The Agency may terminate this Agreement with immediate effect (or with effect from a specific date) by giving notice to the ESCO, if the ESCO:
          1. fails to provide the Works in accordance with the Works Specification or otherwise in accordance with the requirements of this Agreement;
          2. breaches any provision of this Agreement and, where that breach is capable of remedy, fails to remedy the breach within 10 Business Days after receiving written notice requiring it to do so (or such later date as may be specified in that notice);
          3. breaches any provision of this Agreement that is not capable of remedy;
          4. or any of its Personnel involved in the provision of the Works, commits fraud, dishonesty or any other serious misconduct;
          5. commits any act or does anything that may be prejudicial or otherwise detrimental to the reputation of the Agency; or
          6. suffers from an Insolvency Event.
    3. Termination Without Cause
       1. The Agency may terminate this Agreement without cause, on notice to the ESCO (such termination to take effect upon receipt of the notice or such later date as specified in the notice).
       2. If this Agreement is terminated pursuant to Clause 15.8(a), the Agency will pay the ESCO:
          1. for the Works performed in accordance with this Agreement up to the date of the termination; and
          2. the unavoidable and substantiated costs incurred by the ECSO as a direct result of the termination, excluding any loss of profit,

and the Agency has no other liability to the ESCO in relation to that termination.

* + - 1. When the Agency issues a notice under Clause 15.8(a), the ESCO must immediately comply with any directions given in the notice and do all that is possible to mitigate its losses arising from the termination of this Agreement.
    1. Grounds for termination by the ESCO
       1. The ESCO may terminate this Agreement by giving at least 20 Business Days written notice to the Agency if the Agency fails to pay amounts due under this Agreement which have the following characteristics:
          1. are the subject of Tax Invoices complying with this Agreement;
          2. are due and payable in accordance with this Agreement;
          3. are not the subject of a good faith dispute;
          4. are overdue for a period of at least 60 Business Days; and
          5. are amounts for which a demand has been made, provided that the demand clearly states that the amount has been overdue for a period of at least 60 Business Days and that the ESCO will have the right to terminate this Agreement on 20 Business Days' notice after the expiration of five Business Days following service of the demand if the demand is not met within that five Business Day period.
       2. This Clause 15.9 constitutes the ESCO's sole and exclusive right to terminate this Agreement.
  1. Dispute Resolution
     + 1. If any dispute arises under or in connection with this Agreement, either party may at any time give written notice to the other requesting that a meeting take place to seek to resolve the dispute.
       2. The parties' representatives must, within five (5) Business Days of service of the written notice, meet to discuss the dispute in good faith with a view to resolve the dispute.
       3. If the dispute is not resolved within ten (10) Business Days of the service of the written notice under Clause 16(a) or such longer period as may be agreed in writing between the parties, either party may refer the dispute to an appropriately qualified expert or mediator as appropriate for determination.
       4. The parties agree that any dispute in connection with Clauses 7 or 9must be determined by an expert.
          1. If the dispute is referred to an expert or mediator for determination, then:

The mediation will be conducted in accordance with the ADC Guidelines for Commercial Mediation which are operating at the time the Dispute is referred to mediation and which set out the procedures to be adopted, the process of selection of the mediator and the costs involved; and

The parties will each pay one half of the costs of the mediator.

* + - 1. If the parties cannot agree on an expert or mediator within seven (7) days of a referral for expert determination or mediation pursuant to Clause 16, then either party may ask the Australian Disputes Centre to appoint an expert or mediator.

Nothing in Clause 16 shall prejudice the right of a party to institute proceedings to enforce payment due under the Agreement or to seek injunctive or urgent declaratory relief.

* 1. Occupational Health and Safety
     + 1. The ESCO must:
          1. not do anything, or fail to do anything it is otherwise obliged to do, which may result in the Agency being in breach of any OH&S Law;
          2. cooperate with the Agency in supporting compliance with OH&S Law; and
          3. immediately comply with any direction, instruction or requirement arising under or given pursuant to OH&S Law.
       2. The Agency:
          1. appoints the ESCO as ‘Principal Contractor’ for the purposes or the requirements in the OH&S Law.
       3. The ESCO must:
          1. prepare and maintain the Occupational Health and Safety Coordination Plan (where the ESCO is appointed as the 'Principal Contractor);
          2. conduct a general hazard identification, risk assessment and control process in relation to the Works;
          3. conduct a job specific hazard identification, risk assessment and control process at each place where the Works will be performed, including the Premises;
          4. train, induct and brief all the ESCO's Personnel on safe work practices and their environmental and workplace health and safety obligations and responsibilities before they commence any Works under this Agreement, as is necessary to enable them to perform their work in a safe manner; and
          5. as soon as practicable after any incident, notify the relevant regulatory authority of any incident involving a personal injury or breach of OH&S Law occurring during the performance of this Agreement and must provide copies of all relevant documents with respect to the incident to the Agency (including all corrective actions);
  2. Confidentiality, Privacy and Data Protection
     1. Use of Confidential Information
        1. The ESCO must keep the Confidential Information confidential and secure and must (and must ensure its Personnel will):
           1. use and reproduce Confidential Information only to the extent necessary to perform its obligations under this Agreement; and
           2. not disclose or otherwise make available Confidential Information other than to its Personnel who have a need to know the information to enable the ESCO to perform its obligations under this Agreement.
        2. The ESCO must not disclose or permit the disclosure of any of the Agency's Confidential Information without written permission from the Agency, except:
           1. to its legal advisors, auditors and other advisors who require this information to provide advice to the ESCO in relation to this Agreement;
           2. to its Personnel having a legitimate reason to know such information;
           3. where the information disclosed is already in the public domain other than due to a breach of this Agreement; or
           4. where the disclosure is required by Law.
     2. Privacy
        1. The ESCO agrees that it will be bound by the Information Privacy Principles, Health Privacy Principles and any applicable Code of Practice (together, Privacy Obligations) with respect to any act done or practice engaged in, by the ESCO or its Personnel, for the purposes of this Agreement, in the same way and to the same extent as the Privacy Obligations would have applied to the Agency in respect of that act or practice had it been directly done or engaged in by the Agency or its Personnel.
        2. The ESCO agrees that it will:
           1. assist the Agency to comply with its obligations under the Privacy Obligations;
           2. immediately notify the Agency upon becoming aware of any breach of the Privacy Obligations and comply with all directions of the Agency in respect of the breach;
           3. provide the Agency with such co-operation as the Agency requires in relation to resolving any complaint concerning privacy; and
           4. provide access to or amendment of any record as directed by the Agency.
        3. The ESCO will comply with any directions made by any of the Commissioners (the Australian Information Commissioner or the Health Complaints Commissioner) which are relevant to this Agreement.
        4. Without limiting Clauses 18.2(a) to 18.2(c), in relation to any Personal Information obtained by the ESCO in connection with this Agreement, the ESCO must:
           1. not collect, use, disclose, store, transfer or handle the information except in accordance with the Privacy Obligations;
           2. not, without the prior consent of the Agency, store or disclose the information to a person outside Victoria;
           3. take all reasonable steps to ensure that the information is protected from misuse, interference or loss, and from unauthorised access, modification or disclosure;
           4. take all reasonable steps to destroy or permanently de-identify information that is no longer needed for the purposes of this Agreement;
           5. co-operate with any reasonable request or direction the Agency makes which relates to the protection of the information or the exercise of the functions of any of the Commissioners, the Australian Information Commissioner or the Victorian Health Complaints Commissioner;
           6. ensure that access to the information is limited to those of its Personnel who are required to access that information for the purposes of this Agreement; and
           7. comply with any reasonable direction of the Agency in relation to a complaint concerning privacy received by either party.
     3. Data Protection

The ESCO acknowledges that the Agency is bound by the Protective Data Security Standards. The ESCO will not do any act or engage in any practice that contravenes a Protective Data Security Standard or would give rise to contravention of a Protective Data Security Standard by the Agency in respect of any Data collected, held, used, managed, disclosed or transferred by the ESCO on behalf of the Agency under or in connection with this Agreement.

* 1. Compliance with Law and Policy
     1. General Law and Policy

The ESCO must, in performing its obligations under this Agreement, comply with:

* + - 1. all Laws affecting or applicable to the provision of the Works by the ESCO under this Agreement including any Laws; and
      2. the Agency’s policies and procedures as notified to the ESCO in writing from time to time.
    1. Victorian Public Sector Commission Code of Conduct

Where, in the course of performing the Works, the ESCO, or its Personnel:

* + - 1. supervise or work with public sector employees;
      2. undertake work that is of a similar nature to the work undertaken by public sector employees at a Premises or a location generally regarded as a public sector workplace; or
      3. use or have access to public sector resources or information that are not normally accessible or available to the public,

the ESCO must (and must ensure that its Personnel) comply with the Victorian Public Sector Code of Conduct.

* + 1. Supplier Code of Conduct

The ESCO acknowledges that:

* + - 1. the Supplier Code of Conduct is an important part of the Agency’s approach to procurement and describes the Agency's minimum expectations regarding the conduct of its suppliers;
      2. it has read the Supplier Code of Conduct; and
      3. the expectations set out in the Code are not intended to reduce, alter or supersede any other obligations which may be imposed on the Supplier, whether under this Agreement or at Law.
    1. Employment policy
       1. The ESCO and any Personnel engaged in the performance of the Works must not:
          1. engage in unethical work practices; or
          2. engage employees or sub contracted workers upon terms and conditions which do not meet industry standards generally applicable in Victoria.
       2. Where a federal industrial award may apply to the capacity in which an employee is engaged by the ESCO, or by a sub-contractor, in performing the Works, the ESCO must:
          1. where applicable, comply with the better off overall test under section 193 of the Fair Work Act 2009 (Cth) in relation to any enterprise agreement it is bound by; or
          2. otherwise ensure that the conditions on which that employee is engaged are no less beneficial to the employee than the rates and conditions under the applicable ward.
    2. Local Jobs First

If item 1 of Schedule 6 indicates that the Local Jobs First Policy applies to this Agreement, then the ESCO must comply with Schedule 6 in performing its obligations under this Agreement.

* + 1. Social Procurement Framework

If Item 1 of Schedule 7 indicates that the Social Procurement Framework applies to this Agreement, then the terms and conditions set out in Schedule 7 are incorporated and form part of this Agreement.

* + 1. Fair Jobs Code

If Item 1 of Schedule 8 indicates that the Fair Jobs Code applies to this Agreement, then the terms and conditions set out in Schedule 8 are incorporated into and form part of this Agreement.

* + 1. No unlawful inducements
       1. The ESCO will not, and will ensure that its Personnel do not, directly or indirectly, offer, promise, agree to pay, give, accept, or solicit anything of value (including to or from any third party) in order to secure any reward or improper benefit other than payment for the performance of their obligations under this Agreement.
       2. The Agency may terminate this Agreement immediately on notice to the ESCO if the ESCO or any of its Personnel is found to have engaged in any conduct under Clause 19.8(a) and recover the amount of any loss resulting from such termination as a debt due from the ESCO.
  1. General
     1. Entire agreement

This Agreement and the DFS contain the entire agreement between the parties in connection with its subject matter. It supersedes all previous agreements or understandings between parties in connection with its subject matter.

* + 1. Variations

This Agreement may be amended or replaced only in writing executed by each party.

* + 1. Assignment

A party may only assign this Agreement or a right under this Agreement with the prior written consent of the other party. The consent of the other party may not be unreasonably withheld.

* + 1. Transfer of Functions
       1. The ESCO acknowledges that the Agency may be reconstituted, renamed or replaced and that some or all of the powers, functions or responsibilities of the Agency may be transferred to or vested in another governmental agency.
       2. If the Agency is reconstituted, renamed or replaced or if some or all of the powers, functions or responsibilities of the Agency are transferred to or vested in another governmental agency, references in this Agreement must be deemed to refer, as applicable, to that reconstituted, renamed or new entity to the extent that it has assumed or has had transferred to it or vested in it those powers, functions or responsibilities.
    2. Rights Cumulative

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and in addition to any other rights of that party.

* + 1. Counterparts

The parties may execute this Agreement in counterparts. All executed counterparts are taken to constitute one document.

* + 1. Further Assurances

Each party must, at its own expense and within a reasonable time, do all things reasonably necessary (including executing and delivering documents) to give full effect to this Agreement and the transactions contemplated by it.

* + 1. Governing law and jurisdiction
       1. This Agreement is governed by the law of Victoria.
       2. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts that may hear appeals from those courts in respect of any proceeding in connection with this Agreement.
    2. Costs

Each party must pay its own costs in relation to the preparation, negotiation and execution of this Agreement.

* + 1. No merger

The rights and obligations of the parties under this Agreement do not merge on completion of any transaction contemplated by this Agreement.

* + 1. Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

* + 1. Notices
       1. Any notice, approval, consent or other communication from one party to another under this Agreement must be:
          1. in writing addressed to the other party;
          2. delivered by hand, post, courier or email; and
          3. must be signed by an authorised officer on behalf of the party giving it.
       2. Notices will be deemed to be given if:
          1. mailed, three (3) Business Days after posting; or
          2. delivered, on the date of delivery; or
          3. emailed, on receipt by the send of confirmation of receipt, except that a notice that is delivered or emailed after 5:00pm will be deemed to be received on the next business day.
    2. Relationship of parties

No party to this Agreement has the power to obligate or bind any other party. Except where this Agreement expressly states otherwise, it does not create a relationship of employment, joint venture, trust, agency or partnership between the parties.

19.14 Stamp duty

Any stamp duty or other taxes of a similar nature (including fines, penalties and interest payable) in connection with this Agreement or any transaction contemplated by this Agreement must be paid bythe Agency, unless determined by the Agency to be payable by the ESCO.

* + 1. Severability

Any provision of this Agreement which is invalid or unenforceable is to be read down, if possible, so as to be valid and enforceable. If the provision cannot be read down, it will be ineffective to the extent of the invalidity or unenforceability, without affecting the remaining provisions.

* + 1. Goods and Services Tax (GST)
       1. Unless otherwise expressly stated in this Agreement, all charges or other sums payable in this Agreement are exclusive of GST.
       2. Every invoice issued must be in the form of a valid GST tax invoice, or be accompanied by a valid GST tax invoice. No amount is payable under this Agreement until a valid GST tax invoice for the amount is received.
       3. If there is any abolition or reduction of any tax, duty, excise or statutory charge associated with the GST, or any change in the GST, the consideration payable for the supply must be varied so that the ESCO’s net dollar margin in respect of the supply remains the same.
       4. If the Agency is required to reimburse the ESCO for any costs or other amount, despite any other provision of this Agreement, the Agency does not have to pay to the ESCO any sum included in that amount for which the ESCO can claim an input tax credit or other like offset.
    2. Set-Off

The Agency may set off against any amount owing to the ECSO under this Agreement any amount then owing by the ESCO to the Agency.

* + 1. Ownership of carbon credits

Any carbon credits, carbon offsets or renewable energy certificates that may accrue pursuant to the Commonwealth Government’s carbon pollution reduction scheme or similar emissions trading scheme or any Commonwealth or State renewable energy target scheme as a result of the EPC Solutions works or in connection with the EPC Solutions works and any subsequent measurement and verification process will be wholly owned by the Agency and the ESCO must take all steps necessary to give effect to this result (including signing all necessary documents).

Signing page

**Executed** as an agreement.

|  |  |  |
| --- | --- | --- |
| Executed by [***insert name of authorised representative***] for and on behalf of [***insert company name***] ACN [*XX*] in the presence of: |  |  |
| Signature of witness |  | Signature of authorised officer |
| Name of witness (print) |  | Name of authorised officer |

|  |  |  |
| --- | --- | --- |
| Executed by [***insert name of authorised representative***] for and on behalf of State of Victoria as represented by [Insert name of Department] in the presence of: |  |  |
| Signature of witness |  | Signature of authorised officer |
| Name of witness (print) |  | Name of authorised officer |

1. Specification

|  |  |  |
| --- | --- | --- |
| Item 1 | Premises | *Address*:  *Use of Premises:* |
| Item 2 | Commencement date | [Insert date] |
| Item 3 | Contractual Completion Date | [Insert date] |
| Item 4 | DFS fee | [$ Insert amount] |
| Item 5 | EPC Solutions works contract sum | [$ Insert amount] |
| Item 6 | Performance guarantee period | [Insert months/years] |
| Item 7 | Measurement and verification fee | [Insert months/years] |
| Item 8 |  |  |
| Item 9 | Maintenance services fee | [$ Insert amount] |
| Item 10 | Maintenance services fee annual adjustment percentage | [$ Insert amount] |
| Item 11 | Approved sub-contractors | [Insert sub-contractor details] |
| Item 12 | Warranty Period | [Insert months/years] |
| Item 13 | Required insurances | [$ Insert amount]  *Public and Product liability*  [$ Insert amount]  *Property (being Industrial Special Risk & Business Interruption*  [$ Insert amount]  *Statutory Works Compensation*  [$ Insert amount]  *Professional Indemnity* |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| *Guaranteed energy savings* | | | | |
| **Contract Year** | *Guaranteed energy cost savings* ($) | Peak Electricity (kWh) | Off-Peak Electricity (kWh) | Natural Gas (GJ) | Water  (kL) | Other Savings |
| **1** |  |  |  |  |  |  |
| **2** |  |  |  |  |  |  |
| **3** |  |  |  |  |  |  |
| **4** |  |  |  |  |  |  |
| **5** |  |  |  |  |  |  |

|  |  |
| --- | --- |
| Liquidated damages rate |  |
| Security | EPC Solutions works security shall be [to be agreed on a project by project basis if required] EPC Solutions works contract sum [insert]  Performance guarantee security shall be [to be agreed on a project by project basis if required] of the cost of guaranteed energy savings [insert figure] |
| Time period for the provision of works specification to the Agency | [Insert months/years] |

1. Works Specification Scope Requirements

The ESCO must ensure the works specification includes the following matters as a minimum:

* 1. Budget

Provide a detailed budget for the completion of the EPC Solutions works including specification of the EPC Solutions works contract sum.

* 1. Target Dates for Program Milestones

Provide a detailed program for EPC Solutions works.

* 1. Process for the Agency Review of Design as Developed Through Various Design Milestones

Describe the process for final design review by Agency (including documentation to be reviewed and timing of each review process).

* 1. Identification and Approval by the Agency of Various Supply/Trade Contractors

The ESCO is to identify for approval by Agency specialised firms to supply and install the systems and demonstrate that proposed firms have undertaken projects of a similar size and complexity. Client references should be provided if required.

* 1. Matters Requiring Completion Before Completion of the Works Specification:
     + 1. *Extent of Design Development: The ESCO is to advise on the approximate percentage completion of design development.*
       2. *Approvals Obtained: ESCO to obtain all applicable authority approvals necessary for works.*
       3. *Authority requirements investigated: ESCO to investigate and report on all relevant authority requirements (including Fire Services Authority).*
       4. *Relevant Third Party Consents Obtained: ESCO to investigate need for and obtain all necessary consents from third parties to allow implementation of works.*
  2. Requirements for ESCO's Investigation and Reporting on Various Issues Relevant to completion of the Works Specification

The ESCO is to investigate and report on all issues relevant to completion of the works specification including with respect to the proposed EPC Solutions works:

* *any impact on architectural intellectual property and moral rights;*
* *any impact of the proposed works on fire and emergency backup services;*
* *any impact on control strategies affecting existing and future, proposed chillers located in Central Plant;*
* *other control strategies across the Premises; and*
* *integration of software with existing systems to ensure software licences remain valid.*
  1. Deliverables Required from ESCO Prior to the Agency's Acceptance of Works Specification

The Agency requires the ESCO to provide (as part of the works specification) the following deliverables, which must be provided before the Agency accepts any works specification:

* + - 1. Site Access and Management Plan – Detailed site access and management plan addressing requirements for site induction, location of and restrictions on access, restrictions on particular types of Equipment, and work practices, site security and safety, protection of public (including signage, fencing, barricades, etc)
      2. *Equipment Suppliers and Equipment Warranty Terms - A list of all suppliers of Equipment the ESCO proposes to engage together with the copies of warranties that will be provided by those suppliers in connection with the Equipment they will supply.*
      3. *Insurance – Proposals for all insurance required to be held by ESCO in connection with the works (including insurer, terms, extent of cover).*
      4. *Subcontractors – List of all proposed subcontractors (including key personnel and contact details).*
      5. *Approvals – Copies of all approvals and correspondence with Authorities relating to the works.*
      6. *Measurement and Verification Plan – see Annexure 1.*

1. Agreed EPC Solutions Works

[Example only - to be agreed by the parties in the Works Specification]

The works specification and works must satisfy and comply with the following requirements:

* 1. Completion of the EPC Solutions works

The Agency requires the EPC Solutions works to be completed by the ESCO by the Contractual Completion Date.

* 1. Operation and Maintenance

The Agency requires the EPC Solutions works implemented by the ESCO to have the following effects on operation and maintenance at the Premises:

* + - 1. integration with existing Equipment and suppliers requirements;
      2. ease of supportability and maintainability of systems, Equipment and fittings;
      3. availability of spare parts;
      4. improved life cycle of controlled plant;

The ESCO is to provide guidance and assistance to the Agency in relation to the proposed savings in operation and maintenance by negotiations with current operations and maintenance service providers.

* 1. Site Issues

A detailed site plan in respect of the carrying out and completion of the EPC Solutions works including the following:

Access: Access to the Premises must be coordinated with the Agency and may not be available to all areas of the Premises at particular times. The ESCO is to keep the level of visibility (personnel, Equipment and work) on the Premises to a minimum, in particular where it directly impacts on tenants or members of the public.

Use of Areas: Preference must be given to the Agency for the use of any areas (e.g. loading dock) or Equipment in the operation of the Premises.

ESCO's Personnel: The Agency must be kept fully informed at all times of the names of the ESCO's personnel and their locations within the Premises where they are working.

* 1. Optional Works Obligations

The Agency may require the ESCO to assume additional optional EPC Solutions works obligations, which will be considered during development of the works specification. These optional works obligations may relate to:

* + - 1. site identification
      2. adjoining property access
      3. site security
      4. dilapidation investigation
      5. Agency ESCO obligations
      6. training

The ESCO is to specify in the works specification whether it proposes these works obligations shall apply to the EPC Solutions works.

* 1. Maintenance

Maintenance Services - The Agency requires maintenance services to be provided by the ESCO to comply with the following:

* + - 1. all statutory requirements; and
      2. existing asset management strategies as implemented by the Agency.
  1. Reporting

EPC Solutions Works Reporting - The ESCO is required to report to the Agency during the carrying out of the EPC Solutions works, to comply with the following:

Form: Status (historical and future)

Frequency: Weekly

Content: Report on the progress of installing EPC Solutions works

Measurement and Verification Reporting - The ESCO is required to report to the Agency annually the energy and water savings achieved as a result of the EPC Solutions works.

* 1. Meetings

Meetings: The Agency requires the ESCO to arrange and hold meetings during the carrying out of the EPC Solutions works, which comply with the following:

Permitted Attendees: ESCO and sub-contractor staff and others as agreed with the Agency

Frequency: Weekly or as agreed with the Agency

Matters to be Discussed: Works program, installation progress, measurement and verification issues, stakeholder communication, and other issues as agreed with the Agency.

* 1. Other Works Requirements
     + 1. The ESCO is to provide consistent labelling of all new and modified Equipment.
       2. The ESCO is to provide a report for the testing and commissioning of the Equipment installed or modified.
       3. The ESCO is to provide (three sets) or update existing operating and maintenance manuals for the project, including at a minimum, functional specification, technical brochures of all Equipment, fault-finding literature, drawings and commissioning data.
       4. The ESCO is to provide details of additional maintenance costs generated by implementation of the works that are not covered under the current maintenance arrangements.
       5. Changes to existing operations and maintenance procedures that form part of the performance guarantee are to be specified by the ESCO and achieved with third party contractors.

1. Base Energy Rates

|  |  |
| --- | --- |
| **Electricity Rates** |  |
| **Gas Rates** |  |
| **Water Rates** |  |

1. Typical Adjustment Factors Affecting Base Year Energy
2. The size, construction, condition and state of repair of the Premises;
3. the use of the Premises, including the hours and level of occupancy of the Premises and the number of employees of the Agency employed on the Premises;
4. the lighting, temperature, humidification and ventilation levels of the Premises and any operational procedures in relation to these;
5. the heating and air conditioning Equipment and other energy-consuming Equipment at the Premises, and the general level of repair and efficiency of this Equipment;
6. weather conditions which are unusual, atypical or extreme, relative to those weather conditions recorded in the DFS for the base year; and
7. any failure by the Agency to observe its obligations under this Agreement.
8. Local Jobs First

Item 1 - Local Jobs First and model clauses apply to this Agreement

☐ Yes ☐No

[Include this Schedule 5 if the value of the procurement is more than $1m (regional) or $3m (Melbourne and/or state-wide. See the following link for further detail https://localjobsfirst.vic.gov.au/about/local-jobs-first]

* + 1. Local Industry Development Plan
       1. Supplier must, in performing its obligations under this Agreement:
          1. comply with the LIDP;
          2. perform all obligations required to be performed under the LIDP, including the LIDP Commitments, by the due date for performance; and
          3. comply with the Local Jobs First Policy.
       2. The Supplier acknowledges and agrees that its obligations as set out in the LIDP apply during the term of this agreement, any extensions to the term and until all of its Reporting obligations as set out in clause 2.3 of this Schedule are fulfilled.
       3. The Supplier's failure to comply with this clause 2.1 will constitute a material breach of this Agreement.
    2. Revised LIDP
       1. If at any time a variation to the Agreement is proposed which involves or effects a change in the nature of any LIDP Commitments, the Supplier must prepare a revised LIDP in collaboration with and certified by Industry Capability Network (Victoria) (Revised LIDP).
       2. When requested by the Contract Manager, the Supplier must provide the Revised LIDP to the Department.
       3. The Revised LIDP must be agreed by the parties before any variation to the Agreement can take effect unless the parties agree that a Revised LIDP is unnecessary.
       4. Once the Revised LIDP is agreed by the parties, the Revised LIDP replaces the LIDP and forms part of the Agreement.
    3. Reporting
       1. The Supplier must prepare and maintain records demonstrating its compliance with the LIDP Commitments.
       2. The Supplier must use the Victorian Management Centre (VMC) for LJF monitoring and reporting.
       3. If the Agreement is for a project valued at $20 million or more, the Supplier must provide a six monthly report demonstrating its progress towards implementing the LIDP through reporting on the VMC.
       4. Prior to or at Practical Completion pursuant to clause 1 of this Schedule, the Supplier must provide to the Contract Manager L
          1. the LIDP Monitoring Table identifying LIDP commitments and actual achievements. The LIDP Monitoring Table must identify and explain any departures from the LIDP commitments and the aggregated outcomes as reported in the LIDP Monitoring Table; and
          2. a Statutory Declaration in the form set out as part of the online LIDP to confirm that the information contained in the LIDP Monitoring Table is true and accurate. The Statutory Declaration must be made by a director of the Supplier of the Supplier's Chief Executive Officer or Chief Financial Officer.
       5. At the request of the Contract Manager, the Supplier must provide further information or explanation of any differences between expected and achieved LIDP outcomes.
       6. The reporting obligations in this Schedule are in addition to and do not derogate from any other reporting obligations as set out in this Agreement.
    4. Verification of Supplier's compliance with LIDP Plan
       1. The Supplier agrees that each of the Department and the Department will have the right to inspect its records in order to verify compliance with the LIDP.
       2. The Supplier must:
          1. permit the Contract Manager, an accountant or auditor on behalf of the Department, or any other person authorised by the Department, from time to time during ordinary business hours and upon Notice, to inspect and verify all records maintained by the Supplier for the purposes of this Agreement;
          2. permit the Department from time to time to undertake a review of the Supplier's performance in accordance with the LIDP; and
          3. ensure that its employees, agents and subcontractors give all reasonable assistance to any person authorised by the Department to undertake such audit or inspection.
       3. The Supplier acknowledges and agrees that the Department’s duly authorised representatives and Industry Capability Network (Victoria) are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Supplier's compliance with the LIDP.
       4. The obligations set out in this clause 2.4 are in addition to and do not derogate from any other obligation under this Agreement.
    5. Use of information

The Supplier acknowledges and agrees that:

* + - 1. Industry Capability Network (Victoria) will assess the Supplier's performance against the Supplier's LIDP;
      2. the statistical information contained in the LIDP and the measures of the Supplier's compliance with the LIDP as reported in the LIDP Monitoring Table will be:
         1. included in the Department's report of operations under Part 7 of the Financial Management Act 1994 in respect of the Department's compliance with the Local Jobs First Policy in the financial year to which the report of operations relates; and
         2. provided to the Responsible Minister for inclusion in the Responsible Minister's report to the Parliament for each financial year on the compliance and performance of the LIDP during that year; and
         3. may be disclosed in the circumstances authorised or permitted under this Agreement or as otherwise required by Law.
    1. Sub-contracting
       1. The Supplier must ensure that any subcontracts entered into by the Supplier in relation to work under this Agreement contain clauses requiring subcontractors:
          1. to comply with the Local Jobs First Policy and the LIDP to the extent that it applies to work performed under the subcontract,
          2. to provide necessary information that allows the Supplier to comply with its reporting obligations under clause 2.3 of this Schedule, and
          3. to permit the Department to exercise their inspection and verification rights under clause 2.4 of this Schedule.
       2. The subcontracting obligations set out in this clause 3 are in addition to and do not derogate from any other obligations under this Agreement.
       3. The Supplier's failure to comply with this clause 3 will constitute a material breach of this Agreement.
    2. Local Jobs First Commissioner
       1. The Supplier acknowledges that:
          1. it is required to comply with any information notice issued to it by the Local Jobs First Commissioner in accordance with s 24 of the Local Jobs First Act 2003;
          2. it is required to comply with any compliance notice issued to it by the Local Jobs First Commissioner in accordance with s 26 of the Local Jobs First Act 2003;
          3. its failure to comply with the compliance notice referred to in this clause 4(a)may result in the issue of an adverse publicity notice by the Responsible Minister under s 29 of the Local Jobs First Act 2003; and
          4. the Local Jobs First Commissioner may:

monitor and report on compliance with the Local Jobs First Policy and LIDP; and

request the Department to conduct an audit in relation to the Supplier's compliance with the Local Jobs First Policy and the LIDP.

* + - 1. The Supplier acknowledges that the Commissioner may recommend that the Department take enforcement proceedings against the Supplier if the Supplier has failed to comply with the Local Jobs First Policy or the LIDP by:
         1. applying to a court to obtain an injunction; or
         2. taking action available under this Agreement.

1. Social Procurement Framework

Item 1 - Social Procurement Commitments and model clauses apply to this Agreement

Yes No

[Note: Social Procurement Commitments and the model clause in this schedule will only apply to contracts valued at over $20m. Tick 'yes' in item 1 only if the Agreement is valued at over $20m. Please reach out to Procurement Services for model clauses if your contract is valued at over $20m .Please see the following link for further detail on the policy <https://www.buyingfor.vic.gov.au/social-procurement-victorian-government-approach>]

* 1. Definitions

1. In this Schedule:
2. Agency means the organisation with which the Supplier has entered into this Agreement.
3. Agreed Social Procurement Commitment Proposal means the agreed proposal between the Agency and the Supplier establishing the Social Procurement Commitments set out at Attachment 1 to this Schedule.
4. ICN means Industry Capability Network (Victoria) Limited of Level 11, 10 Queens Road, Melbourne VIC 3004 ACN 007 058 120.
5. Social Procurement Commitment means an obligation required to be performed by the Supplier, as set out in the Agreed Social Procurement Commitment Proposal, in relation to delivering a Social Procurement Framework Outcome.
6. VMC (formerly Victorian Management Centre) means the information management platform that collects data to support government and industry with the Social Procurement Framework and Local Jobs First policy, project delivery and performance, administered by the ICN.
   1. Agreed Social Procurement Commitment Proposal
      * 1. The Supplier will, in performing its obligations under this Agreement:
           1. comply with the Agreed Social Procurement Commitment Proposal;
           2. perform all Social Procurement Commitments by the due date for performance as set out in the Agreed Social Procurement Commitment Proposal or otherwise agreed between the parties in writing.
        2. The Supplier acknowledges and agrees that the Agreed Social Procurement Commitment Proposal (including the Social Procurement Commitments) applies during the term of this Agreement and any extensions to the term and until all obligations under clause 4 of this Schedule are fulfilled.
        3. The Supplier’s failure to comply with clause 2 may constitute a breach of this Agreement.
   2. Reporting
      * 1. The Supplier will prepare and maintain records demonstrating its:
           1. compliance with the Agreed Social Procurement Commitment Proposal;
           2. performance against the Social Procurement Commitments.
        2. The Supplier will, during the term of this Agreement, provide a written report to the Agency demonstrating its progress toward performing the Social Procurement Commitments at least every [insert period] and any other such times as requested by the Agency, acting reasonably.
        3. The Agency may request the Supplier to meet to discuss the contents of the report and other issues concerning the progress towards the Social Procurement Commitments including any identified reporting deficiencies and timeframes for rectification.
        4. The reports provided in accordance with clause 3(b) will:
           1. be submitted (where possible) by the Supplier using the VMC – or as otherwise agreed by the Agency;
           2. be in a form satisfactory to the Agency (acting reasonably);
           3. include all supporting information reasonably required by the Agency to verify the contents of the report.
        5. Within two months of the completion of the Services or the expiry or termination of this Agreement, whichever is earlier, the Supplier will provide:
           1. a written final report to the Agency demonstrating its compliance with the Agreed Social Procurement Commitment Proposal and satisfactory performance of the Social Procurement Commitments; and
           2. a statutory declaration in the form set out in Attachment 2 to this Schedule to confirm that the information contained in the final report is true and accurate. The Supplier must ensure the statutory declaration is made by a director of the Supplier or the Supplier’s Chief Executive Officer or Chief Financial Officer.
        6. At the request of the Agency, the Supplier will provide further information about, or explanation of, any:
           1. non-compliance with the Agreed Social Procurement Commitment Proposal;
           2. failure to perform the Social Procurement Commitments by the due date for performance.
        7. The obligations set out in this clause 3 are in addition to, and do not derogate from, any other obligations set out in this Agreement.
   3. Verifying compliance
      * 1. The Supplier acknowledges and agrees that the Agency will have the right to inspect the Supplier's records to verify its compliance with the Agreed Social Procurement Commitment Proposal.
        2. The Supplier will:
           1. permit the Agency, or a duly authorised nominee of the Agency, from time to time during ordinary business hours and upon reasonable notice, to inspect and verify all records maintained by the Supplier for the purposes of this clause 4;
           2. permit the Agency, or a duly authorised nominee of the Agency, from time to time to undertake a review of the Supplier’s performance against the Social Procurement Commitments; and
           3. ensure that its employees, agents and subcontractors give all reasonable assistance to the Agency, or a duly authorised nominee of the Agency, to undertake such inspection, verification or review.
        3. The Supplier acknowledges and agrees that the Agency, or a duly authorised nominee of the Agency, is authorised to obtain information from any relevant persons, firms or corporations, including third parties, in connection with the Supplier’s performance against the Social Procurement Commitments.
        4. The obligations set out in this clause 4 are in addition to, and do not derogate from, any other obligations as set out in this Agreement.
   4. Use of information
      * 1. The Supplier acknowledges and agrees that the Agency will assess the Supplier’s performance against the Social Procurement Commitments and this information may be:
           1. provided by the Agency to other departments such as the departments responsible for the Social Procurement Framework;
           2. considered in the assessment or review of the Supplier's eligibility to tender for future Victorian Government contracts; and
           3. disclosed in accordance with this Agreement or as otherwise required by Law.
   5. Subcontracting
      * 1. The Supplier will ensure that any subcontracts it enters into in relation to this Agreement contain clauses requiring its subcontractors to:
           1. comply with the Agreed Social Procurement Commitment Proposal to the extent that it applies to work performed under the subcontract as though the subcontractor was the Supplier;
           2. provide any necessary information to the Supplier and/or the Agency to ensure the Supplier can comply with its obligations under this Schedule;
           3. permit the Agency to exercise its rights under clause 4 of this Schedule as though that clause referred to the subcontractor in place of the Supplier.
        2. The obligations set out in this clause 6 are in addition to, and do not derogate from, any other obligations as set out in this Agreement.
        3. The Supplier's failure to comply with this clause 6 may constitute a breach of this Agreement.
7. Social Procurement Commitment Proposal

[Note: Departments and Agencies may need to clarify or negotiate the proposed Social Procurement Commitments and reporting requirements set out in the successful Bidder’s Social Procurement Commitment Proposal. For example, a successful Bidder may propose a Social Procurement Commitment, but it is unclear how performance will be measured.

Once these have been agreed, this document becomes the Supplier’s Agreed Social Procurement Commitment Proposal. Insert a copy of the Agreed Social Procurement Commitment Proposal here.]

1. Fair Jobs Code

Item 1 - Fair Jobs Code and model clauses apply to this Agreement

☐ Yes ☐No

[Only include this Schedule if the Fair Jobs Code applies to this procurement and the value of this contract is over $3m in metropolitan Melbourne and over $1m in rural areas, but under $20m. Use High Value Procurement Contract model clauses for procurements over $20m. If the Fair Jobs Code does not apply, delete the content of this Schedule and replace it with the words ‘Not used’. Please see the following link for further detail regarding the policy <https://www.buyingfor.vic.gov.au/fair-jobs-code-suppliers-and-businesses> ]

* 1. Definitions

In this Schedule:

**Adverse Ruling** means a ruling (by any court, tribunal, board, commission or other entity with jurisdiction or legal authority to determine the matter) that the Supplier has breached an applicable employment, industrial relations or workplace health and safety law.

**DJSIR** means the Department of Jobs, Skills, Industry and Regions (and its successor Government department) as the Department responsible for the FJC.

**Enforceable Undertaking** means a promise or agreement made by the Supplier with a regulator, Court or other body (including the Fair Work Ombudsman, WorkSafe Victoria and Wage Inspectorate Victoria) in respect of a breach or alleged/suspected breach of an applicable employment, industrial relations or workplace health and safety law.

**FJC Guidelines** means Fair Jobs Code Guidelines, available at www.buyingfor.vic.gov.au/fair-jobs-code-and-guides.

**FJC** means the Fair Jobs Code issued by the State of Victoria available at www.buyingfor.vic.gov.au/fair-jobs-code.

**FJC Unit** means the Fair Jobs Code Unit, an administrative group within DJSIR with responsibilities in relation to the FJC.

**Notice** means a notice given, delivered or served in accordance with this Agreement.

**Pre-Assessment Certificate** means a certificate issued to the Supplier by the FJC Unit prior to entering into this Agreement, or which is renewed during the term of this Agreement.

* 1. **Fair Jobs Code**
     + 1. The Supplier warrants that at the time of entering this Agreement it holds a valid Pre-Assessment Certificate.
       2. In performing its obligations under this Agreement the Supplier acknowledges and agrees that it shall:
          1. continue to hold a valid Pre-Assessment Certificate; and
          2. comply with the FJC.
       3. If at any time during the term of this Agreement the Supplier's Pre-Assessment Certificate is revoked by the FJC Unit that revocation will constitute a breach of this Schedule which will enable the Department to exercise its rights under clause 6 of this Schedule.
       4. The Supplier acknowledges and agrees that the obligations for holding and maintaining a Pre-Assessment Certificate apply during the term of this Agreement and any extensions to the term.
  2. **Verification of Supplier's compliance with the Fair Jobs Code**
     + 1. The Supplier must, on request by the Department, provide a copy of the Pre‑Assessment Certificate or any related correspondence with the FJC Unit.
       2. If, during the term of this Agreement, the Supplier's Pre-Assessment Certificate expires the Supplier must provide Notice to the Department of the expiry within 10 Business Days.
       3. If the Supplier fails to promptly take steps to renew an expired Pre-Assessment Certificate after notifying the Department of the expiration, the expiration will constitute a breach of this Schedule which will enable the Department to exercise its rights under clause 6 of this Schedule.
  3. **Ongoing duty of disclosure and cooperation** 
     + 1. If during the term of this Agreement, the Supplier is the subject of an Adverse Ruling or Enforceable Undertaking, it must provide Notice to the Department and the FJC Unit within 10 Business Days of the Adverse Ruling or Enforceable Undertaking being made.
       2. During the term of this Agreement the Supplier must:
          1. cooperate with all reasonable requests from the Department seeking evidence of the Supplier's compliance with the FJC;
          2. permit the Department's Representative, an accountant or auditor on behalf of the Department, DJSIR or any other person authorised by the Department or DJSIR, from time to time during ordinary business hours and upon Notice, to inspect and verify all records maintained by the Supplier relating to compliance with the FJC under this Agreement; and
          3. ensure that its employees, agents and subcontractors give all reasonable assistance to any person authorised by the Department or DJSIR to undertake such audit or inspection.
       3. The Department will bear all costs for any audit in accordance with clause 4(b)(ii) of this Schedule.
       4. The Supplier acknowledges and agrees that the Department, DJSIR, or their duly authorised representatives (including the FJC Unit), are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Supplier’s compliance with the FJC.
       5. The obligations set out in this clause 4 are in addition to and do not derogate from any other obligation under this Agreement.
       6. A failure to comply with this clause 4 will constitute a breach of this Schedule which will enable the Department to exercise its rights under clause 6 of this Schedule.
  4. **Use of information**

The Supplier acknowledges and agrees that:

* + - 1. the FJC Unit will assess the Supplier’s compliance with the FJC;
      2. information regarding the Supplier’s compliance with the FJC including any disclosures regarding Adverse Rulings or Enforceable Undertakings:
         1. will be reported by the Department to the FJC Unit in compliance with the Department’s obligations under the FJC; and
         2. may be disclosed in the circumstances authorised or permitted under the terms of this Agreement or as otherwise required by Law; and
      3. nothing in this clause removes the obligation for the Supplier to report Adverse Rulings or Enforceable Undertakings to the FJC Unit as per clause 4 of this Schedule.
  1. **Consequences of breach**

Any breach of the provisions of this Schedule will enable the Department, in its absolute discretion, to do any or all of the following:

* + - 1. suspend the Agreement until such time as the breach has been remedied to the satisfaction of the Department and within a timeframe acceptable to the Department;
      2. by written Notice immediately terminate the Agreement; or
      3. exercise any rights that it has under this Agreement.

1. Expert Determination Rules

1. The parties acknowledge that their objective is to have the dispute resolved in the most efficient manner possible and authorise the expert to mandate an expedited dispute resolution process appropriate for the dispute than may include provision of written submissions, conferences and a form of hearing, as the expert considers appropriate.

2. Liability for the costs of the parties relevant to the dispute shall be determined by the expert with the principle that costs follow the event and, failing determination, shall be shared equally by the parties.

3. The expert will act as an expert and not an arbitrator and may make a decision from his or her own knowledge and expertise.

4. The expert must make his or her determination in relation to the dispute within ten business days of the conclusion of the last of the step in the dispute resolution process as mandated by the expert.