

**CITY OF MARATHON, FLORIDA
RESOLUTION 2013-57**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, WAIVING THE CITY'S PURCHASING POLICIES AND PROCEDURES AND APPROVING A "PIGGY-BACK" AGREEMENT BETWEEN THE CITY OF MARATHON, FLORIDA AND ENERGY SYSTEMS GROUP, LLC TO CONDUCT A PHOTOMETRIC ANALYSIS OF THE STREET LIGHTS ALONG THE U.S. 1 CORRIDOR AND TO RETROFIT STREET LIGHT POLES AS PART OF A PILOT PROGRAM WITH DECORATIVE LIGHTS IN AN AMOUNT NOT TO EXCEED \$200,000.00; AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT AND EXPEND BUDGETED FUNDS ON BEHALF OF THE CITY; AND PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the City of West Palm Beach issued Requests for Proposals No. 09/10-118 (with addendums) to solicit proposal for energy performance contracting services; and

WHEREAS, pursuant to this competitive procurement process the City of West Palm Beach selected Energy Systems Group, LLC, (the "Contractor") to perform certain energy cost saving measures; and

WHEREAS, pursuant to Resolution 2007-171, the City of Marathon, Florida (the "City") is authorized to enter into contracts for materials, supplies, equipment, public improvements or services without competitive bidding by utilizing existing contract terms and prices entered into by other local, state or federal governmental authorities, provided that the governmental authority has followed a competitive bidding procedure leading to the award of the contract in question which is substantially similar to the competitive procedure outlined in the City's purchasing policies and procedures; and

WHEREAS, the City desires to engage the Contractor to perform similar energy cost saving measures as provided to the City of West Palm Beach to include, but not limited to, a photometric study of the U.S. 1 corridor lighting and to replace several light poles with decorative light poles.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THAT:

Section 1. The above recitals are true and correct and incorporated herein.

Section 2. Based upon the recommendation of the City Manager the City Council waives the City's purchasing policies and procedures; and the agreement between the City and the Contractor for a photometric study of the U.S. 1 corridor lighting and to replace several light poles with decorative light poles in an amount not to exceed \$200,000, a copy of which is attached hereto

as Exhibit "A," together with such non-material changes as may be acceptable to the City Manager and approved as to form and legality by the City Attorney, is hereby approved. The City Manager is authorized to execute the agreement and expend budgeted funds on behalf of the City.

Section 3. This resolution shall take effect immediately upon its adoption

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MARATHON, FLORIDA, THIS 23rd DAY OF JULY, 2013.

THE CITY OF MARATHON, FLORIDA



Mayor Mike Cinque

AYES: Snead, Bull, Keating, Ramsay, Cinque
NOES: None
ABSENT: None
ABSTAIN: None

ATTEST:



Diane Clavier, City Clerk

(City Seal)

APPROVED AS TO FORM AND LEGALITY FOR THE USE AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:



City Attorney

**ENERGY SERVICES PROGRAM AGREEMENT BETWEEN
THE CITY OF MARATHON
AND
ENERGY SYSTEMS GROUP, LLC**

THIS AGREEMENT is made between the City of Marathon, Florida, a Florida municipal corporation whose address and principal place of business is 9805 Overseas Highway, Marathon, Florida 33050, (hereinafter the "City") and Energy Systems Group, LLC., an Indiana limited liability company authorized to do business in Florida whose address and principal place of business is: 4655 Rosebud Lane, Newburgh, Indiana 47630, (hereinafter the "Contractor"), and

WHEREAS, the City of West Palm Beach issued Requests for Proposals No. 09/10-118 (with addendums) to solicit proposal for energy performance contracting services; and

WHEREAS, pursuant to this competitive procurement process the City of West Palm Beach selected the Contractor to perform certain energy cost saving measures (the "WPB Agreement"); and

WHEREAS, pursuant to Resolution 2007-171, the City is authorized to enter into contracts for materials, supplies, equipment, public improvements or services without competitive bidding by utilizing existing contract terms and prices entered into by other local, state or federal governmental authorities, provided that the governmental authority has followed a competitive bidding procedure leading to the award of the contract in question which is substantially similar to the competitive procedure outlined in the City's Purchasing Policy; and

WHEREAS, the City desires to engage the Contractor to perform similar energy cost saving measures as provided to the City of West Palm Beach to include, but not limited to, an Photometric Study of the US 1 corridor lighting and to replace several light pole with decorative light poles (the "Work").

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the Contractor and the City agree as follows.

1. **WPB Agreement.**

- (a) The WPB Agreement is attached hereto as **Exhibit "A"** to this Agreement and made a part hereof by this reference. Except as modified herein all of the terms and conditions of the WPB Agreement shall apply to the City and Contractor.
- (b) The following provisions of the WPB Agreement are stricken:
 - (1) Section 1 – Definitions
 - (2) Section 2 – Incorporation of Other Documents

- (3) Section 3 – Term of Contract; Interim Period
- (4) Subsections 4.4.2, 4.4.3, and 4.15.
- (5) Section 6 – Payments to ESG for Project Work
- (6) Section 8 – Performance Savings Guarantee
- (7) Section 12 – Insurance
- (8) Subsection 13.2
- (9) Section 21 – Documentation for Section 179D Tax Deduction
- (10) Section 22 – Assignment of Environmental Attributes
- (11) Subsections 23.9, 23.14, 23.16 and 23.17
- (13) All Schedules and Appendix

2. **Scope of Services/Deliverables.**

- (a) The Contractor shall provide the Work for a lump sum price specified in **Exhibit “B” – Scope of Work** attached to this Agreement, and made a part hereof by this reference. Contractor shall be responsible for supplying all apparatus, equipment, labor, materials, means of transport, services and tools incidental or necessary to complete the Work.

3. **Term/Commencement Date.**

- (a) Unless specified otherwise in **Exhibit “B”** the Contractor shall not commence work until the City issues Contractor a written Notice to Proceed and the Work shall be fully completed and ready for final payment in accordance with the Agreement Documents no later than December 31, 2013 (“Final Completion”). The City Manager may extend the term of this Agreement up to an additional sixty (60) days at his sole discretion based upon the recommendation of the City’s Public Works Director.
- (b) Contractor agrees that time is of the essence and Contractor shall complete each deliverable for the Work within the timeframes set forth in the Work Schedule, unless extended by the City Manager.

4. **Compensation and Payment.**

- (a) The Contractor shall invoice the City on a monthly basis. The total amount invoiced shall not exceed \$200,000.00. All invoices shall provide a detailed statement of the Work performed by Contractor for the period of time covered by the invoice.
- (b) The City shall pay Contractor in accordance with the Florida Prompt Payment Act.

- (c) If a dispute should occur regarding an invoice submitted, the City Manager may withhold payment of the disputed amount and shall pay to the Contractor the undisputed portion of the invoice. Upon written request of the Finance Director, the Contractor shall provide written documentation to justify the invoice. Any compensation disputes shall be decided by the City Manager whose decision shall be final.

5. **City's Responsibilities.**

- (a) Furnish to Contractor, at the Contractor's written request, all available maps, plans, existing studies, reports and other data pertinent to the Work, in possession of the City.
- (b) Arrange for access to, and make all provisions for Contractor to enter upon, real property as required for Contractor to perform the Work as may be requested in writing by the Contractor.

6. **Contractor's Responsibilities.**

- (a) The Contractor shall exercise the same degree of care, skill and diligence in the performance of the Work as is ordinarily provided by a professional under similar circumstances. If at any time during the term of this Agreement or within one year from the completion of the Work, it is determined that the Contractor's deliverables are incorrect, defective or fail to conform to the Scope of Work, upon written notification from the City Manager, the Contractor shall at Contractor's sole expense, immediately correct the work.

7. **Insurance.**

The Contractor shall secure and maintain throughout the duration of this Agreement insurance of such type and in such amounts as required herein. The underwriter of such insurance shall be qualified to do business in the State of Florida and have agents upon whom service of process may be made in the State of Florida. The insurance coverage shall include a minimum of:

- (a) Worker's Compensation and Employer's Liability Insurance. If applicable, coverage to apply for all employees at minimum statutory limits as required by Florida Law.
- (b) Comprehensive Automobile and Vehicle Liability Insurance. Motor vehicle liability insurance, including applicable no-fault coverage, with limits of liability of not less than \$500,000.00 per occurrence, combined single limit for Bodily Injury Liability and Property Damage Liability. Coverage shall include all owned vehicles, all non-owned vehicles, and all hired vehicles.

- (c) Commercial General Liability. Commercial general liability coverage with limits of liability of not less than \$1,000,000.00 per occurrence combined single limit for Bodily Injury Liability and Property Damage Liability.
- (d) Professional Liability. Professional liability coverage with limits of liability of not less than \$1,000,000.00 per occurrence and \$1,000,000.00 combined aggregate per year.
- (e) Certificates of Insurance shall be provided to the City at the time of execution of this Agreement. Certificates of Insurance shall include the City as additional insured on the Comprehensive Automobile and Vehicle Liability and Commercial General Liability policies. Contractor shall provide not less than fifteen (15) calendar days' written notice shall be provided to the City before any policy or coverage is cancelled or restricted.
- (f) If at any time during the term of this Agreement Contractor fails to maintain the above specified insurance coverage it shall indemnify and hold harmless the City against any claim for damages, unless such claim is solely the result of City's negligence.

8. **Agreement Documents.**

The following documents (if applicable) shall, by this reference, be considered part of this Agreement:

WPB Agreement;
Exhibits;
Scope of Work/Specifications;
Insurance Certificates; and
Bonds

9. **Attorneys Fees and Waiver of Jury Trial.**

- (a) In the event of any litigation arising out of this Agreement, each party shall be responsible for its attorneys' fees and costs, including the fees and expenses of any paralegals, law clerks and legal assistants, and including fees and expenses charged for representation at both the trial and appellate levels.
- (b) In the event of any litigation arising out of this Agreement, each party hereby knowingly, irrevocably, voluntarily, and intentionally waives its right to trial by jury.

10. **Notices/Authorized Representatives.**

- (a) Any notices required by this Agreement shall be in writing and shall be deemed to have been properly given if transmitted by hand-delivery, by registered or certified mail with postage prepaid return receipt requested, or by a private postal service, addressed to the parties (or their successors) at the following addresses:

For the City: Roger Hernstadt, City Manager
City of Marathon, Florida
9805 Overseas Highway
Marathon, Florida 33050

With a Copy to: John Herin
City Attorney
GrayRobinson, PA
401 E. Las Olas Blvd.
Suite 1850
Fort Lauderdale, 33301

For The Contractor: Chris Summers
Regional Director
Energy Systems Group, LLC
17757 U.S. Hwy. 19 N.
Suite 210
Clearwater, Florida 33764

With a Copy to: Energy Systems Group, LLC
4655 Rosebud Lane
Newburgh, Indiana 47630
Attention: General Counsel

11. **Governing Law.**

- (a) This Agreement shall be construed in accordance with and governed by the laws of the State of Florida. Exclusive venue for any litigation arising out of this Agreement shall be in Monroe County, Florida, Middle Keys Division of the Circuit Court or the Southern District of Florida.

12. **Ownership and Access to Records and Audits.**

- (a) All complete and incomplete records, books, documents, maps, data, deliverables, papers, and financial information (the "Records") created as part of or in furtherance of the Work under this Agreement shall be the property of the City.

- (b) The City Manager or his designee shall, during the term of this Agreement and for a period of three (3) years from the date of termination of this Agreement, have access to and the right to examine and audit any Records of the Contractor involving transactions related to this Agreement.
- (c) The City may cancel this Agreement for refusal by the Contractor to allow access by the City Manager or his designee to any Records pertaining to work performed under this Agreement that are subject to the provisions of Chapter 119, Florida Statutes.

13. **Independent Contractor.**

- (a) The Contractor and its employees, volunteers and agents shall be and remain independent contractors and not agents or employees of the City with respect to all of the acts and services performed by and under the terms of this Agreement. This Agreement shall not in any way be construed to create a partnership, association or any other kind of joint undertaking, enterprise or venture between the parties.

14. **Compliance with Laws.**

- (a) The Contractor shall comply with all applicable laws, ordinances, rules, regulations, and lawful orders of public authorities relating to the Work.

15. **Waiver.**

- (a) The failure of either party to this Agreement to object to or to take affirmative action with respect to any conduct of the other which is in violation of the terms of this Agreement shall not be construed as a waiver of the violation or breach, or of any future violation, breach or wrongful conduct.

16. **Survival of Provisions.**

- (a) Any terms or conditions of either this Agreement that require acts beyond the date of the term of the Agreement, shall survive termination of the Agreement, shall remain in full force and effect unless and until the terms or conditions are completed and shall be fully enforceable by either party.

17. **Authorization to Sign Agreement.**

- (a) The execution and delivery of this Agreement by Contractor is within Contractor's capacity and all requisite action has been taken to make this Agreement valid and binding on Contractor in accordance with its terms.

18. **Non-Exclusive Agreement.**

- (a) The services to be provided by the Contractor pursuant to this Agreement shall be non-exclusive and nothing herein shall preclude the City from engaging other firms to perform the same or similar services for the benefit of the City as determined in its sole and absolute discretion.

19. **Conflicting Provisions.**


- (a) In the event there is a conflict between any of the terms and conditions of this Agreement and the WPB Agreement, the more restrictive language – as applied to the Contractor – shall prevail.

[THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties execute this Agreement on the respective dates under each signature. The City, signing by and through its City Manager, attested to by its City Clerk, duly authorized to execute same; and by Contractor by and through its President, who has been duly authorized to execute same.

ATTEST:

CITY OF MARATHON:



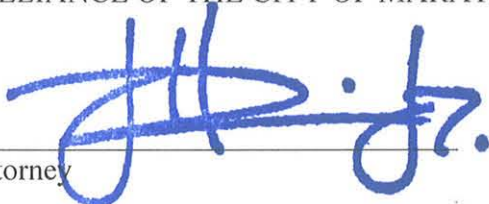
Diane Clavier, City Clerk

By: 

Roger Hernstadt, City Manager


Date: 08/2/13

APPROVED AS TO FORM AND LEGALITY FOR THE USE
AND RELIANCE OF THE CITY OF MARATHON, FLORIDA ONLY:



City Attorney

CONTRACTOR:

By: 

Gregory F. Collins, President

Date: 8/2/13

EXHIBIT "A"
WPB AGREEMENT

CONTRACTOR
ORIGINAL



GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT

ENERGY SYSTEMS GROUP, LLC;

Matter No. 08592.002
RFP 09/10-118
237-11

Table of Contents

RECITALS	1
SECTION 1. DEFINITIONS	2
SECTION 2. INCORPORATION OF OTHER DOCUMENTS	3
SECTION 3. TERM OF CONTRACT; ECM TERMS; ITERIM PERIOD	3
SECTION 4. DESIGN AND INSTALLATION OF CONSERVATION MEASURES	
SECTION 5. HAZARDOUS MATERIALS	
SECTION 6. PAYMENTS TO ESG FOR PROJECT WORK	19
SECTION 7. FISCAL FUNDING	31
SECTION 8. PERFORMANCE SAVINGS GUARANTY	24
SECTION 9. MAINTENANCE	28
SECTION 10. WARRANTIES	24
SECTION 11. OWNERSHIP	
SECTION 12. INSURANCE	26
SECTION 13. BONDS	27
SECTION 14. INDEMINIFICATION AND LIMITATION OF LIABILITY	
SECTION 15. EVENTS OF DEFAULT	29
SECTION 16. REMEDIES UPON DEFAULT	29
SECTION 17. DISPUTE RESOLUTION	
SECTION 18. TERMINATION	
SECTION 19. ASSIGNMENT	32
SECTION 20. REPRESENTATIONS AND WARRANTIES	32
SECTION 21. MISCELLANEOUS	33

SCHEDULE A – ECMS TO BE INSTALLED	40
SCHEDULE B – ECM INSTALLATION SCHEDULE.....	
SCHEDULE C – ESG MAINTENANCE & TRAINING RESPONSIBILITIES	
SCHEDULE D – CERTIFICATE OF ACCEPTANCE.....	
SCHEDULE E – COMPENSATION TO ESG.....	
SCHEDULE F – ENERGY SAVINGS GUARANTY.....	
SCHEDULE G – COST SAVINGS FORMULA	
SCHEDULE H – MONITORING & VERIFICATION PLAN.....	
SCHEDULE J – BASELINE.....	
SCHEDULE K – CITY’S MAINTENANCE RESPONSIBILITIES	
SCHEDULE L – PERFORMANCE BOND.....	
SCHEDULE M – GUARANTY SAVINGS GUARANTY BOND.....	
SCHEDULE N – SYSTEMS START-UP AND COMMISSIONING	
SCHEDULE O – STANDARDS OF SERVICE	
SCHEDULE P – EQUIPMNET WARRANTIES	
.....	
APPENDIX 1 – INVESTMENT GRADE ENERGY AUDIT	
APPENDIX 2 – ROOM BY ROOM LIGHTING INVENTORY	
APPENDIX 3 – EVERNIA GARAGE DESIGN DOCUMENTS	
APPENDIX 4 – POLICE STATION DESIGN DOCUMENTS	
APPENDIX 5 – CITYS SPECIFICATIONS 01700	
APPENDIX 6 – OPEN BOOK PRICING SHEET	
APPENDIX 7 – ECM SUMMARY	



ENERGY SAVINGS PERFORMANCE CONTRACT

Matter No. 08592.002
RFP 09/10-118

This Energy Savings Performance Contract (the "Contract") is made by and between the **CITY OF WEST PALM BEACH, FLORIDA**, a Florida municipal corporation, with a physical address of 401 Clematis Street, West Palm Beach, Florida and a mailing address of P.O. Box 3366, West Palm Beach, FL 33402-3366 ("City") and **ENERGY SYSTEMS GROUP, LLC**, an Indiana limited liability ESG authorized to do business in the State of Florida, with a principal address of 4655 Rosebud Lane, Newburgh, Indiana 47630 ("ESG"), for the purpose of installing certain energy and water cost saving equipment, and providing other services designed to save energy for the City's property and buildings.

RECITALS

WHEREAS, City owns and operates certain buildings and facilities and is in need of energy and water cost saving equipment and services designed to save energy and associated energy costs at said buildings and facilities; and

WHEREAS, the City issued Request for Proposals No. 09/10-118, and Addendums 1 through 6 (the "RFP") pursuant to state and local law to solicit proposals for Energy Performance Contracting Services; and

WHEREAS, ESG responded to the RFP by submitting its Proposal dated June 9, 2010 (the "Proposal"), and

WHEREAS, ESG was selected and performed a comprehensive energy use and savings analysis of certain City buildings, facilities and equipment (the "Energy Audit") which City has approved; and

WHEREAS, ESG has made an assessment of the utility consumption characteristics of the buildings, facilities and equipment described in the RFP and has ascertained that if certain energy savings improvements are made, the amount of energy and operations and maintenance savings can be reasonably ascertained and guaranteed in an amount sufficient to cover all costs associated with the installation of the energy cost saving measures and services; and

WHEREAS, ESG will provide the City with a written guarantee that the cost savings will meet or exceed the costs of the system; and

WHEREAS, City desires to retain ESG to design, purchase, install, implement, provide training, maintain and monitor certain energy cost savings measures and equipment and to provide other services and strategies, for the purpose of achieving energy and water cost reductions, as more fully described in this Contract; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, City and ESG agree as follows:

SECTION 1. DEFINITIONS

The following terms have the meanings specified below unless the context clearly requires otherwise:

~~**Annual Excess Savings** means the amount of any actual annual Cost Savings that exceeds total annual contract payments made by City under this Contract for such calendar year pursuant to §489.145(3)(d)(2), Florida Statutes.~~

~~**Annual Reconciliation** means a determination pursuant to §489.145(5)(e), Florida Statutes, and Section 8.6 of this Contract, as to whether a shortfall in annual Cost Savings or an excess in annual Cost Savings exists based on the provisions of ESG's written savings guarantee reflected in Schedule F (*Energy Savings Guarantee*) with savings calculated according to Schedule G (*Cost Savings Formula*).~~

~~**Baseline** means City's fuel, energy or water consumption for each ECM. The initial Baseline is set forth in Schedule J (*Baseline*). To the extent the Baseline may be adjusted, it shall be adjusted in accordance with Schedule J.~~

~~**Commencement Date** means, with respect to each ECM, the first day of the calendar month after which all of the following events have occurred: (i) all schedules are in final form and accepted by City; (ii) ESG has delivered a notice to City that it has completed installation and commenced operating all of the ECMs in accordance with the provisions of Schedule B (*Installation Schedule*); (iii) no Event of Default exists; and (iv) City has inspected and accepted said installation and operation as evidenced by an executed Certificate of Acceptance for all ECMs, as set forth in Schedule D.~~

~~**ESG** means the energy savings contractor identified in the first paragraph of this Contract.~~

~~**Energy Conservation Measure** or "ECM" means each of the energy conservation measures, including facility alterations or equipment installations identified in the Energy Audit and set forth in Schedule A, together with any training programs incidental to this Contract, which reduce the City's energy or water consumption, wastewater production, or energy-related operating costs.~~

~~**Cost Savings** means the measured reduction in the cost of fuel, energy, water consumption, or wastewater production, and stipulated operation and maintenance, if applicable, created from the implementation of one or more Conservation Measures when compared with the established Baseline. The Cost Savings shall be determined in accordance with the formulas and methodologies set forth in Schedules G and H.~~

~~**Equipment** means all items of property described in the Schedule A (*ECMs to Be Installed*).~~

~~**Fiscal Year** means the annual period from October 1st through September 30th.~~

~~**Energy Audit** or "Audit" means the detailed investment grade energy or water and/or wastewater audit performed by ESG, along with an analysis of the Energy Conservation Measures, and their costs, savings, and benefits prior to entry of this Contract. The Audit includes a narrative describing and justifying the need for the ECMs. The Audit is attached as Appendix 1 and has been accepted by City, and is incorporated into and made part of this Contract.~~

~~**Guarantee** means ESG's guarantee reflected on Schedule F (*Energy Savings Guarantee*), whereby ESG~~

~~guarantees that the savings will meet or exceed the costs of the ECMs and the estimated cost savings established under this Contract.~~

~~Interim Period means the period from the date the Contract is signed until the Commencement Date.~~

~~Non-Appropriation means the failure of an appropriation or of the City Commission to appropriate money for any Fiscal Year sufficient for the continued performance by City of all of City's obligations under this Contract as evidenced by the passage of a final budget which does not include funding sufficient to pay all payments due.~~

~~Parties means both City and ESG collectively.~~

~~Savings Calculation Formula means ESG's Savings Calculation Formula reflected on Schedule G and Schedule H.~~

~~Work or Project means the installation of the ECMs as described in Schedule A.~~

~~SECTION 2. INCORPORATION OF OTHER DOCUMENTS~~

~~2.1 This Contract incorporates and makes a part hereof the following documents (the "Contract Documents"), listed in their order of precedence in the event of a conflict between any of their terms and conditions:~~

- ~~1- This Contract~~
- ~~2- All Schedules and Appendixes identified in this Contract, regardless of whether attached.~~
- ~~3- The Investment Grade Energy Audit (Appendix 1)~~
- ~~4- ESG's Proposal in response to the RFP.~~

~~2.2 Investment Grade Energy Audit. ESG has, under separate agreement, submitted the complete Investment Grade Energy Audit and analysis of the facilities, dated September 1, 2011, and attached as Appendix 1, which has been approved and accepted by City, and incorporated into this Contract. The Investment Grade Energy Audit includes all Conservation Measures agreed upon by the parties.~~

~~SECTION 3. TERM OF CONTRACT; INTERIM PERIOD~~

~~3.1 Contract Term. Subject to all of the following provisions in this Contract and contingency provision of this section and the termination provisions of Section 18, this Contract shall be binding on all parties as of the date it is fully executed. This Contract shall expire one year from the date it was fully executed; but shall be automatically renewed annually for a term not to exceed sixteen (16) years, unless extended by written amendment to this Contract. All such renewals shall be subject to sufficient annual appropriations by the City Commission for debt service related to this Contract, as provided in this Contract.~~

~~3.2 Financing Contingency. The City's obligation to proceed under this Contract is contingent upon obtaining financing for the ECMs and payments to be made to ESG under this Contract at an interest rate of 4.0% or less, through a financial institution and by method(s) acceptable to the City, in City's sole discretion. If this contingency cannot, in City's sole opinion, be achieved, City may terminate this Contract without~~

recourse, upon notice to ESG.

~~3.3 Interim Period. The period from contract execution to the Commencement Date shall be known as the "Interim Period". All energy savings achieved during the Interim Period belong to and shall be fully credited to the City.~~

SECTION 4. DESIGN AND INSTALLATION OF CONSERVATION MEASURES

4.1 Work/ Project Defined. ESG shall design, procure and install the Energy Conservation Measures ("ECMs") specified in Schedule A and described more fully in the Energy Audit, at the identified locations, provide training integral to the operation of the ECMs and commission the ECMs, as specified in this Contract and the Contract Documents, which shall be referred to in this Contract as the "Work" or "Project".

4.2 Changes to ECMs. If, due to failure of FDOT or other regulating agency to approve an ECM, or City's need to remove an ECM from the Project, prior to its completion, due to the costs of remediating environmental hazards discovered, or for any other reason, any such change shall be documented by a formal written amendment to this Contract, along with written amendments to Schedule A, Schedule E, Schedule F, Schedule H and any other schedule, as appropriate. If the City determines, in its sole discretion, that after such changes, there will not be sufficient energy savings to make the Project economically feasible, the City may terminate this Contract in accordance with the provisions of Section 18.

4.3 Design of ECMs.

4.3.1 Professionals. ESG represents that design of all ECMs shall be performed by licensed and qualified engineers, architects or other appropriate design professionals. The contractual obligations of such professional persons or entities are undertaken and performed in the interests of ESG and the City.

4.3.2 ESG will be responsible for identifying and performing any necessary surveying, geotechnical investigation, analysis, and design dictated by the Work. ESG shall be responsible for verification of existing conditions, including research of all existing City records and other information within reason and as defined in Schedule A.

4.4 Construction / Installation of ECMs.

4.4.1 Performance and Supervision of the Work. ESG shall retain licensed and qualified contractors and shall supervise and direct the performance of the Work using its best skill, attention, and judgment. ESG shall be solely responsible for site safety and for all construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under this Contract. ESG shall organize the procurement of all materials and equipment so that they will be available at the time they are needed for the Work; and ensure that an adequate force of skilled workmen are available to complete the Work on schedule and in accordance with all requirements of this Contract.

~~4.4.2 Specifications. (a) ESG shall install the ECMs pursuant to specifications in Schedule A (ECMs) and Appendix 1 (Energy Audit), Appendix 2 (Room-by-Room Lighting Inventory), Appendix 3 (Evernia Garage Design Documents) and Appendix 4 (Police Station Design Documents, along with City's standard specifications, attached in Appendix 5 (City Specifications).~~

~~4.4.3 Schedule of Installation of ECMs. Recognizing that time is of the essence of this Contract,~~

ESG shall perform the work in such manner and with such sufficient equipment and forces to complete the work in accordance with Schedule B (*ECM Installation Schedule*). Prior to the commencement of any Work, ESG shall prepare and submit to City, an updated Schedule B, graphically depicting the activities contemplated to occur as a necessary incident to performance of the work required to complete the project, showing the sequence in which ESG proposes for each such activity to occur and duration (dates of commencement and completion, respectively) of each such activity. The schedule shall be complete in all respects, covering approvals, mobilization and demobilization, an allowance for weather delays, submittals, and jobsite delivery of material and equipment. ESG agrees to complete the Work and Project in accordance with the agreed construction schedule as amended by approved and duly executed change orders.

a) **Progress Schedule.** At the end of each calendar month, ESG shall provide the City with a separate construction schedule to show the actual progress of the work performed and the occurrence of any events which have affected the progress of performance of the work already performed or will affect the progress of the performance of the work yet to be performed (the "progress schedule"), in contrast with Schedule B, the planned schedule.

b) ESG agrees that whenever it becomes apparent that the Work completion date as established by Schedule B will not be met, ESG shall notify the City of the potential schedule change within three (3) days of knowledge of a potential delay. Prior to requesting a time extension change order, ESG shall execute some or all of the following remedial actions at ESG's sole cost and expense:

1. Increase manpower as necessary to eliminate work backlog.
2. Increase the number of working hours per shift, shifts per working day, working days per week, construction equipment, or any combination of the foregoing to eliminate the backlog.

c) Neither the City nor ESG shall be considered to own the schedule float time.

4.4.4 **Coordination of the Work.** ESG shall consult with designated City staff in order to coordinate the Work, including installation of any ECM, and to provide appropriate training in the operation of any ECM. ESG shall not permit any act that will interfere with the performance of the City's activities at any facility or location without the prior written approval of the City. ESG may not install any ECM that will require the hiring of additional personnel by the City without the express permission and written approval of the City. ESG shall consult with the City in a timely matter regarding the coordination of the Work with any other work being performed by other companies at the City facilities or sites. ESG will not perform any Work which requires the closing of any portion of a public street or right-of-way without coordination with the City and obtaining appropriate permits.

4.4.5 **Project Meetings.** ESG shall, at its expense, attend any and all meetings called by City to discuss the work under the Contract. City will distribute typed minutes of each meeting to all attendees. Failure of ESG to promptly object to the typed minutes shall constitute ESG's agreement with the content of the typed minutes.

4.4.6 **Subcontractors.** At least 14 calendar days prior to commencement of the Work, ESG shall furnish to the City in writing the names of the persons or entities (including those who are to furnish materials or equipment fabricated to a special design) whom ESG will engage as sub-contractors or suppliers for the Project. ESG shall not change such sub-contractors or suppliers without written notice to City, and shall not contract with a proposed person or entity to whom the City has made reasonable and timely objection in writing, after such notice. ESG understands and agrees that ESG alone is responsible to the City for all of the work under the Contract and that any review of subcontractors, sub-subcontractors or suppliers by the City

will not in any way make the City responsible to any subcontractor or sub-subcontractor or suppliers.

a) By appropriate written agreement, ESG shall require each subcontractor, to the extent of the work to be performed by the subcontractor, to be bound to the Contractor by terms of the Contract and Contract Documents, including but not limited to the insurance requirements for workers' compensation and general liability coverage. City shall be named as an intended Third Party Beneficiary in all subcontractor agreements, provided such naming shall not create privity of contract between City and subcontractor. Each subcontract agreement shall preserve and protect the rights of the City under the Contract Documents with respect to the work to be performed by the subcontractor. Where appropriate, ESG shall require each subcontractor to enter into similar agreements with sub-subcontractors. ESG shall make available to each proposed subcontractor, prior to the execution of the subcontract agreement, copies of the Contract Documents to which the subcontractor will be bound, and, upon written request of the subcontractor, identify to the subcontractor terms and conditions of the proposed subcontract agreement which may be at variance with the Contract Documents. Subcontractors will similarly make copies of applicable portions of such documents available to their respective proposed sub-subcontractors. ESG shall include in all subcontracts a provision requiring the subcontractor to consent to an assignment of the subcontract to the City.

b) All subcontracts shall provide the following exact language"

Sub-contractor "expressly waives any claims for damages which it may suffer by reason of delay caused by events beyond its' control, including delays claimed to be caused by the City or its Engineer and agrees that its exclusive remedy shall be an extension of its contract time."

4.4.7 Project Manager. ESG shall employ a competent project manager who shall be responsible for the coordination of the Work, provide general direction and oversight to the sub-contractors. ESG shall give the City advance written notice if it intends to remove or replace the project manager. In the event the project manager fails to perform its duties under this Contract in a matter acceptable to City, ESG shall provide a replacement acceptable to City.

4.4.8 Verification of Dimensions and Existing Conditions. ESG is responsible for becoming knowledgeable of the conditions of the Work premises and the conditions under which the Work is to be performed, other than concealed conditions which ESG should not have reasonably been expected to discover or anticipate and specifically excluded in Schedule A and the Energy Audit. All dimensions and existing conditions have been verified by ESG during the energy Audit by actual measurement and observation. All discrepancies between the requirements of the project documents and the existing conditions or dimensions shall be reported to the City as soon as they are discovered. Failure to verify and report prior to the commencement of work shall constitute ESG's acceptance of existing conditions as fit for the proper execution of the Work under this Contract, other than concealed conditions which ESG should not have reasonably been expected to discover or anticipate.

4.4.9 Equipment. ESG is responsible for proper care and maintenance of all equipment while in its control. At the time of transfer to the City, the City may refuse acceptance of the equipment if the City determines in its sole discretion that the equipment has not been properly cared for by ESG. In such event, the City may withhold payment or shall be reimbursed for such item. The equipment and the operation of the equipment by ESG shall at all times conform to all federal, state and local code requirements.

4.4.10 Material and Workmanship.

(a) ESG shall ensure that all materials used by ESG and its subcontractors and workmanship performed or caused to be performed by ESG in connection with the Work meets or exceeds all applicable codes and is performed in a workmanlike manner. Where conflicts exist between applicable codes, the more stringent provision shall apply;

(b) ESG shall ensure that all equipment and materials to be used in the Work for which Underwriters Laboratory labeling services is provided shall be UL labeled;

(c) ESG shall obey the following list of codes where applicable:

- (1) Applicable construction and electrical code;
- (2) Underwriters Laboratories (UL);
- (3) Insulated Power Cable Engineers Association (IPCEA);
- (4) National Electrical Code (NEC);
- (5) National Electrical Manufacturers Association (NEMA);
- (6) American National Standards Institute (ANSI); and
- (7) Institute of Electrical and Electronic Engineers (IEEE).

4.4.11 Utilities. At locations where required, ESG shall obtain at its cost, and maintain, all utilities at the project sites, except the City will pay the direct costs of water used by ESG. ESG will be responsible for obtaining electrical power supplies for construction ECMs, as applicable.

4.4.12 Hurricane Plan. If any work is to be performed during hurricane season, ESG shall provide City with ESG's hurricane plan prior to the commencement of any work. The hurricane plan shall describe the actions to be taken to secure the Work site(s) in the event a named tropical storm or hurricane is predicted to affect the project work area. Contractor shall abide by City's requirements for Severe Weather Advisory, found at www.cityofvfpb.org/engineering.

4.4.13 Work Site Safety. ESG shall maintain adequate protection of the Work from damage, and shall take all reasonable precautions to protect the City's property from injury or loss arising in connection with this Contract. ESG shall take all necessary precautions for the protection of City employees and the public. ESG shall make good any damages, injury, or loss to the Work and to the property of the City resulting from lack of reasonable protective precautions.

4.4.14 Cleaning Up. ESG shall remove at its own expense from the City's property and from all public and private property all temporary structures, rubbish, and waste materials resulting from its Work. All such debris, rubbish and waste materials shall be properly disposed of in accordance with all governing laws and regulations.

4.4.15 Salvage Rights. City reserves the right to retain any surplus or salvage materials.

4.4.16 Harm to Buildings or Facilities. ESG shall perform all Work under this Contract in such a manner so as not to harm the structural integrity of the buildings, facilities, equipment or their operating systems. ESG shall repair and restore to its original condition any area of damage caused by ESG's performance under this Contract. ESG failure to complete the repair or restoration required under this paragraph shall constitute an Event of Default. All costs associated with such corrective action to damage caused by ESG's performance of the work shall be borne by ESG.

4.4.17 Responsibility for Damages. ESG shall be responsible for all loss or damage to the Work, buildings, facilities, equipment, or to improvements or personal property thereon and the work of other companies caused by ESG's performance of the Work.

4.4.18 City's Right to Correct Work. In the event that ESG neglects or fails to carry out the Work in accordance with this Contract and the project documents, the City may correct such deficiencies after giving twenty (20) business days written notice to ESG and its surety. This shall be without prejudice to any other remedy the City may have. City may deduct, from the payments to be made to ESG for the Work, the amount of all costs incurred in correcting deficiencies made necessary by such neglect or failure. If such payments to be made to ESG are not sufficient to cover such amount, ESG shall be liable in such amount to the City.

4.4.19 Emergencies. In case of bona fide emergencies as determined by the City involving public health or public safety or to protect against further loss or damage to the City's property or to prevent or minimize serious disruption of City services or to insure the integrity of City's records, the City may cause such Work or measures as is necessary to be performed without prior notice to ESG or its surety.

4.5 Permits and Approvals.

4.5.1 ESG shall obtain and pay for all necessary permits and approvals for the design, installation and operation of the ECMs. The ECMs and the operation of the ECMs by ESG shall at all times conform to all applicable codes. The City cannot and will not waive any permits or approvals required from any other governmental bodies. ESG shall furnish copies of each permit or license which is required to perform the Work to the City before ESG commences the portion of the Work requiring such permit or license.

4.5.2 Right of Way Permit; Traffic Plans. ESG shall obtain a City of West Palm Beach right-of-way permit for each required road closure. As part of the requirements of the permit, ESG shall submit for City's review and approval, in its regulatory capacity, signed and sealed detailed Maintenance of Traffic (MOT) plans for each phase of the work. During the times ESG is working in the project area, ESG shall utilize flagmen, traffic control devices and variable message boards on a full time basis, where and when needed, to facilitate the movement of traffic along and around the project work. All MOT plans shall be reviewed and approved by City prior to implementation of Work by ESG.

4.5.3 If ESG performs any Work which is contrary to any permit or license granted, or any applicable laws, ordinances, codes, rules or regulations, ESG shall make changes as required to comply therewith and shall bear all costs arising therefrom without additional compensation from the City.

4.6 Royalties and Patents. ESG shall pay all royalties and license fees due to third parties in connection with the Work. The approval of any method of construction, invention, appliance, process, article, device, material, or equipment of any kind by the City will only be an approval of its adequacy for the Work, and will not be an approval of the use thereof by ESG in violation of any patents or other rights of any third person. ESG shall indemnify the City against all suits and claims that may be based on an infringement of patents, trademark or trademark on designs.

4.7 Changes in the Work.

4.7.1 Pursuant to Section 4.2, City may remove an ECM from the Project. If any change justifies a modification in the Guaranteed Maximum Price or schedule, ESG shall submit a request for change order at its expense. If a request for change order is made, ESG is not authorized to vary the work unless a written Change Order or written Construction Change Directive is issued by the City. No change order shall be valid unless executed by the authorized signatory of City. Contractor shall notify the City in writing within seven (7) calendar days of any occurrence which, in the opinion of ESG, entitles it to claim a time extension or adjustment to the Guaranteed Maximum Price, absent which notice, Contractor shall have waived such claim. The City may issue an executed change order authorizing any changes in the work, adjustments in the Guaranteed Maximum Price for removal of ECMs and extensions of time. Execution of any Change Order by the parties shall constitute a final settlement and release by ESG of all matters relating to the claim or change in the work which is the subject of the Change Order, including, but not limited to, all direct and indirect costs associated with such change and any and all adjustments to the Guaranteed Maximum Price and the Contract time.

4.7.2 If a change order is not yet approved or cannot be agreed upon, ESG is authorized, upon issuance of a written Construction Change Directive (CDD) approved by City, to proceed with such change on a time and material basis plus ten percent (10%). Contractor expressly acknowledges that commencing work without a written Change Order or Construction Change Directive executed by Owner in advance of commencement of work waives any claim by Contractor to an adjustment to the Guaranteed Maximum Price and the Contract Time.

4.7.3 Upon approval by City as to any adjustments to the Guaranteed Maximum Price and/or contract time for changes performed under a CDD, such approval shall be recorded by the preparation of a change order. ESG shall not seek payment for work performed pursuant to a CDD until it has been converted to a change order.

4.7.4 A bond rider from the Surety shall be submitted to the City with each change order that increases the Guaranteed Maximum Price.

4.8 Extensions.

4.8.1 Extensions of time will be allowed for delays which affect critical items on the *ECM Installation Schedule*, Schedule B, arising from unforeseeable causes beyond the control and without the fault or negligence of ESG. A request for an extension of time must be made in writing to the City within seven (7) calendar days after the cause of delay. In the case of a continuing cause of delay, only one request is necessary. The grant of an extension of time to ESG shall not impair or prejudice the rights of the City under this Contract.

4.8.2 To support a request for a change order to the Contract time, ESG must provide the following information to City:

1. Confirmation whether all schedule updates, submittals and other conditions of the Contract have been met;
2. Affirmative representation that the delay is beyond the control of Contractor and subcontractors and due to no direct or indirect fault of Contractor.
3. Nature of the delay.
4. Dates of commencement / and end of delay.

5. Evidence that the delayed work results in a direct delay to the schedule critical path.
6. List of tasks/work affected by the delay.
7. Anticipated extent of delay.
8. Recommended action to minimize delay.
9. Confirmation that ESG has used all the float time available for the work involved in the delay request.
10. Such other supporting information as requested by City.

4.8.3 Time extensions for weather delays will only be considered if all float time is exhausted prior to the weather occurrence.

4.9 No Damages for Delay. Certain risks and uncertainties in connection with the Work are assumed by ESG as a part of this Contract and are included in the compensation for the Work. Thus, ESG, except as otherwise definitely specified herein, shall bear all loss or damage for hindrances or delays during the progress of any portion of the Work and also all loss or damage arising out of the nature of the Work to be done, or from inclement weather, or from any unforeseen and unexpected conditions or circumstances encountered in connection with the Work, and except as otherwise definitely specified in this Contract, no payment shall be made by the City for such loss or damage. ESG expressly agrees that a Change Order for an extension of completion time constitutes its sole and exclusive remedies for efficiency or other related time or impact-based claims (hereinafter collectively "delay") or for delay attributable to any foreseen or unforeseen condition, or for delays claimed to be the result of active, intentional, knowing or passive interference by City, and ESG waives claims for any and all damages which it may suffer by reason of such claims.

4.10 Inspections.

4.10.1 All materials and equipment and each part of the detail of the Work shall be subject at all times to inspection by the City or its designated representatives or consultants. ESG shall allow the City access to all parts of the Work, and shall furnish such information and assistance as is required to make a complete and detailed inspection or inspections.

4.10.2 ESG shall, if City requests, remove or uncover such portions of the finished Work as the City may direct. After the examination, ESG shall restore said portion of the Work to the standard required by this Agreement. If the Work thus exposed or examined proves acceptable, the expenses of uncovering or removing and the replacing of the parts removed shall be the responsibility of the City and such uncovering, removing and replacing shall be deemed to be an excusable event of delay, if a delay in completion is caused thereby. If the Work so exposed or examined has not been performed in accordance with this Agreement, the expense of uncovering, removing and replacing any portion of the Work necessary to comply with this Agreement shall be borne by ESG and requests for a time extension or claims for delay will not be granted.

4.11 Meetings and Reports. ESG shall schedule weekly progress meetings and shall give timely advance written notice and agenda of such meetings to the City. ESG shall record minutes and distribute copies of minutes of meetings to City within five (5) business days after each meeting.

4.12 Subcontracts and Subcontractors.

4.12.1 Those portions of the work that ESG does not customarily perform with ESG's own personnel shall be performed under subcontracts or by other appropriate agreements with ESG. ESG shall, upon entering into any contract with a subcontractor, furnish the City with an executed copy of such contract. ESG shall remain responsible for the professional and technical accuracy of all services performed, whether by

ESG or its subcontractors or others on its behalf, throughout the term of this Contract.

4.12.2 All subcontracts shall be subject to, consistent with, and in conformance with all applicable local, State and federal laws, rules, regulations, and codes, and shall contain provisions that require all services to be performed in strict accordance with the requirements of this Contract and shall provide that the subcontractors are subject to all the terms of this Contract, including but not limited to insurance requirements for workers compensation. The Owner shall be named as an intended Third Party Beneficiary in all subcontractor agreements provided such naming shall not create privity of contract between Owner and subcontractor. Contractor shall include in all subcontracts a provision requiring the subcontractor to consent to an assignment of the subcontract to the Owner. All subcontracts shall provide the following exact language:

“Sub-contractor “expressly waives any claims for damages which it may suffer by reason of delay caused by events beyond its’ control, including delays claimed to be caused by the City or its Engineer and agrees that its exclusive remedy shall be an extension of its contract time.”

4.13 Contractor and Material Liens. ESG shall not grant, or allow to exist, any lien or security interest for labor or material or otherwise on the ECMs, the premises or any other property owned by the City. ESG shall take all actions to remove any such lien or security interest within 30 days of notice of such lien or interest.

4.14 Startup and ECM Commissioning: ESG shall conduct a thorough and systematic performance test of the installed ECMs in accordance with the procedures specified in Schedule N and prior to acceptance of the ECMs by City. ESG shall provide notice to the City of the scheduled test(s) and the City and/or its designees shall have the right to be present at any or all such tests conducted by ESG and/or manufacturers of the ECMs. ESG shall be responsible for correcting and/or adjusting all deficiencies in ECM systems or operations that may be observed during commissioning procedures. ESG shall notify Florida Power & Light (FPL) on behalf of the City of equipment that was replaced/retrofitted and which qualifies for a rate adjustment. City shall be responsible for verifying that the rate adjustment is properly reflected in FPL’s billing.

~~4.15 Training. ESG shall conduct the training on the ECMs as described in Schedule C (ESG’s Maintenance and Training Responsibilities). The training specified in Schedule C must be completed prior to acceptance of the ECM. ESG shall provide ongoing training, as defined in Schedule C, whenever needed with respect to updated or altered equipment, including upgraded software as defined by the software manufacturer. Such training shall be provided at no additional cost to City.~~

4.16 Substantial Completion.

4.16.1 Requirements Prior to Substantial Completion. When ESG considers the work for the ECMs to be substantially complete, ESG will submit to City, the following items which shall be completed as a condition precedent to substantial completion and prior to a request by ESG for inspection for substantial completion:

- a. Written notice that the work is substantially complete.
- b. All general construction completed and the project components shall be clean and all systems fully functional.
- c. All mechanical and electrical work substantially complete, fixtures in place, connected, cleaned, fully functional and ready for use.
- d. All electrical circuits shall be scheduled in panels and all panels and disconnect switches properly labeled.

- e. Issuance of all permits and certificates, test certificates, inspections, and other approvals and releases by governing authorities required for City's use of the ECM.
- f. Project site shall be cleared of ESG's excess equipment and/or supplies and material.
- g. Manufacturers' certifications and warranties and any special guarantees or maintenance agreements shall be delivered to City.
- h. Record drawings and specifications, if required pursuant to Schedule A, which meet the City's requirements.
- i. All operations and maintenance manuals for all equipment shall be delivered to City.
- j. All required spare parts, as defined in Schedule A, as well as any special devices and tools shall be delivered to City.
- k. A deductive change order for any uncommitted contingency or allowance funds has been prepared and submitted in draft.
- l. All keys and blanks shall have been provided.
- m. All training has been provided.

4.16.2 Punchlists. Within thirty (30) calendar days after reaching substantial completion, ESG shall arrange a joint work inspection with the City for inspection for substantial completion and development of punch list of items necessary for the completion of the ECMs. Said punch list shall be prepared, signed by ESG and submitted to City not later than five (5) days after the inspection for substantial completion. City shall review submitted punch list within fifteen (15) days of receipt and if complete, shall sign punch list and distribute approved copies ESG. If not complete, City shall return punch list to ESG with a written detail of missing or disputed items. The final completion date for the ECMs shall be extended, on a day for day basis, for each day the City and ESG are delayed in completing the Final Punchlist.

4.16.3 Punchlist Work. Agreed punch list items shall be corrected by ESG prior to any request for final inspection and acceptance. The final ECM completion date shall be extended, on a day for day basis, for each day the City is delayed in returning punch list to ESG. ESG agrees to complete the Punchlist within forty-five (45) days of the date of its receipt of the signed Punchlist, unless otherwise agreed in writing by duly authorized representatives of City and ESG. Agreed punch list items shall be corrected by ESG prior to any request for final inspection and acceptance.

4.16.4 Any dispute over punch list items shall be mediated between City and ESG by an independent Engineer acting as mediator to develop an agreed punch list signed by City and ESG. Agreed punch list items shall be corrected by ESG prior to any request for final inspection and acceptance.

4.17 Record Drawings. Prior to final inspection, and as indicated in Schedule A, ESG shall provide City with Record or "as-built" drawings and specifications which comply with City's Final Record Drawing Requirements found at www.cityofvtpb.org/engineering and the following requirements:

A complete set of mylar or paper marked-up as-built drawings with "RECORD" or "AS BUILT" clearly printed on each sheet, along with one electronic copy of all signed and sealed drawings in ".pdf" format, shall be provided to City. As-built surveys shall be prepared by an independent third party land surveyor registered with the State of Florida on State Plane Coordinates. ESG shall accurately and neatly transfer all deviations from progress as-builts to final as-builts. As-built records shall include drawings signed and sealed by a registered land surveyor certifying the elevation and location of improvements. Certified drawings are to show locations, lines and grade of buried pipe line four (4) inches or larger in diameter and exterior to buildings, and other buried facilities (e.g. valves, tanks, vaults, storm inlets, ducts, etc.) installed or discovered as a result of the work. Certified drawings are to show building corners, sidewalks, paved areas and the location of all

above ground structures within the project site. ESG or its contractor shall sign each final record drawing and note thereon that the final as-builts are complete and accurate. ESG shall also provide a complete set of marked-up specifications with "RECORD" or "AS-BUILT" clearly printed on the cover. ESG shall accurately and neatly transfer all deviations from progress specifications to final as-builts.

4.18 Final Inspection and Acceptance.

4.16.1 Requirements Prior to Final Inspection. The following items shall be completed as a condition precedent to a request by ESG for final inspection of the ECMs:

- a. Completion of all Punchlist items and outstanding items under Section 4.15.1.
- b. All items required by City's Specifications (*Schedule Q*).
- c. Where appropriate, a complete set of "Record" or "As-Built" drawings, meeting City's requirements. ESG shall or cause each final record drawing to be: (i) signed by the person that prepared them; and (ii) noted thereon that the final as-builts are complete and accurate.
- d. A complete set of marked-up specifications with "Record" or "As-Built" clearly printed on the cover. ESG shall ensure that all deviations from progress specifications are accurately and neatly transferred to final as-builts.
- e. A signed and notarized affidavit indicating that no asbestos containing materials were used or installed during the course of the work.
- f. A list of each piece of equipment having an individual value of \$500 or greater. The list shall include, at a minimum, the name, make and model number, quantity installed, value of equipment.

4.18.2 Final Inspection. ESG shall inform City in writing that the work is ready for final inspection. The City will, within ten (10) business days, conduct such inspection. If City finds any element of ECM work to be deficient, City shall, within fifteen (15) business days, provide ESG with a written deficiency list. If ESG receives a deficiency list and once ESG has completed all items on the deficiency list, ESG can request a second inspection by City to verify the ECM is complete. Again the re-inspection shall occur within ten (10) business days and a written response within fifteen (15) business days.

4.18.3 Acceptance. Not later than fifteen (15) business days after final inspection without any deficiency, City will provide ESG with a Certificate of Acceptance of all ECMs, in the form of Schedule D, signed by the Mayor and the Project Manager, which shall establish the Commencement Date.

4.18.4 The date of the Certificate of Acceptance shall be the date of the commencement of the warranty period for the ECMs. Except as specified in Schedule C (*ESG's Maintenance and Training Responsibilities*), any maintenance and repairs due to ordinary wear and tear caused by ECM use will be made at the expense of City.

4.19 Operating Manuals. ESG shall also furnish City with at least three (3) full sets of diagrams, instructions, manuals, reports and other documentation needed to maintain and operate the ECMs. ESG shall also provide City with an electronic copy of all diagrams, drawings, manuals and documentation.

4.20 Disposal of Materials Removed. ESG shall provide City with written documentation that lamps and ballasts removed have been disposed at a qualified facility, in accordance with all governing rules and regulations.

4.21 Direct Purchase. City will directly purchase some or all of the streetlight equipment from a vendor and to provide such equipment to ESG for installation. In such event, ESG will comply with City's

procedures for obtaining such equipment from City.

SECTION 5 HAZARDOUS MATERIALS

5.1 ESG acknowledges that compliance with *the National Emission Standard for Hazardous Air Pollutants* as promulgated by the United States Environmental Protection Agency pursuant to Section 112 of the Clean Air Act is a continuing obligation requiring any and all demolition or renovation activity completed by or on behalf of the City, to conform to the standards for such activity as set forth in 40 CFR 61.145. The City shall observe all notification procedures established by the United States and Florida Environmental Protection agencies in the execution of the Work under this Contract.

5.2 The pertinent provisions of the *Hazardous Substances Construction Disclosure Act*, 415 ILCS 70/1, (the "Act") shall apply in the event that ESG or any of its subcontractors encounters any hazardous substance or material covered by the Act in the performance of the work, the existence of which has not previously been disclosed to ESG by the City. ESG shall, before disturbing such materials, immediately notify the City of the location of such hazardous materials. ESG shall advise the City as to whether it is feasible to re-route the Work as to avoid such materials. If such re-routing is reasonably feasible, ESG shall do so without additional compensation. If such re-routing or avoidance is not reasonably feasible in the judgment of the City and such material must be disturbed or relocated to complete the work, and if (i) removal or containment of the hazardous substance or material cannot be effectuated without a cessation of the work; or (ii) applicable law, rule or regulation requires cessation of the work, or (iii) continuation of the work exposes any person to a substantial risk, ESG may suspend its performance of the work without penalty until the substance or material is removed or contained by the City.

5.3 The following options are available to City in the event that undisclosed hazardous materials are encountered in the performance of the Work by ESG or its subcontractors:

- (i) If feasible, City may direct ESG to modify the scope of the work to eliminate portions of the work affected by the undisclosed hazardous substance or material.
- (ii) The City shall not be liable for damages or other costs or expenses incurred by ESG if the existence of the hazardous substance or material was disclosed to ESG by the City or, if as in its investigation of the related premises in performing the Audit and recommending the ECMs, ESG should reasonably have been expected to discover or anticipate the existence of the hazardous substance or material and ESG could have developed the scope of the work in such a manner as to avoid said hazardous substance or material.

5.4 ESG and City agree that any work relating to (i) asbestos, material containing asbestos, or the existence, use, detection, removal, containment or treatment thereof, or (ii) pollutants, hazardous wastes, hazardous materials, contaminants (collectively "Hazardous Materials") or the storage, handling, use, transportation, treatment or the disposal, discharge, leakage, detection removal, or containment thereof which is not specifically provided for in this Contract, is the responsibility of the City.

~~SECTION 6 PAYMENTS TO ESG FOR PROJECT WORK~~

~~6.1 Open Book Pricing,~~

~~6.1.1 Open book pricing will be required for a cost reasonableness review, such that ESG will fully disclose all costs of materials and labor purchased and subcontracted by ESG and a list of hourly rates and position descriptions for labor or services provided by ESG. The open book pricing sheet is included as Appendix 6. Estimates for number of hours required for the project and deviations of these budgeted hours shall require prior written approval by the owner or shall not be paid. ESG will maintain cost accounting records on authorized work performed under actual costs for labor and material, or other basis requiring accounting records. ESG will afford the City access to these records and preserve them for a period of three (3) years after final payment.~~

~~6.1.2 The equipment costs component of hard costs will be evaluated through price analysis to compare costs with reasonable criteria such as established catalog and market prices. Individual cost line items will be compared to the hard cost total by dividing individual line items by the project hard cost, as defined by AIA, to arrive at a percentage of Hard Costs. These costs will be compared to the Cost Averages Project Database of 51 completed projects larger than \$4 million dollars compiled by the Penn State Facilities Engineering Institute.~~

~~6.2 Compensation to ESG~~

~~6.2.1 ECM Installation. ESG will be compensated for installation of the ECMs and training and annual monitoring services by a guaranteed maximum fixed price in the amount of Four Million Three Hundred Fifty-Six Thousand Nine Hundred Twenty-One and 09/100 Dollars (\$4,356,921.09) ("Guaranteed Maximum Price") excluding Owner's contingency, in accordance with Schedule E (Compensation to ESG). The total installation price is a guaranteed maximum fixed price for ECM installation, subject only to the modification for varying condition other than what has been defined in Schedule A and the Energy Audit. ESG will bear the full risk of any price increases due to construction delays or increases in the cost for materials and labor.~~

~~6.2.2 Annual Monitoring. City will compensate ESG on an annual basis for measurement and verification of the achieved energy cost savings at the annual amounts listed in the following table. Payment will be made after City's receipt and acceptance of the Annual Reconciliation Report, in accordance with Section 8.6 and Schedule H.~~

<u>Year</u>	<u>Cost</u>
1	\$15,000
2	\$15,300
3	\$15,606
4	\$15,918
5	\$16,236
6	\$16,561
7	\$16,892
8	\$17,230
9	\$17,575

10	\$17,926
11	\$18,285
12	\$18,651
13	\$19,024
14	\$19,404
15	\$19,792

6.3 ~~Required Information.~~ Each payment request shall include the following information:

1. ~~Contract Number~~
2. ~~Project Name: Energy Savings~~
3. ~~ECM identification~~
4. ~~City's representative/project manager~~
5. ~~Detailed estimate and payment request on a standard AIA form, covering the percentage of the total amount of the physical Work which has been completed from the start of the job up to and including the last day of the preceding month, together with quantity and unit prices of materials and equipment utilized.~~
6. ~~The unit cost of such materials and equipment required in the permanent work which has been delivered to the site and suitably protected but not as yet incorporated in the work, and for which payment is being sought.~~
7. ~~Partial Release of Lien from contractor~~
8. ~~Partial Releases of Lien from each sub-contractor on the payment request~~
9. ~~Consent of Surety~~
10. ~~Subcontractor Utilization Report identifying all subcontractors and material suppliers utilized.~~
11. ~~Such other supporting evidence as may be required by Owner and/or the Engineer;~~

6.4 ~~Initial Payment.~~ Prior to submittal of its initial payment request, ESG shall have submitted the following items to the City:

1. ~~List of subcontractors and suppliers~~
2. ~~Project schedule with schedules for each ECM Group~~
3. ~~Schedule of values~~
4. ~~All current certificates of insurance~~
5. ~~Public construction bond or payment and performance bonds~~
6. ~~Designation of ESG's Project Manager~~

The initial payment request will not be accepted unless all of the above items have been received by City.

6.5 ~~Progress Payments.~~ ESG may invoice for progress payments for construction or installation of the ECMs on a monthly basis based on percentage of the work physically completed. All payment requests are required to be submitted in draft form, in advance and not more than once each month, via email to the City's project manager.

6.6 ~~Invoices.~~ After review and approval of the draft, ESG shall prepare and submit an original final payment request to: ~~City of West Palm Beach - Accounts Payable, PO Box 3366, West Palm Beach, FL 33402-3366.~~ Invoices must identify the PO number and contract number. Invoices shall identify the nature of

~~the Work and dates(s) of service. All necessary back-up documentation shall be provided to the satisfaction of the City. The City will not be responsible for any delay in payment if ESG submits its invoice to any other address.~~

~~6.7 No payment made under this Contract shall be conclusive evidence of the performance of the Work by ESG, either wholly or in part, and no payment shall be construed to be an acceptance of or to relieve ESG of liability for the defective, faulty or incomplete rendition of the Work.~~

~~6.8 Payment of Invoices. Payment will be made upon receipt of a proper invoice in accordance with the Local Government Prompt Payment Act, Section 217.70, et al., Florida Statutes, which also establishes a process and remedies for non-compliance.~~

~~6.9 Retainage.~~

~~6.9.1 In accordance with the Local Government Prompt Payment Act, until the Work and entire Project is determined to be fifty percent physically (50%) complete, Owner shall withhold retainage of ten percent (10%) from each progress payment paid to ESG based on ESG's estimate and invoice. The Project will be considered 50% complete upon completion of 50% of the actual scope of work, including those change orders initiated by City for addition or modification to the scope of work.~~

~~6.9.2 After the Project is determined to be 50% complete, and unless otherwise prohibited by the terms of any federal grant funding the Project in whole or in part: i) Owner shall withhold retainage of five percent (5%) from each progress payment paid to ESG; and ii) ESG may present to City a payment request for up to half (50%) of the retainage held by City (50% of the 50% retainage already withheld. Not 50% of total retainage). If City has grounds under Florida law to continue to retain all or a portion of the requested retainage, City may continue to hold all retainage. If Project is not on schedule when request for payment of retainage is submitted, City may continue to hold all retainage.~~

~~6.9.3 Final payment may be made to certain select sub-contractors whose work is satisfactorily completed prior to the total completion of the Project but only upon advance written approval of City and Surety.~~

~~6.9.4 ESG shall timely pay and not withhold payments to sub-contractors if such payments have been made to ESG. Should withholding occur for any reason, ESG shall immediately return such monies to City, adjusting pay requests and project bookkeeping as required.~~

~~6.10 Contingency Funds. All contingency sums are owner's contingency funds and remain the property of City until the expense is approved in writing. Schedule E includes an agreed sum as a contingency, which amount is identified solely for budget purposes and remains the City's funds: \$93,880 for additional street lighting and \$50,000 for material cost increases prior to contract execution. Use of contingency funds may only be approved for the purpose of defraying expenses due to unforeseen conditions and materials price increases. ESG shall obtain prior written approval from City prior to the expenditure of contingency funds and ESG will be required to furnish documentation evidencing expenditures charged to contingency prior to the release of such funds by City. All uncommitted contingency or allowance funds remain the funds of the City.~~

~~6.11 Energy Audit Fees. The value established for the Energy Audit is set forth on Schedule E. The fees paid to ESG for completion of the Energy Audit shall be calculated by reducing the established value by \$40,000 to credit the City for the additional expenses for its consultant.~~

6.12 Punch List.

~~6.12.1 Following determination by the City of substantial completion of an ECM Group and creation of the punch list, ESG shall separately list each item of the punch list required for final completion and the estimated cost of completing each item. The City may retain a sum equal to 150% of the estimated cost of correcting and completing the unfinished items, as determined by the City.~~

~~6.12.2 If a good faith dispute, as determined by City, exists as to whether one or more items identified on the punch list have been completed pursuant to the Contract, City may continue to withhold up to 150% of the total costs to complete such items(s).~~

6.13 Final Payment.

~~6.13.1 Upon City Certificate of Acceptance of ECM for all ECMs and/or ECM Groups, and compliance with all City's requirements for Project Closeout, contained in City's Specification 01700, attached as Appendix 5. ESG may submit the final payment request for the Project. In case of disputed indebtedness or liens, ESG may submit in lieu of evidence of payment a surety or public construction bond satisfactory to City guaranteeing payment of all such disputed amounts when adjudicated in cases where such payment has not already been guaranteed by a surety or bond.~~

~~6.13.2 The final payment request shall include the following items:~~

- ~~1. Final Certification by ESG or its engineer~~
- ~~2. Certified copy of punch list stating each item has been completed or otherwise resolved and accepted.~~
- ~~3. Final Statement of Accounting reflecting:
 - ~~a. original guaranteed maximum price~~
 - ~~b. any approved change order (with quantity and unit prices where applicable)~~
 - ~~c. allowances / contingency use~~
 - ~~d. deductions for uncorrected work~~
 - ~~e. deductions for re-inspection costs~~
 - ~~f. deductions for re-testing costs due to failed tests~~
 - ~~g. other adjustments~~
 - ~~h. adjusted contract price~~
 - ~~i. payments made~~
 - ~~j. any pending payment requests~~
 - ~~k. sum remaining due to Contractor~~~~
- ~~4. Final Change Order, if applicable, reflecting approved adjustments to the Guaranteed Maximum Price not previously made by Change Order.~~
- ~~5. Documentation of proper disposal of lamps and ballasts~~
- ~~5. Notarized and corporate sealed Final Release of Liens from all sub-contractors and suppliers.~~
- ~~6. Notarized and corporate sealed Final Release of Liens from ESG~~
- ~~7. Lienor's Affidavit from ESG.~~
- ~~8. Consent of surety for final payment.~~
- ~~9. All operating manuals not already provided to City~~
- ~~10. All written warranties not already provided to City~~
- ~~11. All pre-requisites for substantial completion and final completion have been met.~~

~~The making and acceptance of the final payment shall constitute a waiver and release of all claims by Contractor, except those previously made in writing and still unsettled. (F.S. 255.077).~~

6.14 Liens; Releases of Liens.

~~6.14.1 Neither the final payment nor any part of the retained percentage shall become due until ESG shall deliver to City complete releases of all claims or liens arising out of the Project or Work, or receipts in full in lieu thereof and, if required in either case, an affidavit that so far as he has knowledge or information the release and receipts include all the labor and materials for which a lien or claim could be filed; but ESG may, if any sub-contractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to City, to indemnify City against any claim or lien (in cases where such payment is not already guaranteed by Surety or Performance Bond). ESG shall use City's forms for all releases of liens. All releases are required to have original signatures. All values on lien releases shall be consistent with the subcontracts.~~

~~6.14.2 If any claim or lien remains unsatisfied after all payments are made, ESG shall refund to City all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and reasonable attorneys' fees.~~

~~6.15 Assignment of Claims. The City shall not be bound by any assignment by ESG to third parties of moneys due or to become due or of any other claims it may have under this Contract except where the City consents in writing to be so bound.~~

SECTION 7. FISCAL FUNDING

7.1 Current Expense. City's obligations under this Contract constitute a current expense that is payable exclusively from legally available funds and shall not be construed to be debt, liability or obligation within the meaning of any applicable constitutional or statutory limitation or requirement. Neither City nor the State nor any political subdivision or agency thereof has pledged any of its full faith and credit or its taxing power to make any payments under this Contract.

7.2 Annual Appropriations. City's performance and obligation to pay under this Contract is contingent upon an annual appropriation. City is subject to the appropriation of funds by the governing body of City in an amount sufficient to allow continuation of its performance in accordance with the terms and conditions of this Contract for each and every Fiscal Year following the Fiscal Year in which the Contract is in effect. Funds must be appropriated each year prior to costs being incurred. Nothing in this paragraph shall prevent the making of contracts with a term of more than one year, but any contract so made shall be executory only for the value of the services to be rendered or paid for in succeeding fiscal years. In the event funds to finance this Agreement become unavailable, the City may terminate this Contract upon no less than twenty-four (24) hours notice to Consultant. The City shall be the sole and final authority as to the availability of funds.

7.3 City's Intent to Request Appropriations and Make Payments. City intends for this Contract to continue until all payments contemplated under Section 6 have been satisfied. City agrees to direct the person within such City in charge of preparing City's budget to include in the budget request for each Fiscal Year the payments becoming due in such Fiscal Year. The Parties acknowledge that appropriation for such payments is a governmental function that City cannot contractually commit the governing body of City to perform and this Contract does not constitute such a commitment. However, City reasonably believes that money in an amount sufficient to make all payments can and will lawfully be appropriated and made available to permit continued utilization of the ECM in the performance of its essential functions during the applicable Terms.

7.4 ESG's Rights if Non-Payment. ESG and City agree that there is no intention to create under this Contract a right in ESG to dispossess City involuntarily of the legal title to or the use of the ECMs or any underlying equipment. If City fails to make payment to ESG for installation of the ECMs, then ESG shall have the right, to the extent permitted by law, to obtain a judgment against City from legally available funds for compensatory damages in the amount of the then applicable construction progress payments due for actual services performed, as shown on Schedule E (*Compensation to ESG and Deliverables*).

SECTION 8 PERFORMANCE SAVINGS GUARANTEE

8.1 Energy, Water, and Wastewater Performance Savings Guarantee ~~ESG has formulated and provided a written Guarantee that the cost savings attributed to the ECMs, as set forth in Schedule F, will meet or exceed the costs of the ECMs and the estimated cost savings set forth in the Energy Audit pursuant to §489.145(4)(e), Florida Statutes; and that the amount of any actual annual savings meet or exceed total annual contract payments made by the City for the ECMs pursuant to §489.145(3)(d)(2), Florida Statutes. The Guarantee is attached as Schedule F, providing the annual level of Cost Savings to be achieved as a result of the ECMs provided for in this Contract and in accordance with the Savings Calculation Formula set forth in Schedule G and the Measurement and Verification Plan set forth in Schedule H, and calculated in compliance with Florida law. The Guarantee is set forth in annual increments for the term of the Contract as specified in Schedule F and has been structured so as to be sufficient to cover any and all annual payments required to be made by the City as set forth in Schedule E (*Compensation to ESG*) plus City's financing costs.~~

8.2 Measuring Cost Savings. ~~ESG and City will measure the Cost Savings using the cost savings formula set forth in Schedule G (*Cost Savings Formula*) and the monitoring and verification plans set forth in Schedule H (*Monitoring and Verification Plan*). ESG will ensure that the reported Cost Savings have in fact been recognized or the provisions of Section 8.7 will apply. In the case of energy-related ECMs, the Cost Savings shall be based on the International Performance Measurement and Verification Protocol ("IPMVP") (January 2010). Monitoring and Verification of savings shall be calculated using a methodology from the International Performance Measurement and Verification Protocol ("IPMVP") (January 2010), that provides for actual savings, as provided in §489.145(3)(d)(2), Florida Statutes, to be measured yearly against the Baseline and as set forth in Schedule J (*Baseline*). Any adjustments to the Baseline are subject to City approval.~~

8.3 Energy Records. ~~City has furnished or shall furnish (or cause its suppliers to furnish) to ESG, upon its request, all of its records and complete data concerning energy or water usage and energy/water-related maintenance for the facilities related to the ECMs described in Schedule A. During the Term, City will provide ESG copies of all energy and water bills relevant to ECMs on a regular basis so that ESG may provide the Annual Reconciliation report identified in Section 8.6.~~

8.4 Interim Savings; and Utility Rebates.

- (a) Interim Savings. ~~Interim Savings, as defined in Section 3.3, belong to the City and will be identified in the first year Annual Reconciliation report.~~
- (b) Utility Rebates. ~~Utility rebates secured or obtained due to the installation of the ECMs belong to the City and will be defined in the first year Annual Reconciliation report.~~

~~8.5 Baseline Costs. Actual savings are measured against baseline costs, the expenses that City would have incurred had the ECMs not been implemented. The parties agree that baseline costs shall be calculated using the Baseline set forth in Schedule J, which has been based on the IPMVP (January 2010) guidelines. Details of the Monitoring and Verification methodology shall be agreed upon by ESG and the City and specified in Schedule H.~~

~~8.6 Annual Reconciliation. Pursuant to §489.145(5)(e), Florida Statutes, ESG is required to provide to City a written annual reconciliation of the Cost Savings for all ECMs. Not later than ninety (90) days after each annual anniversary of the Commencement Date, ESG will deliver to City's Project Manager an Annual Reconciliation report for such year, reflecting the amount guaranteed and the amount of actual Cost Savings achieved as calculated in accordance with Schedule G (*Cost Savings Formula*). Upon delivery of the report and all supporting documentation, City will have thirty (30) business days to accept or reject the report. City shall provide written notice of such rejection, within the stated acceptance period, specifying the basis of the deficiency. ESG shall have twenty (20) business days to cure such deficiency and deliver to City a corrected reconciliation report. If City fails to reject any report (including corrected reconciliations) within 60 business days of receipt of all required documentation, City shall be deemed to have accepted the Annual Reconciliation contained in the report as of the final day of the 60th business day period, unless a longer acceptance period is mutually agreed upon in writing. The Annual Reconciliation report verification requirement is set forth in Schedule H (*Monitoring & Verification Plan*).~~

~~8.7 Annual Shortfalls. If the Annual Reconciliation reveals a shortfall in guaranteed Cost Savings, ESG is liable for such shortfall and shall pay to City the amount of the shortfall of the debt service (principal plus interest), as incorporated in the Energy Savings Guarantee, Schedule F. City shall submit to ESG a written statement as to the amount of the shortfall to the extent the Annual Reconciliation or an City review reveals such shortfall, which may be incorporated into City's response to ESG's Annual Reconciliation. ESG shall remit such payments to City within sixty (60) days of written notice by City of such monies due. If ESG fails to make such payment to City within sixty (60) days after demand therefore, City demand payment pursuant to the Energy Savings Guaranty Bond identified in Schedule F (*Savings Guarantee*) and Schedule M (*Energy Savings Guaranty Bond*).~~

~~8.8 Annual Excess Savings. Any annual excess savings shall belong solely to the City.~~

~~8.9 Additional Material Costs. In the event that the City expends unanticipated material costs for warranted ECM(s) due to the failure of any ECM manufacturer to honour its warranty, City shall invoice ESG for such additional material costs and ESG shall reimburse City for such material costs within thirty (30) days of invoice date. A manufacturer's failure to honour its warranty does not include circumstances where the warranty claim is in dispute due to City's inability to substantiate the validity of the claim.~~

SECTION 9. MAINTENANCE

9.1 Maintenance. ESG is responsible only for the repair of new equipment installed under this Contract during ESG's one-year warranty period pursuant to Schedule C (*ESG's Maintenance Responsibilities and Training*) at no additional cost to the City, except or unless maintenance service is specifically detailed in Schedule E (*Compensation to ESG*); provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of City or any employee or other agent of City, and ESG can so demonstrate such causal connection, ESG may charge City for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

9.2 Standards of Service. ESG will ensure that the ECMs operate in a manner which will provide the standard of service for lighting as described in Schedule O.

9.3 City Maintenance Procedures. City agrees that it shall adhere to, follow and implement the conservation procedures and methods of operation to be set forth on **Schedule K** (*City's Maintenance Responsibilities*). City agrees to maintain the ECMs in good repair and to protect and preserve all portions thereof that may in any way affect the operation or maintenance of the ECM. If ESG contends that City is not performing maintenance responsibilities in accordance with Schedule K (*City's Maintenance Responsibilities*), then ESG shall submit a report to City and City and ESG shall mutually determine what, if any, adjustments to Baseline will be made.

9.4 Stock. Extra stock of materials or other items not defined in Schedule A shall be paid for by City.

9.5 Malfunction and Emergencies. The City shall use its best efforts to notify ESG or its designee within forty-eight (48) hours after the City's actual knowledge of the occurrence of:

9.5.1 Any material malfunction in the operation of the ECMs or any pre-existing energy-related equipment;

9.5.2 Any material alteration or modification in the ECMs or their operation.

City may take reasonable steps to protect an ECM if, due to an emergency, it is not possible or reasonable to notify ESG before taking any such actions. In the event of such an emergency, City shall take reasonable steps to protect the ECM from damage or injury and shall follow instructions for emergency action provided in advance by ESG.

9.6 Material Changes to ECMs by City. To the extent ESG is responsible for maintenance, City shall not move, remove, modify, alter, or make any material changes affecting the ECMs or any part thereof without the prior written approval of ESG, which consent shall not be unreasonably withheld, except City may perform its maintenance responsibilities as set forth in Schedule K (*City's Maintenance Responsibilities*). If ESG contends that City has made any material changes, then ESG shall submit a report to City and City and ESG shall mutually determine what, if any, adjustments to Baseline will be made.

9.7 Material Change Defined. A material change shall include any change in or to the ECMs or the buildings or structures housing the ECMs, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of the City to increase or decrease annual costs of energy usage by at least \$5,000, in the aggregate, after adjustments for climatic variations. Actions by the City which may result in a material change which is subject to this paragraph 9.5, include, but are not limited to the following:

9.7.1 Changes in the manner of use of the ECMs by the City; or

9.7.2 Changes in the hours of operation for the ECMs or the buildings or structures in which they are housed, or for any equipment or energy using systems operating at the same locations; or

9.7.3 Permanent changes in the Standards of Service set forth in Schedule O; or

9.7.4 Changes in the occupancy of the building or structure housing ECMs; or

9.7.5 Changes in the structure of the building or structure housing ECMs; or

- 9.7.6 Changes in the types and quantities of equipment used at the building or structure housing ECMs; or
- 9.7.7 Modification, renovation or construction at the building or structure housing ECMs; or
- 9.7.8 City's failure to provide maintenance of and repairs to the ECMs pursuant to paragraph 9.2 hereof; or
- 9.7.9 Any significant damage to the ECMs or the building or structure, caused by fire, flood, or other casualty or any condemnation; or
- 9.7.10 The permanent or temporary closing of a building or structure housing ECMs; or
- 9.7.11 Any other substantially changed condition, other than weather, affecting energy use at the building or structure housing ECMs.

9.8 Reported Material Changes; Notice by City. The City shall use its best efforts to deliver to the ESG a written notice describing all actual or proposed material changes to ECMs or the buildings or structures where they are houses or in the operations of the ECMs or their related buildings or structures, no less than thirty (30) days before any actual or proposed material change is implemented. Notice to ESG of material changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by the City within forty-eight (48) hours after the event constituting the material change was discovered by the City to have occurred.

9.9 Reported Material Changes; Adjustments to Baseline/Benchmarks. Any changes in energy usage which occur as the result of a reported material change shall be timely reviewed by ESG and the City to determine what, if any, adjustments to the Baseline set forth in Schedule J are necessitated by such material change(s). ESG and the City agree that any adjustments made to the Baseline shall be in accordance with generally accepted engineering principles.

9.10 Unreported Material Changes. Upon and after the Commencement Date and, as defined in Schedule F (*Energy Savings Guarantee*), in the absence of any reported material change(s) in the ECMs, their buildings or structures, or in their operations, if energy savings deviates by more than \$1,000 during any month from projected energy savings for that month, after adjustment for changes in climatic conditions, then ESG shall timely review such changes to ascertain the cause of such deviation. ESG shall report its findings to the City in a timely manner. ESG and City shall determine what, if any, adjustments to the Baseline set forth in Schedule J are necessary.

9.11 Changes to ECMs by ESG. Notwithstanding anything to the contrary in this Contract or elsewhere, ESG shall at all times have the right, subject to City's prior written approval, which approval shall not be unreasonably withheld, to change any ECM, revise any procedures for the operation of the ECMs or equipment or implement other saving actions, provided that (i) such modifications or additions to, or replacement of the ECM, and any operational changes, or new procedures are necessary to enable ESG to achieve the guaranteed savings and; (ii) any cost incurred relative to such modifications, additions or replacement of the ECM, or operational changes or new procedures shall be the responsibility of ESG. All modifications, additions or replacements of the ECM or revisions to operating or other procedures shall be made by written amendment to this Contract pursuant to §255.258 Florida Statutes.

9.12 Replacement of Failed ECM. In the event that the City must replace failed equipment with a different product, the City will work with ESG to select a product with costs and performance specifications similar to the original ECM equipment. City and ESG will determine whether the replacement results in a material

change which requires adjustment to the Baseline.

SECTION 10. WARRANTIES

10.1 Warranty of Design. ESG hereby warrants to the City that the ECMs shall be designed with no material defects in design, determined in accordance with sound architectural and engineering principles and generally accepted industry standards; and (ii) shall be designed in accordance with generally accepted architectural and engineering standards. This warranty shall extend for one year from the date of the Certificate of Acceptance of all ECMs issued by the City. Without limiting any other remedy available to City, ESG shall furnish at its own expense any redesign or revisions to the design documents necessary to correct any material errors, omissions, failures or deficiencies in such documents with respect to the warranty of design and constructability or installation of the ECMs, and shall, at its sole cost and expense, correct any work performed in accordance with deficient documents. The City's review or approval of, or payment for, any design services under this Contract shall not be construed as a waiver of any rights under this Contract or any cause of action arising out of performance under this Contract.

10.2 Equipment Warranties.

10.2.1 ESG Warranty. ESG covenants and agrees that all equipment to be installed as part of this Contract shall be new, in good and proper working condition and protected by appropriate original equipment manufacturer written warranties covering all parts and equipment performance. ESG shall be responsible for the repair of new equipment installed under this Contract which require repair during the ESG warranty period. The ESG warranty period extends one (1) year from the date of the Certificate of Acceptance of all ECMs issued by the City. ESG is responsible to repair or replace defective equipment under ESG warranty period, at no additional expense to the City.

10.2.2 Manufacturer Warranties. Manufacturer equipment warranties for all installed equipment will be provided by ESG to City during final check-out and commissioning as part of the official project close out documentation. Manufacturer's and installer's standard warranties providing no less than (1) one year coverage are set forth in Schedule P (*Equipment Warranties*). The warranties shall commence upon the acceptance of the ECMs. All manufacturer warranties shall be transferable and extend to City. The warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessary. Warranties do not include failure results from City negligence, or from fire, lighting, water damage, or any other cause beyond the control of ESG and its sub-contractors. This warranty of materials and equipment is separate from, independent of, and in addition to any other guarantees in this Contract.

10.3 Workmanship Warranties. ESG warrants that all work performed under this Contract complies with customary, reasonable and prudent standards of care in accordance with standards in the industry and will be performed in a professional manner and consistent with the Contract documents.

10.4 Warranty Claims. The City is obligated to notify ESG of all warranty claims issued to any ECM manufacturer within thirty (30) calendar days of issuing the claim to the manufacturer.

SECTION 11. OWNERSHIP

11.1 City Ownership of Documents. All tracings, plans, drawings, specifications, maps, computer files and/or reports prepared or obtained under this Contract, as well as all data collected, together with summaries and charts derived therefrom, will be considered works made for hire and will become the property of the City

without restriction or limitation on their use and will be made available, upon request, to the City at any time during the performance of such work and/or upon completion or termination of the ECMs or this Contract. Upon delivery to the City of said document(s), the City will become the custodian thereof in accordance with Chapter 119, Florida Statutes. ESG or its contractors will not copyright any material and products or patent any invention developed under this Contract. ESG and its consultants grant to the City an exclusive irrevocable and perpetual right and license to use or re-use the plans, drawings, specifications and other materials prepared by ESG and/or its consultants in accordance with Section 287.055(10), Florida Statutes, and such use or re-use shall not be considered procurement of professional services for a project or contract award. Any re-use of ESG's documents, except for the specific purpose for this Project, will be at no additional cost to the City and at City's sole risk, without liability or legal exposure to ESG or its consultants.

11.2 Ownership of Certain Proprietary Property Rights. City shall not, by virtue of this Contract, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents, other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the ECMs. ESG shall grant to City all rights for the duration of this Contract for any and all software or other intellectual property rights necessary for City to continue to operate, maintain, and repair the ECM in a manner that will yield maximal consumption reductions.

11.3 Ownership of Existing Equipment. Ownership of the equipment and materials presently existing at the facilities at the time of execution of this Contract shall remain the property of City even if it is replaced or its operation made unnecessary by work performed by ESG pursuant to this Contract. ESG shall be responsible for the disposal of all equipment and materials designated by City as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

11.4 Ownership of Installed Equipment; Risk of Loss. Upon the issuance of a Certificate of Acceptance for the ECMs, City shall have all legal title to and ownership of all underlying equipment and ESG shall take all actions necessary to vest such title and ownership in City. Prior to the issuance of a Certificate of Acceptance for any ECM, the risk of loss or damage to all items shall be the responsibility of ESG, unless loss or damage results from negligence by City, and ESG shall be responsible for filing, processing and collecting all damage claims.

11.5 Patent and Copyright. ESG, without exception, shall indemnify and save harmless City and its employees from liability of any nature or kind, including cost and expenses for or on account of any copyrighted, patented, or unpatented invention, process or article supplied by ESG. ESG has no liability when such claim is solely and exclusively due to the combination, operation or use of any equipment or data not supplied by ESG or is based solely and exclusively upon City's alteration of the equipment or material. City will provide prompt written notification of a claim of copyright or patent infringement and will afford ESG full opportunity to defend the action and control the defense. Further, if such a claim is made or is pending ESG may, at its options and expenses procure for City the right to continue use of, replace or modify the article to render it non-infringing. (If none of the alternatives are reasonably available, City agrees to return the article on request to ESG and receive reimbursement, if any, as may be determined by a court of competent jurisdiction.) If ESG uses any design, device, or materials covered by letters, patent or copyright, it is mutually agreed and understood without exception that the negotiated prices shall include all royalties or costs arising from the use of such design, device, or materials in any way involved in the Work.

~~SECTION 12. INSURANCE~~

~~12.1 Insurance. At all times during the Term, ESG shall maintain in full force and effect all insurance coverages in a company or companies lawfully authorized to do business in Florida such insurance as will protect the City from claims set forth below which may arise out of or result from performance under this Contract by ESG, or by a subcontractor of ESG, or by anyone directly or indirectly employed by ESG, or by anyone for whose acts ESG may be liable.~~

~~12.2 Continued Coverage. Any liability coverage on claims made basis shall remain effective for five (5) years after final payment. If any of the required insurance coverages are required to remain in force after final payment, an additional certificate evidencing continuation of such coverage shall be submitted along with the application for final payment.~~

~~12.3 Adverse Material Change. The City shall be provided a minimum of thirty (30) days prior written notice of any adverse material change, including any reduction, non-renewal or cancellation of Contractor's required insurance coverage, or any increase in the Consultant's self-insurance retention.~~

~~12.4 Certificate of Insurance. Evidence of insurance, being a current ACORD certificate of insurance or its equivalent, executed by the insurer, or its agent or broker, evidencing that a policy of insurance and any required endorsements have been issued by the agent/broker shall be delivered to City prior to execution of this Contract. The Certificate of Insurance shall be dated and show the name of ESG, the specific Project or Contract by name and contract number, the name of the insurer, the number of the policy, its effective date, and its termination date.~~

~~12.5 Additional Insured. All required insurance (except Worker's Compensation and Professional Liability) shall include an Additional Insured endorsement identifying the City as an Additional Insured. No costs shall be paid by the City for an additional insured endorsement.~~

~~12.6 Required Coverage: ESG shall maintain following liability coverage, in the limits specified:~~

~~Comprehensive General Liability: Not less than \$1,000,000.00 Combined Single Limit per each occurrence and \$2,000,000 aggregate, with bodily injury limits. May not be subject to a deductible exceeding \$25,000.~~

~~Automobile Liability: Not less than \$1,000,000.00 for injuries per person in any one accident or occurrence and \$1,000,000.00 in the aggregate for injuries per occurrence or accident, with \$100,000.00 for property damage in any one accident or occurrence, or \$300,000.00 Combined Single Limit, covering each motor vehicle. May not be subject to a deductible exceeding \$10,000.~~

~~Worker's Compensation: Worker's Compensation and Employer's Liability Insurance with limits of Employer's Liability Insurance not less than \$500,000 "each accident," \$500,000 "disease policy limit," and \$500,000 "disease each employee."~~

~~Professional Liability or Errors and Omissions: Not less than \$1,000,000 per claim, including appropriate prior acts coverage for the period of time ESG provided services to the City. Self-insured retentions or deductibles should not exceed \$50,000.00 for written~~

agreements or contracts with the City with a value of less than \$1,000,000.

12.7 The policies for General Liability shall be written to include contractual liability insurance to protect City against claims from the operations of subcontractors.

12.8 These insurance requirements shall not in any manner limit or qualify the liabilities and obligations assumed by ESG under this Contract.

12.9 ESG shall be entirely responsible for securing Certificates of Insurance coverage as set forth above from all subcontractors who are engaged in the Work.

12.10 ~~Guarantee Insurance Policy. In the event an insurance policy is selected to support the Schedule F, (Energy Savings Guarantee), such policy shall be in an amount equal to the amount of the Guarantee during the remaining term of the Guarantee Period. It shall name City as a beneficiary and shall provide that payment shall be made to City upon presentation to the insurer of one or more Shortfall Payment Demands by City. It shall provide that the insurer may conclusively rely as to the completeness and accuracy of all statements in such Shortfall Payment Demands. The insurer shall not be required to make any inquiry, inspection or investigation in connection therewith. In the event a dispute as to an Annual Reconciliation shortfall is resolved in ESG's favor, ESG will first reimburse the insurer from the funds it receives.~~

SECTION 13. BONDS

13.1 Public Construction Bond. ESG shall, prior to the commencement of any Work under this Contract, provide City with a public construction bond, or a performance bond and payment bond, in the amount of the total compensation to be paid to ESG as the Guaranteed Maximum Price as shown in Section 6.2.1 and Schedule E. The bond(s) shall be on forms furnished by the City, in the form set forth in Schedule L. Moreover, ESG agrees that the following language shall be expressly included within the language of its bond(s):

“The Surety expressly agrees to be bound by all terms and conditions related to delay and time or impact-related damages. Surety shall be bound by the warranty or warranties contained in the contract documents and shall be responsible for any and all warranty obligations or damages as a result of latent defects or deficiencies in the work performed under the contract. The Surety waives all rights against City and its agents and employees for damages or other causes of loss by the Surety's performance of its obligations under this Bond, including claims by Surety against City for costs it asserts were not warranted by the contract documents, excluding only such rights as the Surety shall have to proceeds of such insurance held by City as fiduciary.”

Notwithstanding any provisions to the contrary, the public construction bond shall not extend to or provide coverage for the Energy Savings Guarantee or any other energy savings guarantees.

13.2 Savings Guaranty Surety Bond.

~~13.2.1 In the event a surety bond is selected to support the Energy Savings Guaranty set forth in Schedule C, ESG shall furnish City, as obligee, a surety bond equal to the amount of the Guarantee during the remaining term of the guarantee period. Such surety bond shall be payable to City, or available to be drawn upon by it upon failure of ESG to make payment in accordance with Section 8.7. If a disbursement is made under the surety bond, it shall be the obligation of ESG, and not City, to reimburse the provider of the instrument. ESG shall at all times maintain the surety bond in effect in an amount sufficient to cover the amount of the Guarantee during the remaining term of the guarantee period.~~

~~13.2.2 If the surety terminates this bond before the end of the guarantee period, the surety shall issue a check payable to both ESG and the City for the amount remaining toward the Energy Savings Guarantee, who shall deposit the check into an escrow account mutually agreeable to both parties. Thereafter, on an annual basis, the amount of the annual guarantee for the prior year shall be withdrawn from the escrow account. The City shall receive the amount of any shortfall in the prior annual guarantee (if any), and ESG shall receive the balance of the amount withdrawn. If there is no shortfall, ESG shall receive the entire annual withdrawal from escrow fund.~~

13.3 Renewals; Material Changes. ESG or its insurer shall provide City thirty (30) days prior written notice that the bond(s) required under this Section have been renewed together and of any attempt to cancel or to make any other material changes in the status, coverage or scope of the required bond or of ESG's failure to pay bond premiums.

13.4 Cost of Bonds. The cost of bonds shall be reflected as a project cost and included in the cost of the ECMs to be installed.

SECTION 14. INDEMNIFICATION AND LIMITATION OF LIABILITY

14.1 Indemnity. ESG agrees to indemnify, defend, save and hold harmless the City, its officers, agents and employees, from any claim, demand, suit, loss, cost or expense for any damages that may be asserted, claimed or recovered against or from City, its officials, agents, or employees by reason of any damage to property or personal injury, including death, and which damage, injury or death arises out of or is incidental to or in any way connected with ESG's performance of the Work and Project or caused by or arising out of (a) any act, omission, default or negligence of ESG or its contractors in the provision of the Work under this Contract; (b) property damage or personal injury, which damage, injury or death arises out of or is incidental to or in any way connected with ESG's or its contractors' execution of Work under this Contract; (c) arising from liens or claims for services rendered for labor or materials furnished in or for the performance of this Contract or (d) the violation of federal, state, county or municipal laws, ordinances or regulations by ESG. This indemnification includes, but is not limited to, the performance of the Work by ESG and its contractors, or any act or omission of ESG, its agents, servants, contractors, patrons, guests or invitees and includes any costs, attorneys' fees, expenses and liabilities incurred in the defense of any such claims or the investigation thereof. ESG agrees to pay all claims and losses and shall defend all suits, in the name of the City, its employees, and officers, including but not limited to appellate proceedings, and shall pay all costs, judgments and attorneys' fees which may issue thereon. City reserves the right to select its own legal counsel to conduct any defense in any such proceeding and all costs and fees associated therewith shall be the responsibility of ESG under this indemnification provision. This indemnification agreement is separate and apart from, and in no way limited by, any insurance provided pursuant to this Contract or otherwise. This paragraph shall not be

construed to require ESG to indemnify the City for its own negligence, or intentional acts of the City, its agents or employees. Nothing in this Contract shall be deemed to be a contractual waiver of the City's sovereign immunity under Section 768.28, Florida Statutes. This clause shall survive the expiration or termination of this Agreement.

SECTION 15. EVENTS OF DEFAULT

15.1 The following are events of default under this Contract:

15.1.1 Any failure by either Party to pay any payment required to be paid when due. City's failure to pay for reason of Non-Appropriation shall not constitute an event of default, and shall be governed by Section 18 of this Contract.

15.1.2 Any failure by either Party to observe and perform any material covenant, condition or agreement on its part to be observed or performed hereunder or under this Contract, other than as referred to in subsection 15.1.1 above.

15.1.3 Failure of ESG to make a required guaranteed savings short fall payment to City in accordance with this Contract and the Energy Savings Guarantee;

15.1.4 Failure of ESG to reimburse the City for additional material costs pursuant to Section 8.9 of this Contract.

15.1.5 ESG initiates a proceeding in any court, seeking liquidation, reorganization, debt arrangement, dissolution, winding up, appointment of trustee, receiver, custodian, or the like for substantially all of its assets, and such proceeding continues undismissed, unstayed and in effect for a period of 60 consecutive days; or an order for relief is entered in an involuntary case under the federal bankruptcy laws or other similar laws now or hereafter in effect.

SECTION 16. REMEDIES UPON DEFAULT

16.1 Opportunity to Cure Defaults. Each Party shall have a period of twenty (20) calendar days after being notified of an event of default to cure said default, provided that the Party has not already failed to cure a similar type of default under the terms of this Contract. If any Party has previously failed to timely cure a similar type of default, then no opportunity to cure similar types of default shall be had.

16.2 Remedies upon Default by City. If a default by City is not cured in accordance with Section 16.1, ESG may, without a waiver of other remedies which exist in law or equity, terminate this Contract and exercise all remedies available at law or in equity or other appropriate proceedings including bringing an action or actions from time to time for recovery of amounts due and unpaid by City, and/or for damages which shall include all costs and expenses reasonably incurred in exercise of its remedy.

16.3 Remedies Upon Default by ESG. If a default by ESG is not cured in accordance with Section 16.1, City shall have the following remedies in law or equity:

16.3.1 City may terminate this Contract.

16.3.2 City may make all available claims against bonds, other security provided and/or insurance policies, which shall include all costs and expenses reasonably incurred in the exercise of its remedy,

16.3.2 City may exercise any and all remedies at law or equity, or institute other proceedings, including, without limitation, bringing an action or actions from time to time for specific performance, and/or for the recovery of amounts due and unpaid and/or for damages, which shall include all costs and expenses reasonably incurred in exercise of its remedy,

16.3.4 City may take any and all steps necessary to cure ESG's default including the hiring or contracting of third parties to fulfill ESG's obligations. In the event City takes any action to effect such cure, ESG shall be obligated to reimburse City for City's costs and expenses, including the direct third party cost and City's additional administrative costs.

SECTION 17. DISPUTE RESOLUTION

17.1 All Disputes: In the event of any dispute or failure to agree should arise between the parties to this Contract, each party agrees to exercise good faith efforts to resolve the matter fairly, amicably, and in a timely manner. The parties shall consider litigation as a last resort, to be employed only when the methods described in this Section fail. To this end, the parties agree to take affirmative steps to communicate effectively, to keep lines of communication open, and to handle all disputes in a reasonable and businesslike manner.

17.2 Mediation. ESG and City agree that in the event of a dispute or failure to agree upon a matter related to this Contract, upon the request of the other party, to submit the matter to non-binding mediation. However, the parties shall first confer informally with one another to attempt to resolve the dispute. In the event that the assistance of an unbiased neutral is required, the unbiased neutral may be a professional mediator, an attorney, an architect, an engineer, or any person the parties agree is unbiased and qualified to understand the dispute and make the determinations that may be required.

17.3 Disputes over \$25,000. In the event of a dispute over \$25,000, the parties agree that the unbiased neutral to assist in mediation may be a board composed of three (3) or more qualified persons whom the parties agree are unbiased and qualified to understand the dispute and make the determinations that may be required.

17.4 Authority: When mediation is utilized each party agrees to have in attendance at their mediation a person with actual authority to resolve the dispute, or in the case of the City, a person with authority to agree to a resolution, subject to approval in accordance with settlement authority by the Mayor or City Commission.

17.5 Non-parties: Persons who have a stake in the dispute but who are not parties to this Contract may be included in the mediation by consent of the parties.

17.6 Litigation. The parties shall consider litigation as a last resort, to be employed only when mediation fails. ESG and the City agree that mediation is a condition precedent to the filing of any claim or action in a court of law.

17.7 Costs of Mediation: ESG and City agree to equally share the costs of mediation.

17.8 Waiver of Arbitration. ESG and City agree and expressly waive any and all provisions regarding arbitration, including any and all provisions regarding arbitration as a condition precedent to litigation contained elsewhere in any Contract documents.

SECTION 18. TERMINATION

18.1 Right to Reject or Stop the Work. The City may reject any sequences or procedures proposed by ESG in connection with the Work which might constitute or create a hazard to the ECMs, the related buildings or structures, or to persons or property, or which deviate from the Project plans and documents or will result in schedule delays or additional costs to the City. This provision shall not be construed to mean that Work which is not rejected is therefore approved. If ESG fails to correct defective Work or fails to supply labor, materials or equipment in accordance with the Project plans and documents or to execute the Work in a workmanlike manner, the City may order ESG to stop the Work, or any portion thereof, until the cause for such stop work order has been eliminated.

18.2 Right to Terminate ESG's Performance of the Work.

18.2.1 If ESG fails or refuses to prosecute the Work with such diligence as to allow completion of the Work substantially in accordance with the *ECM Installation Schedule*, Schedule B or ESG commits a material breach of any other provision of this Contract or the Project plans and documents, and provided that such breach continues for twenty (20) calendar days after written notice to ESG demanding that such breach be cured, or if cure cannot be effected in such twenty (20) calendar days and ESG fails to propose and commence a cure acceptable to the City within an time acceptable to City, then City may terminate ESG's right to proceed with the Work and installation of ECMs under this Contract.

18.2.2 In such case, the City will give ESG and its surety written notice of intention to terminate ESG's right to complete the work of the ECMs and the reason therefor and, unless within seven (7) business days the delay or violation shall cease or a cure acceptable to the City for correcting the situation is proposed, the City may issue a termination notice to ESG and its surety. Thereupon, the City may select one or more of the following options:

- (a) The surety will be given the opportunity to complete all or a portion of the work in accordance with the Project plans and documents. Such completion may include, but not be limited to: (i) the use of a completing company, satisfactory to City, pursuant to a written takeover agreement, (ii) the payment of a sum of money required to allow the City to complete the work, or (iii) other arrangements agreed to by the City and the surety.
- (b) If within seven (7) business days following the issuance of the termination notice, the surety fails to notify the City that it intends to exercise its right to undertake the work, the City may take over the work, exclude ESG from the premises and incorporate into the Work all materials and equipment stored at the premises and finish all or a portion of the Work as the City may deem expedient.
- (c) The City may determine to complete some ECMs but not all of the Project;
- (d) The City may determine to cancel the Project and proceed no further.

18.2.3 In the event of termination, City shall pay ESG for that portion of Work satisfactorily completed and accepted by City, plus mobilization costs, as well as the costs for material that is ordered or purchased and cannot be returned.

18.2.4 In the event all or a portion of the Work is completed for an ECM by ESG or its surety, ESG's saving guaranty shall continue to apply to the completed ECM.

18.3 Termination for Non-Appropriation. This Contract shall immediately terminate with respect to ESG's annual monitoring services as set forth in Schedule E (*Compensation to ESG*) for which a Non-Appropriation has occurred. The termination shall be effective as of the last day for which funds were appropriated and ESG may then pursue its rights under this Contract.

18.4 Termination Upon Default. This Contract is also subject to termination upon the occurrence of an event of default, as provided in Section 15.

SECTION 19. ASSIGNMENT

19.1 Assignment by ESG. ESG acknowledges that City is induced to enter into this Contract by, among other things, the professional qualifications of ESG. ESG agrees that neither this Contract nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of City; provided ESG can without prior approval from City assign this Contract to its parent or affiliate companies.

19.2 ESG may, with prior written approval of City, which consent shall not be unreasonably withheld, delegate its duties and performance under this Contract, and/or utilize subcontractors, provided that any assignee(s), delegee(s), or subcontractor(s) shall fully comply with the terms of this Contract. Notwithstanding the provisions of this paragraph, ESG shall remain jointly and severally liable with its assignees(s), or transferee(s) to City for all of its obligations under this Contract.

SECTION 20. REPRESENTATIONS AND WARRANTIES

20.1 Mutual Representations. Each Party warrants and represents to the other that:

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

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

(c) its execution, delivery, and performance of this Contract will not breach or violate, or constitute a default under any Contract, lease or instrument to which it is a party or by which it or its properties may be bound or affected; or

(d) it has not received any notice, nor to the best of its knowledge is there pending or threatened any

notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits or orders which would materially and adversely affect its ability to perform hereunder.

20.2 City Representations. City hereby warrants and represents that:

(a) it has provided or shall provide timely to ESG, all records relating to energy and/or water usage and energy/water-related maintenance of the facilities requested by ESG and the information provided is, and all information in other records to be subsequently provided pursuant to this Contract will be, true and accurate in all material respects; and

20.3 ESG Representations. ESG hereby warrants and represents that:

(a) before commencing performance of this Contract it shall have (i) be licensed or otherwise permitted to do business in the State of Florida, and (ii) provided proof and documentation of required insurance pursuant to Section 12, (iii) provided all required bonds pursuant to Section 13; and (iv) made available, upon reasonable request, all documents relating to its performance under this Contract, including all contracts and subcontracts entered into;

(b) it shall use qualified subcontractors and delegees, licensed and bonded in Florida to perform the work so subcontracted or delegated pursuant to the terms of this Contract;

(c) it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to perform its obligations under this Contract.

~~SECTION 21. DOCUMENTATION FOR SECTION 179D TAX DEDUCTION~~

~~21.1 As a result of the implementation of this Project, certain tax deductions under Section 179D of the Internal Revenue Code may be available because of the energy efficient improvements to the Owner's buildings. Because the City is a tax exempt entity, it is not eligible for any such deductions. In these circumstances, Section 179D allows for the system designer to claim any eligible deductions. The City, as Project owner agrees to allocate these Section 179D tax deductions to ESG to the extent such deduction arises from the technical specifications developed by ESG and the implementation of this Project.~~

~~21.2 Upon job completion, the City agrees to execute the required written allocation including the declaration related to this tax code provision. ESG will be responsible for preparing the declaration and all accompanying documentation for Owner's signature. ESG will be designated the Section 179D beneficiary. It is anticipated that such documents will be part of ESG's tax filings for year 2012, filed in 2013.~~

~~21.3 In consideration for the City's willingness to execute these documents, ESG agrees to share with the City 50% of the anticipated cash value of these deductions by crediting the City that value against the total project cost, as detailed in Schedule E (Compensation to ESG).~~

~~SECTION 22 ASSIGNMENT OF ENVIRONMENTAL ATTRIBUTES~~

~~22.1 "Environmental Attributes" means any and all credits, deductions, benefits, emission reductions, incentives, offsets, and allowances, howsoever entitled, attributable to and arising from the implementation of this Project, whether such Environmental Attributes now exist or are developed in the future. Environmental Attributes include but are not limited to: (1) Any avoided emissions of pollutants to the air, soil, or water; (2)~~

~~Any avoided emissions of carbon dioxide (CO₂), methane (CH₄) and other greenhouse gases (GHGs); (3) Section 45 credits; (4) green tags; (5) renewable energy credits; and (6) The reporting rights to these avoided emissions such as White Tag Reporting Rights. Environmental Attributes also include any energy, capacity, reliability, or other energy reduction attributes that result from the implementation of this Project.~~

~~22.2 All Environmental Attributes arising from the implementation of this Project shall be owned by City. The City assumes full responsibility for any work, costs, liabilities, or other risks associated with the Environmental Attributes arising from the implementation of this Project.~~

SECTION 23. MISCELLANEOUS

23.1 Waiver of Liens. ESG will obtain and furnish to City a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each ECM. Should liens or claims be filed against City property by reason of ESG's acts or omissions, ESG shall cause same to be discharged by bond or otherwise within ten (10) days after filing.

23.2 Compliance with Law and Standard Practices. ESG shall perform its obligations hereunder in compliance with any and all applicable federal, state, and local laws, rules, and regulations, in accordance with sound engineering and safety practices, and in compliance with any and all reasonable rules of City relative to the Work.

23.3 Independent Contractor. ESG acknowledges and agrees that it is an independent contractor of the City and is not an employee of the City. ESG acknowledges that it shall have no authority to bind City to any contractual or other obligation whatsoever. ESG shall be responsible to the City for all work or services performed by ESG or any person or firm engaged as a sub-consultant or subcontractor to perform work in fulfillment of this Contract.

23.4 Right to Audit. ESG shall maintain adequate records for the work performed under this Contract for five (5) years following completion of the Project, or conclusion of any litigation regarding this Contract. The City shall have the right to audit ESG's books and records, (in whatever form they may be kept, whether written, electronic or other) relating or pertaining to this Contract (including any and all documents and other materials, in whatever form they may be kept, which support or underlie those books and records), kept by or under the control of ESG, including, but not limited to those kept by ESG, its employees, agents, assigns, successors and subcontractors, which inspection shall occur at the City's expense, upon prior notice, with regard to the Project and this Contract. Failure by ESG to permit such audit shall be grounds for termination of this Contract by the City.

23.5 Public Records Law. ESG shall allow public access to all documents, papers, letters or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by ESG in conjunction with this Contract. Failure by ESG to grant such public access shall be grounds for immediate unilateral cancellation of this Contract by the City. ESG shall be solely responsible for taking whatever action it deems appropriate to legally protect its claim of exemption from the public records law.

23.6 Taxes. ESG understands that in performing the Project, ESG is not exempt from paying sales tax to its suppliers for materials required for ESG to perform under this Contract. ESG shall not be authorized to use the City's tax exemption number for purchasing supplies or materials.

23.7 Public Entity Crimes Act. Consultant represents that the execution of this Agreement will not violate the Public Entity Crimes Act (Section 287.133, Florida Statutes), and certifies that Consultant and its sub-consultants under this Contract have not been placed on the convicted vendor list or discriminatory vendor list maintained by the State of Florida within 36 months from the date of submitting a proposal for this Contract or entering into this Contract. Violation of this section may result in termination of this Contract and recovery of all monies paid to ESG, and may result in debarment from City's competitive procurement activities.

23.8 Non-Discrimination. In performing under this Contract, ESG shall not discriminate against any person because of race, color, religion, sex, gender identity or expression, genetic information, national origin, age, disability, familial status, marital status or sexual orientation.

23.9: Small Business Requirements. ~~Consultant shall comply with the City's Small Business Ordinance set forth in Chapter 66 of the Code of Ordinances of the City of West Palm Beach, which is incorporated herein by this reference. Consultant shall comply with the small business commitment contained in Consultant's Proposal, or as approved by the Small Business Division. Consultant shall maintain all relevant records and information necessary to document compliance with the Small Business Ordinance and shall allow the City to inspect and audit such records.~~

23.10. Force Majeure. Any deadline provided for in this Contract may be extended, as provided in this paragraph, if the deadline is not met because of one of the following conditions occurring with respect to that particular project or parcel: fire, strike, explosion, power blackout, earthquake, volcanic action, flood, war, civil disturbances, terrorist acts, hurricanes and acts of God, provided the non-performing party and its subcontractors are without fault in causing such default or delay, and such default or delay could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing party through the use of alternate sources, workaround plans or other means. When one of the foregoing conditions interferes with contract performance, then the party affected may be excused from performance on a day-for-day basis to the extent such party's obligations relate to the performance so interfered with; provided that no such extension shall be made unless notice thereof is presented by ESG to City in writing within ten (10) business days after the start of the occurrence of such delay, and ESG shall use best efforts to perform its obligations during such period of delay, and notify City of its abatement or cessation; and further provided, the party so affected shall use reasonable efforts to remedy or remove such causes of non-performance. The party so affected shall not be entitled to any additional compensation by reason of any day-for-day extension.

23.11. Ethics; Conflicts of Interest

23.11.1 ESG represents that it has not given or accepted a kickback in relation to this Contract and has not solicited this Contract by payment or acceptance of a gratuity or offer of employment.

23.11.2 ESG represents that it has not solicited this contract by payment of a gift or gratuity or offer of employment to any official, employee of the City or any City agency or selection committee.

23.11.3 ESG represents that it does not employ, directly or indirectly, the mayor, members of the city commission or any official, department director, head of any City agency.

23.11.4 ESG represents that it does not employ, directly or indirectly, any official of the City. ESG represents that it does not employ, directly or indirectly, any employee or member of any board, committee or agency of the City who, alone or together with his household members, own at least five percent (5%) of the total assets and/or common stock of ESG.

23.11.5 ESG represents that it has not knowingly given, directly or indirectly, any gift with a value greater than \$100 in the aggregate in any calendar year to the mayor, members of the city commission, any department director or head of any city agency, any employee of the city or any city agency, or any member of a board that provides regulation, oversight, management or policy-setting recommendations regarding the ESG or its business.

23.11.6 ESG represents that it presently has no interest and shall acquire no interest, either direct or indirect, which would conflict in any manner with its performance under this Contract. The ESG further represents that no person having any interest shall be employed or engaged by it for the Project.

23.11.7 ESG, its officers, personnel, subsidiaries and subcontractors shall not have or hold any continuing or frequently recurring employment, contractual relationship, business association or other circumstance which may influence or appear to influence ESG's exercise of judgment or quality of the Services being provided under this Contract.

23.11.8 ESG, its officers, personnel, subsidiaries and subcontractors shall not, during the term of this Contract, serve as an expert witness against City in any legal or administrative proceeding unless compelled by court process. Further, ESG agrees that such persons shall not give sworn testimony or issue a report or writing, as an expression of his or her expert opinion, which is adverse or prejudicial to the interests of City or in connection with any pending or threatened legal or administrative proceeding. The limitations of this section shall not preclude such persons from representing themselves in any action or in any administrative or legal proceeding.

23.11.9 ESG shall promptly notify the City in writing by certified mail of all potential conflicts of interest or any event described in this Section. Said notification shall identify the prospective business interest or circumstance and the nature of work that ESG intends to undertake and shall request the opinion of the City as to whether such association, interest or circumstance would, in the opinion of the City, constitute a conflict of interest if entered into by the ESG. The City agrees to notify the ESG by certified mail of its opinion within thirty (30) calendar days of receipt of the said notification and request for opinion. If, in the opinion of the City, the prospective business association, interest or circumstance would not constitute a conflict of interest by the ESG, the City shall so state in its opinion and the ESG may, at its option, enter into said association, interest or circumstance and it shall be deemed not in conflict of interest with respect to services provided to the City by ESG under this Contract.

23.11.10 In the event ESG is permitted to utilize subcontractors to perform any services required by this Contract, ESG agrees to prohibit such subcontractors, by written contract, from having any conflicts as within the meaning of this section.

23.12. Lobbying Certification. ESG certifies to the best of its knowledge and belief that no funds or other resources received in connection with this Contract will be used directly or indirectly to influence legislation or any other official action by any Member of Congress or the Florida Legislature or any state agency.

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

~~23.14 Notice. All written notices, demands and other communications required or provided for under this Contract shall be sent by certified mail, return receipt requested, postage prepaid, in the case of mailing, or by overnight or same day courier, or by electronic transmission producing a written record, or hand delivered to the other party at the following address(es) or to such other address or person as shall be designated by a party~~

in a written notice given in the manner required hereby.

TO ESG: Chris Summers with copy to: Energy Systems Group, LLC
Regional Director 4655 Rosebud Lane
Energy Systems Group, LLC Newburgh, IN 47630
17757 US Hwy 19 North, Suite 210
Clearwater, FL 33764

TO CITY: City Administrator with copy to: City Attorney
City of West Palm Beach City of West Palm Beach
401 Clematis Street PO Box 3366
West Palm Beach, FL 33401 West Palm Beach, FL 33402

23.15. Unauthorized Aliens/Patriot's Act. The knowing employment by ESG or its sub-consultants of any alien not authorized to work by the immigration laws or the Attorney General of the United States is prohibited and shall be a default of this Contract which results in unilateral termination. In the event that the ESG is notified or becomes aware of such default, ESG shall take steps as are necessary to terminate said employment with 24 hours of notification or actual knowledge that an alien is being employed. ESG's failure to take such steps as are necessary to terminate the employment of any said alien within 24 hours of notification or actual knowledge that an alien is being employed shall be grounds for immediate termination of this Contract and unilateral termination. ESG shall take all commercially reasonable precautions to ensure that it and its sub-consultants do not employ persons who are not authorized to work by the immigration laws or the Attorney General of the United States. Consultant further represents that it is not in violation of any laws relating to terrorism or money laundering, including the Executive Order No. 13224 on Terrorist Financing and/or the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56., the "Patriot Act").

~~23.16. Governing Law; Jurisdiction; Venue; Litigation. This Contract shall be construed and interpreted, and the rights of the parties hereto determined, in accordance with Florida law without regard to conflicts of law provisions. The City and ESG submit to the jurisdiction of Florida courts and federal courts located in Florida. The parties agree that proper venue for any suit concerning this Contract shall be Palm Beach County, Florida, or the Federal Southern District of Florida. Consultant agrees to waive all defenses to any suit filed in Florida based upon improper venue or *forum nonconveniens*. TO ENCOURAGE PROMPT AND EQUITABLE RESOLUTION OF ANY LITIGATION, EACH PARTY HEREBY WAIVES ITS RIGHTS TO A TRIAL BY JURY IN ANY LITIGATION RELATED TO THIS CONTRACT.~~

~~23.17. Inspector General. ESG is aware that the Inspector General of Palm Beach County has the authority to investigate and audit matters relating to the negotiation and performance of this Contract, and may demand and obtain records and testimony from ESG and its subcontractors and lower tier subcontractors. ESG understands and agrees that in addition to all other remedies and consequences provided by law, the failure of ESG or its subcontractor or lower tier subcontractors to fully cooperate with the Inspector General when requested may be deemed by the City to be a material breach of this Contract justifying its termination.~~

23.18 Severability. In the event that any term or provision of this Contract shall to any extent be held invalid or unenforceable, it is agreed that the remainder of this Contract, or the application of such terms or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected and every other term and provision of this Contract shall be deemed valid and enforceable to the

maximum extent permitted by law.

21.19. Waiver. Any waiver by either party of any one or more of the covenants, conditions, or provisions of this Agreement, shall not be construed to be a waiver of any subsequent or other breach of the same or any covenant, condition or provision of this Contract.

23.20. Headings. The headings contained in this Contract are provided for convenience only and shall not be considered in construing, interpreting or enforcing this Contract.

23.21. Controlling Provisions. Except as otherwise specifically provided herein, in the event of any conflict between the specific provisions of this Contract and the requirements or provisions of the RFP and/or Proposal, the provisions shall be given precedence in the following order: (1) this Contract with Schedules and Appendices, (2) the RFP; and (3) the Proposal. Wherever possible, the provisions of the documents shall be construed in such manner as to avoid conflicts between provisions of the various documents.


23.22 Counterparts; Digital Signatures. This Contract may be executed in one or more counterparts, each of which shall be deemed to be an original and such counterparts will constitute one and the same instrument. The parties to this Contract may agree to execute this Contract, and all subsequent amendment or modifications to it, by electronic means.

23.23. Entire Agreement; Amendment. This Contract, including the RFP, the Proposal, Exhibits, Schedules and Appendix, which are incorporated into this Contract in their entirety, whether or not attached hereto, embody the entire agreement and understanding of the parties with respect to the subject matter of this Contract and supersede all prior and contemporaneous agreements and understandings, oral or written, relating to said subject matter. This Contract may only be modified by written amendment executed by the City and ESG.

[Remainder of page intentionally blank. Signatures on following page.]

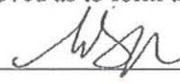
IN WITNESS WHEREOF, and intending to be legally bound, the Parties subscribe their names to this Contract by their duly authorized officers on the date last executed below

ATTEST:

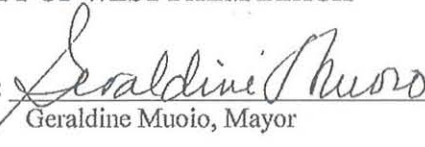


City Clerk

CITY ATTORNEY'S OFFICE
Approved as to form and legality:

By: 

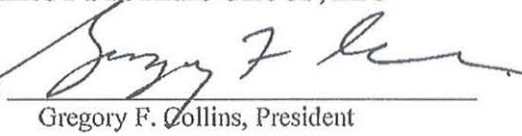
CITY OF WEST PALM BEACH

By: 

Geraldine Muoio, Mayor

Date: 12/7, 2011

ENERGY SYSTEMS GROUP, LLC

By: 

Gregory F. Collins, President

SCHEDULES

- A. ~~ECMs to be Installed~~
- B. ~~ECM Installation Schedule~~
- C. ~~ESG Maintenance & Training Responsibilities~~
- D. ~~Certificate of Acceptance~~
- E. ~~Compensation to ESG~~
- F. ~~Energy Savings Guaranty~~
- G. ~~Cost Savings Formula~~
- H. ~~Monitoring & Verification Plans~~
- J. ~~Baseline~~
- K. ~~City Maintenance Responsibilities~~
- L. ~~Performance Bond~~
- M. ~~Energy Savings Guaranty Bond~~
- N. ~~Systems Start-Up and Commissioning~~
- O. ~~Standards of Service~~
- P. ~~Equipment Warranties~~

APPENDIX

- 1. ~~Energy Audit~~
- 2. ~~Room-by-Room Lighting Inventory~~
- 3. ~~Evernia Garage Design Documents~~
- 4. ~~Police Station Design Documents~~
- 5. ~~City Specification 01700~~
- 6. ~~Open Book Pricing Sheet~~
- 7. ~~ECM Summary~~

EXHIBIT "B"
SCOPE OF SERVICES



17757 US Highway 19 North
Suite 210
Clearwater, FL 33764-6592
Tel 727.533.0403
Fax 727.533.0723

July 16, 2013

Carlos Solis, PE
The City of Marathon
Public Works Manager
9805 Overseas Hwy
Marathon, FL 33050

Dear Mr. Solis,

In response to your request, the following is our proposal to provide electrical design and construction services on the above referenced project. The project consists of re-lighting approximately 2,000 feet of highway or as many lights as possible up to the total construction budget along US 1. The new street lighting design will use decorative lighting assemblies at the existing locations to best meet FDOT's lighting standards in the City of Marathon, Florida.

The proposal is broken down into Design and Construction services with their associated line items and fees. The fees associated with the Design are a fixed fee, while the construction costs are budgetary.

ESG proposes a stepped process during the Design phase. The first step will require coordination with FDOT to determine the illumination requirements for the Highway. With the City's assistance in locating nearby Cities (i.e.: Tavernier) with the same roadway configurations and less lighting, ESG will present the information to FDOT to aid in our case for lower light levels for the proposed re-lighting in Marathon. Upon FDOT's decision for required light levels the potential lighting equipment can be identified and their performances reviewed. The second step is to generate sample photometric plans representative of the pilot section. Various lighting technologies and pole heights will be reviewed to best meet the lighting standards of FDOT. The sample photometric plans and lighting cut sheets will be submitted to the City for review. The third step involves evaluating the existing pole foundations to determine if they can be re-used with the new pole assembly. The pole foundations will need to be certified with the pole assembly selected to meet the wind load requirement of 180MPH per the 2010 Florida Building Code adopted in March of 2012. The fourth step is creating the final Photometric, Demolition and Renovation electrical plans to be submitted to FDOT. Meanwhile, the bid package for materials and subcontractors can be issued.

Anytime during the design phase the City may request ESG to stop working if it is determined that the design cannot meet the intent of the City.

After the Design phase is complete there will be a review and permitting process with FDOT. Maintenance of traffic plans will be developed to work along the Highway.

The construction phase of the project includes: Ordering materials, securing permits, demolition of old poles, installation of new poles, and project close out documents.

Upon completion of the project ESG will provide a post illumination performance review of the new lighting system and collect feedback from the community on the pilot project. A final assessment report will be provided.

Sincerely,



Bryan Reardon
Sr. Account Executive
Phone: 727-512-2220
breardon@energysystemsgroup.com

**City of Marathon US 1 Street Lighting Pilot Project
Design Build Services**

Electrical (Fixed Fee):

Fees:

1. Coordination with FDOT to determine illumination requirements for pilot project located along US 1 in Marathon, FL. With the City's assistance be able to reference other Cities who have the same traffic configuration along US 1 with less lighting installed to help with our case of lowering the light levels.	\$1,700.00
2. Establish equipment specifications and performance criteria for new lights and poles.	\$1,300.00
3. Identify potential lights and poles.	\$1,500.00
4. Site Visit to verify readily observable conditions.	\$3,500.00
5. Develop multiple sample photometric plans representative of the roadway utilizing various lighting configurations and sources (LED, HID) to provide a decorative lighting system that best meets the illumination requirements of FDOT. The sample photometric plans will be based on 3-4 existing poles located along US 1 near the airport. The sample photometric plans and lighting assembly cut sheets will be provided to the City for review.	\$5,000.00
6. Evaluate existing concrete pole bases for new decorative lighting system to meet current wind load of 180MPH. City to provide existing pole base specifications.	\$4,000.00
7. 100% Signed and Sealed Photometric, Demolition and Renovation electrical plans to be submitted to FDOT.	\$4,500.00
8. Bid package for material and labor.	\$1,000.00
Total Electrical Design	\$22,500.00

FDOT and MOT Approval (Fixed Fee):

1. Manage FDOT review and approval of proposed pole set and layout.	\$1,500.00
2. Develop and secure approval for Maintenance of Traffic plans.	\$1,000.00
Total FDOT and MOT Approval Coordination	\$2,500.00

Construction (Budgetary Estimates):

1. Order Materials	\$110,000.00
2. Secure Permits	\$2,500.00
3. Remove old lights and poles	\$5,000.00
4. Install new lights and poles	\$50,500.00
5. Develop and provide project as-builts. Submit any required post project documentation to FDOT.	\$3,500.00
6. Provide project closeout documents and O&M manuals	\$500.00
Total Construction	\$172,000.00

Performance Review (Fixed Fee):

1. Review post illumination performance against design requirements and assist in soliciting community and council feedback on pilot project.	\$2,000.00
2. Develop and provide final project assessment report	\$1,000.00
Total Performance Review	\$3,000.00

Total Project Budget	\$200,000.00
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