

AGENDA REQUEST FORM
THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

Meeting Date 09/19/06	Open Agenda <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Time Certain Request <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Agenda Item Number EE-3
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TITLE:
Approval of Energy Services Agreement with FPL Services, LLC.

REQUESTED ACTION:
 It is requested that the School Board approve and authorize the execution of the attached Energy Services Agreement with FPL Services for Energy Conservation Measures in ten schools.

SUMMARY EXPLANATION AND BACKGROUND:
 In September of 2001 and 2004, The School Board of Broward County, Florida, entered into Energy Service Agreements with FPL Services to perform utility saving retrofits to District schools. These projects were referred to as Phase 1 and Phase 2. Building on the success of these projects, staff has requested that FPL Services examine an additional twelve (12) schools and prepare Technical Energy Audits on these facilities per State Statute 1013.23 for Energy Efficiency Contracting. They have identified Energy (including water) conservation measures for these schools. This Energy Services Agreement stipulates that these improvements to the school will pay for themselves in a ten (10) year period, through avoided electric, water, fuel and maintenance material costs. The scope of work includes lighting retrofits with high efficiency lights, motion sensors, water conservation, irrigation control and air conditioning chiller replacement. Due to capital budget constraints only 10 of these 12 schools are included in this agenda item. Budget allowing, the remainder will be presented to the Board next year. These utility savings measures will avoid \$3,270,830 in electrical, water and maintenance materials over 10 years as guaranteed by FPL Services. If there is any shortfall in savings, as outlined in the agreement, FPL Services will monetarily reimburse the District. The retrofits will cost the District \$2,363,571 and an additional \$320,119 for ten (10) years of maintenance, measurement and verification of savings. This Energy Services Agreement will authorize FPL Services to install utility savings measures as described above. Exhibit 2 will be on display in the lobby at the K.C. Wright Center, Board Members Office and Official School Board Records.

- SCHOOL BOARD GOALS:**
- Goal One: All students will achieve at their highest potential.
 - Goal Two: All schools will have equitable resources.
 - Goal Three: All operations of the school system will demonstrate best practices while supporting student achievement.
 - ✓ •Goal Four: All stakeholders will work together to build a better school system.

FINANCIAL IMPACT:
 The Financial Impact is \$2,683,690 which will be recovered through the guaranteed savings within the 10 year agreement period as stated in the Energy Services Agreement. The source of funds is the capital budget for Energy & Utility Conservation Program.

- EXHIBITS: (List)**
1. Energy Services Agreement with FPL Services
 2. Technical Energy Audits and Contract Schedules

APPROVED	<table border="0" style="width:100%;"> <tr> <td colspan="2">SOURCE OF ADDITIONAL INFORMATION:</td> </tr> <tr> <td>Thomas Lindner</td> <td style="text-align: right;">754-321-4691</td> </tr> <tr> <td>Donnie Carter</td> <td style="text-align: right;">754-321-2610</td> </tr> <tr> <td>Name</td> <td style="text-align: right;">Phone</td> </tr> </table>	SOURCE OF ADDITIONAL INFORMATION:		Thomas Lindner	754-321-4691	Donnie Carter	754-321-2610	Name	Phone
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Name	Phone								

(For Official School Board Records' Office Only)

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA
Donnie Carter, Deputy Superintendent, Operations **SEP 19 2006**

Approved in Open Board Meeting on: _____
 By: School Board Chair

ENERGY SERVICES AGREEMENT

**AN
ENERGY SERVICES
PERFORMANCE CONTRACT**

With:

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA

And:

FPL SERVICES, LLC

Agreement Date: _____

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List of Schedules

Schedule A - Approved ECMs to be implemented by ESCO

This schedule contains a complete description of the Energy Conservation Measures (ECMs) approved by SBBC listed by ESCO.

Schedule B - Equipment to be Installed by ESCO

This schedule contains a complete description of all equipment to be installed by ESCO under this performance contract. It accurately describes all items, indicates the quantity (if applicable), indicates the location of the installation and lists all applied warranties.

Schedule C - Description of Facilities; Pre-Existing Equipment Inventory

This schedule contains descriptions of all the facilities participating in this contract including an inventory of the equipment prior to ECM implementation.

Schedule D - Energy Saving Guarantee

This schedule fully describes the energy saving guarantee provided by the ESCO defined in units of energy to be saved. The guarantee covers annual service provided by the ESCO and that the ESCO will be responsible for reimbursing SBBC in the event of a savings shortfall.

Schedule E - Compensation to ESCO

This schedule includes detailed descriptions of services to be provided by the ESCO and the corresponding compensation for those services throughout the term of the contract. This schedule also contains information about the compensation is calculated, if an annual inflation index is to be used, and at what time intervals the ESCO is to be paid.

Schedule F - Baseline Energy Consumption

The baseline energy consumption is the "yardstick" by which all energy savings achieved by the installed project will be measured. Baseline calculation methodologies are generally contained in the audit document but is also incorporated into this schedule, as well. The process used to account for any adjustments to the baseline due to weather, occupancy, building use, equipment malfunctions, etc. are also clearly defined in this schedule.

Schedule G - Savings Measurement & Calculation Formulae; Methodology to Adjust Baseline

A description of the savings calculations process used to compute the savings performance of the installed equipment is contained in this schedule. This calculation includes a process to compare the level of energy that would have been consumed without the project (referred to as "Baseline") with what actual energy was used during a specific time period (monthly, quarterly, etc.). The baseline, from which savings are to be measured, will be adjusted to account for the prevailing conditions (e.g., weather, billing days, occupancy, etc.) during the measurement period.

Schedule H - Construction and Installation Schedule

The proposed construction and installation schedule for the ECMs approved by SBBC are contained in this attachment showing individual task and total project durations

required for ECM implementation. This schedule is a useful tool for tracking the ESCO's performance, progress and timeline of the Work delineated in this Contract.

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

This schedule describes the start-up and commissioning procedures required by ESCO upon installation of every equipment item as part of ECM implementation. For the installed mechanical and electrical equipment, start-up and commissioning will ensure proper operation and service per equipment manufacturer specifications and SBBC facility design requirements. This schedule also contains the specific parameters (settings and conditions) required for the installed mechanical and electrical equipment under this Contract to operate at acceptable efficiency and energy/utility consumption levels that will produce the energy/utility savings guaranteed by the ESCO.

Schedule J - Standards of Comfort

The standards of comfort to be maintained for heating, cooling, lighting levels, hot water temperatures and any special conditions for occupied and unoccupied areas of the facility is explicitly described in this schedule.

Schedule K - ESCO's Maintenance Responsibilities

This schedule describes in detail the operation and maintenance services to be provided by ESCO throughout the Term of this Contract. The schedule contains information regarding ESCO responsibilities and specifies which equipment items will be regularly maintained at which schools and at what time intervals. The maintenance services required by this Contract are critical in ensuring that equipment operation continues to provide the efficient service guaranteed by the ESCO.

Schedule L - SBBC's Maintenance Responsibilities

This schedule describes the operations and maintenance responsibilities that may be ascribed to facility staff as agreed to by both parties. In some instances, it will contain no more than a description of routine O&M currently being performed on existing energy/utility consuming equipment in the facility. In other cases, facility staff may be used to provide some maintenance on the new equipment installed under this Performance Contract, with the ESCO providing any specialized services as needed.

Schedule M - Facility Maintenance Checklist

This attachment contains a list of the different maintenance services required under this Contract for each of the participating schools, including all equipment items requiring maintenance and the timeframe maintenance is to be performed. The list allows SBBC and ESCO to keep track of the maintenance services performed for equipment installed under this Contract and to ensure that all installed equipment is regularly maintained as scheduled.

Schedule N - ESCO's Training Responsibilities

A scope of ESCO's Training to SBBC facility/maintenance staff is contained in this schedule explaining what the ESCO's Training responsibilities are at each participating school. The training will include technical education on equipment maintenance, operation and emergency procedures for all of the equipment installed by ESCO under this Contract.

Schedule O - ECM Annual Cash Flow

This schedule contains a spreadsheet of all project costs, fees, savings, rebates associated with the approved ECMs to be implemented.

Schedule P - Projected Energy Savings for Approved ECMs

This attachment contains the projected energy savings guaranteed by the ESCO for the 10-year Term of this Contract. Monthly comparisons will be made between actual energy consumption and the projected energy consumption to determine if there is a savings shortfall, in which case the ESCO guarantees to pay SBBC the difference.

Schedule Q - List of Subcontractors

This schedule provides a complete list of the subcontractors contracted by the ESCO to perform the Work required by this Contract.

List of Definitions

Commencement Date - the first day of the month following the month in which Delivery and Acceptance of all ECM's covered in this Agreement has occurred and commences the ten (10) year period of the applicable savings guarantee.

Commissioning – as to each ECM the point at which such ECM has been installed and is ready for beneficial use by SBBC, and ready for inspection, in accordance with this agreement.

Delivery and Acceptance - Delivery and Acceptance has the meaning in section 2.2.2 of this Agreement.

Energy Conservation Measure (ECM) – an opportunity to conserve energy, reduce energy consumption, and reduce associated costs by adding, modifying and/or upgrading facility equipment and/or systems with modern energy efficient technologies as defined in Section 1013.23, Florida Statutes (2005), as amended from time to time.

Energy Management Inventory Website – the web site that conforms to section 1.4 of this agreement.

Energy Management Performance Contracting Website – the web site that conforms to section 1.4 of this agreement.

Interim Period - The length of time between Contract execution and Commencement Date is known as the "Interim Period", not to exceed twelve (12) months, during which ECM implementation will be performed. Services provided by ESCO during the Interim Period include construction and installation, start-up and commissioning of equipment.

Material Change - any change in or to the Facilities, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of SBBC, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedules D, G, and P by at least 2% of total annual project guarantee after adjustments for climatic variations.

Punchlist – has the meaning in section 2.2.2 of this agreement.

Term – the length of ten (10) years following the delivery and acceptance beginning with the Commencement Date of each implemented ECM by SBBC during which ESCO will provide maintenance of equipment installed by ESCO and provide monitoring of energy and utility consumption.

Work – the installation and delivery of the Equipment to SBBC by ESCO.

**THE SCHOOL BOARD OF BROWARD COUNTY
ENERGY SERVICES AGREEMENT
ENERGY MANAGEMENT PERFORMANCE CONTRACTING PROJECT**

This **ENERGY SERVICES AGREEMENT** (hereafter referred to as the "Agreement ") is made and entered into as of this 19 day of September, 2006, in the County of Broward, State of Florida, by and between

THE SCHOOL BOARD OF BROWARD COUNTY, FLORIDA
(hereafter referred to as "SBBC")

a body corporate organized and existing under the laws of the State of Florida
having its principal place of business at
600 Southeast Third Avenue
Ft. Lauderdale, Florida 33301

and

FPL SERVICES, LLC

(hereafter referred to as "ESCO"),

having its principal offices at 9250 W. Flagler Street, Miami, Florida 33174.

SBBC and ESCO are collectively referred to herein as the "Parties".

WITNESSETH:

Whereas, SBBC owns and operates the Facilities collectively attached in Schedule C, and is in need of energy saving equipment and service designed to save energy and associated energy costs at said Facilities; and

Whereas, SBBC has issued a Request for Proposals, RFP 98-379V and issued an Addendum thereto (collectively attached hereto as Appendix A and made part hereof by reference) used to identify qualified energy performance contractors for energy performance-based contracts; and

Whereas, ESCO submitted a response to the RFP and participated in a competitive evaluation procedure designed to identify qualified energy performance contractors; and

Whereas, SBBC has selected ESCO as a qualified energy performance contractor; and

Whereas, ESCO has submitted to SBBC an Energy Audit Report, hereafter referred to as "Report", a copy of which is attached hereto as Appendix B made part hereof by reference, which is a detailed engineering and economic analysis that clearly describes how the utility tariffs were used to calculate savings for all Energy Conservation Measures (ECMs) proposed by the ESCO and describes the ESCO's plan for

installation and implementation of the ECMs and services described herein, including anticipated Associated Costs with such installation and implementation, including schedules and complementary Exhibits; and

Whereas, SBBC has selected feasible ECMs attached hereto as Schedule A from the ECMs recommended by ESCO in the Report, and based on those selected ECMs, the Parties negotiated this ESA under which ESCO would design, procure, install, implement, maintain and monitor such selected ECMs at the Facilities; and

Whereas, ESCO has developed or become knowledgeable about the procedures for controlling energy consumption through the use of Energy Audits and engineering analyses on the equipment installed and maintained at the Facilities; and

Whereas, ESCO has made an assessment of the energy consumption of the Facilities and existing equipment described in Schedule C, which SBBC has approved; and

Whereas, SBBC desires to retain ESCO to purchase, install and service certain energy efficiency equipment of the type or class described in Schedule A, attached hereto and made part hereof and to provide other services for the purpose of achieving energy cost reductions within Facilities, as more fully set forth herein; and

Whereas, SBBC desires to compensate ESCO for its services based upon the value of Net Utility and Energy Savings that are obtained; and

Whereas, SBBC is authorized under the Constitution and the laws of the State of Florida and Section 1013.23, Florida Statutes, to enter into this Agreement for the purposes set forth herein.

Now Therefore, in consideration of the mutual promises and covenants contained in this Contract, the sufficiency of which is hereby acknowledged, SBBC and ESCO, intending to be legally bound, agree as follows:

1. GENERAL

SECTION 1.1 – RECITALS

The foregoing recitals are true and correct and as incorporated herein by reference.

SECTION 1.2 – SCOPE OF AGREEMENT

ESCO will provide services to SBBC including the implementation of approved ECMs described in Schedule A made part hereof by reference which involves installation and maintenance of equipment designed to reduce energy/utilities consumption and associated costs for the SBBC Facilities described in Schedule B, and providing other services designed to save energy for the following ten (10) SBBC Facilities. ESCO shall be responsible for installation, maintenance, or other duties only as to ECMs installed

by ESCO and only as expressly stated and assumed by ESCO in the appropriate Schedule to this Contract.

Atlantic West Elementary
Coconut Creek Elementary
Coconut Creek High
Deerfield Beach Middle
Hollywood Central Elementary School
James Lanier Center
Liberty Elementary
McNicol Middle
Sheridan Technical Center
Stirling Elementary

SECTION 1.3 - ENERGY AUDIT AGREEMENT

ESCO has submitted the Report set forth in Appendix B and dated July 12, 2006 which was accepted by SBBC as set forth in Letter of Acceptance, Exhibit II (a) made part hereof by reference. The Report includes all the ECMs recommended by ESCO from which the feasible ECMs were approved by SBBC. The Work authorized in this Agreement will be based on the ECMs approved by SBBC collectively attached in Schedule A. The Report discloses costs recommended by ESCO associated with the ECMs, including engineering/design costs, contractor/vendor labor costs, material costs and equipment costs, SBBC project management costs, construction management costs, commissioning costs, permit costs, performance/payment costs, overhead/profit, maintenance fees, energy consumption monitoring fees, energy monitoring and control system costs, and training fees recommended by ESCO which provides an estimate of the amount of the energy and utility cost savings. This Report has been signed and sealed by a Florida Registered Professional Engineer. ESCO has included with the Report a written guarantee that the energy and utility cost savings will meet or exceed the amortized cost of the ECMs recommended in the Report.

ESCO certifies to SBBC and acknowledges that information and data other than the historical utility usage data provided by the SBBC was of their own source, and that any information or data provided to ESCO by SBBC was verified and validated by ESCO prior to development of the financial proposals for each ECM.

SBBC has reviewed the Report and found that the amount it would spend on the ECMs recommended by ESCO will not exceed the amount to be saved in energy and utility costs over not more than ten (10) years from the date of implementation, based on life-cycle costing calculations if the recommendations in the Report were followed.

SECTION 1.4 - SBBC PERFORMANCE CONTRACTING WEBSITE

Following completion of each ECM implementation, ESCO shall enter all relevant data and information into the SBBC Performance Contracting Website database associated

with the equipment installed under this Agreement. Throughout the 10-year Agreement Term, ESCO shall also enter the following energy/utility consumption data and associated savings on a monthly basis for each facility into the Website:

- a) Electricity usage in kiloWatt-hours (kWh)
- b) Electricity demand in kiloWatts (kW)
- c) Electricity monthly charges (\$)
- d) Difference from projected consumption levels in kiloWatt-hours (kWh)
- e) Water usage in gallons (gal)
- f) Water monthly charges (\$)
- g) Difference from projected water consumption levels in gallons (gal)
- h) Gas usage in Therms (thms)
- i) Gas monthly charges (\$)
- j) Difference from projected gas consumption levels in Therms (thms)
- k) Savings with comparison to baseline 12-month period (\$) for all utilities
- l) Difference from projected consumption levels in dollars (\$) for all utilities

Once entered into the Website, all relevant data and information will become SBBC property. However, ESCO may use data and information from the Website for the Work authorized under this Agreement with permission from SBBC.

SECTION 1.5 - COMPLETE AGREEMENT

This Agreement, when executed, together with all Schedules attached hereto or to be attached hereto, as provided for by this Agreement shall constitute the entire Agreement between both parties and this Agreement may not be amended, modified, or terminated except by a written Agreement signed by the parties hereto.

SECTION 1.6 - ORDER OF PRECEDENCE AMONG AGREEMENT DOCUMENTS

In the event of a conflict between Agreement provisions, the provisions of the following documents shall take precedence in this order:

- a) the Energy Services Agreement
- b) the Schedules and Attachments
- c) the Energy Audit Agreement
- d) the Request for Proposal

2. PROJECT SCHEDULE

SECTION 2.1 - SCHEDULES, EXHIBITS AND APPENDICES

The ESCO has prepared and SBBC has approved and accepted the Schedules, Exhibits, and Appendices as set forth below, copies of which are attached hereto (or will be as provided for in the Agreement), set forth in their entirety as Attachment - I and made a part of this Agreement by reference.

This Agreement, including its Exhibits and Schedules, sets forth the full and complete understanding of the parties and supersedes any and all negotiations prior hereto with respect to the subject matter of this Agreement.

Schedules

- Schedule A - Approved ECMs to be implemented by ESCO
- Schedule B - Equipment to be Installed by ESCO
- Schedule C - Description of Facilities; Pre-Existing Equipment Inventory
- Schedule D - Energy Saving Guarantee
- Schedule E - Compensation to ESCO
- Schedule F - Baseline Energy Consumption
- Schedule G - Savings Measurement & Calculation Formulae; Methodology to Adjust Baseline
- Schedule H - Construction and Installation Schedule
- Schedule I - Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
- Schedule J - Standards of Comfort
- Schedule K - ESCO's Maintenance Responsibilities
- Schedule L - SBBC's Maintenance Responsibilities
- Schedule M - Facility Maintenance Checklist
- Schedule N - ESCO's Training Responsibilities
- Schedule O - ECM Annual Cash Flow
- Schedule P - Projected Energy Savings for Approved ECMs
- Schedule Q - List of Subcontractors

Exhibits

- Exhibit I - Performance Bond/Payment Bond
- Exhibit II - Certificate of Acceptance-Installed Equipment
- Exhibit IIA- Letter of Acceptance
- Exhibit III - Letter of Credit

Appendices

- Appendix A - RFP for ESCO Solicitation
- Appendix B - Energy Audit Reports

Section 2.1.1 - Other Documents

This Agreement incorporates herein and makes a part hereof the entire RFP and ESCO Energy Audit Reports labeled Appendix A and B respectively. Notwithstanding, the provisions of this Agreement and the attached Schedules shall govern in the event of any inconsistencies between the Energy Audit Report and the provisions of this Agreement. Terms in the RFP and Energy Audit Reports do not enlarge either party's obligations under this Agreement.

SECTION 2.2 – AGREEMENT PERFORMANCE PERIOD

The Agreement shall be effective and binding upon the parties immediately upon its execution. Under the performance period specified by this Agreement, each ECM implementation involves four stages listed in chronological order: 1) Interim Period, 2) Delivery and Acceptance, 3) Commencement Date, 4) Term of Maintenance and Monitoring Service.

Section 2.2.1 - Interim Period

The length of time between Agreement execution and Commencement Date is known as the “Interim Period”, not to exceed twelve (12) months, during which ECM implementation will be performed. Services provided by ESCO during the Interim Period include construction and installation, start-up, commissioning and maintenance of the equipment specified in Schedule B (hereafter referred to as “Equipment”). All energy savings achieved during the interim period will be fully credited to SBBC in accordance with RFP 98-379V.

Whether or not Delivery and Acceptance of each ECM is completed by the end of the twelve (12) months, the Term of Maintenance and Monitoring Service will begin the first day after the twelve (12) months. Further delays with ECM implementation past the maximum period of twelve (12) months may seriously affect energy and utility cost savings as compared to ESCO’s projections due to the decreased term in which to achieve the cost savings. Any loss in actual energy and utility cost savings resulting from delays in implementation of ECMs past the twelve (12) months will be paid to SBBC by ESCO and, any unforeseen costs due to the delays will not be responsibility of SBBC.

In the event of any delay caused by SBBC or its agents in the implementation of any ECM, the start date for the Term of Maintenance and Monitoring shall be extended day for day for any such delay.

Section 2.2.2 – Delivery and Acceptance

The parties agree that final Delivery and Acceptance will be executed for the Work following the completion and SBBC approval of ECM implementation including completion of construction, installation, start-up, calibration and test and balance of equipment per SBBC design requirements. The term “Delivery” will be referred to as the completion of implemented ECMs and turnover of ownership from ESCO to SBBC. The term “Acceptance” will be referred to as SBBC’s final acceptance of ECM implementation.

The ESCO shall provide a Delivery and Acceptance Certificate in a form acceptable to SBBC and ESCO (the “Delivery and Acceptance Certificate”) for each ECM completed pursuant to Schedules B and H. Upon receipt of each Delivery and Acceptance Certificate, SBBC Energy Manager and UBCI Inspector shall promptly inspect the Work performed by ESCO identified therein and execute each such Delivery and Acceptance Certificate as soon as reasonably possible, but in no event later than fourteen (14) calendar days after delivery of the same by the ESCO, unless SBBC

provides the ESCO with a Punchlist. A "Punchlist" is a written statement from the SBBC Energy Manager that identifies specific material or equipment performance deficiencies that he/she wishes the ESCO to correct. The ESCO will correct such deficiencies identified by SBBC on the Punchlist and will give written notice to SBBC upon correction of such deficiencies. SBBC shall then execute and deliver the "Notice of Completion" as soon as reasonably possible, but in no event later than fourteen (14) calendar days after delivery of the Delivery and Acceptance Certificate by the ESCO. The "Notice of Completion" is a formal document that will be submitted by SBBC to ESCO upon completion of each ECM and after all, if any, Punchlist items have been completed for that ECM, pursuant to the installation Schedule H, subject to the warranty under Section 8 of this Agreement.

Section 2.2.3 - Commencement Date

The Commencement Date shall be the first day of the month after the month in which all schedules are in final form and ECM implementation acceptance by SBBC. Within three (3) business days after Commencement Date, ESCO will deliver a Notice to SBBC that it has installed and commenced operating all of the Equipment specified in Schedule B and in accordance with the provisions of Section 4 and Schedule H; and SBBC has inspected and accepted said installation and operation as evidenced by the Certificate of Acceptance – Installed Equipment as set forth in Exhibit II made part hereof by reference.

Section 2.2.4 – Term of Maintenance and Monitoring Service

Following the delivery and acceptance of the implemented ECM, the term of maintenance and monitoring service (hereafter referred to as "Term") shall be for ten (10) years beginning with the Commencement Date. Performed services from ESCO include maintenance of installed and upgraded facility equipment in accordance with Schedule K and monitoring of energy and utility consumption during the 10-year Term. The parties agree to divide the maintenance service performed during the 10-year term as specified in Schedule K, ESCO Maintenance Responsibilities and Schedule L, SBBC Maintenance Responsibilities. Maintenance responsibilities for all ECMs will be mutually agreed to by ESCO and SBBC as designated in Schedule K, which in no case shall be amended by either party less than ninety (90) calendar days prior to the Commencement Date. Unless Schedule K expressly provides that ESCO is responsible for any maintenance, the responsibility shall be solely that of SBBC.

SECTION 2.3 – PROJECT SCOPE EXPANSION; OTHER GOODS AND SERVICES

Section 2.3.1 – Project Scope Expansion

After completion of ECM implementation at all SBBC Facilities serviced under this Agreement, SBBC may decide to procure expanded implementation of those ECM's at other SBBC Facilities (hereafter referred to as "Phase III"). The energy performance contractor with whom SBBC will contract to provide this expanded implementation for Phase III shall be selected in compliance with sections 1013.23 and 287.005, Florida Statute.

Section 2.3.2 – Other Goods and Services

During or after completion of ECM implementation by ESCO serviced under this Agreement, SBBC may decide to contract additional service(s) from ESCO including but not limited to any additional maintenance of the equipment, systems, or components thereof installed under this Agreement or any additional maintenance on other equipment, systems or components thereof not included in the scope of ECMs at the participating facilities. SBBC may also decide to contract additional service(s) at other SBBC facilities not participating with the energy services specified in this Agreement. Any additional services and additional maintenance service(s) shall be procured by SBBC in compliance with Section 1013.23 and 287.055, Florida Statutes.

3. FINANCIAL OBLIGATIONS

SECTION 3.1 - ENERGY SAVINGS GUARANTEE

For the Project, ESCO shall guarantee that the Guaranteed Consumption in Schedule D shall be less than SBBC's historical Baseline Consumption in Schedule F during each successive twelve (12) month period of the Term beginning on the Commencement Date. The resulting reduction of energy/utilities consumption and the resulting cost savings shall be monitored and measured by ESCO.

ESCO has formulated and, subject to the adjustments provided for in Section 5.7, has guaranteed the annual level of energy and operations savings to be achieved as a result of the installation and operation of the Equipment and provision of services provided for in this Agreement as specified in Schedule P and in accordance with the Savings Calculation Formula as set forth in Schedule G. The Energy Savings Guarantee is set forth in annual increments for the term of the Agreement as specified in Schedule O and has been structured by the ESCO so as to be sufficient in each year to cover the amortized cost of the ECM's implemented.

SECTION 3.2 - ANNUAL REVIEW AND REIMBURSEMENT/RECONCILIATION

If at the end of every twelve (12) months following the commencement of any given project specified in Schedule A, the ESCO has failed to achieve the annual Energy Savings Guarantee specified for that project in Schedule D, the ESCO will pay SBBC within forty-five (45) days the difference between the annual amount guaranteed and the amount of actual Utility and Energy Savings achieved by the project in accordance with Schedules D and G. The ESCO shall remit such payments to SBBC within forty-five (45) days. In the event that the reconciliation between the annual amount guaranteed and the amount of actual Utility and Energy Savings achieved by the Project reveals an excess in energy cost savings, such excess savings shall not be used to cover potential energy savings cost savings shortages in subsequent contract years.

SECTION 3.3 - ESCO COMPENSATION AND FEES

ESCO has structured the Energy Savings Guarantee, referred to in Section 3.1 above, to include any and all annual payments required to be made by SBBC in connection with financing/purchasing the Equipment to be installed by ESCO under this Agreement. Actual Utility and Energy Savings achieved by ESCO through the operation of Equipment shall be sufficient to cover any and all annual fees to be paid by SBBC to ESCO for the provision of services as set forth and in accordance with Schedules E and P.

SECTION 3.4 - PAYMENTS TO ESCO

Payments due to ESCO will be made upon SBBC final acceptance of each ECM and receipt of written Payment Request from ESCO throughout the length of time it takes ESCO to complete all ECMs, not to exceed twelve (12) months, in accordance with Schedule E. The "Payment Request" shall document the completion of each ECM implementation and an itemized list of all associated costs for which payment is required from SBBC. Payment requests shall be forwarded to SBBC Energy Manager along with the Delivery and Acceptance Certificate. Any payment adjustments to ESCO shall be during the Annual Review, as outlined in Section 3.2.

Invoices from the ESCO requesting payment for services performed shall be reviewed and paid to the ESCO within forty-five (45) days of receipt as set forth in Schedule E.

Section 3.4.1 - Progress Payments

If ECM implementation exceeds a duration of thirty (30) days, ESCO shall submit a Payment Request only for progress of ECM's implementation as of date Payment Request was written. Progress Payment for such ECMs will be submitted to ESCO at 50% and 100% of Work completed upon validation of progress by SBBC. Final payment for such ECMs will be submitted to ESCO upon completion and SBBC final acceptance in accordance with the provisions of Section 4 and Schedules B and H and as evidenced by the signed Certificate of Acceptance as set forth in Exhibit II (b), and unless and until Equipment is fully and properly functioning.

Section 3.4.2 - Rebates Program Payments

ESCO shall incorporate utility rebate and power demand reduction rebate payments into the Term's first year cash flow, Schedule O, calculation of each respective ECM Projects. In that regard, ESCO shall coordinate with SBBC when formulating rebate programs considerations with utility companies. All rebates that result from ECM implementation will be applied towards project cash flow by ESCO.

Section 3.5 - Not applicable for Phase 2

SECTION 3.6 - FISCAL FUNDING

Section 3.6.1 - Nonappropriation of Funds

In the event that no SBBC funds, insufficient SBBC funds or other funds are appropriated and budgeted, and funds are otherwise unavailable by any means whatsoever in any fiscal period for which payments are due ESCO under this Agreement, then SBBC will, not less than one-hundred and twenty (120) days following the end to such applicable fiscal period, in writing, notify the ESCO of such occurrence and this Agreement shall terminate on the last day of the fiscal period for which appropriations were made without penalty or expense to SBBC of any kind whatsoever, except as to the portions of payments herein agreed upon for which SBBC and/or other funds shall have been appropriated and budgeted or are otherwise available. The parties stipulate that this agreement does not and shall not be construed to constitute a debt, liability, or obligation of SBBC or a pledge of the faith and credit of the School Board.

Section 3.6.2 – Non-substitution

In the event of a termination of this Agreement due to the non-appropriation of funds or in the event this Agreement is terminated by ESCO due to a default by SBBC, SBBC agrees, to the extent permitted by Florida law, not to purchase, lease, rent, borrow, seek appropriations for, acquire or otherwise receive the benefits of any of the same and unique services performed by ESCO under the terms of this Agreement for a period of three-hundred sixty five (365) days following such default by SBBC, or termination of this Agreement due to non-appropriations.

4. ECM IMPLEMENTATION

SECTION 4.1 – DESIGN, CONSTRUCTION, AND EQUIPMENT INSTALLATION

Section 4.1.1 – ECM Design

ESCO agrees to abide by all SBBC Design Guide Specifications previously provided to ESCO in accordance with RFP 98-379V. ESCO shall meet all current SBBC Design Guide Specifications, SBBC Facility Design Criteria and State Requirements for Educational Facilities (SREF) codes and all other applicable building codes as currently enacted or as amended from time to time.

ESCO agrees to submit a final design to SBBC of each ECM no less than 14 calendar days prior to ECM implementation start for the purpose of confirming potential conflicts and to ensure the ECMs are designed per SBBC facility design criteria and specifications. Design submittal will include drawings, list of materials and proposed implementation schedule.

In the event of conflict among applicable building codes, the direction of UBCI inspector will prevail.

Section 4.1.2 - Construction and Equipment Installation

The construction and equipment installation shall proceed in accordance with the construction schedule approved by SBBC and attached hereto as Schedule H.

Equipment installation and operational settings shall meet SBBC design requirements, and installations shall conform to the provisions of SREF and all other applicable laws and building codes.

Section 4.1.3 - SBBC Inspection of Performed Work

All inspections will be conducted by SBBC or municipal Building Code Inspectors in a timely manner not to exceed fourteen (14) days. Building systems start-up and commissioning shall not begin until the work has been completely inspected and approved by the inspectors.

If Work performed by ESCO fails to pass the Inspector's inspection due to negligence or fault of ESCO, then the ESCO has 30 calendar days to resolve the cause(s) of failure, except if such failure is due to areas of SBBC's responsibility.

Inspections will follow a predetermined schedule and also be randomly conducted throughout the installation and start-up/commissioning of all the Work specified under this Agreement as the implementation of approved ECMs progresses.

Section 4.1.4 - Systems Startup and Equipment Commissioning

The ESCO shall conduct a thorough and systematic performance test of each element and total system of the installed Equipment in accordance with the procedures specified in Schedule I and prior to acceptance of the project by SBBC. The ESCO shall provide notice to SBBC of the scheduled test(s) and SBBC and/or its designees shall have the right to be present at any or all such tests conducted by ESCO and/or manufacturers of the Equipment. The ESCO shall be responsible for correcting and/or adjusting all deficiencies in systems and Equipment operations that may be observed during system commissioning procedures if the responsibility of the ESCO is as designated in the Schedules to this Agreement.

Section 4.1.5 - Cleanup During ECM Implementation

ESCO is responsible for the removal of all trash and debris that is solely caused by the Work performed by ESCO under this Agreement from SBBC property and for site cleanup on a daily basis at its expense. ESCO shall dispose of hazardous waste, such as ballasts, fluorescent and HID bulbs, resulting from the Work performed by ESCO in accordance with all federal and state regulations as currently enacted or amended from time to time, at no additional cost to SBBC.

SECTION 4.2 - PERFORMANCE BY ESCO

ESCO shall perform all tasks/phases under this Agreement, including design, construction, and installation of the Equipment in such a manner so as not to harm the structural integrity of the buildings or their operating systems and so as to conform to the standards set forth in Schedule J and the construction schedule specified in Schedule H. ESCO shall repair and restore to its original condition any area of damage caused by ESCO's performance under this Agreement. SBBC reserves

the right to review the work performed by ESCO and to direct ESCO to take certain corrective action if, in the opinion of SBBC, the structural integrity of the Facilities or its operating system is or will be harmed. ESCO shall not be responsible for remedying any existing conditions that may be in violation of any applicable laws. All costs associated with such corrective action to damage caused by ESCO's performance of the work shall be borne by ESCO.

SECTION 4.3 - TRAINING BY ESCO

Section 4.3.1 - Training SBBC Personnel

ESCO shall conduct the training program described in Schedule N attached hereto. All necessary training specified in Schedule N shall be provided by ESCO to SBBC personnel and must be completed prior to acceptance of the Equipment installation ending the Term of each Facility, with regard to Equipment servicing and repairs which was performed by ESCO pursuant to Schedules I and K during the terms of this Agreement . The ESCO shall provide training as required with respect to updated or altered Equipment, including upgraded software. Such training shall be provided at no charge to SBBC up to 40 hours per school. Notwithstanding such training obligations ESCO shall have no responsibility arising from or relating to SBBC's incorrect or improper operation of ECM's.

Section 4.3.2 - Training Documentation

ESCO shall provide all necessary training documents, operating manuals, timeframe of training program and original equipment warranty documents.

SECTION 4.4 - REQUIRED PROJECT DOCUMENTS

ESCO shall provide the following documents to SBBC in a timely manner as designated below:

<u>Document</u>	<u>Due to SBBC</u>
Scope of Work	At Submittal of ECM Design
Work Plan	At Submittal of ECM Design
Engineering Drawings, Specifications	At Submittal of ECM Design
List of Subcontractors and Vendors	Within 10 days of Execution
Monthly Status Report	Monthly
Monthly Measurement and Verification Report	Monthly
Monthly Energy and Utility Savings Report	Monthly
Payment Requests	Upon Completion of each ECM
Training Plan and Schedule	After ECM Implementation
Agreement Completion Letter	After Agreement Performance Period
Equipment Warranties	After ECM Implementation
Delivery and Acceptance Certificates	After ECM Implementation
Equipment Operation and Maintenance Manuals	After ECM Implementation
Equipment Maintenance Agreement	At Submittal of ECM Design

As-Built Drawings (Hardcopy and Electronic formats)	After Accepted ECM
Software Documentation (If Applicable)	After ECM Implementation
Licenses	Within 10 days of Execution
Insurance Policy	Within 10 days of Execution

Section 4.4.1 – Progress Status Reports

Throughout the Interim Period specified in this Agreement, ESCO shall submit, in hardcopy form to SBBC Energy Manager, weekly summaries and schedule updates of ongoing and planned construction, equipment installation, equipment maintenance, project management administration, and all other technical or administrative tasks performed under this Agreement. The Progress Status reports and updated schedules can be submitted electronically, faxed or forwarded via the US Postal Service.

Section 4.4.2 – Energy and Utility Savings Reports

Following SBBC’s final acceptance of each ECM, ESCO shall submit, in hardcopy form to SBBC Energy Manager, original monthly reports including a complete analysis of energy and utility consumption comparing actual consumption levels to baseline 12-month period and projected consumption levels for each facility. The analysis shall include calculations and graphs of produced savings by individual ECM and by cumulative groups of ECMs for each facility. The Energy and Utility Savings Reports can be submitted electronically, faxed or forwarded via the US Postal Service.

SECTION 4.5 – DOCUMENTATION AND DRAWINGS

Section 4.5.1 – Photography/Video

SBBC and ESCO agree that all ECMs implemented as a result of this Agreement may be documented by either party by photography/video at any time during the Interim Period or Term of the Agreement. Each party holds the intellectual property rights to its own documentation.

Section 4.5.2 – Equipment Documents

ESCO shall provide five (5) copies of all equipment specifications, operating and servicing instructions and other pertinent documentation to SBBC for each Facility.

Section 4.5.3 – General Obligation to Provide Documentation

Each report and document prepared by ESCO or received from manufacturers or vendors of the ECMs relating to the ECM’s operation, servicing and repairs shall become the property of SBBC. ESCO shall promptly provide a certified updated copy of each such report and document to SBBC.

Section 4.5.4 – As-Built Drawings

ESCO shall provide to SBBC five (5) copies, in electronic CAD and hardcopy forms, of "As-Built" drawings, specifications, instruction manuals and associated plant modifications document conforming to contractual SBBC needs within forty-five (45) calendar days following each completed ECM installation. ESCO shall provide each Project site for SBBC with one record copy, in electronic and hardcopy forms, of all Agreement and Project documents, in good order and marked to record all changes made during performance of the Work.

Section 4.5.5 - All Drawings

All drawings prepared by ESCO in performance of the Agreement shall become the property of SBBC. All Facility certified final documents and drawings and copies thereof shall be delivered to SBBC within sixty (60) calendar days following the Commencement Date.

SECTION 4.6 - APPROVALS AND COORDINATION

Section 4.6.1 - Licenses and Approvals

SBBC shall use its best efforts to assist ESCO in obtaining all necessary approvals for installation of the Equipment. The materials and equipment installed by ESCO and operation of the equipment by ESCO shall at all times conform to all federal, state and local code requirements as from time to time amended. ESCO shall furnish copies of each license, which is required to perform the work to SBBC before the ESCO commences the portion of the work requiring such license. ESCO shall only use properly licensed employees and subcontractors and provide SBBC with copies of applicable licenses prior to commencement of work by such employees and subcontractors.

Section 4.6.2 - Coordination During Installation

SBBC and ESCO shall coordinate the activities of ESCO's material and equipment installers with those of SBBC, ESCO employees, and its agents. ESCO shall not commit or permit any act which will interfere with the progress of the Work performed under this Agreement or the performance of business activities conducted by SBBC or its employees without prior written approval of SBBC.

Section 4.6.3 - Security Badges

ESCO agrees to have all its employees, sub-contractors or agents who will be entering onto SBBC property as a result of this Agreement apply for and wear, while on SBBC property, a photo identification badge issued by SBBC. ESCO shall obtain from SBBC Purchasing Department a Photo Identification Badge request form upon execution by the parties of this Agreement. An individual Photo Identification Badge Request form shall be completed for each employee, sub-contractor or agent who will be entering onto SBBC property as a result of this Agreement. Each completed Photo Identification Badge Request form shall be submitted to the SBBC Purchasing Department Vendor Information Desk for authorization. The authorized Photo Identification Badge Request form shall be delivered by ESCO to the Personnel Office,

Kathleen C. Wright Administration Center, 600 S.E. Third Avenue, Fort Lauderdale, Florida. At this location, each individual for whom a SBBC photo identification badge is requested will be asked to fill out other forms, show his/her driver's license and social security card, and be fingerprinted. A background check will then be conducted on each badge applicant. Therefore, SBBC reserves the right to require additional information from any applicant and to deny a badge to any applicant. Any applicant denied a badge is prohibited from entering onto SBBC property as an employee, sub-contractor or agent of ESCO. The current total fee for a SBBC security background check is \$67.00. Of this amount, \$52 must be in the form of a money order made payable to "Fingerprinting Services, LLC" for the fingerprinting, and \$15 must be in money order or company check made payable to "the School Board of Broward County" for the photo identification badge. These fees are non-refundable.

Section 4.6.4 – Jessica Lunsford Act

Background Screening: ESCO agrees to comply with all requirements of Sections 1012.32 and 1012.465, Florida Statutes, and all of its personnel who (1) are to be permitted access to school grounds when students are present, (2) will have direct contact with students, or (3) have access or control of school funds, will successfully complete the background screening required by the referenced statutes and meet the standards established by the statutes. This background screening will be conducted by SBBC in advance of ESCO or its personnel providing any services under the conditions described in the previous sentence. ESCO shall bear the cost of acquiring the background screening required by Section 1012.32, Florida Statutes, and any fee imposed by the Florida Department of Law Enforcement to maintain the fingerprints provided with respect to ESCO and its personnel. The Parties agree that the failure of ESCO to perform any of the duties described in this section shall constitute a material breach of this Agreement entitling SBBC to terminate immediately with no further responsibilities or duties to perform under this Agreement. ESCO agrees to indemnify and hold harmless SBBC, its officers and employees from any liability in the form of physical or mental injury, death or property damage resulting in ESCO's failure to comply with the requirements of this Section or with Sections 1012.32 and 1012.465, Florida Statutes.

SECTION 4.7 – HAZARDOUS MATERIALS

Hazardous materials/conditions as specified in this Section may be identified as one or more of the following: (a) materials or substances classified as toxic or hazardous either (i) on or within the walls, floors, ceilings or other structural components, or (ii) otherwise located in the work area, including asbestos or presumed asbestos-containing materials, formaldehyde, containers or pipelines containing petroleum products or hazardous substances; (b) situations subject to special precautions or equipment required by federal, State, or local health or safety regulations; or (c) unsafe working conditions.

Section 4.7.1 – Exclusion of Hazardous Materials

The Work does not include directly or indirectly performing or arranging for the detection, testing, handling, storage, removal, treatment, transportation, disposal, monitoring, abatement or remediation of any contamination of any site at which Work is

performed and any soil or groundwater at the site by petroleum or petroleum products (collectively called "Oil"), asbestos, PCBs or hazardous, toxic, radioactive or infectious substances, including any substances regulated under RCRA, CERCLA or any other federal, state or local environmental laws, regulations, statutes, rules, standards or ordinances (collectively called "Hazardous Materials"), including without limitation ionization smoke detectors, ballasts, mercury bulb thermostats, used oil, contaminated filters, contaminated absorbents, and refrigerant. Except as expressly disclosed pursuant to Section 4.7.2, SBBC represents and warrants that there are no Hazardous Materials or Oil present at SBBC's locations where the Work is to be performed.

Section 4.7.2 – SBBC's Responsibility with Hazardous Materials

With the sole exception of designated lamps, ballasts, and refrigerant to be removed by ESCO within the scope of this Contract, SBBC shall have sole responsibility and liability with respect to the proper identification, removal and disposal of any hazardous materials (e.g., asbestos) or correction of any hazardous condition which affects the ESCO's performance of the work hereunder. If SBBC becomes aware of Changes or Updates of Hazardous materials or situations that may affect the working conditions at the job sites then SBBC shall notify the ESCO immediately. SBBC warrants that, prior to the execution of this Agreement, it notifies ESCO in writing of any and all Oil or Hazardous Materials present, potentially present or likely to become present at the site and provide a copy of any site safety policies and information, including but not limited to lock-out and tag procedures, chemical hygiene plan, material safety data sheets, and other items covered or required to be disclosed or maintained by federal, state or local laws, regulations or ordinances.

Regardless of whether or not the Oil or Hazardous Material was disclosed pursuant to Section 4.7.2, SBBC shall be solely responsible for property testing, abating, encapsulating, removing, disposing, remedying or neutralizing such Oil or Hazardous Materials, and for the costs thereof. ESCO shall have the right to stop the Work until the site is free from Oil or Hazardous Materials. In such event, ESCO will receive an equitable extension of time to complete the Work, and compensation for delays caused by Oil or Hazardous Materials remediation. In no event, shall ESCO be required or construed to take title, ownership or responsibility for such Oil or Hazardous Materials. SBBC shall sign any required waste manifests in conformance with all government regulations, listing SBBC as the generator of the waste. If someone other than SBBC is the generator of the waste, SBBC shall arrange for such other person to sign such manifests.

Section 4.7.3 – ESCO's Responsibility with Hazardous Materials

If any such materials, situations or conditions, whether disclosed or not, are in fact discovered by the ESCO or others and provide an unsafe condition for the performance of the Work or services, the discovery of the material, situation or condition shall constitute a cause beyond the ESCO's reasonable control and ESCO shall have the right to cease or not commence the Work or support services until the area has been made safe by SBBC or SBBC's representative, at SBBC's expense.

If, during the course of performing the Work, the ESCO becomes aware of any such hazardous materials or hazardous condition, the ESCO shall report such matter to

SBBC immediately and before disturbing (or further disturbing) such materials or condition. Work in the affected areas shall be resumed by the ESCO only upon the written direction of SBBC, when such materials have been removed or such condition has been corrected, and then only if such continuation of Work shall not violate any applicable law or permit.

The ESCO is responsible for the proper care, handling, control, treatment and clean up of any hazardous material they carry or bring to the workplace, and which were not already present, in released or unreleased form on the site. The ESCO shall be responsible for any damages caused by the hazardous material they bring to the workplace.

SECTION 4.8 - TIME AND DELAYS

If ESCO is delayed at any time in the progress of performing its obligations under this Agreement by any act of SBBC or any other contractor employed by SBBC; or by changes ordered or requested by SBBC in the Work performed pursuant to this Agreement; or by labor disputes, fire adverse weather conditions or other events or occurrences which could not be reasonably anticipated; or unavoidable casualties; or any other problem beyond the ESCO's reasonable control (an "Excusable Delay), then the time for performance of the obligations affected by such Excusable Delay shall be extended by the period of any delay actually incurred as a result thereof.

All time in the Agreement documents is calculated on a consecutive calendar basis. Time is of the essence in this Agreement, and any breach of same shall go to the essence hereof, and ESCO, in agreeing to complete the Work within the time herein mentioned, has taken into consideration and made allowances for reasonable hindrances and delays incident to his Work.

ESCO agrees to commence the Work when directed by SBBC and to diligently and continuously perform such Work and to coordinate the Work with other Work being performed on the Project by other trades so that SBBC shall not be delayed by any act or omission of ESCO in completion of the Project within the time specified above.

ESCO shall make payments promptly to its vendors, subcontractors, suppliers and for labor, material and equipment used by it in the performance of his work.

ESCO shall not be entitled to any claim for damages on account of hindrance or delays from any cause whatsoever, but if caused by any Act of God, active interference on the part of SBBC, such act, hindrance, or delay may only entitle ESCO to receive an extension of time as its sole and exclusive remedy.

An extension of time to complete the Work shall be determined by SBBC, provided that ESCO provides SBBC with notice in writing of the cause of said act, hindrance or delay within twenty (20) days after occurrence. In the event the request for extension is not made in writing within that twenty-day time period, ESCO acknowledges and agrees it has forever waived any and all rights to such an extension.

This "no damage for delay" clause will encompass any damages for delay or disruption even if ESCO completes construction of the Work in a timely fashion in accordance with this Agreement. Damages as referenced in this "no damage for delay" shall include any type of damages that are or could be awarded by any court or arbitration panel such as, by way of general example, but not limitation, tort, contract, strict liability, consequential damages, liquidated damages and/or punitive damages.

By way of specific example but not limitation, damages are referenced within this clause includes loss of use, loss of profits, labor inefficiency, loss of bonding capacity, overhead and repair costs, costs of capital replacement, loss of wages, pain and suffering, loss of production costs to replace facilities, equipment and/or product loss, increased and/or extended home office overhead, increased general conditions, costs of mobilization and demobilization, decrease in value, and/or any other damages or loss.

5. EQUIPMENT MAINTENANCE AND OPERATION SERVICES

SECTION 5.1 - ACTIONS BY ESCO

ESCO shall provide all service, repairs, and adjustments to the Equipment installed under terms of this Agreement pursuant to Schedules I and K. SBBC shall incur no cost for Equipment service, repairs, and adjustments provided, however, that when the need for maintenance or repairs principally arises due to the negligence or willful misconduct of SBBC or any employee or other agent of SBBC, and ESCO can so demonstrate such causal connection, ESCO may charge SBBC for the actual cost of the maintenance or repair insofar as such cost is not covered by any warranty or insurance proceeds.

SECTION 5.2 - MALFUNCTIONS AND EMERGENCIES

Throughout the Interim Period and Term of this Agreement, SBBC shall use its best efforts to notify the ESCO or its designee(s) within 24 hours after SBBC's actual knowledge and occurrence of: (i) any malfunction in the operation of the Equipment or any preexisting energy related equipment that might materially impact upon the guaranteed energy savings, (ii) any interruption or alteration to the energy supply to the Facilities, or (iii) any alteration or modification in any energy-related equipment or its operation.

Where SBBC exercises due diligence in attempting to assess the existence of a malfunction, interruption, or alteration it shall be deemed not at fault in failing to correctly identify a such conditions as having a material impact upon the guaranteed energy savings. SBBC shall notify ESCO within twenty-four (24) hours upon its having actual knowledge of any emergency condition affecting the Equipment. ESCO shall respond or cause its designee(s) to respond within four (4) hours and shall promptly proceed with corrective measures. Any telephonic notice of such conditions by SBBC shall be followed within three business days by written notice to ESCO from SBBC. If SBBC unreasonably delays in so notifying ESCO of a malfunction or emergency, and the malfunction or emergency is not otherwise corrected or remedied,

such conditions will be treated as a Material Change and the applicable provisions of Section 5.7 shall be applied.

SECTION 5.3 - ACTIONS BY SBBC

After Commencement Date and equipment installed by ESCO is fully operational, SBBC shall not move, remove, modify, alter, or change in any way the Equipment or any part thereof without the prior written approval of ESCO except in cases of regular SBBC Facility maintenance or emergency, as set forth in Schedule L. Notwithstanding the foregoing, SBBC may take reasonable steps to protect the Equipment if, due to an emergency, it is not possible or reasonable to notify ESCO before taking any such actions. In the event of such an emergency, SBBC shall take reasonable steps to protect the Equipment from damage or injury and shall follow instructions for emergency action provided in advance by ESCO. SBBC agrees to maintain the Facilities in good repair and to protect and preserve all portions thereof, which may in any way affect the operation or maintenance of the Equipment.

SECTION 5.4 - SBBC'S COMPLIANCE WITH FACILITIES MAINTENANCE

- m) The parties acknowledge and agree that ESCO has entered into this Agreement in reliance upon the prospect of earning compensation based on guaranteed energy savings in energy used at Facilities, as set forth on Schedules D and E, attached hereto and made a part hereof.
- n) The parties further acknowledge and agree that the said guaranteed energy savings would not likely be obtained unless certain procedures and methods of operation designed for energy conservation shall be implemented, and followed by SBBC on a regular and continuous basis.
- o) SBBC agrees that it shall adhere to, follow and implement the energy conservation procedures and methods of operation to be set forth on Schedule L, to be attached hereto and made a part hereof after SBBC's approval.

SECTION 5.5 - STANDARDS OF COMFORT

ESCO will maintain and operate the Equipment in a manner, which will provide the standards of heating, cooling, hot water, and lighting as described in Schedule J.

SECTION 5.6 - UPGRADING OR ALTERING THE EQUIPMENT

ESCO shall at all times have the right, subject to SBBC's prior written approval, which approval shall not be unreasonably withheld, to change the Equipment, revise any

procedures for the operation of the equipment or implement other energy saving actions in the Facilities, provided that:

- (i) the ESCO complies with the standards of comfort and services set forth in Schedule J herein;
- (ii) such modifications or additions to, or replacement of the Equipment, and any operational changes, or new procedures are necessary to enable the ESCO to achieve the energy savings at the Facilities and;
- (iii) any cost incurred relative to such modifications, additions or replacement of the Equipment, or operational changes or new procedures shall be the responsibility of the ESCO.

All modifications, additions or replacements of the Equipment or revisions to operating or other procedures shall be described in supplemental Schedule(s) to be provided to SBBC for approval, which shall not be unreasonably withheld, provided that any replacement of the Equipment shall be new and have equal or better potential to reduce energy consumption at the Facilities than the Equipment being replaced. The ESCO shall update any and all software to be used in connection with the Equipment. All replacements of and alterations or additions to the Equipment shall become part the Equipment described in Schedule B and shall be covered by the provisions and terms of Sections 4 and 5.

SECTION 5.7 - MATERIAL CHANGES

Section 5.7.1 - Material Change Defined

A material change (hereafter referred to as "Material Change") shall include any change in or to the Facilities, whether structural, operational or otherwise in nature which reasonably could be expected, in the judgment of SBBC, to increase or decrease annual energy consumption in accordance with the provisions and procedures set forth in Schedules D, G, and P by at least 2% of total annual project guarantee after adjustments for climatic variations. Actions by SBBC which may result in a Material Change which include but are not limited to the following:

- (i) manner of use of the Facilities by SBBC; or
- (ii) hours of operation for the Facilities or for any equipment or energy using systems operating at the Facilities; or
- (iii) permanent changes in the comfort and service parameters set forth in Schedule J; or
- (iv) occupancy of the Facilities; or
- (v) structure of the Facilities; or
- (vi) types and quantities of equipment used at the Facilities; or

- (vii) modification, renovation or construction at the Facilities; or
- (viii) SBBC's failure to provide maintenance of and repairs to the Equipment in accordance with Schedule L; or
- (ix) any other conditions other than climate affecting energy use at the Facilities.

Section 5.7.2 - Reported Material Changes

Notice by SBBC:

SBBC shall use its best efforts to deliver to the ESCO a written notice describing all actual or proposed Material Changes in the Facilities or in the operations of the Facilities at least thirty (30) days before any actual or proposed Material Change is implemented or as soon as is practicable after an emergency or other unplanned event. Notice to the ESCO of Material Changes which result because of a bona fide emergency or other situation which precludes advance notification shall be deemed sufficient if given by SBBC within twenty-four (24) hours after having actual knowledge that the event constituting the Material Change occurred or was discovered by SBBC to have occurred.

Section 5.7.3 - Unreported Material Change

In the absence of any Material Changes in the Facilities or in their operations, the baseline energy consumption as set forth in Schedule F should not change more than two percent (2%) during any month from the projected energy usage for that month, after adjustments for changes in climatic conditions. Therefore, if energy consumption for any month as set forth in Schedule F deviates by more than two percent (2%) from the energy consumption for the same month of the preceding Agreement year after adjustments for changes to climatic conditions, then such deviation shall be timely reviewed by the ESCO to ascertain the cause of deviation. The ESCO shall report its findings to SBBC in a timely manner and the ESCO and SBBC shall determine what, if any, adjustments to the baseline will be made in accordance with the provisions set forth in Schedule G.

Section 5.7.4 - Adjustments for Material Changes

In the event of any increase or decrease in energy consumption for any month resulting from a reported or unreported Material Change, the amount of that increase shall be subtracted from or that decrease shall be added to the total energy consumption for that month prior to the calculation of energy savings pursuant to Schedule G.

If a reported or unreported Material Change affected energy consumption in the same calendar month in the preceding year, the next preceding Agreement year where a Material Change has not occurred will be used to compute the energy savings for the current month.

6. CHANGE ORDERS AND CLAIMS

A Change Order is a written order signed by SBBC and the ESCO authorizing a change in the Work or adjustment in the price, or a change to the installation Schedule described in Schedule H.

SECTION 6.1 – CHANGE ORDER POLICY

No Change Orders originating from ESCO will be allowed unless requested in writing by SBBC Energy Manager. If SBBC decides to pursue a Change Order and requests ESCO to submit proposal(s) for the changes in the Work, the ESCO may then submit a cost proposal for generating the proposal(s) for changes in the Work. If ESCO submits a proposal pursuant to such request but SBBC chooses not to proceed, SBBC is under no obligation to reimburse the ESCO for any costs incurred in preparing the proposal.

SECTION 6.2 – CLAIMS FOR CONCEALED OR UNKNOWN CONDITIONS

If conditions are encountered at the site that are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Agreement Documents, or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Agreement Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than twenty-one (21) days after first observance of the conditions, and, if appropriate, equitable adjustment to the Agreement Price and Installation Schedule shall be made by a Change Order. If the Parties cannot reach Agreement, the party seeking adjustment in the Price or Installation Schedule may assert a claim in accordance with Paragraph 6.3 below.

SECTION 6.3 – CLAIMS POLICY

If ESCO wishes to make a claim for an increase in the Price (exclusive of delay damages which were expressly waived in Section 4.8 of this Agreement) or an extension in the Installation Schedule, it shall give SBBC written notice thereof within (10) days after the occurrence of the event giving rise to such a claim. This notice shall be given by the ESCO before proceeding to execute the Work, except in an emergency endangering life or property, in which case the ESCO shall have the authority to act, in its discretion, to prevent threatened damage, injury or loss. Claims arising from delay shall be made within forty-eight (48) hours after the delay. Increases based upon design and estimating costs with respect to possible changes requested by SBBC shall be made within forty-eight (48) hours after the decision is made not to proceed with the change. No such claim shall be valid unless so made. Any change in the Price to Schedule E resulting from such claim shall be authorized by Change Order.

7. RECORDS AND AUDITS

SECTION 7.1 – SBBC ACCESS TO RECORDS; AUDIT

SBBC's agent or authorized representative for the purpose of official business shall have the right, throughout the term of this Agreement and for a minimum of five years following completion of the Agreement, to inspect, audit and obtain copies of all records prepared, received or maintained by ESCO regarding this Agreement.

SBBC's agent or authorized representative, including auditors, lawyers and accountants, for the purpose of official business associated with work authorized under this Agreement shall have access to the Company's facilities, shall have access to all records, and shall be provided adequate and appropriate work space in order to conduct audits in compliance with this Section. SBBC's agent or authorized representative shall give ESCO reasonable advance notice of intended audits.

ESCO shall maintain adequate records to verify the amounts, recipients, and uses of all disbursements of funds passing in conjunction with the Agreement for a minimum of five years after the completion of the Agreement. The term "records" used in this Section shall be defined to include, but not be limited to, all accounting records, written policies and procedures, computer records, disks and software, videos, photographs, subAgreement files, original estimates, estimating worksheets, correspondence, and any other supporting documents relating to this Agreement (all of the foregoing herein referred to as "records"). Failure to maintain the records required by this Section shall establish a presumption in favor of SBBC for the recovery of any funds paid by SBBC under the Agreement for which adequate books, records, and supporting documents are not available to support their purported disbursement.

SECTION 7.2 – ENERGY AND UTILITY RECORDS

SBBC has furnished or shall furnish (or cause its energy suppliers to furnish) to ESCO, upon its request, all of its records and complete data concerning energy usage and energy-related maintenance for the Facilities described in Schedule C, including the following data for the most current thirty-six (36) month period; utility records; occupancy information; descriptions of any changes in the building structure or its heating, cooling, lighting or other systems or energy requirements; descriptions of all energy consuming or saving equipment used in the Facilities; bills and records relating to maintenance of energy-related equipment, and a description of energy management procedures presently utilized. If requested, SBBC shall also provide any prior energy audits of the Facilities and copies of SBBC's financial records related to energy usage and operations for said thirty-six (36) month period at said Facilities.

SECTION 7.3 – PUBLIC RECORDS

The parties agree that this Agreement, all existing and future orders, quotations, bids, and proposals are subject to the Florida Public Records Act ("ACT"), except where a specific exemption exists under said ACT. The ESCO shall be responsible for complying with any public document requests submitted to it for documents in its possession and/or control, and shall be responsible for any attorney's fees awarded pursuant to Chapter 119, Florida Statutes, regarding such public document request

8. WARRANTIES

SECTION 8.1 - EQUIPMENT AND MATERIALS

ESCO covenants and agrees that all equipment installed as part of this Agreement is new, in good and proper working condition and protected by appropriate written warranties covering all parts and equipment performance. ESCO also hereby warrants that all such equipment and materials shall be free of defects in materials and workmanship, including installation and setup, provided that no repairs, substitutions, modifications, or additions have been made, except by ESCO or with ESCO's written permission, and provided that after delivery such equipment or materials have not been subjected by non-ESCO personnel to accident, neglect, misuse, or use in violation of any instructions supplied by ESCO. ESCO further agrees to deliver to SBBC for implemented ECMs, all such written warranties and for inspection and approval, to pursue rights and remedies against manufacturer and ESCO of the equipment under the warranties in the event of equipment malfunction or improper or defective function, and defects in parts, workmanship and performance, to notify SBBC whenever defects in equipment parts or performance occur which give rise to such rights and remedies and those rights and remedies are exercised by ESCO. The cost of any risk of damage or damage to the equipment and its performance, including damage to property and equipment of SBBC or the Facilities, due to ESCO's failure to exercise its warranty rights shall be borne solely by ESCO.

To the extent that any warranties are transferable, ESCO shall transfer such warranties to SBBC at the expiration of this Agreement. The warranties shall specify that only new, and not reconditioned parts, may be used and installed when repair is necessitated by malfunction.

All warranties required hereunder shall be in force for a minimum of one (1) year from the Commencement Date as defined in Section 2.2.3 hereof. Lamps shall have a manufacturer warranty of at least of 3 years; ballasts shall have a minimum 5 year warranty.

THE WARRANTIES SET FORTH HEREIN ARE EXCLUSIVE AND ESCO EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, WHETHER WRITTEN OR ORAL, IMPLIED OR STATUTORY, INCLUDING BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, WITH RESPECT TO THE EQUIPMENT AND MATERIALS PROVIDED HEREUNDER. ESCO SHALL NOT BE LIABLE FOR ANY SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING FROM, OR RELATED TO, THIS LIMITED WARRANTY OR ITS BREACH.

Nothing in this Section shall be construed to alleviate/relieve the ESCO from complying with its obligations to perform under all terms and conditions of this Agreement and as set forth in all attached Schedules.

SBBC shall promptly notify ESCO of any warranty claims within thirty (30) days of discovery (and no later than thirty (30) days following conclusion of warranty period), and ESCO shall promptly correct or remedy the warranty matter. ESCO's sole liability, and SBBC's sole remedy, shall be to repair, or replace such affected ECM.

SECTION 8.2 – EQUIPMENT AND MATERIAL REPAIR AND REPLACEMENT

Throughout Interim Period and 10-year Term, ESCO's sole liability shall be to repair or replace defective equipment or materials, at ESCO's option and at ESCO's expense. ESCO shall be responsible for the repair of defective equipment beyond the warranty period up to and including the 10th year and in so doing bring the defective equipment back into operation to produce the same level of energy savings guaranteed in the Energy Audit Report. If ESCO is unable to restore the defective equipment's level of service and efficiency by repair, then ESCO shall replace the defective equipment with one that operates at least with the same level of service and efficiency as the original equipment originally installed by ESCO under this Agreement. This repair coverage does not apply to fluorescent lamps or ballasts.

The ESCO shall respond to equipment repair or replacement of defective equipment or materials within twenty-four (24) hours. The repair or replacement Work shall be commenced within forty-eight (48) hours when the equipment and/or materials are readily available or "off-the-shelf" items. Where the equipment or materials are not readily available, the ESCO shall expedite the ordering and receipt of such equipment and materials, and begin the repairs or replacements within forty-eight (48) hours of receipt of the equipment or materials. If the ESCO does not respond and/or take action within the time parameters above, and when defective equipment and materials have been determined, SBBC may, at its own discretion, move to remedy the repair or replacement. SBBC shall then be entitled to reimbursement by the ESCO for all reasonable costs relating to such repair/replacement. The limited warranty contained in this Section shall constitute the exclusive remedy of SBBC and the exclusive liability of the ESCO for any breach of any warranty related to the equipment and materials furnished by the ESCO pursuant to this Agreement.

SECTION 8.3 – THIRD-PARTY WARRANTIES

In addition to the warranty set forth in Section 8, the ESCO shall, assign to SBBC any and all manufacturer's or installer's warranties for equipment and materials not manufactured by the ESCO and provided as part of the Work, to the extent that such third-party warranties are assignable and extend beyond the one (1) year limited warranty set forth in Section 8.

9. INSURANCE TERMS

SECTION 9.1 - PERFORMANCE AND PAYMENT BONDS

The ESCO will obtain a performance bond at 100% of the Agreement Price, as well as a payment bond of 100% of the Agreement Price. Refer to Schedule O – ECM Annual Cash Flow for the exact Agreement Price. Both bonds shall be for the benefit of SBBC in accordance with Section 255.05, Florida Statutes.

SECTION 9.2 - LETTER OF CREDIT

Prior to the date when the Agreement is signed by the Parties, the ESCO shall provide to SBBC a certified Letter of Credit in form and substance acceptable to SBBC and in an amount not less than the Guaranteed total Energy and Utility Savings stipulated in the Contract. Such Letter of Credit shall be irrevocable and it shall remain in effect until SBBC has realized the total estimated energy and utility savings based on approved ECMs for the full duration of the Term of this Agreement, but subject to prorated adjustments, if necessary. The Letter of Credit for this Agreement is incorporated for reference herein as Exhibit III.

SECTION 9.3 - PROPERTY/CASUALTY INSURANCE

Section 9.3.1- Insurance Requirements

Proof of the following insurance will be furnished by ESCO to the SBBC Purchasing Department by Certificate of Insurance within fifteen (15) days of execution of this Agreement by the parties. Such Certificate must contain a provision for notification to SBBC thirty (30) days in advance of any material change in coverage and cancellation. **SBBC shall be named on the Certificate as an additional insured under the General Liability Insurance.** The insurance information submitted must be on an insurance carrier's Certificate of Insurance.

- (i) General Liability Insurance, including Contractual Liability to cover the hold harmless requirement set forth herein, with bodily injury limits of not

less than \$1,000,000 per occurrence combined single limit for bodily injury and property damage.

- (ii) Professional Liability insurance with limits of not less than \$1,000,000 per occurrence.
- (iii) Auto Liability Insurance covering all owned, non-owned and hired vehicles used in connection with this Agreement, with bodily injury limits of liability of not less than \$1,000,000 per person; and \$1,000,000 per occurrence and property damage limits of not less than \$1,000,000.
- (iv) Worker's Compensation in accordance with Florida Statutory limits and Employer's Liability Insurance with a limit of not less than \$100,000 per occurrence.

2. Builders Risk Insurance for the perils of fire, vandalism, mischief and those included in extended coverage in the amount of one hundred percent (100%) of the values of risk. Such policies shall be written to protect the Contractor and the Owner as their interest may appear.

Prior to commencement of work under this Agreement, the ESCO will be required to provide SBBC with current certificates of insurance specified above.

Section 9.3.2 - Property Damage and Personal Injury

The ESCO shall be responsible for (i) any damage to the Equipment or other property on the Facilities and (ii) any personal injury where such damage or injury occurs as a result of the ESCO's performance under this Agreement.

10. LEGAL PROVISIONS

SECTION 10.1 - INDEMNIFICATION

- (i) **By SBBC:** SBBC agrees to be fully responsible for its acts, or its agents' acts of negligence when acting within the scope of their employment and agrees to be liable for any damages resulting from said negligence. Nothing herein is intended to serve as a waiver of sovereign immunity by SBBC. Nothing herein shall be construed as consent by SBBC to be sued by third parties in any matter arising out of any contract.
- (ii) **By ESCO:** ESCO agrees to indemnify, hold harmless and defend SBBC, its agents, servants and employees from any and all claims, judgments, costs and expenses including, but not limited to, reasonable attorney's fees, reasonable investigative and discovery costs, court costs and all other sums which SBBC, its agents, servants and employees may pay or become obligated to pay on account of any, all and every claim or demand, or assertion of liability, or any claim or action founded thereon, but only to the extent arising or alleged to have arisen out of the products, goods or services furnished by the ESCO, its agents, servants or employees; the

equipment of the ESCO, its agents, servants or employees while such equipment is on premises owned or controlled by SBBC; or the negligence, recklessness or wrongful misconduct of ESCO or that of the ESCO's agents, servants or employees when acting within the scope of their employment, whether such claims, judgements, costs and expenses be for damages, damage to property including SBBC's property, and injury or death of any person whether employed by the ESCO, SBBC or otherwise.

- (iii) SBBC shall give written notice within thirty (30) days of any asserted claims of actions indemnified against hereunder and shall cooperate in the defense of any such claims or actions. SBBC shall not settle any such claims or actions without prior written consent of ESCO.
- (iv) ESCO shall give written notice within thirty (30) days of any asserted claims of actions indemnified against hereunder and shall cooperate in the defense of any such claims or actions. ESCO shall not settle any such claims or actions without prior written consent of SBBC.

SECTION 10.2 - EVENTS OF DEFAULT

Section 10.2.1 - Notification of Default

In the event any of the provisions of this Agreement are violated by ESCO, the Superintendent of Schools shall give written notice to ESCO stating the deficiencies and unless such deficiencies are corrected within five (5) business days of notice, a recommendation will be made to the School Board to find ESCO in default of this Agreement.

Section 10.2.2 - Events of Default by SBBC

Each of the following events or conditions shall constitute an "Event of Default" by SBBC:

- (i) any failure by SBBC to pay ESCO any sum due for a service and maintenance period of more than forty-five (45) days after written notification by ESCO that SBBC is delinquent in making payment and provided that ESCO is not in default in its performance under the terms of this Agreement; or
- (ii) any other material failure by SBBC to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein, provided that such failure continues for ninety (90) days after notice to SBBC demanding that such failures to perform be cured or if such cure cannot be performed in ninety (90) days, SBBC shall be deemed to have cured default within ninety (90) days upon the commencement of a cure and diligent subsequent completion thereof;

- (iii) any representation or warranty furnished by SBBC in this Agreement which was false or misleading in any material respect when made.

Section 10.2.3 - Events of Default by ESCO

Each of the following events or conditions shall constitute an "Event of Default" by ESCO:

- (i) the standards of comfort and service set forth in Schedule J (Standards of Comfort) are not provided due to failure of ESCO to properly design, install, maintain, repair or adjust the Equipment except that such failure, if corrected or cured within ninety (90) days after written notice by SBBC to ESCO demanding that such failure be cured, shall be deemed cured for purposes of this Agreement; or
- (ii) any representation or warranty furnished by ESCO in this Agreement is materially false or misleading in any material respect when made; or
- (iii) failure to furnish and install the Equipment and make it ready for use within the time specified by this Agreement as set forth in Schedules B and H; or
- (iv) provided that the operation of the Facility is not adversely affected and provided that the standards of comfort in Schedule J are maintained, any failure by ESCO to perform or comply with the terms and conditions of this Agreement, including breach of any covenant contained herein except that such failure, if corrected or cured within ninety (90) days after written notice by SBBC to ESCO demanding that such failure to perform be cured, shall be deemed cured for purposes of this Contract; or
- (v) any lien or encumbrance upon the equipment by any subcontractor, laborer or materialman of ESCO; or
- (vi) the filing of a bankruptcy petition whether by ESCO or its creditors against ESCO which proceeding shall not have been dismissed within sixty (60) days of its filing, or an involuntary assignment for the benefit of all creditors or the liquidation of ESCO; or
- (vii) Any change in ownership or control of the ESCO without notification to SBBC, which shall not be unreasonably withheld; or
- (vii) failure by the ESCO to pay any amount due SBBC or perform any obligation under the terms of this Agreement or the Energy Savings Guarantee as set forth in Schedule D.

SECTION 10.3 - REMEDIES UPON DEFAULT

Section 10.3.1 - Remedies upon Default by SBBC

If an Event of Default by SBBC occurs, ESCO may, without a waiver of other remedies which exist in law or equity 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 SBBC, and/or for damages.

Section 10.3.2 - Remedies Upon Default by ESCO

In the Event of Default by ESCO, SBBC shall exercise any or 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.

SBBC shall not exercise any such remedies or rights without first providing ESCO thirty (30) days following written notice to cure such Event of Default.

SECTION 10.4 - ASSIGNMENT

The ESCO acknowledges that SBBC is induced to enter into this Agreement by, among other things, the professional qualifications of the ESCO. The ESCO agrees that neither this Agreement nor any right or obligations hereunder may be assigned in whole or in part to another firm, without the prior written approval of SBBC.

Section 10.4.1 - Assignment by ESCO

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

Section 10.4.2 - Assignment by SBBC

SBBC may transfer or assign this Agreement and its rights and obligations herein to a successor or purchaser of the Buildings or an interest therein. SBBC shall remain jointly and severally liable with its assignees or transferees to the ESCO for all of its obligations under this Agreement.

SECTION 10.5 - REPRESENTATIONS AND WARRANTIES

Each party warrants and represents to the other that:

- (i) its execution, delivery, and performance of this Agreement 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; and

- (ii) 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.

SECTION 10.6 - ADDITIONAL REPRESENTATIONS OF THE PARTIES

SBBC hereby warrants, represents and promises that:

- (i) it has provided or shall provide timely to ESCO, all records relating to energy usage and energy-related maintenance of Facilities requested by ESCO and the information set forth therein is, and all information in other records to be subsequently provided pursuant to this Agreement will be true and accurate in all material respects; and
- (ii) it has not entered into any leases, contracts with other persons or entities regarding the leasing of energy efficiency equipment or the provision of energy management services for the Facilities or with regard to servicing any of the energy related equipment located in the Facilities. SBBC shall provide ESCO with copies of any successor or additional leases of energy efficiency equipment and contracts for management or servicing of preexisting equipment at Facilities which may be executed from time to time hereafter within thirty (30) days after execution thereof.

ESCO hereby warrants, represents and promises that:

- (i) before commencing performance of this Agreement:
 - (a) it shall have become licensed and bonded and be permitted to do business in the State of Florida
 - (b) it shall have provided proof and documentation of required insurance pursuant to Section 9.3 it shall make available, upon reasonable request, all documents relating to its performance under this Agreement, including all contracts and subcontracts entered into;
- (ii) it shall use qualified subcontractors and delegees, licensed and bonded in this State of Florida to perform the work as subcontracted or delegated pursuant to the terms hereof;
- (iii) that it is financially solvent, able to pay its debts as they mature and possessed of sufficient working capital to complete the Work and perform its obligations under this Agreement.

SECTION 10.7 - WAIVER OF LIENS

ESCO will obtain and furnish to SBBC a Waiver of Liens from each vendor, material manufacturer and laborer in the supply, installation and servicing of each piece of Equipment.

SECTION 10.8 - COMPLIANCE WITH LAW AND STANDARD PRACTICES

ESCO 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 SBBC relative to the Facilities. ESCO shall be responsible for obtaining all governmental permits, consents, and authorizations as may be required to perform its obligations hereunder.

SECTION 10.9 - CAPACITY OF THE CONTRACTOR

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

Section 10.9.1 - ESCO Responsibility

ESCO will serve as the prime contractor for this Agreement and will be responsible to SBBC for all Agreement deliverables. ESCO shall remain responsible for the professional and technical accuracy of all services performed by its subcontractors, business partners, agents or others on its behalf, throughout the term of this Agreement.

Section 10.9.2 - Other Vendors and Contracts

Throughout the Term of this Agreement, SBBC may contract services from other Vendors (including other ESCOs and subcontractors) than those contracted to perform the Work specified in this Agreement at SBBC's discretion.

Section 10.9.3 - Subcontractors

Prior to starting Work, ESCO shall notify SBBC in writing of any subcontractor THAT ESCO intends to employ. SBBC shall have the right to disapprove subcontractors. Subcontractors to be employed will be set forth in Schedule Q to be prepared by ESCO. If SBBC disapproves the employ of an intended subcontractor, the ESCO shall eliminate it from Schedule Q and propose a substitute subcontractor consistent with the terms of this Agreement. In the event ESCO subcontracts any of the rights or obligations hereunder, ESCO will remain wholly responsible to SBBC and not be relieved of any of its rights or obligations.

SECTION 10.10 - NO IMPLIED WAIVER

The failure of either party hereto to insist at any time upon the strict performance of any covenant or Agreement or to exercise any option, right, power or remedy contained in this Agreement shall not be construed as a waiver or relinquishment thereof for the future. The waiver of redress for any violation of any term, covenant, Agreement or condition contained in this Agreement shall not prevent a subsequent act, which would have originally

constituted a violation, from having all the force and effect of an original violation. No expressed waiver shall affect any condition other than the one specified in such waiver and that one only for the time and in the manner specifically stated.

SECTION 10.11 - SEVERABILITY

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

SECTION 10.12 - FORCE MAJEURE

Except for payment obligations, in the event that a party is rendered unable, wholly or in part, by an event of Force Majeure, to perform any obligation it has under this Agreement, it is agreed that upon such party giving notice and full particulars of such event of Force Majeure to the other party, as soon thereafter as practicable, the obligation of the party giving notice shall be suspended to the extent affected by such event of Force Majeure for no longer period than the duration of the inability. However, no event of Force Majeure shall relieve a party from any obligation to make a payment to the other for expenses already incurred. The party giving notice shall use its best efforts to remedy the cause of such inability or incapacity with all reasonable dispatch. The requirement herein that any event of Force Majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or other such industrial disturbances when such course is, in the opinion of the party directly affected, inadvisable. Neither party shall be liable to the other for any claim(s), loss(es), liability(ies) or expense(s) sustained or incurred arising out of, relating to, or resulting from the inability or incapacity of the party giving notice to perform its obligations under this Agreement due to any event of Force Majeure, as herein defined. In no event shall lack of funds on the part of either party be deemed Force Majeure.

An event of "Force Majeure" as used herein means an unforeseen event beyond the reasonable control of and which occurs without the fault or negligence of the Party claiming Force Majeure which events may include, without limitation: inability or delay in obtaining material and/or equipment; total cessation of operation of any Facilities; acts of God; strikes, lockouts or other such industrial disturbances; wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage or vandalism; mandates, directives, orders, inactions or restraints of any governmental, regulatory or judicial body or agency.

SECTION 10.13 - TERMINATION OF AGREEMENT

Termination for Convenience SBBC reserves the right to terminate this Agreement, for convenience and without cause, prior to completion of the installation of the ECMs upon thirty (30) written notice to ESCO of SBBC's desire to terminate this Agreement.

Termination for Cause If ESCO defaults in, or fails or neglects to carry forward the Work in accordance with this Agreement, SBBC may provide notice in writing of its intention to terminate this Agreement to ESCO. If ESCO, following receipt of such written notice, neglects to cure or correct the identified deficiencies within thirty (30) calendar days, SBBC may terminate this Agreement and take possession of the site together with all materials thereon, and move to complete the Work itself expeditiously.

If SBBC fails to make payments as they become due, or otherwise defaults or breaches its obligations under this Agreement, ESCO may give written notice to SBBC of ESCO's intention to terminate this Agreement. If, within thirty (30) calendar days following receipt of such notice, SBBC fails to make the payments then due, or otherwise fails to cure or perform its obligations, ESCO may, by written notice to SBBC, terminate this Agreement and recover from SBBC payment for Work executed and for losses sustained for materials, tools, construction equipment and machinery, including but not limited to, reasonable profit and applicable damages.

Neither party shall terminate or cancel this Agreement except as expressly permitted herein. This Agreement shall be valid and effective upon signature, and shall remain in full force and effect in accordance with its terms until fully performed.

SECTION 10.14 - CONFIDENTIALITY

ESCO shall keep confidential all personal and other confidential data and information that is provided to it by SBBC, or that otherwise comes into ESCO's possession in performance of its obligation under this Agreement, and ESCO shall not disclose the same to other persons or entities without prior written SBBC approval.

SECTION 10.15 - INDEPENDENT CONTRACTOR

The relationship of ESCO and SBBC established by this Agreement is that of an independent contractor.

SECTION 10.16 - NON-DISCRIMINATION

The parties shall not discriminate against any employee or participant in this Agreement because of race, age, religion, color, gender, national origin, marital status, disability, or sexual orientation.

SECTION 10.17 - WAIVER OF DAMAGES

IN NO EVENT SHALL SBBC OR ESCO AND ITS OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES OR AFFILIATES, SUBCONTRACTORS OR AGENTS BE LIABLE FOR SPECIAL, INDIRECT, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL

DAMAGES OF ANY NATURE, UNDER ANY THEORY OF RECOVERY, CONNECTED WITH OR RESULTING FROM THE WORK OR THIS CONTRACT, INCLUDING BUT NOT LIMITED TO DAMAGES OR CLAIMS IN THE NATURE OF LOST REVENUE, INCOME OR PROFITS, LOSS OF USE, AND IRRESPECTIVE OF WHETHER ESCO WAS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. In no event shall ESCO's liability to SBBC, for any and all claims under any theories of recovery whatsoever arising from or related to this Contract, in the aggregate exceed the lesser of: (i) the amounts already received by ESCO as payment hereunder; or (ii) the total Agreement price.

11. MISCELLANEOUS

SECTION 11.1 – OWNERSHIP

Section 11.1.1 – Ownership of Certain Proprietary Rights

SBBC Shall not, by virtue of this Agreement, acquire any interest in any formulas, patterns, devices, secret inventions or processes, copyrights, patents or other intellectual or proprietary rights, or similar items of property which are or may be used in connection with the Equipment. The ESCO shall grant to SBBC a perpetual, irrevocable royalty-free license for any and all software or other intellectual property rights necessary for SBBC to continue to operate, maintain, and repair the Equipment in a manner that will yield maximal energy consumption reductions.

The foregoing license shall only apply to software supplied by ESCO within the scope of the ECMs, and shall be subject to the license terms of the licensing party.

Section 11.1.2 – Ownership of Existing Equipment

Ownership of the equipment and materials presently existing at the Facilities at the time of execution of this Agreement shall remain the property of SBBC even if it is replaced or its operation made unnecessary by work performed by ESCO pursuant to this Agreement. If applicable, ESCO shall advise SBBC in writing of all equipment and materials to be replaced at the Facilities and SBBC shall within ten (10) days designate in writing to the ESCO which equipment and materials that should or should not be disposed of off-site by the ESCO. It is understood and agreed to by both Parties that SBBC shall be responsible for and designate the location and storage for any equipment and materials that should not be disposed of off-site. The ESCO shall be responsible for the disposal of all equipment and materials designated by SBBC as disposable off-site in accordance with all applicable laws and regulations regarding such disposal.

SECTION 11.2 – LOCATION AND ACCESS

SBBC shall provide sufficient space on the Facilities for the installation and operation of the Equipment and shall take reasonable steps to protect such Equipment from harm, theft and misuse. SBBC shall provide access to the Facilities for ESCO to perform any function related to this Agreement during regular business hours, or such other reasonable hours as may be requested by ESCO and acceptable to SBBC. The

ESCO's access to Facilities to make emergency repairs or corrections as it may determine are needed shall not be unreasonably restricted by SBBC.

SECTION 11.3 – ADMINISTRATIVE SERVICES

SBBC will not provide ESCO with facilities, office space, administrative support or administrative support staff throughout the term of this Agreement.

SECTION 11.4 – DEREGULATION OF ELECTRICITY

In the event of Deregulation of Electricity, no commitment is made to the current carrier, and all savings projections will be based on utilization, not prices paid. In the event of a shortfall in the Net Utility and Energy Savings calculations, the ESCO shall calculate the net shortfall of units by the baseline rate, subject to adjustments as outlined by written request from SBBC, for the dollar amount due to SBBC.

SECTION 11.5 – M/WBE PARTICIPATION

Vendor agrees to submit a monthly M/WBE Utilization Report (hereinafter referred to as "Report"), included herein as Exhibit 1, which will track payments to M/WBE(s) by Vendor resulting from the Agreement. Vendor agrees to submit an M/WBE Utilization Report not more than 15 days after the end of each month, whether the M/WBE received payments or not.

SECTION 11.6 – EXTENSION

In addition to any renewal options contained herein, SBBC is granted the right to extend this Agreement for the period of time necessary for SBBC to release, award and implement a replacement bid or RFP for the goods, products and/or services provided through this Agreement. Such extension shall be upon the same prices, terms and conditions as existing at the time of SBBC's exercise of this extension right. The period of any extension under this provision shall not be for a period of excess of six (6) months from (a) the termination date of this Agreement or (b) the termination date under any applicable period of renewal under this Agreement.

12. NOTICES, HEADINGS AND AUTHORITY

SECTION 12.1 - NOTICES

When any of the Parties desire to give notice to the other, such notice must be in writing, sent by U.S. Mail, postage prepaid, addressed to the party for whom it is intended at the place last specified. The place for giving notice shall remain such until it is changed by written notice in compliance with the provisions of this section. For the present, the Parties designate the following as the respective places for giving notice:

To SBBC: Superintendent of Schools
The School Board of Broward County, Florida
600 Southeast Third Avenue
Fort Lauderdale, Florida 33301

With a Copy to: Executive Director Plant Operations
The School Board of Broward County, Florida
3810 NW 10th Ave
Oakland Park, Florida 33309

To FPLS: Development and Construction Manager
FPL Services, LLC.
PO BOX 14000
Juno Beach, FL 33408-0420

With a Copy to: Contracts Attorney
FPL Law Department (Law/JB)
700 Universe Blvd.
Juno Beach, FL 33408

SECTION 12.2 - HEADINGS

The captions, section numbers, article numbers, titles and headings appearing in this Agreement are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope of intent of such sections of this Agreement, nor in any way affect this Agreement and shall not be construed to create a conflict with the provisions of this Agreement.

SECTION 12.3 - AUTHORITY


Each person signing this Agreement on behalf of either party individually warrants that he or she has full legal power to execute this Agreement on behalf of the party for whom he or she is signing, and to bind and obligate such party with respect to all provisions contained in this Agreement.

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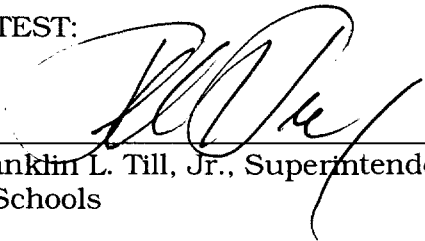
IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereto subscribe their names to this Agreement by their duly authorized officers on the date first above written.

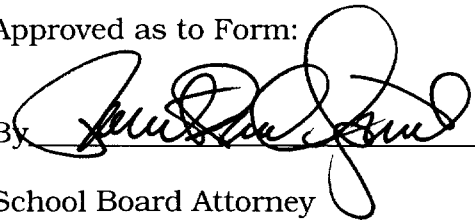
For SBBC

THE SCHOOL BOARD OF BROWARD
COUNTY, FLORIDA

By 
Benjamin J. Williams, Chair

ATTEST:


Franklin L. Till, Jr., Superintendent
of Schools

Approved as to Form:
By 
School Board Attorney

THIS SPACE WAS INTENTIONALLY LEFT BLANK.

For ESCO

(Corporate Seal)

FPL Services, LLC
(ESCO)

ATTEST:

By Ms Santos
(Signature)

_____, Secretary

Printed Name: MARLENE SANTOS

-or-

Title: PRESIDENT

Mrs Rodning
Witness

Daphnia R. Eto
Witness

STATE OF Florida

COUNTY OF Dade

The foregoing instrument was acknowledged before me this 5th day of September, 2006 by

Marlene Santos of FPL Services on behalf of the corporation. He/She
(Name of Person) (Company Name)

took an oath and is personally known to me or has produced _____ as identification.

(SEAL)

Katherine A. Moeckel
Signature - Notary Public

My Commission Expires:

Katherine A. Moeckel
Printed Name of Notary



Katherine A Moeckel
My Commission DD154711
Expires December 20, 2006

DD154711
Notary's Commission No.

ATTACHMENT - I: Schedules, Exhibits, Appendices

SCHEDULES

- SCHEDULE A - APPROVED ECMS TO BE IMPLEMENTED BY ESCO
- SCHEDULE B - EQUIPMENT TO BE INSTALLED BY ESCO
- SCHEDULE C - DESCRIPTION OF FACILITIES; PRE-EXISTING EQUIPMENT INVENTORY
- SCHEDULE D - ENERGY SAVING GUARANTEE
- SCHEDULE E - COMPENSATION TO ESCO
- SCHEDULE F - BASELINE ENERGY CONSUMPTION
- SCHEDULE G - SAVINGS CALCULATION FORMULAE; METHODOLOGY TO ADJUST BASELINE
- SCHEDULE H - CONSTRUCTION AND INSTALLATION SCHEDULE
- SCHEDULE I - SYSTEMS START-UP AND COMMISSIONING OF EQUIPMENT; OPERATING PARAMETERS OF INSTALLED EQUIPMENT
- SCHEDULE J - STANDARDS OF COMFORT
- SCHEDULE K - ESCO'S MAINTENANCE RESPONSIBILITIES
- SCHEDULE L - SBBC'S MAINTENANCE RESPONSIBILITIES
- SCHEDULE M - FACILITY MAINTENANCE CHECKLIST
- SCHEDULE N - ESCO'S TRAINING RESPONSIBILITIES
- SCHEDULE O - ECM ANNUAL CASH FLOW
- SCHEDULE P - PROJECTED ENERGY SAVINGS FOR APPROVED ECMS
- SCHEDULE Q - LIST OF SUBCONTRACTORS

EXHIBITS

- EXHIBIT I - PERFORMANCE BOND /PAYMENT BOND
- EXHIBIT II - CERTIFICATE OF ACCEPTANCE - INSTALLED EQUIPMENT
- EXHIBIT IIa - LETTER OF ACCEPTANCE
- EXHIBIT III - LETTER OF CREDIT

APPENDICES

- A. APPENDIX A – RFP FOR ESCO Solicitation; and
- B. APPENDIX B – Energy Audits